TERESA GLADWELL,

Grievant,

v. **Docket No. 04-02-347**

BERKELEY COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Teresa Gladwell ("Grievant") initiated this proceeding on June 2, 2004, challenging the docking of her pay at the conclusion of the 2003-2004 school year, due to her failure to obtain required staff development hours. The grievance was denied at level one on June 4, 2004, and a level two hearing was conducted on August 11, 2004. The grievance was denied in a level two decision dated September 20, 2004. Level three consideration was bypassed, and Grievant appealed to level four on September 22, 2004. In lieu of a level four hearing, the parties elected to have a decision rendered based upon the lower level record. This matter became mature for consideration on January 21, 2005, the deadline for the parties' final fact/law proposals. (See footnote 1) Grievant was represented in this matter by Harvey M. Bane of WVEA, and Respondent was represented by counsel, Gregory W. Bailey.

The following facts have been proven by a preponderance of the evidence of record.

Findings of Fact

1. Grievant is employed by Respondent as a classroom teacher at Musselman High School.

2. Just prior to the beginning of the 2003-2004 school year, Grievant's mother suffered a serious illness. Grievant did not return to work until October 1, 2003. She was on approved leave throughout her absence.

3. Respondent conducted staff development for professional employees during the first three days of the 2003-2004 employment term.

4. State Board of Education Policy 5500 requires professional employees to obtain eighteen

hours of job-related staff development training during each school year.

5. Grievant was on leave during Respondent's staff development training for the 2003-2004 school year. She only obtained three training hours throughout the remainder of the school year.

6. On May 21, 2004, Grievant was notified by the staff development coordinator, Robyn Lopez, that she lacked fifteen of the required staff development hours. Grievant was given the option of being docked two and a half days' pay or two and a half personal days.

7. Grievant's representative, Mr. Bane, spoke with Ms. Lopez by telephone on May 28, 2004. He inquired whether Grievant could make up the hours, and Ms. Lopez informed him that Grievant could submit a personalized plan for obtaining the training hours prior to June 30, which would probably be approved. Grievant was given until June 5, 2004, to submit the plan.

8. Grievant initiated this grievance on June 2, 2004, and did not submit a personalized plan. 9. By letter dated June 30, 2004, Ms. Lopez notified Grievant that her pay had been docked two and a half days, due to her failure to comply with the staff development hours requirements.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W..Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §.4.21 (2004); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

Grievant contends that she should not be penalized twice for being absent during staff development training. Because she used her personal leave time during her absence, she argues that she is being penalized yet again by having her pay docked for the two and a half days of training that she missed. Also, as a 200-day employee, Grievant contends that the docking of her pay on two days upon which she used approved leave amounts to an extension of the 200-day contract term. She argues that Respondent's practice is arbitrary and capricious, and that her pay should be restored.

Respondent has adopted a county policy, “GAD”, governing County Professional Staff Development, which mirrors the provisions of West Virginia Board of Education Policy 5500. Both

provide that the board of education must schedule at least three noninstructional days of staff development for professional employees each year, and professional staff are required to participate in eighteen hours of such training per year. Boards of education are encouraged, but not required, to provide additional opportunities for staff development in addition to the mandatory eighteen hours. Neither policydiscusses the consequences of an employee's failure to obtain the yearly requirement of staff development hours.

"Personnel actions of a county board of education which are not encompassed by statute are reviewed against the 'arbitrary and capricious' standard . . . ." Cornell v. Putnam County Bd. of Educ., Docket No. 03-40-111 (June 26, 2003); Wellman v. Mercer County Bd. of Educ., Docket No. 95-27-327 (Nov. 30, 1995). “Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion." Trimboli v. Dep't of Health and Human Res., Docket No. 93-HHR-322 (June 27, 1997). “While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education." Trimboli, supra; Blake v. Kanawha County Bd. of Educ., Docket No. 01-20-470 (Oct. 29, 2001).

Respondent has cited no authority--statutory, regulatory, or otherwise--for the penalty it imposed upon Grievant. Clearly, Policy 5500 provides for no such penalty for employees who have not obtained the required number of staff development hours, and, in fact, it appears to place much of the burden for providing this training upon the board of education. There is no requirement that all of the eighteen hours of staff development occur prior to the beginning of the school year, and, in actuality, the policy specifically states that only two of the three days must occur prior to January 1. Accordingly, a board of education may separate staff development training days to occur throughout the school year. This would be a logical method to provide the training opportunities, in order to avoidsituations such as the instant one, where an absent employee misses the entirety of the training, because it was offered on consecutive days.

Although a board of education is certainly justified in depriving an employee of pay for disciplinary reasons, such as during a suspension, or for unapproved absences occurring during the school year, (See footnote 2) there is simply no authority for depriving an employee of pay for days which she

has already worked or used approved leave. If Grievant was being disciplined, it would have to be for immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, or conviction on a felony charge, as required by W. Va. Code § 18A-2-8. In addition, as set forth in W. Va. Code § 18A-2-7, if an employee is suspended, a hearing upon the specific charges must be conducted by the board of education. None of that occurred in this case.

Respondent has failed to demonstrate it was authorized to take this action against Grievant. Moreover, even if Respondent were justified in requiring that Grievant make up the missed training through her own personalized plan, it should have notified her of this requirement much earlier in the year, so arrangements could be made. The evidence in this case was that each school has a staff development coordinator, and this person could easily have notified Grievant of her deficiency and the need to correct it prior to late May of 2004, at the end of the school year. Therefore, Grievant's two and a half days of pay must be restored.

The following conclusions of law support this decision.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W..Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §.4.21 (2004); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. Professional employees of county boards of education must obtain eighteen hours of job related staff development each year, and each board of education must schedule at least three noninstructional days of staff development each year. West Virginia Board of Education Policy 5500, 126 CSR 149 (1997).

3. "Personnel actions of a county board of education which are not encompassed by statute are reviewed against the 'arbitrary and capricious' standard . . ." Cornell v. Putnam County Bd. of Educ., Docket No. 03-40-111 (June 26, 2003); Wellman v. Mercer County Bd. of Educ., Docket No. 95-27-327 (Nov. 30, 1995). “Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion." Trimboli v. Dep't of Health and Human Res., Docket No. 93-

HHR- 322 (June 27, 1997).

4. Respondent had no authority to dock Grievant's pay for her failure to obtain sufficient staff development hours, and this action was arbitrary and capricious.

Accordingly, this grievance is **GRANTED,** and Respondent is **ORDERED to** pay Grievant for the two and a half days that her pay was docked in June of 2004.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Berkeley County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: February 23, 2005

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Respondent's counsel had inadvertently failed to mail his fact/law proposals by the original submission deadline of December 22, 2004. His submission was ultimately filed on January 10, 2005, over Grievant's objection. Grievant was given until January 21, 2005, to respond to Respondent's submission, but did not do so.

Footnote: 2

See Adkins v. Boone County Board of Education, Docket No. 03-03-080 (May 20, 2003).