THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

ANNE LAMBERT,

Grievant,

v. **Docket No. 06-31-047**

MONROE COUNTY
BOARD OF EDUCATION,

Respondent.

DECISION

Grievant filed this grievance on November 11, 2005, claiming violation of *W. Va. Code* §§ 18A-2-2, 18A-4-16, and 18A-4-7a. For relief she seeks, “Payment for time worked (back pay) plus interest and any other benefits due. Reinstated to former position. If not reinstated then former position should be posted immediately.” The grievance was denied at Levels I and II, and Grievant bypassed Level III. A Level IV hearing was held at the Grievance Board's Beckley office on April 19, 2006. Grievant was represented by Ben Barkey of West Virginia Education Association, and Respondent was represented by Greg Bailey of Bowles Rice McDavid Graff & Love LLP. This case became mature on May 19, 2006, upon the parties' submissions of findings of fact and conclusions of law.

Issues and Arguments

Grievant asserts she held an extracurricular position for the 2004-2005 school year and she should have been allowed to continue in that position for the 2005-2006 school year. She also argues Respondent does not regularly post its extracurricular positions.

Respondent asserts Grievant is not qualified for the extra curricular position, and was only allowed to remain in that position during the 2004-2005 school year because itwas near the end of program when it was determined her qualifications did not meet the requirements. Respondent also contends it posts extracurricular positions.

Findings of Fact

1. Grievant is employed by Respondent as a Spanish and Journalism teacher at James Monroe High School. She is certified only in Spanish and German for grades 5- 12.

2. On September 3, 2004, Respondent sought applications for extracurricular positions for the 2004-2005 school year. The positions were described as:

Teacher for after-school 21st Century Community Learning Center programs at Mountain View, Peterstown Elementary School, Peterstown Middle School. These positions may be filled by several teachers rotating days to be worked.

Level II, Grievant's Exhibit 1.

3. The 21st Century Community Learning program is grant funded annually, and the positions are posted on a yearly basis. It is an extracurricular program for elementary and middle school students.

4. Grievant applied and was awarded two separate extracurricular contracts. One contract, covering from September 1, 2004 and ending June 1, 2005, related to "enrichment and other activities in afterschool [sic] program; not to exceed 5 hours/week." Level II, Respondent's Exhibit 5.

5. The second contract covering September 1, 2004 and ending June 15, 2005, related to "tutoring, and mentoring in afterschool [sic] program; not to exceed 2 hours/day." Level II, Respondent's Exhibit 6. 6. During the 2004-2005 school year, more students were participating in the 21st Century Program than expected, and there was insufficient staff to serve the participating students. Grievant was asked to be a teacher at the elementary grade level. 7. In March 2006, Grievant was off work for one day due to a car accident, and when she returned to work, she was informed she no longer had the teacher position because the director, Judy Azulay, believed Grievant was not qualified to teach elementary school children. Grievant was told the position had been posted.

8. Grievant called and spoke with Ms. Azulay and represented she held a certification in grades

5-12. Grievant subsequently provided Ms. Azulay with a letter stating she held "certification in 5-12 grade levels." Level II, Grievant's Exhibit 4.

9. Based on Grievant's representation, Ms. Azulay assumed Grievant held a multi-subject certification for grades 5-12, and for that reason Ms. Azulay determined it was suitable for Grievant to continue to provide instruction to 4th graders. Grievant continued teaching in the extracurricular program.

10. Near the end of the 2004-2005 school year, Ms. Azulay conducted a review of the teacher's qualifications to identify potential candidates to provide instruction to middle school students during the summer. Upon reviewing Grievant's certification, Ms. Azulay discovered Grievant was certified in only German and Spanish. This certification did not make her eligible for the extracurricular teaching position she was holding.

11. Because there were only a limited number of days left in the program, Ms. Azulay allowed Grievant to complete the program so as not to disrupt the students.

12. On September 14, 2005, Respondent once again posted positions seeking qualified teachers for the 21st Century Community Learning Center Program for the 2005-2006 school year. The posting required applicants to hold a valid teaching certificate at the applicable grade level.

13. Grievant did not submit an application in response to this posting.

14. On October 11, 2005, the 21st Century Community Learning Center program began for the 2005-2006 school year. Grievant went to Peterstown Elementary on that day and offered to assist the site coordinator with the students. Grievant was permitted to assist with the program. She was considered a substitute while performing these duties until a determination was made that the number of students participating was stable and a posting for additional teachers was undertaken. While working for the program, Grievant was compensated appropriately.

15. The site coordinator informed Ms. Azulay that Grievant was teaching for the program. Ms. Azulay then informed the site coordinator that Grievant did not hold the appropriate certification to teach elementary school children.

16. The site coordinator notified Grievant that because she lacked the necessary certification for the position, Grievant could no longer teach, and her last day of work was October 31, 2005.

Discussion

Since this grievance is not about discipline, Grievant must prove all of her claims by a

preponderance of the evidence, which means she must provide enough evidence for the undersigned Administrative Law Judge to decide that her claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliterv. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met her burden. *Id.*

In the statement of grievance, Grievant cites a number of statutes she believes Respondent has violated. First, Grievant cites a violation of *W. Va. Code* § 18A-4-7, which relates to payment for substitute teachers. Grievant was paid in accordance with every other teacher's salary who worked for the program for the days she worked during both the 2004-2005 and 2005-2006 school years. Therefore, Grievant has failed to prove Respondent violated *W. Va. Code* § 18A-4-7.

Grievant also alleges Respondent violated *W. Va. Code* §§ 18A-2-2, 18A-4-16, and 18A-4-7a. *W. Va. Code* § 18A-2-2 deals with teaching contracts. However, it is not applicable in this case because Grievant is grieving an extracurricular assignment which is covered under *W. Va. Code* § 18A-4-16. *W. Va. Code* § 18A-4-16 provides that the terms and conditions of the extracurricular assignment must be mutually agreed upon by the employer and employee, and formalized by a contract separate from the worker's regular contract of employment. *Spillers v. Brooke County Bd. of Educ.*, Docket No. 95-05- 329 (Sept. 18, 1995). *See Ramey v. Mingo County Bd. of Educ.*, Docket No. 93-29-470 (May 12, 1994). *See Layman v. Cabell County Bd. of Educ.*, Docket No. 01-06-001 (May 8, 2001).

Grievant did not apply for the posted position and was not awarded an extracurricular contract for the school year 2005-2006. Instead, Grievant offered her help to the program director, who, given the number of students attending, needed some assistance until the enrollment number could be determined. Grievant provided thatassistance, and in turn was financially compensated for her work. However, Grievant clearly was not qualified to fill the position because her certification was in German and Spanish grades 5-12.

With respect to *W. Va. Code* § 18A-4-7a, "This Grievance Board has previously determined that the provisions of *W. Va. Code* § 18A-4-7a are not applicable in the selection of professional personnel for extracurricular assignments. *Hall v. Mingo County Bd. of Educ.* Docket No. 95-29-529 (Mar. 28, 1996); *Foley v. Mineral County Bd. of Educ.*, Docket No. 93-28-255 (Oct. 29, 1993); *Smith v. Logan County Bd. of Educ.*, Docket No. 91-23-040 (July 31, 1991). Thus, 'the appropriate standard

of review for decisions concerning selection of professional personnel to fill [extracurricular] assignments is abuse of discretion.' *McCoy v. Kanawha County Bd. of Educ.*, Docket No. 94-20-141 (Oct. 13, 1994), citing *Pockl v. Ohio County Bd. of Educ.*, 185 W. Va. 256, 406 S.E.2d 687 (1991); *Foley, supra; See Dillon v. Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986); *Jackson v. Grant County Bd. of Educ.*, Docket No. 97-12-224 (Oct.16, 1997)." *Lusher v. Putnam County Bd. of Educ.*, Docket No. 99-40-061 (May 7, 1999).

"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. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Resources*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capriciousactions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "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. *See generally, Harrison v. Ginsberg*, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." *Trimboli, supra*.

Respondent's decision to cease utilizing Grievant to teach in the after-school program was not arbitrary and capricious. Grievant was not properly qualified for the position.

Conclusions of Law

1. Since this grievance is not about discipline, Grievant must prove all of her claims by a preponderance of the evidence, which means she must provide enough evidence for the undersigned Administrative Law Judge to decide that her claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met her burden. *Id.*

2. *W. Va. Code* § 18A-4-16 provides the terms and conditions of the extracurricular

assignment must be mutually agreed upon by the employer and employee,and formalized by a contract separate from the worker's regular contract of employment. *Spillers v. Brooke County Bd. of Educ.*, Docket No. 95-05-329 (Sept. 18, 1995). *See Ramey v. Mingo County Bd. of Educ.*, Docket No. 93-29-470 (May 12, 1994). *See Layman v. Cabell County Bd. of Educ.*, Docket No. 01-06-001 (May 8, 2001).

3. "This Grievance Board has previously determined that the provisions of *W. Va. Code* § 18A-4-7a are not applicable in the selection of professional personnel for extracurricular assignments. *Hall v. Mingo County Bd. of Educ.,* Docket No. 95-29-529 (Mar. 28, 1996); *Foley v. Mineral County Bd. of Educ.*, Docket No. 93-28-255 (Oct. 29, 1993); *Smith v. Logan County Bd. of Educ.*, Docket No. 91-23-040 (July 31, 1991).

4. "The appropriate standard of review for decisions concerning selection of professional personnel to fill [extracurricular] assignments is abuse of discretion.' *McCoy v. Kanawha County Bd. of Educ.*, Docket No. 94-20-141 (Oct. 13, 1994), citing *Pockl v. Ohio County Bd. of Educ.*, 185 W. Va. 256, 406 S.E.2d 687 (1991); *Foley, supra; See Dillon v. Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986); *Jackson v. Grant County Bd. of Educ.*, Docket No. 97-12-224 (Oct.16, 1997)." *Lusher v. Putnam County Bd. of Educ.*, Docket No. 99-40-061 (May 7, 1999).

5. "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. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't ofHealth and Human Resources*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "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. *See generally, Harrison v. Ginsberg*, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." *Trimboli, supra*.

6. Grievant failed to establish Respondent violated any statute or policy or otherwise abused its discretion in not allowing Grievant to remain teaching the after-school program.

Accordingly, this grievance is hereby **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monroe County. Any such appeal must be filed within thirty 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. Theappealing 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: June 22, 2006

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Wendy A. Campbell

Administrative Law Judge