THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

MARILYN COOK,
Grievant,

v. **Docket No. 2009-0435-LogED**

LOGAN COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

A grievance was filed by Grievant, Marilyn Cook, at level one of the grievance procedure, on September 19, 2008, contesting her transfer. Her Statement of Grievance reads, "[v]iolation of WV State Code 18A-4-7a by transferring the grievant to a first grade position after the beginning of the instructional term. Discrimination by transferring the grievant when others were not. Reprisal against the employee because of prior grievances." The relief sought is to be placed back into the kindergarten position from which she was transferred. This grievance proceeded directly to level three by the mutual agreement of the parties. A level three hearing was held before the undersigned Administrative Law Judge on November 12, 2008, at the Grievance Board's office in Charleston, West Virginia. Grievant was represented by Felicia L. Law and Misty Peal-Auville, West Virginia Education Association. Respondent appeared by Leslie Tyree, Esquire. This matter became mature for consideration upon receipt of the Grievant's proposed findings of fact and conclusions of law on December 12, 2008. Respondent chose not to file proposals.

Synopsis

Grievant is employed by the Respondent as a teacher at Man Elementary School. Grievant is certified to teach K-8. Grievant was assigned to a first grade teaching position

for the 2008-2009 school year. When Grievant reported for the beginning of the school year, the Principal informed Grievant that she would have to move to another classroom because the room would be used for a kindergarten class. Grievant informed the Principal that she was certified to teach kindergarten and would agree to teach the kindergarten class for the 2008-2009 school year. The primary motivation behind Grievant's decision was eliminating the necessity to physically change classrooms. This reassignment resulted in the first grade class at Man Elementary School being instructed by a substitute teacher not certified to teach that grade. After the start of the instructional term, Superintendent Wilma Zigmund informed Grievant that she would be returning to the her first grade class for the remainder of the 2008-2009 school year. The move of Grievant back into her first grade class was in the best interest of the students at Man Elementary. In addition, it was not arbitrary and capricious for Superintendent Zigmund to move Grievant. This grievance is denied.

After a detailed review of the entire record, the undersigned makes the following Findings of Fact:

Findings of Fact

1. Grievant is a full-time professional employee of the Respondent in the capacity of a teacher.

2. Grievant has been employed by the Respondent for more than 20 years, and is currently teaching at Man Elementary School.

3. Grievant is certified to teach K-8.

4. Grievant was assigned by Superintendent Zigmund to a first grade teaching position for the 2008-2009 school year.

5. At the beginning of the school year, when Grievant reported to Man Elementary on August 21, 2008, Principal Leah Perry informed Grievant that she would have to move to another classroom because her current room would be used for a kindergarten class.

6. At that time, due to an unexpected number of students enrolling in kindergarten class, a position had been posted, but had not been filled.

7. Grievant informed Principal Perry that she was certified to teach kindergarten and would agree to take the kindergarten class for the 2008-2009 school year.

8. Although this arrangement was memorialized in a letter and faxed to the Board office on or about Thursday, August 21, 2008, it was a change in assignment that was not communicated to Superintendent Zigmund.

9. The change in assignment resulted in an “option 4" temporary substitute teacher, who was not certified in K-8, being assigned to teach first grade at Man Elementary.[1]

10. A few days into the instructional term, Superintendent Zigmund became aware that Grievant, certified in K-8 and previously assigned by her to teach first grade, was teaching kindergarten at Man Elementary.

11. On September 15, 2008, Grievant was informed by Superintendent Zigmund that she would be returning to her first grade class for the remainder of the 2008-2009 school year.

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[1]This reference is to a prospective employable professional person who has obtained a baccalaureate degree from an accredited institution of higher education within the past year. W. VA. CODE § 18A-1-1(i)(4).

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. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant asserts that her transfer to a first grade position after the beginning of the instructional term was improper, because it was in violation of W. VA. CODE § 18A-4-7a. Although Grievant asserted claims of discrimination and reprisal in her initial grievance form, neither claim was mentioned nor developed at level three. Accordingly, those assertions in the original Statement of Grievance need not be addressed.[2] Respondent's position is that it has the authority to transfer professional personnel during the instructional term when it is in the best interest of the students. For reasons more fully set out below,

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[2]The Grievance Board has long held that elements or allegations of the grievance which are raised, but not pursued or developed will be considered abandoned. *Church v. McDowell County Bd. of Educ.*, Docket No. 33-87-214 (Nov. 30, 1987).

the undersigned agrees that Grievant's return to the first grade assignment was in the best interest of the students and was not done in an arbitrary or capricious manner.

The authority of the Respondent to transfer professional personnel during the instructional term is found in the provisions of W. VA. CODE § 18A-4-7a(l). That section provides:

> (l) After the fifth day prior to the beginning of the instructional term, no person employed and assigned to a professional position may transfer to another professional position in the county during that instructional term unless the person holding that position does not have valid certification. The provisions of this subsection are subject to the following:
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> (1) The person may apply for any posted, vacant positions with the successful applicant assuming the position at the beginning of the next instructional term;
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> (2) Professional personnel who have been on an approved leave of absence may fill these vacancies upon their return from the approved leave of absence; and
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> (3) The county board, upon recommendation of the superintendent may fill a position before the next instructional term when it is determined to be in the best interest of the students: Provided, That the county superintendent shall notify the state board [of education] of each transfer of a person employed in a professional position to another professional position after the fifth day prior to the beginning of the instructional term. The Legislature finds that it is not in the best interest of the students particularly in the elementary grades to have multiple teachers for any one grade level or course during the instructional term. It is the intent of the Legislature that the filling of positions through transfers of personnel from one professional position to another after the fifth day prior to the beginning of the instructional term should be kept to a minimum.

The authority of Respondent to realign positions within an individual elementary school from one school year to the next is found in W. VA. CODE § 18A-4-7a(p). That section provides:

> Notwithstanding any other provision of the code to the contrary, where the total number of classroom teaching positions in an elementary school does

> not increase from one school year to the next, but there exists in that school a need to realign the number of teachers in one or more grade levels, kindergarten through six, teachers at the school may be reassigned to grade levels for which they are certified, without that position being posted: Provided, That the employee and the county board of education mutually agree to the reassignment.

"County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel; nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." *Cahill v. Mercer County Bd. of Educ.*, 195 W. Va. 453, 465 S.E.2d 910 (1995); *Bd. of Educ. v. Enoch*, 186 W. Va. 712, 414 S.E.2d 630 (1992); *Egan v. Bd. of Educ.*, 185 W. Va. 302, 406 S.E.2d 733 (1991). Even when, as in this case, the county board is given the authority to make a determination in "its sole and exclusive judgment," that broad grant of discretion must still be exercised reasonably, rather than arbitrarily.

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). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). "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, supra*.

Under the circumstance presented, the undersigned cannot find Respondent's action in moving Grievant back into the first grade class to have been arbitrary or capricious or an abuse of discretion. As is common place in the application of the enigmatical provisions of chapter 18A, the individual facts of the grievance must be examined to reach the logical outcome of the grievance. Grievant's primary argument to the undersigned is that this change in assignment after the fifth day of the beginning of the instructional term is prohibited. The undersigned disagrees. The facts of this grievance indicate that this was not a transfer of Grievant to another professional position in the county during the instructional term. The facts establish that the first grade class was the original assignment of the Superintendent within the elementary school; therefore, the code section which Grievant relies upon is of little use.

The key undisputed fact in this matter centers around Superintendent Zigmund's original assignment of Grievant to the first grade classroom. This was done because of her experience, her certification, and recognition of her excellent reputation in providing quality instruction to that grade level. Unbeknownst to Superintendent Zigmund, Principal Perry made the change in assignments because Grievant did not want to move from the room in which she had previously taught. Once Superintendent Zigmund became aware that an uncertified temporary substitute was teaching a large group of first graders, while a certified full-time professional was instructing a small group of kindergarten children, she made the switch. Clearly, this was in the best interest of the first graders. Grievant has

failed to establish that it was improper for Superintendent Zigmund to undo the reassignment of Grievant by Principal Perry.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. 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. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. "County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel; nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." *Cahill v. Mercer County Bd. of Educ.*, 195 W. Va. 453, 465 S.E.2d 910 (1995); *Bd. of Educ. v. Enoch*, 186 W. Va. 712, 414 S.E.2d 630 (1992); *Egan v. Bd. of Educ.*, 185 W. Va. 302, 406 S.E.2d 733 (1991).

3. Grievant did not meet her burden of proof and demonstrate that the move returning her to the first grade class by Superintendent Zigmund was arbitrary and capricious, an abuse of discretion, nor did she establish a violation of any statute.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 WEST VIRGINIA CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: February 2, 2009

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Ronald L. Reece
Administrative Law Judge