THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KAREN STOVER,
Grievant,

v. **Docket No. 2010-1051-LogED**

LOGAN COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

This grievance was filed by Grievant, Karen Stover, on February 12, 2010, against her employer, the Logan County Board of Education. The statement of grievance reads:

> Grievant contends that the Respondent has approved her for transfer even though: (a) there is a continuing need for her to perform her currently assigned duties: and, (b) there is a less senior aide at Grievant's school who is assigned to work with an autistic child without the certification as an autistic mentor. (Grievant is certified as an autistic mentor.) Grievant alleges a violation of W.VA. CODE § 18A-2-7 and § 18A-4-8b(d)(3).
>
> As relief, Grievant seeks:
>
> Recision of her transfer and reassignment to Chapmanville Regional High School for the 2010-2011 school year.

A hearing was held at level one and was denied at that level on April 27, 2010. A level two mediation was conducted on July 13, 2010. Appeal to level three was made on July 16, 2010, and a level three hearing was conducted on October 12, 2010, before the undersigned Administrative Law Judge. Grievant was represented by counsel, John Roush, Esq., of the West Virginia School Service Personnel Association, and Respondent was represented by counsel, Leslie Tyree, Esq. This matter became mature for decision on November 16, 2010, upon receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by the Logan County Board of Education as an itinerant special education aide. During the 2008-2009 school year, Grievant was assigned to Chapmanville Regional High School as an aide for a child whose individual education plan ("IEP") required one on one adult supervision. Due to a failure by the school to report that the child was graduating, Grievant remained at the school during the 2009-2010 school year. Upon learning that the child had graduated and that Grievant remained at the school during the 2009-2010 school year, Logan County Superintendent Wilma Zigmond notified Grievant that she would be transferred for the 2010-2011 school year. Because of Grievant's status as an itinerant special education aide and Respondent's ample discretion in personnel matters, this grievance is denied.

Findings of Fact

1. Grievant is employed by Respondent as an itinerant special education aide.

2. During the 2008-2009 school year, Grievant was assigned to a child at Chapmanville High School whose IEP required one on one adult supervision.

3. Grievant is certified as an autism mentor.

4. The child to whom Grievant was assigned graduated at the close of the 2008-2009 school year.

5. Chapmanville High School failed to report to the Board of Education that the child graduated.

6. Grievant remained at Chapmanville Regional High School during the 2009-2010 school year.

7. Upon learning the child had graduated, Logan County Superintendent Wilma Zigmond made the determination that due to overextended school funding and lack of need at Chapmanville Regional High School, Grievant would be transferred for the 2010-2011 school year to East Chapmanville Elementary School.

8. Another aide, Elizabeth Sanders, was not transferred and was retained at Chapmanville Regional High School for the 2010-2011 school year.

9. According to the Service Personnel Seniority List[1], Grievant has been employed by Respondent as an Aide since March 27, 2006. Ms. Sanders has been employed as an Aide by Respondent since August 21, 2008.

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 Board 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

[1]Grievant's Exhibiit No. 1.

(May 17, 1993).

Grievant argues that based upon her seniority as an aide and her certification as an autism mentor, Respondent violated W.VA. CODE § 18A-4-8b(d)(3) and § 18A-2-7. Grievant asserts that the position of aide was still needed at Chapmanville Regional High School, for the 2010-2011 school year, and that due to her seniority, she should have been the aide retained at the school. The following discussion by this Grievance Board in *Learmonth v. Fayette County Board of Education*, Docket No. 03-10-200 (Aug. 20, 2003) is pertinent to this case:

> Boards of education are not required by law to base transfer decisions on seniority, or to consider seniority as a factor in making transfer decisions. Transfer decisions "are based on the needs of the school, as decided in good faith by the superintendent and the board. *Hawkins v. Tyler County Bd. of Educ.*, 166 W.Va. 363, 275 S.E. 2d 592 (1979) and *Post v. Harrison County Bd. of Educ.*, Docket No. 89-17-355 (Feb. 20, 1990). *See Jochum v. Ohio County Bd. of Educ.*, Docket No. 91-35-396 (Jan. 31, 1992)." *Stewart, et al., v. Kanawha County Bd. of Educ.*, Docket No. 96-20-370 (Jan. 31, 1997). W.VA. CODE § 18A-2-7 "grants broad discretion to a superintendent, and gives him the authority to transfer school personnel subject only to the approval of the board. *Post* [*supra*]." *Stewart, supra*.

Grievant asserts that even though the child to which she was designated graduated, she should have remained at the school instead of other aides due to her qualification as an autism mentor. At the level three hearing, Grievant testified that she helped assist special needs students other than the child she was assigned to. As this Grievance Board noted in *Sharp v. Jackson County Board of Education*, Docket No. 07-18-361 (Feb. 26, 2008), "it is well established that a board of education has ample discretion in assessing how to best serve the needs of its special needs students." Superintendent Zigmond testified that Logan County has 30 employees in service positions <u>above</u> the amount reimbursed through the state funding formula. As such, Superintendent Zigmond indicated

that her decision to transfer Grievant was based upon the need to maintain fiscal integrity and Chapmanville Regional High School's expressed lack of need for Grievant.

Grievant argues that her transfer was not based on a lack of need at Chapmanville Regional High School. It is well-recognized that county boards of education have substantial discretion in matters related to hiring, assignment, transfer, and promotion of school personnel. However, that discretion must be tempered in a manner that is reasonably exercised, in the best interest of the schools, and in a manner which is not arbitrary and capricious. *Syl. Pt. 3, Dillon v. Bd. of Educ.*, 177 W.Va. 145, 351 S.E. 2d 58 (1986). "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 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." *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 (1982)." *Trimboli, supra, Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

Grievant's status is that of an itinerant special education aide. As this Grievance Board stated in *Davisson v. Lewis County Bd. of Educ.*, Docket No. 02-21-209 (Nov. 13, 2002), "a board of education... has the discretion to designate a... position as itinerant when it is posted; employees who bid upon and are awarded such positions may, accordingly, be moved to accommodate the students' needs. *Vance v. Jefferson County Bd. of Educ.*, Docket No. 02-19-030 (March 28, 2002); *Bailey v. Raleigh County Bd. of Educ.*, Docket No. 97-41-495 (April 20, 1998)." *See also, Bennett v. Randolph County Bd. of Educ.*, Docket No. 05-42-396 (April 12, 2006).[2]

The following conclusions of law support the decision reached.

---

[2]Since the filing of this grievance, the Grievance Board's precedent on the allowable discretion to transfer itinerant positions was reinforced by House Bill 4512, passed March 13, 2010, effective July 1, 2010. House Bill 4512 amended W.VA. CODE § 18A-4-8 to include paragraph (r) as follows:

> "Itinerant status means a service person who does not have a fixed work site and may be involuntarily reassigned to another work site. A service person is considered to hold itinerant status if he or she has bid upon a position posted as itinerant or has agreed to accept this status. A county board may establish positions with itinerant status only within the aide and autism mentor classification categories and only when the job duties involve exceptional students. A service person with itinerant status may be assigned to a different work site upon written notice ten days prior to the reassignment without the consent of the employee and without posting the vacancy. A service person with itinerant status may be involuntarily reassigned no more than twice during the school year. At the conclusion of each school year, the county board shall post and fill, pursuant to section eight-b of this article, all positions that have been filled without posting by a service person with itinerant status. A service person who is assigned to a beginning and ending work site and travels at the expense of the county board to other work sites during the daily schedule, shall not be considered to hold itinerant status."

The decision in this grievance is based solely upon the legal precedent established at the time of the filing of this grievance.

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 Board 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).

2. W.VA. CODE § 18A-2-7 grants broad discretion to a superintendent, and gives him or her the authority to transfer school personnel subject only to the approval of the board. *Post v. Harrison County Bd. of Educ.*, Docket No. 89-17-355 (Feb. 20, 1990).

3. Transfer decisions "are based on the needs of the school, as decided in good faith by the superintendent and the board. *Hawkins v. Tyler County Bd. of Educ.*, 166 W.Va. 363, 275 S.E. 2d 592 (1979) and *Post v. Harrison County Bd. of Educ.*, Docket No. 89-17-355 (Feb. 20, 1990). *See Jochum v. Ohio County Bd. of Educ.*, Docket No. 91-35-396 (Jan. 31, 1992)." *Stewart, et al., v. Kanawha County Bd. of Educ.*, Docket No. 96-20-370 (Jan. 31, 1997).

4. It is well-recognized that county boards of education have substantial discretion in matters related to hiring, assignment, transfer, and promotion of school personnel. However, that discretion must be tempered in a manner that is reasonably exercised, in the best interest of the schools, and in a manner which is not arbitrary and

capricious. *Syl. Pt. 3, Dillon v. Bd. of Educ.*, 177 W.Va. 145, 351 S.E. 2d 58 (1986).

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 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." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

6. "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 (1982)." *Trimboli, supra, Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

7. It is well established that a board of education has ample discretion in assessing how to best serve the needs of its special needs students. *Sharp v. Jackson County Board of Education*, Docket No. 07-18-361 (Feb. 26, 2008).

8. A position posted as itinerant may, appropriately, be moved to accommodate the students’ needs. *Vance v. Jefferson County Bd. of Educ.*, Docket No. 02-19-030 (March 28, 2002); *Bailey v. Raleigh County Bd. of Educ.*, Docket No. 97-41-495 (April 20, 1998).” *See also, Bennett v. Randolph County Bd. of Educ.*, Docket No. 05-42-396 (April 12, 2006).

9. Respondent's decision to reassign Grievant to East Chapmanville Elementary School was justified under the circumstances and was not arbitrary and capricious.

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 W. VA. 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: DECEMBER 13, 2010

_____
Jennifer Lea Stollings-Parr
Administrative Law Judge