THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

CELESTE W. EVANS,
Grievant,

v. **Docket No. 2009-0747-MarED**

MARSHALL COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

"A tree sheds poison daggers; a glistening red seed stops the heart; a shrub causes intolerable pain; a vine intoxicates; a leaf triggers a war. Within the plant kingdom lurk unfathomable evils."[1]

Celeste Evans, Grievant, appealed this grievance to level three on May 22, 2009, after denial at level one and a mediation session at level two. She asserts a violation of W. VA. CODE § 6C-2-2(ii) which is a misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination. Grievant seeks relief by the "reinstatment of all plants at Sherrard Middle School or the immediate and permanent removal and ban of all living plants (large and small) from all Marshall County School Classrooms, and School buildings, the Marshall County Schools Office Building, Transportation Building, future buildings under construction and/or buildings to be under construction and any building that Marshall County Schools funds in any way with tax payer monies." The level three hearing was conducted before the undersigned Administrative Law Judge on October 5, 2009, at the

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[1]Amy Stewart, Wicked Plants: The Weed That Killed Lincoln's Mother and Other Botanical Atrocities, Algonquin Books of Chapel Hill, 2009.

Grievance Board's Westover office. Grievant appeared in person and by her representative, Owens Brown, West Virginia Education Association. Respondent appeared by Richard S. Boothby, Esquire, Bowles, Rice, McDavid, Graff & Love. This matter became mature for consideration upon receipt of the parties' proposed findings of fact and conclusions of law on November 12, 2009.

Synopsis

Sometime during the 2007-2008 school year, the administration of Sherrard Middle School began to receive complaints from staff members about allergic reactions to a suspected air contaminant at the school. An indoor environmental testing and consulting company was contracted to determine the source of the air contaminant that was affecting the staff. The company recommended that the Respondent remove flora in all areas of the school to limit the condition. The school's library contained more than forty plants that had been situated there for many years. All plants were removed from the school building without an objection from the faculty staff. Thereafter, four small potted plants were placed on a table in the library by a faculty staff member. Respondent's maintenance supervisor ordered the plants be removed because their presence in the building was not in compliance with the environmental report. In view of the circumstances of this grievance, this was an arbitrary and capricious act in that it was not supported by the environmental report. This grievance is granted in part, and denied in part.

The following findings of fact are based upon the record developed at level one and level three.

Findings of Fact

1. Grievant has been employed by Respondent for over twenty years as a teacher. Grievant is presently assigned to Sherrard Middle School as a media specialist.

2. When the teachers at Sherrard Middle School returned to begin the 2007-2008 school year, the hallway and some of the classrooms were outfitted with buckets and garbage cans to catch water from the deteriorating heating and air-conditioning duct work in the ceiling.

3. As the year progressed, the teachers became concerned that the water leaking through the ceiling tiles in the building posed a health threat.

4. At their December 13, 2007, faculty meeting the teachers decided to address their concerns in a letter to the superintendent noting the air quality problems. The faculty senate letter notes the concern of the teachers regarding "the health and safety of our students who suffer from asthma and other breathing problems." Grievant's Exhibit 1, Level Three.

5. On January 31, 2008, SDI Environmental, an indoor environmental testing and consulting firm, tested the air at Sherrard Middle School.

6. In a report dated February 1, 2008, SDI Environmental released its findings and recommendations to improve the air quality at the school. Respondent's Exhibits 1 and 2, Level Three.

7. The report states in pertinent part as follows in regard to plants:

> There is an overabundance of plants and plant material in many observed rooms. In general indoor plants are not adverse, however and [sic] plants that are contaminated with fungal spores are widely viewed as primary sources of allergenic compounds when improperly cared for and in quantities like those observed at the school. Plants also raise relative humidity and

> MVOC levels (Mycometer values which indicate that the level of mold is high above normal background level due to mold growth). This was also reflected in reading taken at the school.

8. The report states in pertinent part as follows in regard to the duct work:

> Upon inspection the ductwork [sic] above the ceiling tile, which also is utilized as the HVAC air return plenum, is in need of professional cleaning. Any water intrusion from the roof will cause ubiquitous mold spores deposited in this area to colonize and flourish. New ceiling tiles and ductwork [sic] remediation will limit this potential. Cleaning should only be performed when all remodeling or new construction has been completed.

9. SDI Environmental recommended that the Respondent remove non-educational flora in all areas of the school to limit the condition.

10. SDI Environmental highly recommended cleaning of HVAC duct work after all construction is completed. The report notes it is advisable to have an experienced licensed remediation contractor perform the appropriate scope of work pertaining to the duct work cleaning.

11. SDI Environmental also highly recommended that post remediation verification testing be performed after all work is completed. This followup testing was not performed.

12. In February of 2008 all plants were removed from the school building.

13. In the summer of 2008 the school's heating and air-conditioning duct work was replaced.

14. In October of 2008 four-small potted plants were placed on a table in the library by a staff member.

15. Kenny Rhodes, supervisor of maintenance, ordered that the four plants be removed citing the noncompliance with the recommendations of the SDI Environmental report.

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 (May 17, 1993).

Grievant contends that the Respondent's zero tolerance for allowing any plants in Sherrard Middle School is a misrepresentation of the report and an arbitrary and capricious act. Respondent counters that it was responding to employee concerns about air quality at their school by hiring SDI Environmental to test the air throughout the facility. SDI made various recommendations to improve air quality, and one was the removal of the large number of plants in the library and cleaning of hard surfaces adjacent to existing plants

after their removal. Respondent asserts that "the Grievance Board, simply put, is not in the business of running the day to day operations of county school systems. Lacking arbitrary and capricious action by a Board of Education which is contrary to all reason and which also affects an employee's conditions in some appreciable manner, there is no cause for intervention by the Grievance Board." Respondent's Proposed Level Three Decision.

Respondent seems to confuse Grievant's complaint concerning the removal of four small plants with the initial removal of all plants from the library after the recommendations of the environmental company. Grievant complied with the removal of the forty or so plants from the library without an objection. In addition, the library surfaces in the area of the plants were cleaned to guard against fungal contamination.

Respondent also represents that the SDI report found the indoor plants in the library of the school as only one likely air contaminant source. This is incorrect. The report also pointed out that water intrusion from the roof would cause ubiquitous mold spores deposited in the area to colonize and flourish. This condition was corrected by Respondent in the summer of 2008 when the duct work was replaced; however, the record did not establish that professional cleaning of the area was undertaken. The report also recommended follow up testing after remediation was completed. This was not done.

The undersigned agrees with Grievant that the action of the maintenance supervisor under this set of facts was arbitrary and capricious. "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). 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)).

The record of this matter reflects that the recommendation that the large number of plants be removed from the library, the area around where the plants had been located be cleaned, and replacement of water damaged duct work were followed by Respondent. Obviously, the conditions in the school in the fall of 2008 had changed and were not the same when the school was in disrepair and the copious amount of plants in the library were producing a cautionary level of air contamination. In fact, the elevated fungal enzyme activity in the library area adjacent to the hallway and windows had been addressed and corrected.

Nothing in the report suggests that a small number of the right type of plants, properly watered, would act to damage the indoor air quality. Accordingly, ordering the removal of four small potted plants in the library was unreasonable and in disregard of the facts and circumstances of the situation. Grievant is right in her contention that she should be permitted to have a small agreed upon amount of plants in her room. Respondent and Grievant should follow the professional guidelines found in Respondent's Exhibit 6 to guard

against fungal contamination. Contrary to Respondent's contention, this safeguard is simple and easy to implement.

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 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).

2. "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).

3. Grievant demonstrated by a preponderance of the evidence that the Respondent's zero tolerance for allowing any small number of plants in Sherrard Middle School was a misrepresentation of the environmental report and an arbitrary and capricious act.

Accordingly, this Grievance is **granted** in part, and **denied** in part. Respondent is **ordered** to allow Grievant a small agreed upon amount of plants in the library done in

accordance with the guidelines provided by the environmental consulting firm. This grievance is denied in regard to the request that Respondent be forced to remove all live plants from Marshall County Schools' facilities.

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 (eff. July 7, 2008).

Date: January 8, 2010

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Ronald L. Reece
Administrative Law Judge