THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BONITA REDD,

Grievant,

v. **Docket No. 2009-1477-McDED**

MCDOWELL COUNTY BOARD OF EDUCATION AND WEST VIRGINIA DEPARTMENT OF EDUCATION,[1]

Respondents.

DECISION

Grievant, Bonita Redd, is employed by the McDowell County Board of Education ("Board") as an Assistant Principal at Mount View Middle School. Ms. Redd filed a level one grievance form dated April 22, 2009, alleging the following:

> **Violation of Policy 4320, Section 126-85-83 (83.2) and Section 126-85-112 (112.2), Violation of Contract (days), Violation of Labor Law, violation of state and federal statutes.**
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> **Violation of Policy 4320, section 83.2 and 112.2.** I have had to input computer WVEIS numbers in breakfast and lunch computers regularly since the beginning of the school year because there are not enough employees **under contract** to perform this duty, **as required by policy.** I have contacted the county, state, and US government to try to resolve this problem; therefore, it is a continuing violation.
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> **Violation of Contract:** My supervisor requested that the administrators at Mount View High School work on Saturday, March 28th to get ready for OEPA visit. **This is outside of my contract days.**
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> **Violation of Labor Laws:** My supervisor has requested that administrators and teachers check the building when there is a **bomb threat.** Employers are not allowed to place their employees at risk or in danger. In addition, if

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[1]The McDowell County school system is operating under intervention by the West Virginia State Department of Education.

> students are allowed to go back into the building after a bomb threat, due to the inexperience of staff in checking for bombs, students' safety is also at risk.[2]

Grievant Redd did not make a request for specific relief on the level one grievance form.

A level one hearing was conducted on May 11, 2009. Grievant Redd appeared *pro se* and the Respondent Board was represented by Kathryn R. Bayless, Esquire. The hearing was recorded and transcribed by a Certified Court Reporter. Suzette Cook, Superintendent of McDowell County Schools, issued a level one decision dated May 27, 2009, denying the grievance.

Grievant filed a timely appeal to level two. A level two mediation was scheduled for September 22, 2009. Grievant failed to appear at the mediation. An Order to Show Cause was issued on November 20, 2009 and Grievant responded to the Order on December 3, 2009, indicating she did not receive notice of the mediation. A second level two mediation was scheduled and held on May 25, 2010. An Order related to that mediation was entered the next day and Grievant Redd subsequently filed a timely appeal to level three.

A level three hearing was scheduled for November 1, 2010, in Beckley, West Virginia. The Respondent Board appeared for that hearing through its counsel, Kathryn Bayless, Esquire. Grievant Redd failed to appear for the hearing. An Order to Show Cause was entered on November 1, 2010. Grievant responded to the second Order to Show Cause on November 5, 2010, stating that she "mistakenly thought that the hearing

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[2] The Statement of Grievance is reproduced herein as it was in the statement attached to the grievance form. All emphasis on words and phrases appear as they do in the original statement.

was going to be held on November 10, 2010. Grievant requested, among other things, that a level three hearing "be conducted as soon as possible, without delay."

A telephone conference was held on December 15, 2010, to discuss scheduling a hearing. Grievant appeared telephonically and Respondent was represented on the telephone by Kathryn R. Bayless, Esquire. The parties agree that, pursuant to 156 C.S.R. 1 § 6.11, they would submit the grievance for decision at level three based upon the factual record developed and transcribed at the Level one hearing plus proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals, the last of which was received at the West Virginia Public Employees Grievance Board on February 14, 2011. This grievance became mature for decision on that date. In her fact/law proposal, Grievant identified the following relief that she is seeking:

- Payment for meals for directly administering the child nutrition program for 84 days, so that the county could receive reimbursement for student meals.
- One day's compensation of [her] daily rate of pay for working on Saturday, March 28, 2009.
- That personnel not be required to check the building for bombs in case of bomb threats or other requests that could endanger the lives of personnel.

Synopsis

Grievant brings three separate claims: that she should be compensated for performing record keeping duties for the school lunch program; that she should receive a day's pay for working three hours on a Saturday; and, that she has been improperly exposed to an unsafe workplace. Grievant was unable to prove that she was entitled to extra compensation for the lunch program or the Saturday she volunteered to work.

Additionally, Grievant was unable to demonstrate that the bomb threat evacuation procedure followed in the school where she works constitutes an unlawful practice. Consequently, the grievance is denied.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant Redd is employed by the Respondent Board as an Assistant Principal at the Mount View Middle School.

2. Grievant Redd is employed pursuant to a professional employee continuing contract with a 210-day employment term. The employment does not include Saturdays, Sundays or legal holidays. *See* W. VA. CODE § 18-5-45. In addition to the Principal Index,[3] Grievant receives a $1000 annual salary supplement. *See* Board Policy 8-016.

3. Breakfast and lunch are made available to students in public school through the Child Nutrition Program that is supplemented by the federal government.[4] Some students receive free or reduced-price meals based upon the income levels of their families. Each school has to keep records of the number of meals served, as well as the students to whom the meals were served, so the program may be properly audited.[5]

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[3] W. VA. CODE § 18A-4-3 requires that Principals and Assistant Principals receive a salary supplement above their normal teaching salary. The supplement is based upon a percentage of the teaching salary. The specific percentage paid to each Principal is dependent upon the number of employees the Principal supervises. The formula for calculating this salary supplement is commonly referred to as the Principal Index.

[4] Specifically, the United States Department of Agriculture.

[5] *See* West Virginia Board of Education Policy 4320, 126 C.S.R. 86 § 1 et. seq.

4. During the period of September 29, 2008, through May 8, 2009, Grievant Redd was required to assist with the lunch record keeping.[6] On eighty-four days during that period Grievant and another employee would enter an identification number into the WVEIS [7] database for each student who was served. This duty took approximately fifteen minutes each day.

5. Grievant received no additional compensation of any kind for performing this duty related to the school lunch program.

6. There was no evidence presented to indicate that Grievant did not receive a thirty-minute duty-free lunch recess as a result of having to perform the record keeping duty related to the school lunch program.

7. The West Virginia Office of Education Performance Audits ("OEPA") was planning to perform an audit of Mount View Middle School in the spring of 2009. Principal Adam Grygiel asked the Assistant Principals if they would voluntarily report to the school on Saturday, March 28, 2009, to work on files to prepare for the OEPA audit at a time when they would not be interrupted by the day-to-day operations of the school.

8. All of the Assistant Principals came to work on March 28, 2009. Grievant worked three hours at the school on that day and the remaining Assistant Principals worked five hours.

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[6] *See* Grievant's Exhibit 1

[7] West Virginia Education Information System is a database operated by the West Virginia Board of Education to track information related to public education.

9. None of the Assistant Principals received any form of additional compensation for working on March 28, 2009. Grievant did not suffer any negative consequence for working less time than her colleagues on that day.

10. From time to time, bomb threats are made regarding the Mount View Middle School. Typically, the threat is made by a perpetrator who calls the 911 emergency operator and reports that there is a bomb in the school. The 911 operator then calls the school and emergency responders to report the threat.

11. The Mount View School Complex houses both the High School and the Middle School. The intercom system is not to both sides of the building. When the Principal receives a call related to a bomb threat he calls the administrators on both sides and directs them each to make an announcement so that all of the students and staff are informed at the same time. The teachers who have students in their rooms evacuate the building with their students.

12. Teachers who are on Conference and Planning time are instructed to report to the office. Those teachers and the administrators check the restrooms and the hallways to make certain that all of the students are out of the building. After that has been accomplished, those employees evacuate the building as well. These employees are instructed to note if anything looks out of place so they might be able to report where the bomb might be placed. Grievant Redd is one of the individuals who is expected to conduct the final check to clear any remaining students from the building.[8]

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[8] Principal Grygiel developed this procedure, but he did not know if it is the same procedure as followed in other schools. Additionally, no emergency plan or policy to be followed by this school or any school in McDowell was presented as evidence by either party.

13. All students and staff are usually evacuated from the building by the time the police arrive in response to the bomb threat.[9]

Discussion

Grievant Redd makes three separate claims in this grievance. First, she asserts that she should receive a free school lunch for each of the eighty-four days she recorded student numbers for the child nutrition program at the school. Grievant alleges that State Board Policy 4320 requires that each employee who performs a lunch duty must receive additional compensation through a separate contract. Next, Grievant claims entitlement for a day's pay at her normal daily rate for working three hours on Saturday, March 28, 2009. Grievant notes that her 210-day employment term excludes Saturdays and Sundays. She opines that the Saturday work constitutes another day of employment for which she must be paid. Finally, Grievant claims that the practice of requiring her and other professional employees to check the building for students after the classrooms have been evacuated results in an unsafe work environment in violation of W. VA. CODE § 21-3-1.

Since none of Grievant Redd's claims involve a disciplinary matter, she bears 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); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). The preponderance standard generally requires proof that a reasonable person would accept

[9] Level one testimony of Principal Grygiel, transcript page 22.

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).

Lunch Duty:

It is undisputed that Grievant performed a lunch duty on eighty-four days during the 2008-2009 school year. Grievant spent approximately fifteen minutes each day recording the identification numbers of students who were participating in the child nutrition program into the WVEIS database. Other employees at the Mount View School complex also entered student numbers into the database for the breakfast and lunch programs during that school year.[10] Grievant points to a specific section of the State Board Policy related to the child nutrition program as requiring that she receive additional compensation under a separate contract for performing this duty. That specific phrase states that:

> School employees who supervise during the lunch or breakfast periods, sell tickets or perform other duties directly related to the food program should do so on a contract basis as described in W.Va. Code §§18A-4-14 and 16.

126 C.S.R. 85 § 83.2

To fully understand this provision it must be put in context. This particular provision is found in section eighty-three of the policy related to "Pricing of Adult Meals." This section requires the school to charge adults who work in the school a price for the meal that at least covers the cost of the meal that is served. However, there is one exception to that rule which states the following:

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[10] During that school year Principal Grygiel and three other employees performed this function in addition to Grievant. There was no evidence presented to indicate that any employee received additional compensation for this duty.

> 83.2. Meals served to adults who are directly involved in the operation and administration of child nutrition programs may, at the discretion of the SFA,[11] be furnished at no charge. As such, their cost may be fully attributed to the nonprofit child nutrition program operation and supported by revenues to the child nutrition program. These meals should be shown as program adult meals, column 6 or 12 on form 43-10-30S. School employees who supervise during the lunch or breakfast periods, sell tickets or perform other duties directly related to the food program should do so on a contract basis as described in W.Va. Code §§ 18A-4-14 and 16.

126 C.S.R. 85 § 83.2.

Pursuant to this provision the school has discretion to provide employees with free meals as compensation for performing duties related to the child nutrition program. However, the school is not required to do so. If the school chooses to provide free meals to these employees it should reflect that they are actually performing duties related to the lunch program by providing contracts for these duties pursuant to W. VA. CODE § 18A-4-14 or §18A-4-16.

W. VA. CODE § 18A-4-14 requires that all teachers and school service personnel must receive a duty-free lunch period of at least thirty continuous minutes. That statute also authorizes an employee to waive his or her lunch recess in exchange for compensation. Policy 4320 requires that a contract be executed if an employee does waive his or her lunch period in exchange for a free meal. Presumably this is to document for audit purposes why the meal is not paid for. There was no evidence that Grievant did not receive a duty-free thirty-minute lunch recess each day so there is no reason for her to have an additional contract pursuant to W. VA. CODE § 18A-4-14.

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[11] SFA is defined as "the governing body that is responsible for the administration of one or more schools and has the legal authority to operate a breakfast or lunch program therein." In this case that is the Mount View School administration.

Likewise W. VA. CODE § 18A-4-16 requires employees to be paid compensation for performing extracurricular duties. The statute defines such duties as follows:

> Extracurricular duties shall mean, but not be limited to, any activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis. . .

It is possible that duties related to the breakfast program could take place before Grievant's "regularly scheduled work hours which might constitute an extracurricular assignment. However, no evidence was presented to indicate that the data entry Grievant performed occurred at such times and there is no indication that those duties constituted an extracurricular assignment. Thus, a contract pursuant to W. VA. CODE § 18A-4-16 would be inappropriate under these circumstances.

The contract provision of State Board Policy 4320 does not apply to Grievant's situation. Grievant could have been given a free meal for performing the data entry duty but that is not required by the policy. Grievant's claim for reimbursement for meals on the eighty-four days she performed this duty must fail.

Work on Saturday:

Principal Grygiel asked all of the Assistant Principals if they would voluntarily come in to work on Saturday, March 28, 2009. The reason for the Saturday session was for the administrators to work on files to prepare for an audit by the OEPA. Principal Grygiel felt that they could get more done without the interruptions that result from their other daily duties. McDowell County Schools is under the direction of the State Department of Education. Successful audits are necessary for the County to be able to assume control of the school system.

It is undisputed that Principal Grygiel made it clear that the Saturday work was voluntary. However, Grievant testified that she believed if she did not report to work as requested she would receive poor ratings on her annual performance evaluations. Grievant reported to work on Saturday as did the remainder of the Assistant Principals. Grievant stayed at work for three hours and the other Assistant Principals stayed for five hours. Grievant received no negative repercussion for working less hours than the others and there was no evidence that Principal Grygiel had previously retaliated against a staff person for not performing a voluntary request.

Grievant is correct in her assertion that her 210-day employment term excludes Saturdays and Sundays. W. VA. CODE § 18-5-45 defines the employment term for professional educators as follows:

> (c) The county board shall provide a school term for its schools that contains the following:
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> (1) An employment term for teachers of no less than two hundred days, exclusive of Saturdays and Sundays.

If Principal Grygiel *required* a teacher to report to work on Saturday, the teacher would have to be paid for an additional day to his or her employment term.[12] Additionally, the "work day" for educators is defined in State Board Policy 2510 as follows:

> **Work Day** - Time allocated for the instructional day and other activities such as homeroom, class changes, lunch, planning periods, and staff development that may not exceed eight clock hours.

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[12] School systems often allow teachers to take a non-instructional day off during the employment term in lieu of a day they work outside the term to attend professional development functions or for reporting late in the evenings to allow for parent/teacher conferences outside the standard workday.

126 C.S.R. 42 § 13.93; (cited in *Lincoln County Bd. of Educ. v. Adkins*, 188 W. Va. 430; 424 S.E.2d 775 (1992)) (relating to whether a teacher's planning period fell within the "work day" or the "school day"). Under this provision, a principal may not *require* a teacher to report to, or stay at, work for more than eight hours without additional compensation.

This situation is not controlled by the foregoing for two reasons. First, Principal Grygiel made it clear to everyone that the Saturday work was voluntary. Grievant did not have to report. There is no evidence that Principal Grygiel would have retaliated against Grievant Redd for not reporting and there was no penalty for her not staying as long as her co-workers. Grievant's assertion that she might have been subjected to a negative evaluation had she not reported is simply too speculative to be given any weight. Second, Grievant receives a salary supplement of $1000 for serving as an Assistant Principal. It is reasonable to assume that this supplement is, at least in part, to compensate administrators for the extra time they must spend at work dealing with administrative functions. Grievant failed to prove that she was entitled to a day's pay for voluntarily reporting to work for three hours on March 28, 2009.

Bomb Threat Procedure:

As part of the procedure for evacuating the building in the face of a Bomb threat, Grievant and other professional employees who are not supervising a classroom with students are assigned to check sections of the building to ensure that there are no students in the restrooms and to take note if anything is clearly out of place. Principal Grygiel requires this procedure to make sure that no student remains in the building

because he or she did not hear the announcement or did not take the announcement seriously.

Grievant asserts that this assignment could endanger the lives of her and her colleagues because it requires them to stay in the building after their co-workers and the students have evacuated. Grievant opines that this procedure violates W. VA. CODE § 21-3-1 by subjecting her and her colleagues to unsafe working conditions. That code provision states in part:

> Every employer shall furnish employment which shall be reasonably safe for the employees therein engaged and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render employment and the place of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees: Provided, That as used in this section, the terms "safe" or "safety" as applied to any employment, place of employment, place of public assembly or public building, shall include, without being restricted hereby, conditions and methods of sanitation and hygiene reasonably necessary for the protection of the life, health, safety, or welfare of employees or the public. . .

This statute has been generally applied to require an employer to provide a safe, healthy, and sanitary workplace for employees. *See Pack v. Van Meter,* 177 W.Va. 485, 354 S.E. 2d. 518 (1986); *Taylor v. Sears Roebuck Co.,* 190 W.Va. 160, 437 S.E.2d 733 (1993). Its application to a bomb threat situation over which the employer has little control is questionable.

Assuming the foregoing statute is applicable, Grievant fails to demonstrate that she and her colleagues are subjected to unreasonably dangerous work conditions. The statute requires the employer to provide a “reasonably safe” work environment. Whether an employer’s actions are reasonable is generally judged by the arbitrary and capricious standard. Arbitrary and capricious actions have been found to be closely related to ones

that are unreasonable. *State ex rel. Eads v. Duncil*, 196 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 his judgment for that of the employer. *See generally*, *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

In the present case, the employees who are not supervising students are simply required to make a quick check of the restrooms and the hallways. There was no evidence presented to indicate how long these employees are engaged in this activity after everyone else has left the building. The evidence does show that all of the employees, including Grievant and her co-workers, are generally out of the building before the emergency responders arrive. Additionally, no evidence was provided as to whether this practice was inconsistent with the school systems emergency plan or generally accepted practices related to evacuation of public buildings in the face of a bomb threat. Given the lack of evidence regarding how much longer Grievant is exposed to danger after the other employees, and the lack of any evidence related to an acceptable standard of evacuating staff and students from the building, the undersigned cannot determine that the procedure followed at Mount View constitutes an unreasonable safety risk to Grievant and her co-workers. Consequently, the grievance must be denied.

Conclusions of Law

1. Since this grievance does not involve disciplinary matters, Grievant bears the burden of proving her claims by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). The 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. Grievant failed to prove that State Board Policy 4320 requires that she be given a separate contract and additional compensation for performing the duty of typing student identification numbers into the WVEIS database for the school lunch program.

3. Because Grievant voluntarily reported to work on Saturday, March 28, 2009, she failed to prove that she was entitled to an additional day's pay for working three hours outside her employment term as defined in W. VA. CODE § 18-5-45.

4. W. VA. CODE § 21-3-1 requires the employer to provide a "reasonably safe" work environment. Whether an employer's actions are reasonable is generally judged by the arbitrary and capricious standard. Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 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))."

5. 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 his judgment for that of the employer . *See generally*, *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

6. Grievant failed to prove by a preponderance of the evidence that the evacuation procedure for bomb threats at Mount View Middle School subjected her or her co-workers to unreasonably dangerous working conditions.

Accordingly, the 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: MAY 26, 2011.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE