THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

GARY SANTY,
Grievant,

v. **DOCKET NO. 2012-1010-MrnED**

MARION COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Gary Santy, filed a grievance against his employer, the Marion County Board of Education, on March 26, 2012. The statement of grievance reads:

> Grievant contends that his placement on the transfer list for the 2012-2013 school year to alter his daily work hours is contrary to law for the following reasons: (a) Grievant contends that his transfer is not 'based upon known or expected circumstances', but rather is based upon the slight possibility that his clerk of the work duties will expire prior to the end of the 2012-2013 school year; (b) Grievant contends that the transfer is being made in order to facilitate supervision of custodians and that duty falls out side [sic] his classification title. Grievant alleges violation of West Virginia Code § [§] 18A-2-7 & 18A-4-8.

As relief Grievant sought "rescission of his transfer and reassignment to his current daily schedule for the 2012-2013 school year."

On April 16, 2012, the parties notified the Grievance Board that they had agreed to waive levels one and two. A level three hearing was held on June 29, 2012, before the undersigned Administrative Law Judge, at the Grievance Board's Westover, West Virginia office. Grievant was represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association, and Respondent was represented by Stephen R. Brooks, Esquire, Flaherty Sensabaugh Bonasso PLLC. This matter became mature for decision

on August 1, 2012, on receipt of the last of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as a Maintenance Foreman. He has also held the position of Clerk of the Works for some period of time for a building construction project. Respondent placed Grievant on transfer so that his shift could be changed from day shift to evening shift, in order to allow him to better monitor the work of the evening custodians. Prior to August 1, Grievant was awarded a second Clerk of the Works position for a second major construction project, and the School Building Authority determined that Grievant would not be allowed to work as Maintenance Foreman while he served in this Clerk of the Works position. Grievant will be working varying hours during the next year and a half in this position, as the job requires. The need for the transfer no longer exists.

The following Findings of Fact are properly made from the record developed at level three.

Findings of Fact

1. Grievant is employed by the Marion County Board of Education ("MBOE") as a Maintenance Foreman. He has also held the position of Clerk of the Works for some period of time, which position has been related to a building project for Fairmont Senior High School.

2. During the 2010-2011 school year Grievant worked the day shift, 7:00 a.m. to 4:00 p.m.

3. The Principal of each school is the supervisor of the custodians assigned to the school. However, as Maintenance Foreman, it is part of Grievant's job to observe the work of custodians, make recommendations, and check to see if they need additional supplies. If there is a problem with a custodian's work, Grievant or Grievant's supervisor, David Straight, try to resolve the problem.

4. A majority of the custodians in Marion County work the evening shift.

5. MBOE Superintendent Gary Price was asked by some of the Principals in Marion County for additional help supervising the work of the custodians on the evening shift. He decided that MBOE needed someone to be on site to supervise the work of the evening custodians, other than the Principals. For this reason, Grievant was placed on transfer to change his shift to a later shift, which would begin at 2:00 p.m. or later.

6. After the filing of this grievance, Grievant was awarded a second Clerk of the Works position related to construction of the new East Fairmont Middle School. It is anticipated that this position will continue for at least one and a half years. The West Virginia School Building Authority approves the selection of the Clerk of the Works, and sets certain rules related to this position. Prior to August 1, the School Building Authority determined that Grievant would not be allowed to work as Maintenance Foreman for MBOE while he is the Clerk of the Works for this project.

7. While Grievant is serving as Clerk of the Works, his work hours vary depending on the needs of the construction project on any given day.

8. Grievant will be returned to his Maintenance Foreman position when the East Fairmont Middle School construction project is completed.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the 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). *See also 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). "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).

W. VA. CODE § 18A-2-7(a) provides that "[t]he superintendent, subject only to approval of the board, may assign, transfer, promote, demote or suspend school personnel . . .." However, W. VA. CODE § 18A-4-8b(k) states that after the transfer is approved, "but prior to August 1, a county board in its sole and exclusive judgment may determine that the reason for any particular reduction in force or transfer no longer exists," and if so, "shall rescind the reduction in force or transfer and notify the affected employee in writing of the right to be restored to his or her former position of employment."

"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). However, this discretion must 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). 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 her judgment for that of a board of education." *Trimboli, supra*; *Blake v. Kanawha County Bd. of Educ.,* Docket No. 01-20-470 (Oct. 29, 2001).

Grievant argued that there was no reason to change Grievant's shift because he had done a fine job monitoring the work of the evening custodians while working the day shift. The evidence, however, does not support Grievant's assertion. Mr. Price had had some complaints from principals, and saw a need for additional supervision on the evening shift. Respondent presented a rational reason for the shift change. Respondent did not exercise its broad discretion in an arbitrary and capricious manner in changing Grievant's shift.

Second, Grievant argued that the reason for the shift change had ceased to exist and that the transfer should be rescinded, because he will be serving solely as Clerk of the Works for the 2012-2013 school year. In fact, as Clerk of the Works, Grievant will be working varying shifts depending on the needs of the construction project. While Grievant will eventually be returned to his position as Maintenance Foreman, it is clear that the work hours intended by the transfer no longer exist for at least the next year and a half, and it is unknown whether there will still be a need for Grievant to work the evening shift after he is returned to his Foreman position. While it is within Respondent's "sole and exclusive judgment," to determine whether the reason for the transfer has ceased to exist, even "that broad grant of discretion must still be exercised reasonably, rather than arbitrarily." *See, Boarman, et al., v. Berkeley County Bd. of Educ.*, Docket No. 06-02-286 (Dec. 1, 2006). The undersigned finds that the reason for the transfer for the 2012-2013 school year has clearly ceased to exist, and it is unreasonable not to rescind the transfer in this case. When Grievant is returned to his Foreman position, if there is still a need to change his shift, Respondent can again place Grievant on transfer at that time.[1]

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 his grievance by a preponderance of the evidence. Procedural Rules of the 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). *See also Holly v. Logan*

[1] Due to the conclusions reached, there is no need to address Grievant's argument that a Foreman cannot be required to monitor the work of custodians.

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). "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. "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). However, this discretion must be exercised reasonably, rather than arbitrarily.

3. 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 v. Kanawha County Bd. of Educ.,* Docket No. 01-20-470 (Oct. 29, 2001).

4. After a transfer is approved, "but prior to August 1, a county board in its sole and exclusive judgment may determine that the reason for any particular reduction in force or transfer no longer exists," and if so, "shall rescind the reduction in force or transfer and notify the affected employee in writing of the right to be restored to his or her former position of employment." W. VA. CODE § 18A-4-8b(k).

5. While it is within Respondent's "sole and exclusive judgment," to determine whether the reason for the transfer has ceased to exist, even "that broad grant of discretion must still be exercised reasonably, rather than arbitrarily." *See, Boarman, et al., v. Berkeley County Bd. of Educ.*, Docket No. 06-02-286 (Dec. 1, 2006).

6. The reason for Grievant's transfer ceased to exist when he was awarded the Clerk of the Works position, and was precluded from serving in the Maintenance Foreman position. Respondent acted in an arbitrary and capricious manner when it failed to rescind the transfer.

Accordingly, this grievance is **GRANTED.** Respondent is **ORDERED** to rescind Grievant's transfer and shift change.

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Acting Deputy Chief
Administrative Law Judge

Date: September 12, 2012