THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

TONYA R. BOHAN,
Grievant ,

v. **DOCKET NO. 2013-0242-LewED**

LEWIS COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Tonya R. Bohan, filed a grievance against her employer, the Lewis County Board of Education, on August 24, 2012. The statement of grievance reads:

> Grievant contends that Respondent's mistake in rotating substitute jobs prevented her from working an assignment at Jane Lew Elementary School starting August 20, 2012. Grievant asserts a violation of W. Va. Code 18A-4-15.

As relief Grievant sought, "compensation for lost wages with interest."

A conference was held at level one on September 18, 2012, and a level one decision denying the grievance was issued October 2, 2012. Grievant appealed to level two on October 15, 2012, and a mediation session was held on January 29, 2013. Grievant appealed to level three on February 6, 2013. A level three hearing was held before the undersigned Administrative Law Judge on July 19, 2013, at the Grievance Board's Westover office. Grievant was represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association, and Respondent was represented by Denise M. Spatafore, Esquire, Dinsmore & Shohl, LLP. This matter became mature for

decision on September 3, 2013, on receipt of the last of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant was called by the automated calling system on July 29, 2012, to substitute for a secretary at Jane Lew Elementary School. Grievant was skeptical as to whether this was a vacancy that Respondent needed to fill since it was during the summer, but she accepted the assignment anyway. She then contacted the county office and inquired about whether she should report to work, and was told that she should not have been called out because the absence would not need to be filled by a substitute, and the substitute assignment was canceled. Grievant did not report to Jane Lew Elementary, and was not paid for the day. Grievant also was not returned to the top of the substitute rotation list, in accordance with Respondent's practice. Grievant did not demonstrate that Respondent's practice of placing a substitute at the bottom of the rotation list when the assignment is canceled violated any statute, regulation, rule or policy, or that it was arbitrary and capricious to do so.

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

Findings of Fact

1. Grievant has been employed by the Lewis County Board of Education ("LBOE") as a substitute secretary for six years.

2. Respondent uses an automated calling system to call out substitutes when an employee reports to the automated system that he or she will be absent. If a substitute

is not needed, the employee is supposed to enter that information into the automated system when he or she reports off work.

3. During the summer months, when a secretary is absent a substitute is not usually needed to fill in for the absent employee. Grievant was aware of this practice.

4. On July 29, 2012, Grievant received a call from the automated call-out system requesting a substitute secretary at Jane Lew Elementary School. Despite the fact that Grievant thought this might be a mistake, she accepted the assignment. Grievant then telephoned Sandy Thompson, the County Office Administrator's secretary, and asked her if a substitute secretary was needed for the day, or if the call-out was a mistake. Ms. Thompson told Grievant she should not have been called as a substitute would not be needed, and the substitute assignment was canceled.

5. Grievant did not report to Jane Lew Elementary School to substitute on July 29, 2012, and she was not paid. Grievant's name, however, was placed at the bottom of the substitute rotation list because she accepted the assignment.

6. Earlier in the summer, on July 4, 2012, the automated call-out system had called a substitute to report to work as a substitute secretary when a substitute was not needed. That substitute, Deborah Lough, accepted the assignment, but she was told not to report to work, and she did not get paid for the day. Her name was also placed at the bottom of the substitute rotation list. Ms. Lough did not file a grievance regarding this incident.

7. After this grievance was filed, County Office Administrator Steve Casto adjusted the automated call-out system so that it could not call-out substitute secretaries during the summer.

8. Respondent does not have a policy in place which addresses what occurs when a substitute assignment is canceled after an employee has accepted the assignment. Respondent's practice is to place the substitute employee's name at the bottom of the rotation list.

9. The next substitute secretary assignment after July 29, 2012, was filled by Ms. Lough, and was a nine day assignment, beginning August 14, 2012. Ms. Lough was the fourth person called the evening of August 13, 2012. The person immediately ahead of her on the rotation list declined the assignment, and the first two substitutes called did not answer the telephone.

10. Grievant received a substitute secretary assignment on August 29, 2012, shortly after the beginning of the school year, that was a nine-day assignment.

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 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).

Grievant argued her name should have been returned to the top of the substitute rotation list. As a result of Respondent's mistake, Grievant lost her place in the substitue secretary rotation, and Grievant believes she should have been paid for the next substitute secretary assignment, which was a nine day assignment. Respondent admits that a mistake occurred, but points out that the same mistake was also made earlier in the summer, and that had neither mistake occurred, Grievant would not have been next in line to receive the nine day assignment, and that the relief sought is speculative as there is no way to know whether Grievant would have accepted that assignment. Respondent argued that it would have been too difficult to return Grievant to the top of the rotation list due to practical difficulties with the automated call-out system. No evidence was placed in the record to support this argument.

W. VA. CODE §18A-4-15 titled, "Employment of service personnel substitutes," states, in pertinent part:

> (a) The county board shall employ and the county superintendent, subject to the approval of the county board, shall assign substitute service personnel on the basis of seniority to perform any of the following duties:
>
> (1) To fill the temporary absence of another service employee;
>
> . . .
>
> (b) Service personnel substitutes shall be assigned in the following manner:
>
> (1) The substitute with the greatest length of service time in the vacant category of employment has priority in accepting the assignment throughout the period of the regular service person's absence or until the vacancy is filled on a regular basis pursuant to section eight-b of this article. Length of service time is calculated from the date a substitute service person begins assigned duties as a substitute in a particular category of employment.

> (2) All service personnel substitutes are employed on a rotating basis according to their lengths of service time until each substitute has had an opportunity to perform similar assignments.

. . .

Respondent maintained a substitute rotation list as required by statute. Grievant was called to substitute, accepted the assignment, but then the assignment she accepted was canceled. Respondent did not represent that it has a policy in place to address what occurs when a substitute is called out when one is not needed, and the assignment is subsequently canceled. While the statute cited above states that each substitute is to have "an opportunity to perform similar assignments," it does not make clear whether an assignment accepted by the substitute that is subsequently canceled before the assignment is performed represents "an opportunity to perform," and the parties did not present argument on this language. Respondent's practice is to place the substitute employee's name at the bottom of the rotation list. The undersigned cannot conclude that the above-cited statutory language should be read to require a different outcome.

"'Personnel actions of a county board of education which are not encompassed by statute are reviewed against the 'arbitrary and capricious' standard . . . .' *Cornell v. Putnam County Bd. of Educ.*, Docket No. 03-40-111 (June 26, 2003); *Wellman v. Mercer County Bd. of Educ.*, Docket No. 95-27-327 (Nov. 30, 1995)." *Carr v. Tucker County Bd. of Educ.*, Docket No. 06-47-376 (May 7, 2007). "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 question presented then is whether the practice of placing the substitute's name at the bottom of the rotation list when an assignment is canceled is unreasonable. This situation is similar to what occurs when an extra-duty trip is canceled after an employee has accepted the trip, which is a common enough occurrence that at least some counties have a policy in place to address this, and the policy in Hancock County is to place the employee's name at the bottom of the rotation list. *See, Mullins v. Hancock County Bd. of Educ.*, Docket No. 2009-1341-CONS (Oct. 27, 2009). While Respondent may have been able to take some different action in this situation, Grievant presented no evidence from which the undersigned can conclude that it was unreasonable to place her name at the bottom of the rotation list.

Further, the undersigned has no authority to mandate changes to Respondent's policies.

> [I]t is not the role of this Grievance Board to change agency policies, and that is what Grievants are seeking. The undersigned has no authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or regulation which mandates such a policy be developed or changed. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997); *Olson v. Bd. of Trustees*, Docket No. 99-BOT-513 (Apr. 5, 2000); *Gary and*

Gillespie v. Dep't of Health and Human Resources, Docket No. 97-HHR-461 (June 9, 1999).

> While this grievance procedure provides state employees with a mechanism to pursue complaints regarding a variety of terms and conditions of employment, it does not empower this Grievance Board with authority to simply substitute its judgment for that of agency management in the day-to-day supervision of its workforce. *See Skaff, supra*.

Board, et al., v. W. Va. Dep't of Health and Human Resources, Docket No. 99-HHR-329 (Feb. 2, 2000).

Frame v. Dep't of Health and Human Res., Docket No. 00-HHR-240/330 (April 20, 2001).

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 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).

2. Substitute service personnel with the greatest length of service time in the vacant category of employment have priority in accepting the substitute assignment throughout the period of the regular service person's absence, on a rotating basis. W. VA. CODE § 18A-4-15.

3. Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). 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).

4. Grievant did not demonstrate that Respondent violated any statute, regulation, rule, policy, or procedure, or that it acted in an arbitrary and capricious manner.

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 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
Administrative Law Judge

Date: October 3, 2013