

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**RHONDA KERSEY,
Grievant,**

v.

Docket No. 2023-0840-LinED

**LINCOLN COUNTY BOARD OF EDUCATION
Respondent.**

DECISION

Rhonda Kersey, Grievant filed this grievance against her employer the Lincoln County Board of Education ("LCBE"), Respondent. Grievant protest and challenges the propriety of identified personnel decision(s) of Respondent. The original grievance filed on May 15, 2023, provides:

W. Va. Code § 6C-2-4 Grievance, 18A-4-7A Decision on Transfer based on seniority; Lincoln County Schools Policy 3131 Best Interests of the District Lincoln County Schools Policy 1540 Lateral Transfer; Dr. Kersey was transferred into a teaching position from a county Coordinator position; her responsibilities were given to other individuals at the county office; there is still a need for her position.

Relief sought:

Placement in Coordinator Position; Back pay.

As authorized by W. VA. CODE § 6C-2-4(a)(4), the grievance was filed directly to level three of the grievance process.¹ A level three hearing was held before the undersigned Administrative Law Judge on September 12, 2023, at the Grievance Board's Charleston office. Grievant appeared in person and was represented by Catricia Martin,

¹ W. VA. CODE § 6C-2-4(a)(4), provides that an employee may proceed directly to level three of the grievance process upon agreement of the parties, or when the grievant has been discharged, suspended without pay, demoted or reclassified resulting in a loss of compensation or benefits.

WV Education Association Respondent was represented by its General Counsel, Leslie Tyree. Esquire. At the conclusion of the level three hearing, the parties were invited to submit written proposed Findings of Fact and Conclusions of Law. Both parties submitted fact/law proposals and this matter became mature for decision on or about October 13, 2023, on receipt of the last of these proposals.

Synopsis

Grievant argues that Respondent improperly terminated her 230-day contract and transferred her into a 200-day contract position, resulting in a significant loss of pay. Respondent in response persuasively establishes that Grievant's former position was eliminated. Grievant was provided an alternative employment contract. Respondent holds the requisite authority to reduce positions. It is not established that the elimination of Grievant's 230-day contract position was unlawful or was done in violation of an applicable rule, regulation, or law. Grievant was without a lateral position to transfer into. A suitable 230-day contract of employment, was not identified. Grievant did not prove Respondent's personnel decision(s) was arbitrary and capricious or an abuse of discretion. This Grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Dr. Rhonda Kersey, Grievant, was previously employed by Respondent during the 2022/2023 school year as the 21st Century Community Learning Center After-

School County Coordinator holding a 230-day contract of employment within the central office. Grievant is currently employed by Respondent, Lincoln County Board of Education, as a teacher holding a 200-day contract of employment.

2. On or about March 10, 2023, Grievant was notified by Respondent that her 230-day contract was being recommended for termination and Grievant would be issued a 200-day contract for the 2023-2024 school year due to the elimination of the 21st Century Community Learning Center After-School County Coordinator position. R Ex 1.

3. Grievant requested a personnel hearing on this action which was held on April 19, 2023. At the April 25, 2023, board meeting, Lincoln County Board of Education members voted 5-0 to approve the Superintendent's recommendation for terminating Grievant's 230-day contract and re-issuing her a 200-day contract.

4. On April 25, 2023, the Lincoln County Board of Education convened its regular meeting to conduct the counties business to include consideration by the Board of recommended personnel changes for the 2023/2024 school year. The Lincoln County Board of Education agenda for the April 25th meeting included the sections which specifically recommended personnel actions regarding Grievant: Section N, the transfer of the following professional and service personnel as provided under West Virginia Code §18A-2-7 and other applicable statutes, as amended due to a general staff reduction due to a decrease in enrollment and a decrease in federal and/or state funding in Lincoln County Schools; and, Section P, to terminate the 230 day contract, consider for transfer and re-issue a new contract of 200 days per WV Code §18A-4-19 for Rhonda Kersey. R Ex 2.

5. The April 25th Minutes of the Lincoln County Board of Education, page 7 affirms that the termination of the Grievant's 230-day contract and transfer and reissuance of a 200-day contract effective at the end of the 2022-2023 school year was approved by a 5-0 vote of the Lincoln County Board of Education. R Ex 3.

6. The position of 21st Century Community Learning Center After-School County Coordinator was eliminated as a cost savings measure and reorganization of central office duties of Lincoln County Schools.

7. Former Assistant Superintendent Josh Brumfield testified at the instant September 12, 2023, level three hearing (L3). He provided rationale and other information pertaining to Respondents actions. The position of the 21st Century Community Learning Center After-School County Coordinator cost the county \$104,000 per year and by eliminating that position those funds remained in the program and can be used for anything determined to improve student achievement to include additional teaching staff, interventionist, or anything else to improve student achievement.

8. Lincoln County Schools had been under a state of emergency declared by the West Virginia Department of Education. The system was 35 professional positions over state formula and 50 positions over state formula in service personnel. Respondent rationalized that personnel cuts were necessary.

9. In the early planning stages for the counties personnel season, all the county directors, principals and administrators made recommendations to then Assistant Superintendent Brumfield's office as to what positions could be cut from their department or school that would save funds but have the least impact on student achievement.

10. Assistant Superintendent. Brumfield received the recommendation to eliminate the position of the 21st Century Community Learning Center After-School County Coordinator from Steve Gaines, Director of Federal Programs.

11. Steve Gaines, Director of Federal Programs, testified at the instant L3 hearing. Mr. Gaines, Grievant's former supervisor, recommended her position be eliminated for the better utilization of federal funding. R Ex 5. The position was eliminated, not the program or key duties.

12. Mr. Gaines absorbed Grievant's duties at the beginning of the 2023-2024 school year while continuing to perform his own duties, thus keeping the saved funds in the funding pot to be allocated as needed to improve student achievement. Mr. Gaines continues and will continue to perform the Grievant's duties along with his own. Respondent maintains Grievant's duties do not require a full-time position. The duties can and are being adequately performed in 10 or less hours a week.

13. No employee received a salary increase as a result of the elimination of the 21st Century Community Learning Center After-School County Coordinator. L3 Testimony Austin Lucas, Lincoln County Treasurer

14. Respondent's Policy 1540 Termination of Administrative Contracts/Lateral Transfer specifies under section D clause 20 provides that the 21st Century Community Learning Center After-School County Coordinator position is only lateral to another 21st Century Community Learning Center After-School County Coordinator. R Ex 4. In other words, Grievant during a reduction in force, would only have been allowed to displace a less senior 21st Century Community Learning Center After-School County Coordinator.

15. Grievant was the only 21st Century Community Learning Center After-School County Coordinator employed by the county, thus the only person available for the reduction. Upon the elimination of the 21st Century Community Learning Center After-School County Coordinator 21st Century Coordinator position, Grievant was without a lateral position to transfer into.

16. Former Assistant Superintendent of Lincoln County Schools, Josh Brumfield, testified to the revision of Lincoln County Schools Policy 1540 in February 2022 to specifically address a lateral transfer for the 21st Century Coordinator. This policy states that the only lateral transfer of a 21st Century Coordinator is a 21st Century Coordinator Brumfield L3 Testimony , see also G Ex I.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018). "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). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

Grievant argues that Respondent improperly terminated her 230-day contract and transferred her into a 200-day contract position, resulting in a significant loss of pay. Grievant patiently maintains that Respondent's decision on this action was unreasonable and unjustifiable considering the millions of dollars she has brought into the county through her grant writing. Respondent does not challenge the work performance of Grievant in that work performance has nothing to do with the elimination of positions during personnel season.

Former Assistant Superintendent Josh Brumfield received the recommendation to eliminate the position of the 21st Century Community Learning Center After-School County Coordinator, held by Grievant from Steve Gaines, Director of Federal Programs. Mr. Gaines (Grievant's former supervisor) recommended the position be eliminated for the better utilization of federal funding. At the April 25, 2023, board meeting, Lincoln County Board of Education members voted 5-0 to approve the terminating of Grievant's 230-day contract and re-issuing her a 200-day contract. The position of 21st Century Community Learning Center After-School County Coordinator was eliminated as a cost savings measure and reorganization of central office duties of Lincoln County Schools. Level three testimony indicated that Grievant's essential duties could be performed in 10 or less hours a week. Mr. Gaines absorbed Grievant's duties at the beginning of the 2023-2024 school year while continuing to perform his own duties, thus keeping the saved funds in the funding pot to be allocated as needed to improve student achievement. Mr. Gaines continues and will continue to perform Grievant's duties along with his own.

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 is so implausible that it cannot be ascribed to a difference of opinion.² 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). 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 authoritarian agency. See generally *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982). It is not established that Respondent's action of eliminating the 21st Century Community Learning Center After-School County Coordinator position, held by Grievant, was arbitrary and capricious or an abuse of discretion. The position of the 21st

² The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001)(citing *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (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 his judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

Century Community Learning Center After-School County Coordinator cost the county 104,000 per year and by eliminating that position those funds remained in the program and can be used for anything determined to improve student achievement to include additional teaching staff, interventionist, or anything else to improve student achievement. The position was eliminated, not the program or key duties. The duties can and are being adequately performed.

Grievant further argues that upon reviewing the criteria necessary for consideration of transfer, it is apparent (to her) that Respondent disregarded Grievant's seniority, certification, licensure, and performance evaluations. Grievant proffers that Respondent violated WV Code §18A-4-7a. Employment, promotion, and transfer of professional personnel; qualifications, which states:

Whenever a county board is required to reduce the number of professional personnel in its employment, the selection of the employee to be properly notified and released from employment pursuant to the provisions of section two, article two of this chapter shall be based upon seniority, certification, licensure and performance evaluations.

The argument is misplaced. The undersigned, as the trier of fact, is aware the position of 21st Century Community Learning Center After-School County Coordinator was eliminated as a cost savings measure and reorganization of central office duties. Grievant was the only 21st Century Community Learning Center After-School County Coordinator employed by the county, thus the only person available for the reduction. Upon the elimination of the position, Grievant was without a lateral position to transfer into. See Lincoln County Schools Policy 1540, R Ex 4 and G Ex I. Grievant did not identify an alternative employment position she qualified to fill as a substitute for the 200-day contract

teaching position identified by Respondent. Grievant failed to identify a suitable 230-day contract of employment.

Respondent has the authority to eliminate positions and transfer employees in the best interest of the school system. Grievant has not met her burden of proof. Grievant did not demonstrate the decision to eliminate the position of the 21st Century Community Learning Center After-School County Coordinator or the decision to transfer her was in violation of an applicable West Virginia Code, school law or regulation.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. The subject of 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 Board, 156 C.S.R. 1 § 3 (2018). “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). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

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.’ Syl. pt. 3, *Dillon v. Wyoming County Board of Education*, 177 W. Va. 145, 351 S.E.2d 58 (1986).” Syl. Pt. 2, *Baker v. Bd. of Educ.*, 207 W. Va. 513, 534 S.E.2d 378 (2000).

3. W. Va. Code §18A-2-7 gives the Superintendent the right to transfer employees, subject to the approval of the board. See *Watts v. Lincoln County Bd. Of Educ.*, Docket No. 98-22-348 (Nov. 30, 1998) *Post v. Harrison County Bd. of Educ.*, Docket No. 89-17-355 (Feb. 20, 1990). The power to transfer employees must be exercised reasonably and in the best interests of school systems and may not be exercised arbitrarily or capriciously. *State ex rel. Hawkins v. Tyler County Bd. of Educ.*, 166 W. Va. 363, 275 S.E. 2d 908 (1980). See *Hyre v. Upshur County Bd. of Educ.*, 186 W. Va. 267, 412, S.E. 2d 265 (W. Va. 1991).

4. A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety. W. Va. Code §29-6A-2(i). See, *Ball v. Dep't. of Highways*, Docket No. 96-DOH-141 (July 31, 1997). "A general claim of unfairness or an employee's philosophical disagreement with a policy does not, in and of itself, constitute an injury sufficient to grant standing to grieve. See *Olson v. Bd. of Trustees/Marshall Univ.*, Docket No. 99-BOT-513 (Apr. 5, 2000), citing *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997)." *Vance v. Jefferson County Bd. of Educ.*, Docket No. 02-19-030R (Nov. 20, 2002); Also see *Lusher, et al. v. Dep't. of Transportation, Div. of Highways*, Docket No. 05-DOH-157 (June 15, 2005).

5. Grievant has failed to demonstrate a violation of W. Va. Code §18A-4-7a.

6. Grievant did not demonstrate the decision to eliminate the position of the 21st Century Community Learning Center After-School County Coordinator or the

decision to transfer her was in violation of an applicable West Virginia Code; school law or regulation.

7. Grievant has not met her burden of proof. Grievant did not prove Respondent's personnel decision(s) was arbitrary and capricious or an abuse of discretion.

8. Grievant did not prove by a preponderance of evidence that Respondent exceeded its discretion pertaining to the instant events.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Intermediate Court of Appeals.³ Any such appeal must be filed within thirty (30) days of receipt of this decision. 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

Date: November 9, 2023

Landon R. Brown
Administrative Law Judge

³ On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over "[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to § 29A-5-4 or any other provision of this code[.]" W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.