THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

WANDA TOLBERT,

Grievant,

v. **Docket No. 2023-0790-KanED**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Wanda Tolbert, is employed by Respondent, Kanawha County Board of Education. On April 19, 2023, Grievant filed this grievance against Respondent stating:

> WV § 18A-4-7a, WV § 18A-2-2; WV § 18A-2-7; WV § 6C-2-2 Grievance. Kanawha County in clear violation of 475 S.E.2d 176 97 W.Va. 112 Ed. Law Rep. 504 Patricia BONER v KANAWHA COUNTY BOARD OF EDUCATION, No. 22365. July 19, 1996. This decision clearly states that it is illegal for the Kanawha Co. BOE to cut full time homebound teachers and replace them with part time generally certified. It has come the attention of the WVEA that the county has likely been in violation of this decision for some time as it had slowly transitioned the program from full time to part time, only not, directly affecting on of out members.

For relief, Grievant seeks "[p]lacement back in position as full time county Homebound Teacher."

By order entered May 18, 2023, by agreement and request of the parties, the grievance was transferred to level three. A level three hearing was held on September 25, 2023, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant appeared in person and was represented by Ben Barkey, West Virginia Education Association. Respondent was represented by its General Counsel, Lindsey McIntosh. This matter became mature for decision on November 6, 2023, upon final

receipt of the parties' written Proposed Findings of Fact and Conclusions of Law ("PFFCL").[1]

Synopsis

Grievant is employed by Respondent as a classroom teacher. At the time of the grievance filing, Grievant was employed as a full-time homebound teacher and filed her grievance protesting the elimination of her position. Grievant argued that the elimination of her position was in violation of a West Virginia Supreme Court of Appeals opinion. Respondent asserts the elimination of the position was within its discretion, was not arbitrary and capricious, and not in violation of the opinion. Grievant failed to prove that the elimination of her position was in violation of the opinion or was otherwise arbitrary and capricious. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is employed by Respondent as a classroom teacher. At the time of the grievance filing, Grievant was employed as a full-time homebound teacher. Grievant had been employed as a full-time homebound teacher for four years. Grievant has been employed by Respondent for over thirty years.

2. Students who are temporarily confined to their homes due to a medically certified health condition may receive educational services at home. These services are referred to as "homebound."

[1] PFFCL were originally due to be submitted by October 25, 2023. Respondent, by counsel, requested an extension to file, which was granted without objection by Grievant.

3. Because the services are temporary, the student remains assigned to their regular classroom teacher, who remains responsible for guiding the student's instruction. A second "homebound" teacher is assigned to the student to facilitate instruction in the home for core courses in collaboration with the classroom teacher.

4. The number of students enrolled in homebound fluctuates during the year due to the temporary nature of the services.

5. Respondent is required to provide instruction for the four core subjects of Math, Science, Language Arts, and Social Studies/History.

6. For school year 2022 – 2023, Respondent employed eight full-time homebound teachers, including Grievant. Respondent also employed other classroom teachers under extra-curricular contracts to teach homebound students in the evenings and weekends.

7. A full-time homebound teacher works a regular eight-hour workday and must provide one hour of instruction per subject per student each week. Allowing for travel time between students, a homebound teacher is expected to have a maximum of twelve students at a time.

8. In recent years, the number of students enrolled in homebound has declined. For school year 2015 – 2016, 472 students were enrolled. By school year 2022 – 2023, enrollment had declined to just 200 students, the majority of whom were special education students.

9. The decline in homebound enrollment was due partly to an overall decline in total school enrollment, changes in Respondent's application of State Board homebound policy, and the availability of virtual school following the pandemic.

10. As a result of the decline in enrollment, and anticipating that enrollment would further decline, Respondent elected to reduce the number of full-time homebound teachers from eight to six for school year 2023 – 2024.

11. To implement this reduction, Respondent elected to eliminate all eight positions and repost six positions with specific certification and location requirements. Respondent elected to do so because, previously, the positions did not specify the need for particular certification or location.

12. Respondent reposted the six positions as follows: four requiring Special Education certification, one requiring secondary Math and Science certification, and one requiring multi-subject certification to be located at Highland Hospital.

13. Respondent determined that it must retain the Math and Science certified teacher as a full-time position because of the shortfall of certified Math and Science teachers, which could leave Respondent unable to contract extracurricular contract teachers with that certification.

14. Grievant did not qualify for any of the six positions posted but was employed as a regular classroom teacher for school year 2023 – 2024.

15. Respondent also reduced the number of extra-curricular contract homebound teachers.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (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. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

Grievant asserts Respondent's decision to eliminate her position violated the West Virginia Supreme Court of Appeals' decision in *State ex rel. Boner v. Kanawha Cty. Bd. of Educ.*, 197 W. Va. 176, 475 S.E.2d 176 (1996).[2] Respondent asserts *Boner* does not act to limit a county board's flexibility in staffing when there is a decrease in need and that Grievant failed to prove Respondent's action was arbitrary and capricious.

"School personnel regulations and laws are to be strictly construed in favor of the employee.' Syl. pt. 1, *Morgan v. Pizzino*, 163 W. Va. 454, 256 S.E.2d 592 (1979). However, "'[c]ounty 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).

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) (citing *Arlington Hosp. v.*

[2] Grievant additionally argued that the elimination of the two full-time positions would impact the quality of homebound education. This argument was rejected in *Boner* and will not be further addressed here. "While we find validity in Petitioners' concern that continuity of instruction is an important feature of successful homebound instruction, we do not turn our decision on that issue, as the quality and efficacy of instruction may more properly be a matter left to the discretion and expertise of the Board." *Boner*, 197 W. Va. at 186, 475 S.E.2d at 186.

Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). "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), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

"'[T]he "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. Syl. Pt 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.,* 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "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 [the employer]." *Trimboli v. Dep't of Health and Human Res.,* Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff'd* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

Boner held that "[a] board of education is prohibited from abolishing the positions of full-time homebound teachers and replacing the instructional services performed by those teachers with hourly-paid employees when no concomitant showing of reduction in

need for such instruction has been made on the grounds that such a plan clearly operates in contravention of the contractual scheme of employment contemplated by West Virginia Code § 18A-2-2 (1993) along with the attendant benefits of such contracts." Syl. Pt 2, 197 W. Va. at 178, 475 S.E.2d at 178.

The facts of *Boner* and the instant case differ in two ways. First, there was no reduction in need in *Boner* and the opinion hinged on the fact that Respondent had eliminated the full-time positions solely to save money. In this case, there was a clear and significant reduction in need. Homebound enrollment declined over the course of five years from 472 to 200 and was expected to continue to decline. Second, in *Boner*, Respondent replaced the full-time homebound teachers with substitute teachers who were not full-time employees and did not receive benefits such as health insurance and paid time off. In this case, Respondent retained six full-time positions and replaced the two eliminated positions with full-time classroom teachers who would teach homebound students through a second extracurricular contract.

Although there was a clear reduction in need for homebound services overall in this case, Grievant argues that the reduction in need did not correspond with the need to eliminate Grievant's specific position. Respondent must teach homebound students the core four subjects: Math, Science, Language Arts, and Social Studies. Respondent retained the full-time position for two of the core subjects, Math and Science, but eliminated the full-time position for the other two core subjects, Language Arts and Social Studies. At the end of school year 2022 – 2023, there were nineteen high school students enrolled in the homebound program. As each homebound teacher could take a maximum of twelve students, this indicates that Respondent still had a need for a full-time Language

Arts/Social Studies homebound teacher at the end of that school year. However, Respondent asserts that the enrollment trend indicated that enrollment would continue to decline. Respondent explained that it chose to retain the full-time Math/Science position only due to the lack of certified Math/Science teachers within the county, which could make it difficult to cover that need through extra-curricular contracts. When reduction in force decisions must be made in the spring for the following year, Respondent can only make its best-informed guess as to need for the next school year. In this case, it cannot be said that Respondent's view of the declining enrollment and need was unreasonable. Respondent's explanation for retaining the Math/Science position is also plausible and reasonable.

Further, the *Boner* Court recognized Respondent's substantial discretion and made clear that "[b]y this ruling, we are not proscribing the hiring of homebound teachers on an hourly-pay basis. We certainly recognize that many of this state's counties may not have a continuing need for full-time homebound teachers. Our ruling today turns on the elimination of full-time positions and the attendant benefits of such positions without a showing of reduced need for full-time instruction. 197 W. Va. at 186-87, 475 S.E.2d at 186-87. As there was a demonstrated reduced need and Respondent has articulated reasonable explanations for the exercise of its discretion, it does not appear that Respondent's action was in violation of the *Boner* opinion. Therefore, Grievant has failed to prove that Respondent's action in eliminating her position was arbitrary and capricious.

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. W. VA. CODE ST. R. § 156-1-3 (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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

2. "School personnel regulations and laws are to be strictly construed in favor of the employee.' Syl. pt. 1, *Morgan v. Pizzino*, 163 W. Va. 454, 256 S.E.2d 592 (1979).

3. "'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).

4. 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) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "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), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

5. "'[T]he "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. Syl. Pt 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.,* 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "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 [the employer]." *Trimboli v. Dep't of Health and Human Res.,* Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff'd* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

6. "A board of education is prohibited from abolishing the positions of full-time homebound teachers and replacing the instructional services performed by those teachers with hourly-paid employees when no concomitant showing of reduction in need for such instruction has been made on the grounds that such a plan clearly operates in contravention of the contractual scheme of employment contemplated by West Virginia Code § 18A-2-2 (1993) along with the attendant benefits of such contracts." Syl. Pt 2, *Boner*, 197 W. Va. at 178, 475 S.E.2d at 178.

7. “By this ruling, we are not proscribing the hiring of homebound teachers on an hourly-pay basis. We certainly recognize that many of this state's counties may not have a continuing need for full-time homebound teachers. Our ruling today turns on the elimination of full-time positions and the attendant benefits of such positions without a showing of reduced need for full-time instruction.” *Boner*, 197 W. Va. at 186-87, 475 S.E.2d at 186-87.

8. Grievant has failed to prove that Respondent’s action in eliminating her position was arbitrary and capricious as there was a reduction in need and Respondent articulated reasonable explanations for the exercise of its discretion.

Accordingly, the 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

[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.

petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

DATE: December 21, 2023

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Billie Thacker Catlett
Chief Administrative Law Judge