THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

BEVERLY CHERYL BAILEY,
Grievant,

v. **DOCKET NO. 2016-1382-MinED**

MINGO COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

This grievance was filed by Grievant, Beverly Cheryl Bailey, against her employer, the Mingo County Board of Education, on March 2, 2016. The statement of grievance reads:

> WV § 18A-2-2 WV § 18A-4-7b Grievant was notified that she was being considered for transfer for the 2016-2017 school term. On February 15, 2016 Grievant asked for a hearing and the board notified her she would be transferred to Kermit PreK-8 and Lenore Prk-8. Later she found that the assignment was for less employment days. She did not receive any notification that her contract was terminated. Also, a coworker in same position was awarded secret seniority for days outside his approved contract (which grievant also worked). This action caused grievant to be transferred as opposed to remaining in her position. (Brown and Repass v Wyoming)

The relief sought by Grievant is, "[b]ackpay, interest, coworkers seniority corrected and any related benefits."

A conference was held at level one on the first grievance on March 21, 2016, and a level one decision denying the grievance was issued April 7, 2016. Grievant appealed to level two on April 13, 2016, and a mediation session was held on July 20, 2016. Grievant appealed to level three on August 1, 2016. A level three hearing was held before Administrative Law Judge Landon R. Brown on December 12, 2016, at the Grievance

Board's Charleston, West Virginia office. Grievant was represented by Ben Barkey, West Virginia Education Association, and Respondent was represented by Denise M. Spatafore, Esquire, Dinsmore & Shohl, LLP. This matter became mature for decision on January 25, 2017, on receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law. This matter was subsequently reassigned to the undersigned Administrative Law Judge for administrative reasons.

Synopsis

Grievant was transferred from a 240-day Assistant Principal position at a high school to a 220-day Assistant Principal position split between two PK-8 schools, due to MBOE eliminating one of the three Assistant Principal positions at the high school. Grievant was not the least senior Assistant Principal in the county, but was placed on transfer because MBOE determined that she was the least senior Assistant Principal at the high school. Grievant began working as an Assistant Principal in July 2013, and was paid for 225 days her first year as she did not begin working in this position on July 1. Another Assistant Principal, who started working in his first administrative position for MBOE as an Assistant Principal at the same high school after Grievant began working there, was found by MBOE to have acquired more seniority than Grievant, because he was paid for 240 days that first year as a result of the Superintendent allowing him to count hours he worked at athletic events as the Athletic Director at the high school as additional work days. Professional personnel employed as Assistant Principals accrue seniority based on the fulfillment of the employment term. By statute, if an Assistant Principal is hired and begins work after the beginning of the fiscal year, the seniority must be prorated. Grievant's employment began after the beginning of the fiscal year, as did her fellow Assistant

Principal, and the seniority of both employees must be prorated for that first year, making Grievant more senior. While Respondent was not required to transfer the least senior Assistant Principal, the transfer decision was based on seniority, and Grievant was transferred as a result of a mistake of fact. Grievant should not have been the employee transferred.

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

Findings of Fact

1. Grievant is employed by the Mingo County Board of Education ("MBOE"). She accepted an Assistant Principal position at Mingo Central High School ("MCHS"), which had been posted, effective July 23, 2013. Prior to this she had not been employed in an administrative position by MBOE.

2. The normal employment term for professional personnel begins July 1 of each fiscal year. Grievant's initial employment contract for the Assistant Principal position, dated August 19, 2013, states that it is "for an annual employment term of 240 days commencing on July 23, 2013, and is an annual self-renewing contract unless the Board provides notice of non-renewal pursuant to West Virginia Code 18A-2-7." Grievant was told she would be paid for 225 days for the 2013-2014 school year, because she did not begin working in the position on July 1, 2013. MBOE's employment records which are used for reporting information to the State Department of Education indicate that Grievant was paid for 225 days during the 2013-2014 school year. Grievant does not dispute that she was paid for 225 days during the 2013-2014 school year.

3. During the 2013-2014 school year, Grievant worked part of some days when school was not in session supervising athletic events. Grievant did not request that she be credited with this work time to accumulate more than 225 days of work time, nor did anyone advise her that this was a possibility.

4. During the 2013-2014 school year the Principal at MCHS, Teresa Jones, allowed employees to report extra time worked to her and take time off work later for that extra time worked as compensatory time off, or comp time. The record does not reflect how many additional hours outside the regular school day Grievant worked at athletic events, whether she reported this time to Principal Jones or anyone else, or whether she used any of this time as comp time.

5. Ted Kinder began working in an Assistant Principal/Athletic Director position at MCHS which had been posted in 2013, effective August 19, 2013. He had not been employed in an administrative position prior to this. His initial employment contract for this position states that it is a "240 day/pro-rated (2013)" contract, for the period September 1, 2013, through June 30, 2014. MBOE's employment records indicate that Mr. Kinder was paid for 240 days during the 2013-2014 school year.

6. When Mr. Kinder signed his contract for the 2013-2014 school year he contacted Superintendent Randy Keatley to indicate that with the additional time he would spend working outside regular school hours in his capacity as Athletic Director, he believed he could work 240 days if he were credited with this additional time worked. Superintendent Keatley agreed to allow Mr. Kinder to receive additional credit for the additional time worked outside the regular school day. Mr. Kinder kept track of the additional hours worked outside the regular school day, and these hours were accumulated

in some fashion which resulted in Mr. Kinder being credited as working 240 days for the school year, and being paid for working 240 days.

7. Because Grievant worked 225 days during the 2013-2014 school year, while Mr. Kinder worked 240 days during that school year, MBOE determined that Mr. Kinder had more seniority as an Assistant Principal than Grievant.

8. During the 2015-2016 school year, there were three Assistant Principals at MCHS. MBOE determined that only two Assistant Principal positions were needed at MCHS, and that one of the three positions would be eliminated at the end of the 2015-2016 school year. Grievant was chosen to be transferred from MCHS, because MBOE believed she had the least seniority of the three Assistant Principals.

9. By letter dated January 5, 2016, Grievant was notified that MBOE Superintendent Robert Bobbera was considering recommending to MBOE that Grievant be transferred to an Assistant Principal position at Kermit PK-8 School for 60% of the time and Lenore PK-8 School for 40% of the time for the 2016-2017 school year, and that she could request a hearing on the proposed transfer, which she did. The hearing requested by Grievant was held on February 15, 2016. Superintendent Bobbera did recommend to MBOE that Grievant be transferred to the positions indicated in the notification, and MBOE approved the transfer on February 15, 2016. Grievant was notified of this action by letter dated February 17, 2016.

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 asserted that she has more administrative seniority as an Assistant Principal than Mr. Kinder, because she began working as an Assistant Principal before he did. From this Grievant concludes that Mr. Kinder should have been transferred, not Grievant. Grievant also argued that since the term of her contract was reduced from 240 days to 220 days,[1] she should have been notified that her contract was being terminated pursuant to WEST VIRGINIA CODE § 18A-2-2(c)[2], and she did not receive this notice. Respondent argued that because Mr. Kinder was paid for the contract term of 240 days in 2013, while Grievant was paid for 225 days of a 240-day contract, Mr. Kinder acquired greater seniority than Grievant. Respondent argued with regard to the transfer notice that WEST VIRGINIA CODE § 18A-2-2 is not applicable when an administrator is transferred, because the continuing contract had not been terminated.

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[1] While the parties both indicated in their written proposals that the number of contract days was reduced, the undersigned did not find this evidence in the record. As will be discussed later, however, whether this is true or not is of no relevance to the legal analysis of this issue.

[2] As noted by Grievant, this statutory provision specifically addresses the continuing contract of a teacher. It is not applicable to the termination of an administrative contract. *Roncella v. McDowell County Bd. of Educ.,* Docket No. 01-33-395 (Dec. 27, 2001).

WEST VIRGINIA CODE §§ 18A-4-7a and 18A-4-7b outline how seniority is acquired by professional personnel. WEST VIRGINIA CODE § 18A-4-7b(a) states that "[a] professional employee shall begin to accrue seniority upon commencement of the employee's duties." WEST VIRGINIA CODE § 18A-4-7b(b) states that "[a]n employee shall receive seniority credit for each day the employee is professionally employed regardless of whether the employee receives pay for that day . . .." With regard to guidance counselors and other professional personnel, except classroom teachers, WEST VIRGINIA CODE § 18A-4-7a further states in subsections (i) and (j) that these employees

> shall gain seniority in their nonteaching area of professional employment on the basis of the length of time the employee has been in that area . . .
>
> (j) Employment for a full employment term shall equal one year of seniority, but no employee may accrue more than one year of seniority during any given fiscal year. Employment for less than the *full employment term* shall be prorated.

(Emphasis added.) The Grievance Board has stated that this language clearly means that "the seniority of all professional employees, including principals, is based upon their fulfillment of an actual 'employment term,' not date of hire. Moreover, if the worker had been hired and had begun work after the beginning of the school term, the seniority for the school year must be prorated. *See also Queses v. Hancock County Bd. of Educ.*, Docket No. 91-15-361 (Dec. 30, 1991). . . . The law simply does not permit an employee to earn more than one year of seniority [in a year]; in fact, even a twelve-month, 261-day school worker cannot earn any more seniority than a ten-month, 200-day worker." *Napolillo v. Marion County Bd. of Educ.,* Docket No. 93-24-175 (Sept. 1, 1993)(Emphasis in original). In addition, MBOE has adopted a Policy entitled 3370 - Seniority for Professional

Personnel, which states, "A. A professional employee shall begin to accrue seniority upon commencement of the employee's duties."

The undersigned finds none of the above statutory language or discussion particularly enlightening. However, reading all of the above together, the undersigned concludes that it is of no relevance how many days Mr. Kinder or Grievant were paid for, as the statute states the employee receives seniority credit "regardless of whether the employee receives pay for that day." Further, it is clear that the number of contract days for which an employee is employed is irrelevant, as an employee working a 200-day contract for the full employment term acquires one year of seniority, as does an employee working a 240-day contract. The above-quoted statutory language is also clear in stating that "[e]mployment for less than the full employment term **shall** be prorated." (Emphasis added.) In this case, the employment term for Assistant Principals began July 1, 2013. Neither Grievant nor Mr. Kinder was employed as an Assistant Principal at the beginning of the employment term, and the seniority of both must, by statute, be prorated based on when each began their employment term as Assistant Principal. Grievant commenced her duties July 23, 2013, while Mr. Kinder commenced his duties August 19, 2013. Grievant has more administrative seniority than Mr. Kinder.

The next issue is whether Grievant has demonstrated that her seniority over Mr. Kinder means that she should not have been transferred. WEST VIRGINIA 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 . . .." "[T]eachers have no right to be assigned to a particular school, and transfers are not based on seniority, but are based on the needs of the school, as decided in good faith by the superintendent and the board.

Hawkins [v. Tyler County Bd. of Educ., 166 W. Va. 363, 275 S.E.2d 908 (1980)]; *Post [v.Harrison County Bd. of Educ.,* Docket No. 89-17-355 (Feb. 20, 1990)]. *See Jochum v. Ohio County Bd. of Educ.,* Docket No. 91-35-396 (Jan. 31, 1992). Thus, whether a transfer was properly conducted is judged by the arbitrary and capricious standard, in the absence of a county policy requiring seniority be considered. *Lester v. McDowell County Bd. of Educ.,* Docket No. 93-33-256 (Jan. 31, 1994); *See also Hawkins, supra.; LeMastus v. Wyoming County Bd. of Educ.,* Docket No 55-87-290-4 (Mar. 23, 1988); *Tenny v. Barbour County Bd. of Educ.,* Docket No. 01-87-166-2 (Nov. 13, 1987)." *Dingess v. Lincoln County Bd. of Educ.,* Docket No. 98-22-053 (May 29, 1998). This same standard is applicable to other professional personnel, including Assistant Principals. "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).

The parties presented no MBOE policy which required the least senior Assistant Principal be placed on transfer. However, the decision as to which employee should be transferred from the high school was based on the whether Mr. Kinder or Grievant had more seniority. Had MBOE found Grievant to be more senior, the evidence clearly indicates that the Superintendent would have recommended Mr. Kinder for transfer, and there is no reason to believe that this recommendation would not have been approved. Thus, the decision as to which employee should be transferred was based on a mistake of fact. Grievant demonstrated that, but for this mistake of fact, she would not have been transferred. Accordingly, the undersigned concludes that Grievant has demonstrated that she should be returned to the position of Assistant Principal at MCHS under a 240-day contract.

Finally, with regard to Grievant's argument that MBOE was required to notify her that her contract was being terminated, the undersigned will note that the Grievance Board has previously clearly stated that, when an employee's administrative contract contains the

language found in Grievant's administrative contract that it is "'an annual self-renewing contract unless the Board provides notice of non-renewal pursuant to the W. VA. CODE § 18A-2-7 . . . .'[, t]his provision allows the Board to not renew the contract by simply transferring the employee. The contract did not provide the security of a continuing administrative assignment." *Townshend v. Grant County Bd. of Educ.,* Docket No. 91-12-222 (Sept. 27, 1991), *aff'd Cir. Ct. of Grant County*, Civil Action No. 91-C-146 (June 16, 1993).

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. "The seniority of all professional employees is not based upon date of hire; rather, seniority is measured from the time school officially begins and is, moreover, prorated if the worker is hired and begins his duties after the commencement of the school year. In addition no employee can earn more than one year of seniority, regardless of

whether he has a 261- or a 200-day employment term. *See* W. VA. CODE § 18A-4-7a; *Queses v. Hancock County Bd. of Educ.*, Docket No. 91-15-361 (Dec. 30, 1991)." *Napolillo v. Marion County Bd. of Educ.,* Docket No. 93-24-175 (Sept. 1, 1993).

3. Grievant and Mr. Kinder both began their duties as Assistant Principals after the commencement of the school year, and the seniority of both must, by statute, be prorated. Grievant has more administrative seniority than Mr. Kinder.

4. "[T]eachers have no right to be assigned to a particular school, and transfers are not based on seniority, but are based on the needs of the school, as decided in good faith by the superintendent and the board. *Hawkins [v. Tyler County Bd. of Educ.,* 166 W. Va. 363, 275 S.E.2d 908 (1980)]; *Post [v.Harrison County Bd. of Educ.,* Docket No. 89-17-355 (Feb. 20, 1990)]. *See Jochum v. Ohio County Bd. of Educ.,* Docket No. 91-35-396 (Jan. 31, 1992). Thus, whether a transfer was properly conducted is judged by the arbitrary and capricious standard, in the absence of a county policy requiring seniority be considered. *Lester v. McDowell County Bd. of Educ.,* Docket No. 93-33-256 (Jan. 31, 1994); *See also Hawkins, supra.; LeMastus v. Wyoming County Bd. of Educ.,* Docket No 55-87-290-4 (Mar. 23, 1988); *Tenny v. Barbour County Bd. of Educ.,* Docket No. 01-87-166-2 (Nov. 13, 1987)." *Dingess v. Lincoln County Bd. of Educ.,* Docket No. 98-22-053 (May 29, 1998). This same standard is applicable to other professional personnel, including Assistant Principals.

5. 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).

6. The decision as to which employee should be transferred was based on a mistake of fact. Grievant demonstrated that, but for this mistake of fact, she would not have been transferred.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to return Grievant to an Assistant Principal position at Mingo Central High School, by no later than July 1, 2017, and to pay her back pay and benefits, if any, for any difference between the number of days in her contract for the 2016-2017 school year, and a 240-day contract.

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).

BRENDA L. GOULD
Deputy Chief Administrative Law Judge

Date: April 21, 2017