**THE WEST VIRGINIA PUBLIC EMPLOYEES**
**GRIEVANCE BOARD**

**LAURA EASTWOOD, et al.,**
**Grievants,**

**v.** **Docket No. 2016-1883-CONS**

**WAYNE COUNTY BOARD OF EDUCATION,**
**Respondent.**

## DECISION

Grievants, Laura Eastwood, Leslie Parker, and Vivian Riffel are employed by the Wayne County Board of Education respectively as a physical therapist, occupational therapist and occupational therapy assistant. On February 29, 2016, Respondent conducted a hearing on recommendations by the Superintendent to reduce Grievants' local salary supplements. At the end of the hearing Respondent voted to approve the recommendations, effective July 1, 2016.

On March 11, 2016, each Grievant filed a grievance contesting Respondent's action. Each Grievant filed a Statement of Grievance that reads:

> On or about February 29, 2016, the Respondent amended the Grievant's 200-day contract by exorbitantly reducing Grievant's annual salary supplement. Said reduction was arbitrary and capricious, unjust, disparate and discriminatory in nature.

The Relief Sought section was completed as:

> Grievant seeks for her full salary supplement to be returned, to be made whole, and any other relief the grievance evaluator deems appropriate. Alternatively, Grievant seeks for any reduction in her salary supplement to be just and reasonable.

On March 24, 2016, the Superintendent conducted Level One conferences for each Grievant. The Superintendent's subsequent decisions denied the grievances. The parties participated in a Level Two mediation sessions on July 27, 2016. Grievants perfected their appeal to Level Three on August 5, 2016. By order dated September 14, 2016, the grievances were consolidated. A Level Three hearing was conducted before Administrative Law Judge Billie Thacker Catlett on December 1, 2016, at the Grievance Board's Charleston office. Grievants appeared in person and by their representatives, Rosemary Jenkins and Brandon Tinney of AFT-West Virginia/AFL-CIO. Respondent appeared by its Superintendent and legal counsel, Howard Seufer, Jr., Bowles Rice LLP. This matter became mature for consideration on January 20, 2017. The case was reassigned on April 5, 2017, for administrative reasons.

**Synopsis**

Grievants contest the action of Respondent which reduced Grievants' local salary supplements. Grievants argue that this action of reducing the annual salary supplements without consideration of other alternatives was arbitrary and capricious. In addition, Respondent's reduction of the salary supplements was improper and a violation of state law. Respondent counters that Grievants did not meet their burden of proof in that they failed to present evidence that the reduction of their salary supplements violated any statute, policy, rule or written agreement applicable to the them. Respondent also argues that Grievants failed to demonstrate that Respondent acted in an arbitrary and capricious manner in reducing their salary supplements in order to save money. The undersigned concludes that Grievants failed to prove their claims by a preponderance of the evidence.

The following Findings of Fact are based upon the record of this case.

**Findings of Fact**

1. Grievants are employed by the Wayne County Board of Education respectively as a physical therapist, occupational therapist, and occupational therapy assistant. Grievants have been employed by Respondent with a $30,000, $30,000 and $16,000 supplement since their hire dates.

2. At the hearing held by Respondent on February 29, 2016, Respondent's Treasurer and Chief School Business Official indicated that the revenue losses for the 2015-2016 and 2016-2017 school years would reduce Respondent's income by $2,450,000.

3. The funds Respondent then had for contingencies totaled only $1,779,761. Even if Respondent applied this entire reserve in an attempt to balance its budget, the budget would still be in the red for the 2016-2017 school year. Respondent would also in such case violate the West Virginia Department of Education's insistence that Respondent maintain a reserve of from three to five percent of its approximately $60 million in annual revenues.

4. It was apparent in February 2016 that without major budget cuts amounting to $2.4 or $2.5 million, Respondent risked incurring a deficit for the upcoming 2016-2017 school year. Respondent and its Superintendent were also apprehensive that future state budget cuts by the Governor and Legislature were possible and could make the Respondent's 2016-2017 financial situation even worse.

5. Based upon an examination of its budget and all areas of expense, Respondent took many cost-saving steps. This was not the first time Respondent acted

to reduce expenses. In reaction to declining student enrollment and other financial pressure, Respondent had, in recent years, already instituted many cost-saving measures.

6. Respondent had already produced a six-figure savings over the past few years by eliminating all three of its assistant superintendent positions, requiring other employees to absorb the duties of those jobs. A bonus that is annually paid from local funds to each of Respondent's national board certified teachers was reduced from $5,000 to half that amount. Respondent also chose not to raise the salaries of Central Office directors by $1,800 to reflect the Legislature's increase of base teacher pay by two percent. This produced an annual savings of over $25,000. The record reflects that many other measures were taken to save money.

7. As part of its overall efforts to reduce costs, Respondent, upon recommendation of its Superintendent, reduced large county, or "local," salary supplements it annually paid to the Grievants. Ms. Eastwood, Respondent's only physical therapist, was first employed by Respondent in 2011; Ms. Parker, Respondent's only occupational therapist, was first employed by Respondent in 2002; and Ms. Riffel, Respondent's only occupational therapy assistant, was first employed by Respondent in the 2007-2008 school year.

8. Grievants are regular professional Respondent employees. They work throughout the schools, but are assigned to the Central Office. Grievants' local salary supplements were over and above their base pay as teachers based upon their years of experience and degree levels.

9. In reducing Grievants' local salary supplements, Respondent was advised by the Superintendent that average salaries within the market for the services performed

by Grievants were lower than the salaries, including local supplements, that Grievants were paid in 2015-2016 and would otherwise have been paid in 2016-2017.

10. On the recommendation of the Superintendent, on February 29, 2016, Respondent voted to reduce the local salary supplements paid to the three Grievants. The Superintendent did not recommend, and Respondent did not consider, eliminating the local salary supplements altogether. The Superintendent did not recommend, and Respondent did not consider, reducing Grievants' annual contract lengths, increasing their workloads, or requiring Grievants to take on the duties of other professional jobs that were eliminated.

11. Ms. Eastwood's annual salary of $70,432 for the 2015-2016 school year included a $30,000 local salary supplement. The $30,000 local salary supplement was in addition to the base salary she would have earned under Respondent's salary schedules as a teacher based upon her years of experience and degree level.

12. Respondent's action of February 29, 2016, reduced Ms. Eastwood's local salary supplement for the ensuing year by $12,724.75, leaving a local salary supplement of $17,275.25 for the 2016-2017 school year. Ms. Eastwood's annual salary for the current school year is $60,770.

13. Ms. Parker's annual salary of $76,432 for the 2015-2016 school year included a $30,000 local salary supplement. The $30,000 local salary supplement was in addition to the base salary she would have earned under Respondent's salary schedules as a teacher based upon her years of experience and degree level.

14. Respondent's action of February 29, 2016, reduced Ms. Parker's local salary supplement for the ensuing school year by $16,041.20, leaving a local salary supplement

of $13,958.80 for the 2016-2017 school year. Ms. Parker's annual salary for the current school year is $60,980.

15. Ms. Riffel's annual salary of $62,055 for the 2015-2016 school year included a $16,000 local salary supplement. The $16,000 local salary supplement was in addition to the base salary she would have earned under Respondent's salary schedules as a 210-day teacher based upon her years of experience and degree level.

16. Respondent's action of February 29 reduced Ms. Riffel's annual salary for the current school year is $48,096, consisting of the base salary she would earn under Respondent's salary schedules as a teacher based upon her 31 years of experience and high school degree, plus the $2,312.10 local supplement.

17. In determining the amount of each Grievant's local salary supplement to reduce, the Superintendent sought to bring Grievants' salaries in line with average salaries paid to physical therapists, occupational therapists and occupational therapy assistants in the marketplace. From her review of the relevant data, the Superintendent arrived at what she calculated were competitive salaries for each of the three Grievants in view of the market for their services. It is those amounts that Respondent, on the Superintendent's recommendation, removed from Grievants' local salary supplement.

18. Nothing in the postings under which Grievants applied for their jobs, and nothing in their written employment contracts, assured them that they would always receive local salary supplements in the amounts that they received in the 2015-2016 school year.

**Discussion**

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievances by a preponderance of the evidence. Procedural Rules of the

W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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). "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).

Grievants argue that Respondent's action reducing the annual salary supplement for Grievants without consideration of other alternatives, such as smaller reductions or reductions similar to those taken on other employees, was arbitrary and capricious.[1] In

[1]"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 Resources*, 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." *Id.* (*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. *See generally, Harrison v. Ginsberg,* [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." *Trimboli*, *supra*.

addition, Respondent's reduction of the county supplements was improper and violated state law.

WEST VIRGINIA CODE § 18A-4-5a provides, in pertinent part, the following:

> Counties may fix higher salaries for teachers placed in special instructional assignments, for those assigned to or employed for duties other than regular instructional duties, and for teachers of one-teacher schools, and they may provide additional compensation for any teacher assigned duties in addition to the teacher's regular instructional duties wherein such noninstructional duties are not a part of the scheduled hours of the regular school day. Uniformity also shall apply to such additional salary increments or compensation for all persons performing like assignments and duties within the county: Provided**,** That in establishing such local salary schedules, no county shall reduce local funds allocated for salaries in effect on the first day of January, one thousand nine hundred ninety, and used in supplementing the state minimum salaries as provided for in this article, unless forced to do so by defeat of a special levy, or a loss in assessed values or events over which it has no control and for which the county board has received approval from the state board prior to making such reduction.

Grievants reliance on the above statute is without merit. It provides that "in establishing such local salary schedules, no county shall reduce local funds allocated for salaries in effect on the first day of January, one thousand nine hundred ninety, and used in supplementing the state minimum salaries as provided for in this article." The provision is of no use to Grievants because there is no evidence in the record showing what funds Respondent allocated on January 1, 1990, to supplement the state minimum salaries of its professional employees.

The Supreme Court of Appeals of West Virginia in *Summers Cnty. Educ. Ass'n v. Summers Cnty. Bd. of Educ.*, 179 W. Va. 107, 365 S.E.2d 387 (1987) gave deference to a school board where the school board excluded salary supplements from its budget and provided only state minimum salaries. The association argued, among other things, that the discontinuance of the salary supplement was arbitrary and capricious because the

school board had sufficient excess funds each year to pay for the salary supplement, which funds, the association argued, the school board instead applied to capital improvements and other expenses. Noting that the school board disagreed with the association's contention that it had excess funds, the Supreme Court addressed the difficult financial decisions that school board's face:

> The Summers County Board of Education, like the boards of education in virtually every county in the State of West Virginia, has had to make difficult budget decisions in the wake of rising costs and declining revenues. Although we sympathize with the plight of underpaid teachers, and we applaud the continuing efforts of all concerned to obtain more money for better education of the children of this State, we conclude that the Summers County Board of Education violated no statutory or constitutional duty by discontinuing the supplements to the salaries of its personnel.[2]

Prior precedent demonstrates that only if a school board's decision is arbitrary and capricious will the Grievance Board and the courts set aside a board's decision regarding budget cuts, an area in which county boards have broad discretion. Merely arguing that cuts in other areas would have resulted in the same or greater savings, as in the instant case, is not sufficient to reverse a school board's action. In this case there is a rational basis for Respondent's decision to reduce Grievants' local salary supplements by the amounts it did, based upon average market salaries, are entitled to deference.

Grievants did not meet their burden of proof in this case. Grievants failed to present evidence demonstrating that Respondent, in reducing their salary supplements, violated, misapplied or misinterpreted any statute, policy, rule, or written agreement applicable to

---

[2] *Summers County*, 179 W. Va. at 110. The Grievance Board has held that school boards are granted broad discretion regarding saving and allocating money and funds: *Brown v. Upshur County Bd. of Educ.*, Docket No. 97-49-399 (Dec. 23, 1997); *Hinzman, et al., v. Randolph County Bd. of Educ.*, Docket No. 96-42-358 (Apr. 23, 1997); *Nichols, et al., v. Calhoun County Bd. of Educ.*, Docket No. 2015-0970-CONS (July 15, 2016).

them. Grievants presented insufficient evidence to establish that Respondent, in addressing its financial difficulties, abused its discretion and acted arbitrarily or capriciously by reducing their supplements.

The following Conclusions of Law support the decision reached.

**Conclusions of Law**

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievances by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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).

2. "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 Resources*, 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." *Id.* (*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. *See generally, Harrison v. Ginsberg,* [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." *Trimboli*, *supra*.

3. The Grievance Board has held that school boards are granted broad discretion regarding saving and allocating money and funds: *Brown v. Upshur County Bd. of Educ.*, Docket No. 97-49-399 (Dec. 23, 1997); *Hinzman, et al., v. Randolph County Bd. of Educ.*, Docket No. 96-42-358 (Apr. 23, 1997); *Nichols, et al., v. Calhoun County Bd. of Educ.*, Docket No. 2015-0970-CONS (July 15, 2016).

4. Grievants failed to present evidence demonstrating that Respondent, in reducing their salary supplements, violated, misapplied or misinterpreted any statute, policy, rule, or written agreement applicable to them.

5. Grievants presented insufficient evidence to establish that Respondent, in addressing its financial difficulties, abused its discretion and acted arbitrarily or capriciously by reducing their supplements.

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 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).

**Date: April 20, 2017**

**_____**
**Ronald L. Reece**
**Administrative Law Judge**