

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**ANDREW PENSE,
Grievant,**

v.

DOCKET NO. 2017-1009-DOE

**DEPARTMENT OF EDUCATION,
Respondent.**

DECISION

This grievance was filed at level one of the grievance procedure by Grievant, Andrew Pense, on September 21, 2016, against his employer, Respondent, Department of Education. The statement of grievance as set forth in the original filing reads:

I am contesting the change in the terms of my employment. The loss of travel reimbursement when required to report to Charleston is a significant loss of benefits to me. The requirement of two days per week in Charleston increases the burden of a travel heavy job.

On appeal to level two Grievant clarified that the loss of travel reimbursement had occurred as a result of Respondent changing Grievant's headquarters location from Fayetteville to Charleston. Grievant further indicated that he has "a satellite office in Fayetteville which provides an adequate place to work." As relief Grievant seeks, as stated in the filing to level three, "that I be allowed to maintain the terms and conditions originally advertised concerning my position, it's headquartering, and associated travel reimbursement."

A conference was held at level one on October 6, 2016, and the grievance was denied at level one on October 19, 2017. Grievant appealed to level two on October 28, 2016, and a mediation was held on January 19, 2017. Grievant appealed to level three on

January 4, 2010. A level three hearing was held before Administrative Law Judge Carrie H. LeFevre on April 21, 2017, at the Grievance Board's Charleston office. Grievant was represented by Katherine L. Dooley, Esquire, The Dooley Law Firm, P.L.L.C., and Respondent was represented by Heather L. Hutchens, General Counsel for Respondent. This matter became mature for decision on receipt of the parties' Proposed Findings of Fact and Conclusions of Law on June 16, 2017. This matter was reassigned to the undersigned Administrative Law Judge on August 25, 2017, for administrative reasons.

Synopsis

Grievant filed a grievance after his headquarters location was changed. That grievance was granted at level one, and the headquarters change was reversed. The decision stated that after a comprehensive review of the situation, "a final recommendation would be made to the State Superintendent of Schools, for his consideration and approval." Several months later the Deputy Superintendent of Schools and Grievant's supervisor made the decision to again change Grievant's headquarters location. While the State Superintendent was kept informed, no recommendation for this change was made to the State Superintendent for approval. Respondent was bound by the level one decision, and could change Grievant's headquarters location only in accordance with the directives of that decision. The decision to change Grievant's headquarters is void.

The following Findings of Fact are made based on the record developed at the level three hearing.

Findings of Fact

1. Grievant has been employed by Respondent, the West Virginia Department of Education ("DOE"), since 2012. He began his employment with DOE as a Farm to School Coordinator with the Office of Child Nutrition, a position which required him to work in the field throughout the state most of his time. At the time this grievance was filed he was an at-will state employee, employed with the Office of Child Nutrition as a Coordinator, serving Braxton, Clay, Webster, Nicholas, Fayette, Greenbrier, Monroe, Summers, Raleigh, Wyoming McDowell, and Mercer Counties in southern West Virginia.

2. Grievant's job as a Coordinator requires him to travel from site to site in the counties he serves, as well as to other regions of West Virginia.

3. Grievant lives in Fayetteville, West Virginia, in Fayette County. The main offices of DOE are in Charleston, West Virginia, at the State Capitol Complex. Fayette County is located in the middle of the counties served by Grievant, and is a more convenient location for providing services to the counties in Grievant's area than Charleston.

4. In both of his positions at DOE, Grievant has worked out of a satellite office housed at the Fayette County Board of Education offices.

5. Grievant accepted the job as the Farm to School Coordinator only after he was assured by DOE personnel that the position would not be headquartered in Charleston. He accepted the Coordinator position only after he was assured by DOE personnel that the position would not be headquartered in Charleston. He recently interviewed for a Lead Coordinator position with the Office of Child Nutrition, but then

declined to pursue the position with DOE, which would have been a promotion with an increase in salary, because that position was headquartered in Charleston.

6. Sometime before February 26, 2016, Grievant was told that his position would be headquartered in Charleston. Grievant filed a grievance contesting this move. A level one decision was issued on March 15, 2016, by Deputy Superintendent of Schools Cindy Daniel, Ed.D., returning Grievant's headquarters to Fayette County. The decision states that, "a comprehensive assessment of the Office of Child Nutrition will be conducted by the Office of the Deputy Superintendent to ascertain more information about the day to day responsibilities of each employee in the office in order to determine the most effective method for assignment of headquarters. Additionally, the assessment will provide information for the potential reassignment of responsibilities if so needed. Upon completion of the assessment, final recommendations **will be made to Dr. Michael Martirano, State Superintendent of Schools, for consideration and approval.**" (Emphasis added.) Grievant did not appeal the level one decision and the satellite office in Fayette County was again made his headquarters.

7. Richard Goff was employed by DOE as the Executive Director of the Office of Child Nutrition until he retired in April 2016. It was his belief that Grievant's position should remain headquartered in Fayette County. Amanda Harrison was hired as Executive Director of the Office of Child Nutrition effective August 1, 2016.

8. At 10:05 a.m., on August 30, 2016, Deputy Superintendent Daniel sent an email to Bekki Leigh and Grievant, copying Ms. Harrison and two other individuals. Ms. Leigh is also employed as a Coordinator in the Office of Child Nutrition at DOE, and her

service area is the 11 counties of the Eastern Panhandle area of West Virginia, including Jefferson, Berkeley, and Morgan Counties. The email informed Grievant, for the first time since his first grievance was filed that, “[e]ffective Tuesday, September 6, 2016, your official headquarters for reporting to work each day will be Charleston (Building 6). Amanda and I have discussed, and agree that for now, you may continue to keep your ‘satellite’ offices, but you will not be reimbursed for travel when traveling to Charleston for work.” The email states that the “decision is based on several factors. First, it is consistent with all other coordinators in the OCN. Second, it is important that you be present when possible as Amanda is working diligently to build/repair relationships in the office. Third, it will allow Amanda to have more time to interact with you as she learns more about the department and your individual responsibilities.”

9. The State Superintendent of Schools was kept informed of events related to whether Grievant’s headquarters should be moved to Charleston, but he did not make a decision on this issue. Deputy Superintendent Daniel and Ms. Harrison made the decision that Charleston would be Grievant’s headquarters.

10. Later in the morning of August 30, 2016, Ms. Harrison called Grievant and indicated to him that she was surprised by Deputy Superintendent Daniel’s earlier email changing his headquarters. At 4:27 p.m. that same day, Ms. Harrison sent Grievant and Ms. Lekki an email advising them that they were to report to Charleston one day per week during the month of September, and starting in October 2016, she wanted “to then examine having each of you here 2 days a week.” Ms. Harrison allowed Grievant and Ms. Lekki to choose the days they would report to Charleston.

11. Ms. Harrison decided that two days a week was the appropriate number of days for Grievant to report to Charleston, based on the amount of time all Coordinators were in the office over a period of one or two months. Ms. Harrison did not base this decision on the amount of time Grievant normally works in an office setting as opposed to working in the field.

12. Ms. Harrison believes it is important for Grievant to be headquartered in Charleston due to the factions, the divisions, the animosity, and the distrust she inherited, as well as the need for cross-training and learning about upgrades. Ms. Harrison did not explain what cross-training was necessary, or how long it would take to accomplish this. She stated that she was getting different answers to the same question from different people, whereas everyone should be saying the same thing. She has scheduled regular staff meetings with team-building activities, and has made efforts to have the Coordinators work across the state with regions other than their assigned region. Ms. Harrison acknowledged that she had no issues with Grievant's work prior to the reassignment of his headquarters to Charleston, and that DOE has available modern communication technology which allows teleconferencing.

13. Deputy Superintendent Daniel described the Office of Child Nutrition as having a history of dysfunction, and she had observed visible divisiveness among employees and unprofessional relationships, and heard comments from employees regarding favoritism. She stated that other Coordinators in the Office of Child Nutrition were resentful and complained that Grievant and Ms. Lekki were allowed to work from satellite offices.

14. Deputy Superintendent Daniel believed Grievant's presence in the Charleston office would help Grievant to learn about the other services provided by the Office of Child Nutrition and would build relationships. Deputy Superintendent Daniel did not indicate that Grievant lacked sufficient knowledge of the services provided by the Office of Child Nutrition to perform his duties.

15. Grievant's most recent evaluation for 2015 rated his performance as "exemplary" in every category, the highest rating possible.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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 that his transfer was arbitrary and capricious, and that it was not based on need. Respondent argued that it had the authority to transfer Grievant, and that the decision was not arbitrary and capricious as it was based on the needs of the office.

Indeed, Respondent has substantial discretion to decide how best to manage its affairs. "The appointing authority may transfer a state employee, at the same or

comparable classification and wages, to any geographical area in which the employee is needed. See *Zigmond v. Civil Service Comm'n, et al.*, 186 S.E.2d 696 (W. Va. 1972), and *Childers v. Civil Service Comm'n*, [155 W. Va. 69,] 181 S.E.2d 22 (W. Va. 1971).” *Goodnight v. W. Va. Div. Of Human Servs.*, 91-DHS-111 (May 31, 1991).¹ Further, “[t]he grievance board simply does not have the authority to second guess a state employer’s employment policy.” *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997). “[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.” *Rice v. Dep’t of Transp./Div. Of Highways*, Docket No. 96-DOH-247 (Aug. 29, 1997). However, the Grievance Board has also held that “[m]anagement decisions are to be judged by the arbitrary and capricious standard.” *Adams v. Regional Jail Auth. and Correctional Facility Auth.*, Docket No. 06-RJA-147 (Sept. 29, 2006).

"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.*

¹ Grievant was notified August 30, 2016, that his headquarters was being changed in one week. September 5, 2016, was the Monday Labor Day holiday. This email gave Grievant, who by all accounts has been a very good employee, only four working days’ notice of this major change in his work requirements, and certainly did not give him enough time to move to his new work location. While Respondent was not required to give Grievant any particular notice, common courtesy would dictate that an employee be given more notice than this in order for the employee to make adjustments to his personal life, particularly when there did not appear to be any great pressing need to change the headquarters.

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 arbitrary and capricious standard of review does not permit an administrative law judge to simply substitute her judgment for that of the school board. *Bradley v. Bd. of Directors*, Docket No. 96-BOD-030 (Jan. 28, 1997). See *Harper v. Mingo County Bd. of Educ.*, Docket No. 93-29-064 (Sept. 27, 1993).

One may indeed question the wisdom of basing the decision to transfer Grievant's headquarters on the resentful feelings of Grievant's co-workers, rather than on which location would best serve the public and be most cost-effective, but this does not make the decision unreasonable; nor can the undersigned substitute her judgement for that of Respondent. Respondent had the authority to change Grievant's headquarters based on the perceived needs of the agency.²

² Grievant also pointed to the assurances made to him that his position would not be headquartered in Charleston. The general rule with regard to these types of promises is that "[a] state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers and all persons must take note of the legal limitations upon their power and authority. [Citations omitted.]" Syl. Pt. 2, *W. Va. Public Employees Ins. Bd. v. Blue Cross Hosp. Serv., Inc.*, 179 W. Va. 605, 328 S.E.2d 356 (1985). "Any other rule would deprive the people of their control over the civil service, and leave the status and tenure of all employees to be governed by whatever arrangements incumbent administrators may agree to or prescribe." *Freeman v. Poling*, 175 W. Va. 814, 819, 338 S.E.2d 415, 421 (1985), citing *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983). In fact, however,

However, this is the second grievance filed by Grievant because his primary work location was changed from Fayetteville to Charleston. As Grievant pointed out, a level one decision was issued after the first grievance was filed, which ruled that Grievant's work location would be reevaluated under certain conditions. The decision clearly stated that a comprehensive assessment of the Office of Child Nutrition will be conducted "in order to determine the most effective method for assignment of headquarters," and that on completion of this assessment, a final recommendation would be made to the State Superintendent of Schools for his consideration and approval. This ruling, however, was not followed by Respondent. Apparently, some type of assessment was made by Deputy Superintendent Daniel which she described as "comprehensive," and the State Superintendent was kept informed, but no recommendation was submitted to the State Superintendent for his consideration and approval. Deputy Superintendent Daniel and Ms. Harrison made the decision to change Grievant's headquarters, not the State Superintendent.

WEST VIRGINIA CODE § 6C-2-4(b)(1) allows a grievant to move a grievance forward from level one to level two "[w]ithin ten days of receiving an adverse written decision at level one." The grievance statute, however, does not provide a mechanism for a respondent to appeal a level one decision. The level one decision is issued by the chief administrator, which "includes a designee, *with the authority* delegated by the chief administrator, appointed *to handle any aspect of the grievance procedure* as established by this article." W. VA CODE §§ 6C-2-2(b) and 6C-2-4(a)(3). (Emphasis added.) Respondent is bound by

no one ever promised Grievant that his position would never be transferred to Charleston.

the decision of the level one grievance evaluator in the first grievance, which was not appealed by Grievant. *Townsend v. Kanawha County Bd. of Educ.*, Docket No. 2016-1702-KanED (May 22, 2017). The level one decision stated that “a final recommendation would be made to the State Superintendent of Schools, for his consideration and approval,” and that was what was required. The Deputy Superintendent and Ms. Harrison were without authority in these circumstances to make the decision to change Grievant’s headquarters, and that decision is void.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant has the burden of proving his 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).

2. Respondent is bound by the decision of the level one grievance evaluator if it is not appealed by the grievant. *Townsend v. Kanawha County Bd. of Educ.*, Docket No. 2016-1702-KanED (May 22, 2017).

3. The level one decision issued after the first grievance was filed by Grievant stated that “a final recommendation would be made to the State Superintendent of Schools, for his consideration and approval,” on whether Grievant’s headquarters location would be changed. Deputy Superintendent Daniel and Ms. Harrison were without authority to make such a decision.

Accordingly, this grievance is **GRANTED**. The decision to change Grievant's headquarters location to Charleston is hereby voided, and Respondent is **ORDERED** to pay Grievant for the travel mileage from his home to Charleston and back for reporting for work from September 6, 2016, forward.

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
Deputy Chief Administrative Law Judge

Date: September 13, 2017