THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DAVID FIELDS,

Grievant,

v. **Docket No. 2017-2152-WayED**

WAYNE COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, David Fields, filed a level one grievance against his employer, Respondent, Wayne County Board of Education, on May 5, 2017, which stated as follows: "Grievant contends that his program of Project Lead the Way was dropped in an arbitrary and capricious manner. His program has as many completors (sic) as other CTE programs in the county that were not dropped. The program is only three years old and not given a chance to develop. This is a violation of 18A-2-7." As relief sought, "Grievant seeks for his position to be made full-time and whole as CTE instructor at Tolsia High School; and any other relief the grievance evaluator deems appropriate."

A level one conference was conducted on May 25, 2017. The grievance was denied at level one by decision dated July 25, 2017, and issued on August 4, 2017. Grievant appealed to level two on August 16, 2017. Grievant amended his statement of grievance at level two, stating as follows: "Grievant contends that his program, Project Lead the Way, was eliminated and his contract terminated because he is a relative of a prior superintendent rather than for legitimate reasons related to the program itself. Grievant's program had as many completers as other CTE programs which were retained for the 2017-2018 school year. Further, his program was only three years old and could

be expected to continue to develop. Grievant contends that Respondent's actions were arbitrary and capricious and in violation of West Virginia Code § 18A-2-7 and/or 18A-2-2." As relief sought, "Grievant seeks (a) reinstatement of his programs and his contract of employment; [b] compensation for lost wages and benefits with interest; (c) any other appropriate relief necessary to make the Grievant whole." A level two mediation was conducted on October 19, 2017. Following the level two mediation, the matter was placed in abeyance at the request of the parties until January 22, 2018. Grievant perfected his appeal to level three on March 2, 2018. In his appeal to level three, Grievant further amended his relief sought to state as follows: "Grievant seeks (a) reinstatement of his program and his contract of employment as the instructor; (b) compensation for lost wages with interest; (c) restoration of all benefits, both pecuniary and non-pecuniary, retroactive to the beginning of the 2017-2018 school year; and (d) any other relief to make Grievant "whole."

The level three grievance hearing was conducted on June 15, 2018, at the Grievance Board's Charleston, West Virginia, office before the undersigned administrative law judge. Grievant appeared in person and by counsel, John E. Roush, Esquire, American Federation of Teachers-WV, AFL-CIO. Respondent appeared by counsel, Leslie K. Tyree, Esquire. This matter became mature for consideration on August 9, 2018, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a CTE teacher at Tolsia High School. In March 2017, Grievant was informed that he was subject to a reduction in force ("RIF")

for lack of need, and that the superintendent would be recommending that his contract for employment be terminated at the end of the school year.[1] Respondent approved this action and Grievant's contract was so terminated. Grievant filed this grievance asserting that Respondent subjected him to a reduction in force and terminated his contract not for lack of need, but instead because of the superintendent's personal vendetta against Grievant's family. Therefore, his reduction in force and termination was arbitrary and capricious. Respondent denied Grievant's claims and argued that it properly imposed the reduction in force and terminated Grievant's contract. Grievant failed to prove his claims by a preponderance of the evidence. Accordingly, this 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 was employed by Respondent as the Project Lead the Way ("PLW") instructor at Tolsia High School. Grievant first began working for Respondent in the fall of the 2013-2014 school year. At that time, Grievant was employed as a kindergarten teacher at first, then moved to a computer aided drafting teaching position during the same school year.

2. At the time Grievant was hired by Respondent, Lynne Hurt was the superintendent. Grievant is not related to Superintendent Hurt.

3. At the beginning of the 2014-2015 school year, Grievant bid on a teaching

[1] Reduction in force, also known as "RIF," is the term used to describe the statutory process followed when a board of education is required to reduce the number of employees in its employment. In this case, the parties are referring to West Virginia Code §§ 18A-2-7 and 18A-4-7a(k).

position for the PLW program at Tolsia High School. PLW was a science, technology, engineering, and mathematics ("STEM") program offered by the Career and Technical Education ("CTE") program. Students in the program took PLW two periods a day for two years. Graduation from the PLW program was designed to give students an edge in obtaining manufacturing jobs, such as those at the Toyota plant.

4. Grievant taught the PLW program for three school years, those being 2014-2015, 2015-2016, and 2016-2017, under a special teaching permit, as he was not fully certified.

5. At the time Grievant was teaching PLW at Tolsia High School, Respondent employed two other PLW teachers in the county. Grievant was the only PLW instructor at Tolsia High School. The other two PLW teachers were fully certified.

6. By letter dated March 24, 2017, then Superintendent, Dr. Steven Paine notified Grievant that, as part of a reduction in force, he would be recommending to the Respondent the termination of his contract of employment at the end of the 2016-2017 school year for lack of need.[2] This was the only PLW position in the county to be eliminated.

7. Following a personnel hearing, Respondent approved Dr. Paine's recommendation to terminate Grievant's employment contract.

8. Grievant's employment contract terminated at the end of the 2016-2017 school year.

9. Grievant did not have the certifications required to be transferred to a different position with the Respondent.

[2] *See*, Respondent's Exhibit 2, Letter dated March 24, 2017.

10. Grievant had been taking engineering and robotics classes offered at West Virginia University and the University of Kentucky to acquire his certification for teaching PLW. Grievant passed his final qualifying test in June 2017. As a result, Grievant received his certification to teach PLW and similar programs after his contract for employment was terminated. Again, Grievant was not certified when the employment decisions were made in this matter.

11. Wayne County Schools had a number of superintendents between the time Grievant was hired and his contract terminated. Following Superintendent Hurt, the Board hired Sandra Pertee, who is Grievant's aunt. Superintendent Pertee retired midway through the 2016-2017 school year. When Superintendent Pertee retired, Respondent hired Dr. Paine as superintendent. Dr. Paine did not stay in the position very long as he was selected to serve as the State Superintendent of Schools. Respondent then hired Dr. David Roach who finished out the 2016-2017 school year. Respondent then hired Todd Alexander to serve as superintendent effective July 1, 2017, commencing the 2017-2018 school year. Mr. Alexander remains the superintendent of Wayne County Schools.

12. Dr. Paine made the personnel decisions in the spring of 2017, one of which was the decision to recommend the termination of Grievant's contract of employment. Dr. Paine was not the superintendent at the time the contract terminated.

13. Along with Grievant, several of his family members, who were also related to former superintendent Pertee, had their employment contracts terminated through the reduction in force. These family members were Mary Pertee, daughter of former Superintendent Pertee, Tara Carbtree, Grievant's aunt, Rhonda Messer, former

Superintendent Pertee's sister, and Thomas Messer, another nephew of former Superintendent Pertee.

14. Along with Grievant and his relatives, there were others whose contracts were terminated due to the reduction in force. In total, there were over sixty such terminations.[3]

15. All of Grievant's aforementioned family members have returned to work for the Respondent.

16. Grievant was not called back to work as a regularly employed full-time employee. Sometime after Mr. Alexander became superintendent on July 1, 2017, Grievant was hired as a long-term substitute math teacher at Tolsia High School during the 2017-2018 school year and he worked every day of that school year. During this school year, Grievant earned less money as a substitute teacher, and was not eligible for benefits such as leave time, insurance, and retirement. Grievant has again been employed as a long-term substitute math teacher at Tolsia High School for the 2018-2019 school year.

17. In the spring semester after Respondent had accepted Superintendent Paine's recommendation to terminate Grievant's contract due to a reduction in force, Superintendent Paine transferred another CTE course, advanced manufacturing, to Tolsia High School from Spring Valley High School. While this was not the same PLW course that Grievant taught, it involved some STEM elements. A teaching position for

[3] *See*, Grievant's Exhibit 1, April 25, 2017, Wayne County Board of Education Meeting Minutes, "Approved Personnel Matters."

this new program was posted for bid and filled by a fully certified teacher.[4] Upon information and belief, the teacher hired for that position is Mr. Meddings.[5] Mr. Meddings had taught a CTE course at Spring Valley High School the previous year. Grievant had not yet received his certification when this was posted and filled.

18. At the time the decision was made to eliminate Grievant's PLW program, there were four students in the program. During his three years teaching PLW, Grievant had approximately eleven students complete the program. This is a higher completer rate than other high schools have in similar courses.

19. As Grievant's PLW program was cut after three years, there were students enrolled in the program who could not complete it. In other words, some of the students took courses intending to graduate from the PLW program, but the course ended before they could do so. The students in the new advanced manufacturing course at Tolsia High School are not the same students who were in Grievant's PLW courses.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2008). "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*.

[4] *See*, testimony of Chandra Perry, Director of Human Resources for Wayne County Schools, level three hearing.
[5] Mr. Meddings first name in unknown.

Grievant argues that Respondent's decision to terminate his contract through the RIF was arbitrary and capricious. Grievant asserts that his contract was not terminated for lack of need, as claimed by Superintendent Paine. Rather, Grievant alleges that his program was eliminated and his contract was terminated due to Dr. Paine's personal vendetta against the family of Sandra Pertee. In his proposed Findings of Fact and Conclusions of Law, Grievant states, in part, the following: "Grievant contends that the stated reasons for his reduction in force and the elimination of the PLW program at Tolsia High School were a pretext. The true reason for Grievant's reduction in force was a Pertee purge. Grievant and four other relatives were caught in this assault on the extended Pertee family."[6] Grievant does not challenge the procedure followed for his RIF. Respondent denies Grievant's claims, and asserts that it properly terminated Grievant's contract for lack of need through the reduction in force, pursuant to West Virginia Code § 18A-4-7a(k)(3), citing financial issues for the its actions.

"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 Bd. of Educ.,* 177 W. Va. 145, 351 S.E.2d 58 (1986).

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

[6] *See*, Grievant's proposed Findings of Fact and Conclusions of Law, pg. 5.

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. Syllabus Point 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).

The evidence presented establishes that Grievant and four of his relatives were RIF'd along with over sixty other employees of Wayne County Schools during the 2017

personnel season.[7] Further, it is undisputed that Grievant's four relatives were returned to work for the 2017-2018 school year. Other than the fact that he and four of his Pertee relatives were RIF'd and his program eliminated, Grievant presented no other evidence to support his claim of a vendetta against them. Grievant also did not attempt to explain the reason behind this alleged vendetta. Grievant did not call Dr. Paine as a witness at the level three hearing, his aunt, Sandra Pertee, or any of his Pertee relatives. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Trustees/W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998)(citing *Harrison v. W. Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995)).

It is undisputed that after Grievant's PLW program was discontinued, Respondent transferred a new CTE program, advanced manufacturing, to Tolsia High School. The position was posted and at least one person bid on it. That person, Mr. Meddings, was a fully certified teacher and was selected to fill the position. Grievant appears to allege that the new course demonstrates that there was no lack of need for his program, that there was no financial issue, and that Dr. Paine just wanted to get rid of him. Respondent argues that this is a different program than what Grievant taught, and that Grievant was not certified to teach the same when it was posted. PLW was not the only CTE course at Tolsia. There were several other CTE courses, and advanced manufacturing has now been added. No evidence about the advanced manufacturing course was offered at the level three hearing, other than the testimony of Chandra Perry and Grievant. Grievant

[7] *See*, Grievant's Exhibit 1, April 25, 2017, Wayne County Board of Education Meeting Minutes, "Approved Personnel Matters."

testified that students at Tolsia had told him that the new program is similar to his PLW course. However, neither party introduced a course description for advanced manufacturing, its curriculum, or the number of students enrolled therein. Also, neither party called Mr. Meddings as a witness at level three.

Grievant has failed to prove by a preponderance of the evidence his claim that Dr. Paine's personal vendetta against the family of Sandra Pertee was the true reason Respondent terminated his contract through the reduction in force and eliminated his program. Respondent has substantial discretion in matters such as these, and Grievant has failed to prove that Respondent's actions were otherwise arbitrary and capricious, or in violation of any statute, rule, or policy. Again, mere allegations alone without substantiating facts are insufficient to prove a grievance. *See Id.* The ALJ may not simply substitute her judgment for that of Respondent. Accordingly, this grievance is denied.

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 his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2008). "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. "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 Bd. of Educ.,* 177 W. Va. 145, 351 S.E.2d 58 (1986).

3. 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).

4. "'[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. Syllabus Point 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).

5. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Trustees/W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998)(citing *Harrison v. W. Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995)).

6. Grievant failed to prove by a preponderance of the evidence that Respondent improperly terminated his contract through the reduction in force and eliminated his program. Further, Grievant failed to prove that Respondent's actions were otherwise arbitrary and capricious, or in violation of any statute, rule, or policy.

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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: September 21, 2018.

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Carrie H. LeFevre
Administrative Law Judge