THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

CASSY MENAS,
Grievant,

v. **Docket No. 2018-1092-MrnED**

MARION COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Cassy Menas, employed by the Marion County Board of Education as a substitute teacher, filed this action directly to Level Three on March 22, 2018, alleging:

> On January 11, 2018, I filed a Freedom of Information Act ("FOIA") request for information and on January 25, 2018, I filed a Level One Grievance against the Marion County Board of Education ("BOE"), which Grievance was known as DOCKET NO. 2018-0910-Mrn.ED ("First Grievance"). Since filing said FOIA request and First Grievance, I discovered several BOE employees of the schools involved in the FOIA request and First Grievance, including but not limited to Vicki Bombard, principal of Barrackville Elementary, and Mindy Brown, assistant principal at Mannington Middle School, have taken retaliatory and discriminatory actions against me as a result of filing the FOIA request and First Grievance in violation of WV Code § 6C-2-3(h) and WV Code § 55-7E-2(a)(1), including but not limited to being removed from certain "Preferred Call Lists" on the eSchool Solutions program, making changes to my "Preferred Call List" designations on the eSchool Solutions program, and even being "blacklisted" as a substitute teacher by being placed on the secret "DO NOT USE" list on the eSchool Solutions program, all with absolutely no notice, explanation or valid reason other than reprisal. As a result of such retaliatory and discriminatory actions in violation of WV Code § 6C-2-3(h), WV Code § 55-7E-2(a)(1), the West Virginia Division of Personnel "Prohibited Workplace Harassment" policy and willful disregard of my rights under the West Virginia Human Rights Act (WV Code § 5-11-1 *et seq*. and the Federal Civil Rights Act of 1964, Title VII, § 42 USC § 2000 *et seq*, and in conjunction with continuing and ongoing atrocious, intolerable, and outrageous singling out and demeaning harassment from Tina Hoffman, the BOE payroll supervisor, I am being precluded from reasonably performing my work as a substitute teacher for the BOE and

being forced to work in an intimidating and hostile work environment.

> According to WV Code § 6C-2-4, an employee may proceed directly to a Level Three Grievance hearing upon agreement of the parties or when the grievant has been discharged, suspended without pay or demoted or reclassified resulting in a loss of compensation or benefits. As a result of the alleged egregious and malicious reprisal actions by the employees of the BOE, I am requesting the BOE to agree to proceed directly to a Level Three hearing. If the BOE is not agreeable to proceed to a Level Three hearing, I take the position that I have effectively been discharged and demoted and/or reclassified as a "Do Not Use Substitute Teacher" resulting in a loss of compensation, and therefore I am requesting to proceed directly to a Level Three hearing.

For relief, Grievant sought the following:

> I am requesting the following relief: (I) in accordance with WV Code § 55-7E-1 et seq., immediate back pay and front pay, (ii) damages for humiliation. (iii) damages for emotional distress, (iv) punitive damages, (v) for the BOE to establish and enforce a written policy to prevent administrators from discriminating and retaliating against employees by placing them on the secretive eSchool Solutions "DO NOT USE" list effectively black-listing employees without cause, notification or disciplinary action (pertaining to the cause), (vi) for the BOE to discipline its employees who are creating a hostile work environment and taking such egregious and malicious discriminatory and retaliatory actions against me and other employees of the BOE, (vii) reimbursement for all costs incurred as a result of this Grievance, including but not limited to reasonable attorney fees and witness fees, and (vi) such other relief as the grievance hearing examiner determines is appropriate.

A Level Three evidentiary hearing was conducted before the undersigned on July 11, 2018, at the Grievance Board's Westover office. Grievant appeared in person and by her counsel, Scott S. Summers. Respondent appeared by Andy Neptune, and by counsel, Richard S. Boothby, Bowles Rice LLP. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on August 23, 2018.

Synopsis

Grievant is employed by Respondent as a substitute teacher. Grievant makes a claim regarding alleged lost opportunities to substitute teach. Grievant claims that this was the result of reprisal and discrimination. Record did not support a finding that Grievant was the victim of either reprisal or discrimination. A building principal has broad discretion in selecting substitute teachers to fill the positions of absent teachers. Without proof that this discretion has been exercised in an arbitrary and capricious manner, or on the basis of some recognized impermissible reason, a substitute teacher's claim for lost wages for not being selected to work as a substitute on any particular day is without merit. Further, Grievant seeks numerous forms of relief which, as a matter of law, are not available through the grievance process. Accordingly, this grievance is denied.

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

Findings of Fact

1. Grievant is employed by Respondent as a substitute teacher.

2. On January 11, 2018, Grievant filed a Freedom of Information Act request with the office of the superintendent of Marion County Schools. This FOIA request concerned the school starting and ending times for several schools in Marion County.

3. On January 11, 2018, in response to Grievant's FOIA request, assistant superintendent, Andy Neptune, called the building principals for the schools referenced in the FOIA request. Mr. Neptune was trying to determine the correct start, midday, and ending times for these schools.

4. On January 11, 2018, Grievant was taken off of the preferred substitute list

for North Marion High School. Grievant was not placed on a "Do Not Use" list at North Marion High School.

5. Both Principal DeVito and Assistant Principal Miletto at North Marion High School recalled that Grievant expressed that she did not want to work every day as she had done throughout most of 2017.

6. On January 11, 2018, Principal Bombard of Barrackville Elementary/Middle School placed Grievant on the "Active Do Not Use" list through the Call Out System. Ms. Bombard did so because she did not want any sort of controversy in her school building and she felt Grievant was being unreasonable in demanding a full day of pay for working seven minutes more than a half-day.

7. About two weeks later, on or about January 25, 2018, Grievant filed a Level One grievance which was given Docket No. 2018-0910-MrnED. That grievance was settled by the parties on March 13, 2018.

8. On January 26, 2018, Grievant was placed on the "Do Not Use" list by someone at Mannington Middle School.

9. On January 26, 2018, Grievant worked as a substitute teacher at Barrackville Elementary/Middle School. On February 6, 2018, Grievant was removed from Barrackville Elementary/Middle School's "Do Not Use" list by Principal Bombard. However, Grievant's "preference number" was lowered from #3 to #30 by Principal Bombard.

10. Grievant claimed that there were 12 days from January 2018 through June of 2018 that she should have been hired as a substitute teacher at Barrackville Elementary/Middle School. Grievant claimed that there were 46 days from January 2018 through June of 2018 that she should have been hired as a substitute teacher at North

Marion High School. Grievant admitted that there is some overlap between these two schools on the cited days. Grievant claims that altogether, she missed 47 days of substitute work at Barrackville Elementary/Middle School and North Marion High School.

11. Grievant offered no evidence regarding any lost substitute teaching opportunities at Mannington Middle School.

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 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).

A review of the applicable law supports agreement with Respondent's position that substitute teachers in West Virginia are not entitled to any minimum number of substitute work assignments. In addition, West Virginia law does not proscribe the method by which substitute teachers are selected for assignments. A building principal has broad discretion

in selecting substitute teachers to fill the positions of absent teachers.[1] Without proof that this discretion has been exercised in an arbitrary and capricious manner, or on the basis of some recognized impermissible reason, a substitute teacher's claim for lost wages for not being selected to work as a substitute on any particular day is without merit.[2] No provision of West Virginia law prohibits a school principal from placing a substitute teacher on a "do not call" list or giving a particular substitute teacher a lower "call out" ranking so that she is offered fewer substitute teaching assignments than other substitute teachers, so long as this is not done in violations of any law.

"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.*

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[1]As stated in WEST VIRGINIA CODE § 18A-4-15, substitutes are "employed" by the board and "assigned" by the superintendent. This is similar to the language used in WEST VIRGINIA CODE § 18A-2-3, which discusses the employment of substitute teachers. As noted by the West Virginia Supreme Court, "[t]his section, which relates to the county superintendent's right to hire substitute teachers, is designed with considerable flexibility[.]" *Davenport v. Gatson*, 192 W.Va. 117, 118, 451 S.E.2d 57, 58 (1994). The statutory scheme for hiring substitute service personnel is consistent with the provisions of the liberal provisions regarding substitute teachers, who are also employed and assigned without reference to other provisions requiring specific hiring preferences.

[2]See generally, *Cook v. Webster County Bd. of Educ.*, Docket No. 02-51-426 (May 14, 2003).

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*.

Grievant makes a claim regarding alleged lost opportunities to substitute teach at Barrackville Elementary/Middle School and North Marion High School. She bases this claim on an allegation of reprisal and discrimination. First, W. VA. CODE § 6C-2-2(o) defines "reprisal" as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." In general, a grievant alleging reprisal or retaliation in violation of W. VA. CODE § 6C-2-2(o), in order to establish a *prima facie* case, must establish by a preponderance of the evidence:

> (1) that she was engaged in activity protected by the statute (*e.g.*, filing a grievance);
>
> (2) that her employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;
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> (3) that, thereafter, an adverse employment action was taken by the employer; and
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> (4) that the adverse action was the result of retaliatory motivation or the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

See Coddington v. W. Va. Dep't of Health & Human Res., Docket Nos. 93-HHR-265/266/267 (May 19, 1994); *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth*., Docket No. 91-PEDTA-225 (Dec. 23, 1991). *See generally Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). Once a *prima facie* case of retaliation has been established, the inquiry shifts to determining whether the employer has shown legitimate, non-retaliatory reasons for its actions. *Graley*, *supra*. *See Mace v. Pizza Hut, Inc*., 180 W. Va. 469, 377 S.E.2d 461 (1989).

On January 11, 2018, Grievant filed a Freedom of Information Act request. On that same day, Mr. Neptune called all of the building principals, including Ms. Bombard and Ms. DeVito, to determine the correct midday time for the purpose of creating a clear system for calling out substitute teachers for half days and full days. On January 11, 2018, Vicki Bombard, principal of Barrackville Elementary/Middle School placed Grievant on "Active Do Not Use" list through the eSchool Solutions Substitute Call Out System.

Ms. Bombard indicated that she did so because she did not want any sort of controversy in her school building and she felt Grievant was being unreasonable in demanding a full day of pay for working seven minutes more than a half-day. The record did not support a finding that Grievant was placed on a "Do Not Use" list because she filed a FOIA request or that she had previously filed a grievance. Grievant failed to do anything more than allege that she was retaliated against by the administration of Mannington Middle School for filing a grievance. In any event, the Grievance Board does not enforce the various provisions of the West Virginia Freedom of Information Act. *Anderson v. Raleigh County Bd. of Educ.*, Docket No. 01-41-378 (Jan. 28, 2002).

Principal DeVito and Assistant Principal Miletto of North Marion High School recalled that Grievant asked to be removed from the preferred substitute list so that she would not be called to work each day. Nevertheless, Grievant alleges that Assistant Principal Miletto removed her from the preferred substitute list in response to her filing a FOIA request. As pointed out above, the Grievance Board does not enforce the various provisions of the West Virginia Freedom of Information Act. Additionally, Grievant failed to prove on which days she should have been offered a particular substitute assignment, by a particular building principal, for which she was qualified, and that she would have definitely accepted the assignment. Grievant acknowledged that she regularly asked not to be called to work as a substitute so that she could attend to personal matters. The record failed to demonstrate that Grievant was placed on the "Do Not Use" list for any impermissible reason.

Next, Grievant alleges that discriminatory actions were taken against her by Respondent. For the purpose of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. Va. CODE § 6C-2-2(d). In order to establish a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
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> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
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> © that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008). The record of this case lacks evidence regarding any other Marion County Schools' substitute teacher that was similarly-situated to the Grievant. Grievant has failed to prove that she was treated differently than one or more similarly-situated employees.

Finally, Grievant seeks numerous forms of relief which, as a matter of law, are not available through the grievance process. Grievant's request for payment of attorney fees must be denied as a matter of law. *Browns-Stobbe/Riggs v. Dep't of Health and Human Res.*, Docket No. 06-HHR-313 (Nov. 30, 2006). The Grievance Board does not award tort-like damages. *Spangler v. Cabell County Bd. of Educ.*, Docket No. 03-06-375 (Mar. 15, 2004). It is also a well-settled rule that the Grievance Board does not have the authority to order an agency to impose discipline on an employee. Relief which entails an adverse personnel action against another employee is extraordinary, and is generally unavailable from the Grievance Board. *Stewart v. Div. of Corr.*, Docket No. 04-CORR-430 (May 31, 2005); *Jarrell v. Raleigh County Bd. of Educ.*, Docket No. 95-41-479 (July 8, 1996). Any decision concerning disciplinary action generally resides with the employer. *Dunlap v. Dep't of Envtl. Prot.,* Docket No. 2008-0808-DEP (March 20, 2009). Unlike public school employees whom the Legislature has empowered county superintendents and boards of education to discipline, the Legislature has not authorized the Grievance Board to discipline school board members. In addition, the Grievance Board does not have the authority to order a political subdivision of the State to adopt a particular policy. Grievant's claims of back pay relief lack merit as a matter of law, and, at best, could only be awarded

based on speculation. *Clark v. Putnam County Bd. of Educ.*, Docket No. 97-40-313 (April 30, 1998).

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 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. W. VA. CODE § 6C-2-2(o) defines "reprisal" as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it."

3. In general, a grievant alleging reprisal or retaliation in violation of W. VA. CODE § 6C-2-2(o), in order to establish a *prima facie* case, must establish by a preponderance of the evidence:

> (1) that she was engaged in activity protected by the statute (*e.g.*, filing a grievance);
>
> (2) that her employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;
>
> (3) that, thereafter, an adverse employment action was taken by the employer; and
>
> (4) that the adverse action was the result of retaliatory motivation or the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

See Coddington v. W. Va. Dep't of Health & Human Res., Docket Nos. 93-HHR-

265/266/267 (May 19, 1994); *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth*., Docket No. 91-PEDTA-225 (Dec. 23, 1991). *See generally Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). Once a *prima facie* case of retaliation has been established, the inquiry shifts to determining whether the employer has shown legitimate, non-retaliatory reasons for its actions. *Graley*, *supra*. *See Mace v. Pizza Hut, Inc*., 180 W. Va. 469, 377 S.E.2d 461 (1989).

4. Discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. Va. CODE § 6C-2-2(d).

5. In order to establish a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> © that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

6. The record did not support a finding that Grievant was the victim of either reprisal or discrimination.

7. "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).

8. Respondent's actions in this case cannot be viewed has unreasonable, or arbitrary and capricious.

9. Grievant's request for payment of attorney fees must be denied as a matter of law. *Browns-Stobbe/Riggs v. Dep't of Health and Human Res.*, Docket No. 06-HHR-313 (Nov. 30, 2006).

10. The Grievance Board does not award tort-like damages. *Spangler v. Cabell County Bd. of Educ.*, Docket No. 03-06-375 (Mar. 15, 2004).

11. It is also a well-settled rule that the Grievance Board does not have the authority to order an agency to impose discipline on an employee. Relief which entails an adverse personnel action against another employee is extraordinary, and is generally unavailable from the Grievance Board. *Stewart v. Div. of Corr.*, Docket No. 04-CORR-430 (May 31, 2005); *Jarrell v. Raleigh County Bd. of Educ.*, Docket No. 95-41-479 (July 8, 1996).

12. The Grievance Board does not have the authority to order a political subdivision of the State to adopt a particular policy. Grievant's claims of back pay relief

lack merit as a matter of law, and, at best, could only be awarded based on speculation. *Clark v. Putnam County Bd. of Educ.*, Docket No. 97-40-313 (April 30, 1998).

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 (eff. July 7, 2008).

Date: September 7, 2018

Ronald L. Reece
Administrative Law Judge