

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**KIMBERLY TOTTEN,
Grievant,**

v.

Docket No. 2018-0777-MinED

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

DECISION

Kimberly Totten, Grievant, filed this grievance against her employer, the Mingo County Board of Education ("MCBE"), Respondent, protesting her removal from participation/association with Mingo High School's BETA Club.¹ The original grievance was filed on December 13, 2017, which provides:

Grievant has been removed as president of Mingo Central High School's BETA Club without notice and an opportunity to respond to the allegations against her. Grievant alleges that Respondent has failed to comply with due process."

The relief sought states:

Grievant seeks reinstatement to the position as president of the BETA Club.

A conference was held at level one on or about January 5, 2018, and the grievance was denied at that level on January 24, 2018. Grievant appealed to level two on January 31, 2018, and a mediation session was held on March 15, 2018. Grievant appealed to level three on March 20, 2018. A level three hearing was held before the undersigned Administrative Law Judge on May 31, 2018, at the Grievance Board's Charleston office. Grievant appeared in person and was represented by legal counsel John Everett Roush,

¹ The BETA Club is a nationwide organization for 4th through 12th grade students. Its purpose is to promote the ideals of academic achievement, character, leadership and service among elementary and secondary school students.

Legal Services, American Federation of Teachers-WV, AFL-CIO. Respondent was represented by its counsel Leslie Tyree. This matter became mature for decision on or about June 29, 2018, the assigned mailing date for the submission of the parties' proposed findings of fact and conclusions of law. Both parties submitted post hearing fact/law proposals.

Synopsis

Grievant, a classroom teacher, filed a grievance after she was removed from an unpaid volunteer position of faculty sponsor of the school's BETA club by the school principal. BETA club is extra-curricular activity for students. Grievant avers she was improperly removed as a faculty sponsor of Mingo Central High School BETA club without notice and cause for insufficient allegations. Mingo County Board of Education, Respondent, maintains a school principal is empowered with the authority to make decisions and operate the daily operations of their respective schools. Accordingly, the instant principal is empowered to determine who will be allowed to volunteer/serve as a club sponsor.

For a quality teacher, the working environment and job satisfaction is more than the brick and mortar of the school house and the compensation received. By a preponderance of the evidence the instant Grievant has persuasively established she was chastened without opportunity to correct or alter debatable conduct. A principal's authority is not omnipotent, discretion must be exercised reasonably. The action(s) of the instant Principal is controversial; however, it cannot be found that the Principal's action is unlawful abuse of discretion.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. The Mingo County Board of Education, Respondent, is a quasi-public corporation created by statute for the management and control of the public schools of Mingo County, West Virginia.

2. Kimberly P. Totten, Grievant, is regularly employed by Respondent as a full-time classroom teacher at Mingo Central High School. In addition to her classroom teacher position, Grievant also served as one of the sponsors for the BETA chapter at Mingo Central High School.

3. BETA is a national organization originally founded in 1934 and is an academic honors program with a strong emphasis on community service. BETA is an organization for 4th through 12th grade students. Its purpose is to promote the ideals of academic achievement, character, leadership and service among elementary and secondary school students. Every year students on the “Senior level” compete in academic and talent competitions such as Creative Writing, English, Math, Science, Social Studies, Spelling, Group Talent, Special Talent, Oratory and Character Skits. On the “Junior level”, students can participate in Science, Social Studies, Language Arts, Spelling, Math, Visual & Performing Arts, etc.

4. BETA clubs operate under the aegis of the school with the principal appointing a sponsor or sponsors who must be school employees.

5. In order to compete at the national level, a participant must place at the

state level. Club members compete in various artistic competitions with BETA clubs from other schools. BETA is a national honors club dating back to the 1950s. It is very popular in the schools in Mingo County.

6. Grievant's family has been active in BETA and its programs for many years. Grievant co-founded the BETA club at Mingo Central High School and has acted as its co-sponsor since the opening of the school in 2011.

7. Grievant has invested a lot of time and emotional involvement in BETA. Grievant is a recognized participant in BETA issues.

8. The BETA clubs in West Virginia have a state convention in the fall, held in Charleston, West Virginia. In the last few years the convention has been held on a weekend in early November.

9. There are advantages and drawbacks to holding the state convention early in November. On the plus side, an early November date is more convenient for the schedules of national BETA representatives who attend. On the negative side, an early November date conflicts with other extra-curricular activities at the schools, like football, and limits the time available for fundraisers to finance the club member's attendance at the convention.

10. The issue of whether the state BETA convention should be held in early November or later in the fall has been controversial for the last several years. At the convention in November 2017, Grievant was an advocate for moving the convention back to early December. Grievant was not the only such advocate. Level III testimony of Crystal Ramey, Sherrie Spence and Deanna Powers.

11. At the State BETA convention in November of 2017, Grievant made her position known during a meeting with BETA members from other schools. In attendance of this meeting were State BETA Council Members as well as the National BETA President.

12. The scheduling of State BETA conference is based upon several criteria including accommodating the schedules of states across the country as well as the National BETA Club leadership.

13. Grievant is passionate about BETA and the students who participate in it. Her advocacy of a December date for the BETA State convention was zealous and fervent.

14. Mingo County Schools has the largest BETA student participation in the state and failure to bring Mingo County students to the state convention would have a pronounced effect on the state convention.

15. The state convention is held at the State Capital, Charleston. Students, sponsors and the school experience some fiscal expense for the multi-day event, e.g., transportation, lodging and food expense. It is more than inferred that the proposed November convention date competes with several other activities in the state and capital city, complicating students' participation.

16. Grievant's lack of deference, essentially her willingness to express her viewpoint may or may not have concerned a cross selection of BETA delegates in attendance of the convention. Interpretation of Grievant's actions vary.

17. Crystal Ramey, a BETA Co-sponsor for Mingo Central High School did not find Grievant's conduct at the conference to be offensive or unprofessional.

18. Elizabeth Keatley is an employee of Respondent at Mingo Central High School and also a state BETA representative.² Ms. Keatley was of the opinion that Grievant was overzealous in expressing her opinion to state and national BETA representatives. Elizabeth Keatley sponsorship/participation with BETA was a direct result of Grievant's patronage.

19. Dr. Sabrina Runyon is the WV Council Chair of BETA as well as a National Board Member. Dr. Sabrina Runyon attended the State BETA Convention.

20. Dr. Johnny Branch is the Vice Chair of BETA, and the Assistant Superintendent of Mingo County Schools. Dr. Branch attended the state conference in November of 2017. It is not established that Assistant Superintendent Branch independently witnessed Grievant conduct herself in an unprofessional manner.

21. Daniel Dean is the Principal at Mingo Central High School. He has been the principal for one and half years. Principal Dean is aware of the school's BETA club, but his personal interaction with the organization is limited.

22. Assistant Superintendent Branch contacted Principal Dean and relayed concerns regarding potential controversy and/or conduct of Grievant. The intent of Assistant Superintendent Branch is debatable.

23. Principal Dean contacted Elizabeth Keatley, regarding Grievant's conduct

² Grievant was instrumental in Ms. Keatley's acquisition of the state representative position. Elizabeth Keatley, L3 testimony.

at the BETA convention. Principal Dean asked Ms. Keatley her opinion regarding Grievant's conduct and received first hand and layered hearsay information.

24. Principal Dean formed an opinion regarding Grievant's conduct.

25. Principal Dean met with Grievant on November 29, 2017. Mr. Dean called Grievant to his office in the presence of the Assistant Principal Ted Kinder. Principal Dean inquired of Grievant regarding activities that transpired at the BETA convention.

26. Grievant openly complained about the scoring of competitions during the state convention, indicating that Mingo County students were possibly scored unfairly. Grievant made note and took exception with the practice schedule and another team's use of microphones during the state convention.

27. Grievant is dedicated and passionate regarding her BETA club mentorship and participation.

28. Grievant was concerned about the scheduling date of next year's state BETA convention. Grievant is of the belief that an alternative date would better suit student participation and this state's ability to stabilize contending extra-curricular activities.

29. Grievant voiced her displeasure with several aspects of the conference in front of teachers, state and national BETA council members, the National BETA president and students.

30. Grievant's acknowledgement that her school's participation in the BETA state convention was significant and "if" they did not participate it would have a notable effect upon the success of the next year's convention, likely got the attention of BETA

administrators. Mingo County Schools has the largest BETA student participation in the state and failure to bring Mingo County students to the state convention would cripple the state convention.

31. Principal Dean relied heavily upon Ms. Keatley's opinion regarding Grievant's activities at the BETA conference. Grievant was not repentant regarding her conduct at the conference.

32. The majority of Principal Dean's understanding of Grievant's conduct was largely hearsay and layered hearsay of others' conduct. Principal Dean was of the opinion that Grievant's actions cast a negative reflection on Mingo Central High School.³

33. Principal Dean was not pleased with Grievant's unrepentant nature and elected to remove her as a sponsor of the BETA club at Mingo Central High School. Another school employee was selected to fill the position.

34. Volunteer club sponsors are not compensated nor formally approved by the Mingo County Board of Education, Respondent, the positions are strictly assigned by the School Principal.⁴

³ The proverbial elephant in the room is Grievant's statements regarding future participation unless some deference is given to regional concerns. It is more than likely that this gave various BETA officials pause. Principal Dean was made aware of a "potential" issue.

⁴ Volunteer club sponsorship has not been recognized as an extra-curricular assignment, which is made by mutual agreement and subject to County Board of Education approval. W. VA. CODE § 18A-4-16 Principals are given the authority to make decisions and operate their schools. This authority includes daily operations, decision making as to who shall be recommended for employment in their school, supervision of school financial matters, setting schedules for their staff and students, deciding when and if to interview candidates for employment in their schools and many other areas of authority. See West Virginia Code § 18A-2-9 which provides among other specifies duties and responsibilities that a public school principal shall be the instructional leader of the school and shall supervise the management and the operation of the school.

35. The removal and replacement of Grievant as the faculty sponsor for BETA did not transpire without notice and did stimulate conversation within Mingo Central High School and the BETA community.

Discussion

This grievance is not the typical grievance matter. Grievant, a classroom teacher, filed a grievance after she was removed from an unpaid volunteer position of faculty sponsor of the school's BETA club by the school principal. Grievant perceives the alteration to her working environment to be punitive. The action contested is not identified as a disciplinary action. In circumstances of this matter, Grievant has the burden of proving her case by a preponderance of the evidence.⁵ Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). Officially, Grievant was not disciplined but it is factually accurate to recognize that Grievant's working condition was altered. The principal, in this factual situation, altered Grievant's employment environment, a *de facto* demotion. "A 'functional demotion' is not a disciplinary matter." *Koblinsky v. Putnam County Health Dep't.*, Docket No. 2011-1772-CONS (Oct. 23, 2012), *aff'd*, Kanawha Cnty. Cir. Ct., Docket No. 12-AA-131 (July 24, 2013).

⁵ Grievant bears the burden of proving the grievant's case by a preponderance of the evidence, except in disciplinary matters, where the burden is on the employer to prove that the action taken was justified. 156 C.S.R. 1 § 3 (2008). "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).

Mingo Central High School BETA Club is a school club, sponsored by school employees, comprised of students at the school, conducted on school grounds and under the ultimate control of the chief administrator of the school, Principal Daniel Dean. BETA sponsors are involved in instructing, coaching, chaperoning, and escorting students to events/competitions. Principal Dean removed Grievant as the volunteer sponsor of the BETA club. Mr. Dean did not feel Grievant was representing the school appropriately as the volunteer sponsor. It is also likely that some individuals were concerned that Grievant's displeasure with a variety of events regarding the state convention "might" transform into less than enthusiastic participation from Mingo County at next year's event(s).⁶ **At issue is whether the principal's action is within the bound of his discretion and/or was an arbitrary action.**

Among the duties of a principal is to make decisions, supervise the management and operation of the school to which he or she is assigned. *A principal shall assume administrative and instructional supervisory responsibility for the planning, management, operation and evaluation of the total educational program of the school or schools to which he is assigned.* See W. Va. Code §18A-2-9. Duties and responsibilities of school principals; assistant principals. In accordance with W. Va. Code § 18A-2-9 a school principal clearly has the authority to remove an individual from serving as a club volunteer. Respondent has the authority to direct Principal Dean to reinstate Grievant as a sponsor of BETA club at Mingo Central High School.⁷

⁶ Polite way of saying, some authorities were concerned that Grievant might just make good on what was perceived as a threat of non-participation.

⁷ County boards of education have substantial discretion in matters relating to the hiring,

Grievant perceives the alteration to her working environment to be corrective and/or punitive in nature (the undersigned is sympathetic to this interpretation). Grievant believes she was treated unfairly yet struggles to identify a cause of action which will sustain the weight of her contention (allegation of wrong doing). The contention that Grievant was denied due process (conceptually) is imperfect in the fact pattern of this case and ultimately fails short of merit.

"An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and an opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494, (1985), *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950). See also West Virginia Supreme Court of Appeals case *Board of Education of the County of Mercer v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402 (1994). "[D]ue process is a flexible concept, and that the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case." *Buskirk v. Civil Serv. Comm'n*, 175 W. Va. 279, 332 S.E.2d 579 (1985) (*citing Clark v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)).

What is required to meet conceptual fair dealing is controlled by the circumstances of each case. Grievant's interest in being a BETA sponsor at Mingo High is not a

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 Board of Education*, 177 W. Va. 145, 351 S.E.2d 58 (1986)." Syl. pt. 2, *Baker v. Bd. of Educ.*, 207 W. Va. 513, 534 S.E.2d 378 (2000).

constitutional protected right. Principal Dean is not required to hold a full-blown hearing to exercise what is recognized as discretionary authority. A school principal is empowered with the authority to determine who may or may not serve as an unpaid volunteer for activities or clubs at the school. See W. Va. Code § 18A-2-9. Grievant met with Principal Dean and Assistant Principal Kinder to discuss the events at the State BETA Convention on November 29, 2017 *prior* to Principal Dean removing her as volunteer or deciding to remove her as a volunteer. By the conclusion of the meeting, Principal Dean was not pleased with Grievant's unrepentant nature and elected to remove her as a sponsor of the BETA club at Mingo Central High School. In other words, Grievant was provided notice of the allegations, some explanation of the evidence, and an opportunity to respond. The allegation, "failure to provide due process," whether duly applicable or not to this volunteer position, it isn't the cause of action suited to deliver Grievant's desired relief. Principal Dean provided Grievant opportunity to defend her action(s).

Grievant is struggling to label Principal Dean's action as unlawful but is stuck with unfair. Illegal and unfair are not synonymous.

Grievant was a zealous advocate for a cause for which she was deeply committed, this is undeniable and readily evident. Grievant's lack of deference, essentially her willingness to express her viewpoint may or may not have given a delegate or two something to think about. Stimulating thought through nonviolent speech isn't illegal, yet. Delegates championing their cause at a convention is part of the process. It is more than likely Grievant's dissatisfaction with the operation of the 2017 BETA convention

was noticed by officials. Several of Respondent's employees were in attendance of the convention.

Allegedly it was explained that BETA contracts with conference venues two years in advance, that the dates for the next two years had been established and the dates were unable to be changed. Grievant was not completely satisfied with the explanation. In fact, Grievant was displeased with the posturing. Grievant voiced her displeasure with several aspects of the conference in front of teachers, state and national BETA council members, the National BETA president and students. Interpretation of Grievant's actions vary. See Level III testimony of Crystal Ramey,⁸ Sherrie Spence⁹ and Deanna Powers

. Certain facts relating to the allegations against Grievant were the subject of conflicting testimony. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. *Young v. Div. of Natural Res.*, Docket No. 2009-0540-DOC (Nov. 13, 2009); *Massey v. W. Va. Public Serv. Comm'n*, Docket No. 99-PSC-313 (Dec. 13, 1999); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). See *Harper v. Dep't of the Navy*, 33 M.S.P.R. 490 (1987). See also *Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). Some factors to

⁸ Crystal Ramey, Mingo BETA co-sponsor did not find Grievant's conduct at the conference to be offensive or unprofessional. Among other information Ms. Ramey, testified that she, herself noted perhaps, we (Mingo County) should sit out a year ("might not be able to be here next year").

⁹ Among other information Sherrie Spence testified the date of the state conference was a controversial issue.

consider in assessing the credibility of a witness include the witness' demeanor, opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the fact finder should consider the presence or absence of bias, interest, or motive, the consistency of prior statements, the existence or nonexistence of any fact testified to by the witness, and the plausibility of the witness' information. *Rogers v. W. Va. Reg'l Jail & Corr. Facility Auth.*, Docket No. 2009-0685-MAPS (Apr. 23, 2009); *Massey, supra*.

In the mind of this trier of fact, Assistant Superintendent Branch's testimony tended to undermine Respondent's position. It did not bolster the specifics of Grievant's alleged conduct. The level of hearsay and contradiction was less than persuasive. His memory had a convenient lapse of recollection and was evasive on many turn-key facts. Assistant Superintendent Johnny Branch's testimony regarding witnessing Grievant's attitude and demeanor was limited. Assistant Superintendent Branch did in deed contacted Principal Dean and relayed concerns regarding potential controversy involving Grievant. The intent of Assistant Superintendent Branch is debatable, it is not convincingly explained. Grievant was an influential co-sponsor of the BETA club at Mingo Central High School, her actions reflected upon Mingo County. Assistant Superintendent was aware that a particular issue was brewing. Mingo County Schools has the largest BETA student participation in the state and failure to bring Mingo County students to the state convention would cripple the state convention.

Principal Daniel Dean relied heavily upon Elizabeth Keatley's opinion regarding Grievant's activities at the BETA conference. Elizabeth Keatley is an employee of

Respondent at Mingo Central High School and also a state BETA representative. Ms. Keatley was of the opinion that Grievant was overzealous in expressing her opinion to state and national BETA representatives. Principal Dean poorly communicate what conduct of Grievant he found to be *per se* unprofessional.¹⁰ Unprofessionalism is more than disagreeing with the subject matter or position of the authority figure. Pursuant to his testimony Principal Dean did not consider giving Grievant an improvement period. Principal Dean formed an opinion regarding Grievant's conduct. Principal Dean specifically took exception with Grievant's demeanor at the November 29, 2017 meeting. See Principal's L-3 testimony. Grievant didn't think she had done anything wrong and elected not to apologize for standing up for Mingo County BETA. Grievant's stance is noble, but it also may have sealed her fate. Principal Dean reacted negatively to Grievant not being repentant. The majority of Principal Dean's understanding of Grievant's conduct was largely hearsay and layered hearsay of others' conduct. Nevertheless, Principal Dean was of the opinion that Grievant's actions cast a negative reflection on Mingo Central High School. Principal Dean electe to removed Grievant as a sponsor of the BETA club at Mingo Central High School. The removal of Grievant from her unpaid volunteer position did not adversely affect her teaching position at the school.

The contention that Principal Dean's action was arbitrary was *seriously* considered. Respondent has the authority to direct Principal Dean to reinstate Grievant

¹⁰ Grievant did not curse or use foul language. She did not physically attack or threaten to attack anyone. She did not resort to attacks on the character of any of the participants. She was vocal and persistent in voicing her opinion on a matter of some importance to the participants of the BETA club. Grievant threatened the *status quo*.

as a sponsor of BETA at Mingo Central High School. A principal's authority is not omnipotent, discretion must be exercised in a reasonable manner or it is on the verge of being arbitrary and capricious.¹¹ While the undersigned disagrees with the severity of Principal Dean's action,¹² it cannot be found that the action was without reasonable justification. Principal Dean action is not arbitrary and capricious conduct. Principal Dean had a good faith belief that Grievant was not exemplifying the image he desired. Principal Dean was of the opinion that Grievant's actions cast a negative reflection.¹³ Applicable law and past practice is clear the school principal has the authority to determine who may or may not serve as an unpaid volunteer for activities or clubs at the school. Grievant has failed to establish unlawful action or abuse of discretion.

The following conclusions of law are appropriate in this matter:

¹¹ Generally, 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 his judgment for that of the authoritarian agency. See generally *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

¹² Opinions may differ on the seriousness of this action. The undersigned is sympathetic with Grievant but believes himself unable to provide the relief requested. Considerable deference is afforded an employer's assessment of the seriousness of an employee's conduct and the prospects for rehabilitation. The undersigned Administrative Law Judge cannot substitute his judgement for that of the employer. *Tickett v. Cabell County Bd. of Educ.*, Docket No. 97-06-233 (Mar. 12, 1998); *Huffstutler v. Cabell County Bd. of Educ.*, Docket No. 97-06-150 (Oct. 31, 1997)."
Meadows v. Logan County Bd. of Educ., Docket No. 00-23-202 (Jan. 31, 2001).

¹³ While not readily admitted, it is also more likely than not that Grievant and Grievant's strong contentions regarding the operations of the annual state convention was perceived as a cancerous discord.

Conclusions of Law

1. Because the subject of 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 Board, 156 C.S.R. 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. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

2. Among the duties of a principal is to make decisions, supervise the management and operation of the school to which he or she is assigned. *A principal shall assume administrative and instructional supervisory responsibility for the planning, management, operation and evaluation of the total educational program of the school or schools to which he is assigned.* W. Va. Code § 18A-2-9.

3. 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 is 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). 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 his judgment for that of the authoritarian agency. *See generally Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

4. Grievant did not demonstrate that the action of the instant principal was clearly excessive or an abuse of discretion.

5. Grievant has failed to establish that Respondent's actions were unlawful.

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: July 30, 2018

Landon R. Brown
Administrative Law Judge