THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ETHEL WHITE,

Grievant,

v. **Docket No. 2017-0899-LogED**

LOGAN BOARD OF EDUCATION,

Respondent.

DECISION

Grievant filed a level one grievance against her employer, Respondent, Logan County Board of Education, on August 29, 2016, which stated as follows:

> [o]n or about August 8, 2016, the Logan County Board of Education denied Ms. White's request to rescind her reduction-in-force and place her in her previous position. Ms. White asserts the following violations of law: On or about February of 2016, Director Thompson told Ms. White that she would receive her position back next year in the event her position returned. Ms. White, relying in this statement, did not assert her right to a hearing of her reduction-in-force (called an "abolishment" in Logan County) or otherwise challenge this action. Ms. White's position was abolished on or about February 25, 2016. However, when her abolished position returned, the position was posted and not awarded to Ms. White, contrary to Director Thompson's earlier statement. Ms. White asserts that this statement fraudulently induced her into not asserting the procedural rights grants (sic) to her, including, but not limited to, her right to a hearing challenging her reduction-in-force.
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> The Logan County Board of Education wrongfully and unlawfully reduced-in-force Ms. White for a purported lack of need when there was, in fact, a specific need for Ms. White's position in the current and preceding school year. Alternatively, the Logan County Board of Education wrongfully and unlawfully reduced-in-force Ms. White for a purported general lack of need when it failed to connect her reduction-in-force with a transfer of a more senior aide into her position. This is in violation of WV Code Section 18A-4-8b.

> The Logan County Board of Education wrongfully and unlawfully posted her position, which an aide not on preferred recall status was awarded without complying with WV Code Section 18-A-4-8(q) which requires no position opening may be filled until all service employees on the preferred recall list receive notice and an opportunity to accept reemployment. This is in violation of WV Code Section 18-A-8b(q).

As stated therein, Grievant seeks the following relief: "Ms. White respectfully requests to be made whole including, but not limited to, reinstatement to her position, all back-pay with interests (sic), seniority, and all other relief and benefits deemed necessary by the grievance evaluator."

The record of this grievance is silent as to the date on which the level one conference was conducted. The grievance was denied at level one by decision issued December 11, 2016. Grievant appealed to level two on January 11, 2017. A level two mediation was conducted on May 22, 2017. Grievant perfected her appeal to level three on June 7, 2017. The level three grievance hearing was conducted on November 16, 2017, at the Grievance Board's Charleston, West Virginia, office before the undersigned administrative law judge. Grievant appeared in person and by counsel, Jeffrey G. Blaydes, Esquire, Carbone & Blaydes, PLLC. Respondent, Logan County Board of Education, appeared by counsel, Leslie K. Tyree, Esquire. This matter became mature for consideration on March 27, 2018, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.[1]

[1] During the level three hearing, Grievant, by counsel, requested a copy of certain recordings from Logan County Board of Education that were mentioned during witness testimony. There was no objection, and the ALJ ordered the production of the recordings. Counsel for Respondent did not have copies of the recordings on the day of the hearing. As counsel for Grievant explained that he wanted to use the recordings when drafting his post-hearing submissions, the ALJ ordered that the record would remain open until December 15, 2017, to allow Respondent time to provide the recordings to counsel for

Synopsis

Grievant was employed by Respondent as an Aide. Grievant was called to a meeting with the personnel director at which Grievant was informed that she was being reduced in force (RIF) and was given a letter to that effect. Grievant did not request a hearing on her RIF and did not challenge the same. As a result of the RIF, Grievant's employment was terminated at the end of the school year. Grievant filed this grievance months after being informed of her RIF asserting that the personnel director mislead her into believing that her RIF would be rescinded and she would get her job back if enough students were enrolled for the next school year. Grievant asserts claims of fraudulent inducement, detrimental reliance, and equitable estoppel. Grievant also argues that there was no lack of need for her position, and that Respondent violated the statute by filling her position with an employee who was not on the preferred recall list. Respondent moved to dismiss the grievance as untimely. Respondent denies Grievant's claims, arguing that the personnel director did not make the statements alleged, that it properly RIF'd Grievant for lack of need pursuant to the applicable statutes, and that it properly

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Grievant and the Grievance Board. The ALJ noted that upon receipt of the media containing the recordings, such would be marked as Grievant's Exhibit 7, then the record would close. The mailing date for proposed Findings of Fact and Conclusions of Law was set as January 5, 2018. Counsel for Respondent was unable to promptly provide working copies of the media containing the audio files. There were technical difficulties. This resulted in the parties seeking extensions of time to submit the recordings, as well as their proposed Findings of Fact and Conclusions of Law. The ALJ granted a number of extensions. Eventually, the ALJ had to convene a telephonic hearing on January 25, 2018, to address the exchange of the audio files, and its impact of the submission of post hearing proposals. Finally, on February 20, 2018, counsel for Grievant received and delivered to the Grievance Board a flash drive containing working copies of the audio files. The ALJ has marked the same as Grievant's Exhibit 7. Thereafter, the ALJ set March 23, 2018, as the mailing date for the parties' proposed Findings of Fact and Conclusions of Law.

filled the vacancy created by Grievant's RIF. Respondent proved that this grievance was untimely filed, but Grievant demonstrated a proper basis to excuse her failure to file in a timely manner. As such, Respondent's Motion to Dismiss is DENIED. Grievant failed to prove her claims by a preponderance of the evidence. Therefore, 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 hired by Respondent as a full-time special education Aide at Chapmanville Middle School (CMS) for the 2015-2016 school year. Grievant was initially hired by Respondent as a substitute special education aide in 2013.

2. During the 2015-2016 school year, Grievant was assigned one to three students, one of whom utilized a wheelchair, and required assistance with movement from room to room, eating, incontinence, and school work. During the school year, the student assignments were rotated among the aides.

3. At the times relevant herein, Rob Dials was the Principal at CMS. Elizabeth Thompson is the Personnel Director for the Logan County Board of Education.

4. On or about February 2, 2016, Mr. Dials called Grievant to a meeting in his office. Grievant received no advance notice of this meeting. When she arrived at Mr. Dials's office, present were Mr. Dials and Ms. Thompson. During this meeting Ms. Thompson informed Grievant that she was going to be subject to a reduction in force, or RIF. Grievant had never been RIF'd before and was unfamiliar with the process.

5. Grievant and Ms. Thompson disagree as to many of the statements made

during this meeting. Neither party called Mr. Dials, who was also present at the meeting, to testify at the level three hearing. Nonetheless, Grievant came away from the meeting believing that if enough special needs students came to CMS for the next school year, her RIF would be rescinded, and she would get her job back.

6. By letter dated February 2, 2016, signed by Superintendent Phyllis Doty, Grievant was informed that she would be recommending to the Board that Grievant's employment be terminated at the close of the 2015-2016 school year due to lack of need. This letter informed Grievant of her right to be heard by the Board, the date and time of the Board meeting, and how to make a request for a hearing. It appears that a copy of this letter was given to Grievant on February 2, 2016, as her signature and that date appear at the bottom of the document. This letter was also mailed to Grievant by certified mail, and Grievant admits to having signed for the same. The record is unclear as to the date Grievant received the certified letter.[2]

7. Following the February 2, 2016, meeting with Ms. Thompson and Mr. Dials, Grievant spoke to a teacher about the number of special needs children coming to CMS in the 2016-2017 school year. Based upon what she was told, Grievant concluded that there would be enough special needs students enrolled at CMS to keep her position at the school. In fact, Grievant learned that the number of special needs students would be increasing from the number enrolled in the 2015-2016 school year.

8. Based upon her understanding of Ms. Thompson's statements during the February 2, 2016, meeting and her conclusion that there would be enough special needs students to keep her position at the school, Grievant did not request a hearing on her RIF

[2] *See*, Grievant's Exhibit 3, letter dated February 2, 2016.

and did not otherwise challenge the same.

9. The Logan County Board of Education voted 5-0 in favor of Grievant's reduction in force at its meeting held on February 25, 2016. Grievant did not attend this meeting.

10. In or about June 2016, Grievant called Ms. Thompson to ask about her position because she had not heard anything about her job for the 2016-2017 school year, or her RIF being rescinded. During this call, Ms. Thompson informed Grievant that her RIF had not been rescinded, and that her position was being bid out, meaning the position was being posted as a vacancy and someone else was going to be hired for the position.

11. Following her call with Ms. Thompson, Grievant went to a regular meeting of the Respondent Board on July 28, 2016, to seek an explanation for what had happened with her position. During the public comment period of the meeting, Grievant "[a]ddressed the Board in regard to her position as an aide at Chapmanville Middle School being RIF (Reduction in Force). She does not understand why when the job was reposted, it was awarded to another person. Mr. Hardesty asked if she would come to the next board meeting and bring her representative with her."[3]

12. As directed by the Board, Grievant returned to the next meeting of the Logan County Board of Education on August 8, 2016, with her representative Wes Toney, who was then with the American Federation of Teachers (AFT). Grievant and her representative addressed the Board in executive session.[4]

[3] *See*, Grievant's Exhibit 1, Minutes of the July 28, 2016, meeting of the Logan County Board of Education.
[4] *See*, Grievant's Exhibit 2, Minutes of the August 8, 2016, meeting of the Logan County Board of Education.

13. Grievant filed this grievance on August 29, 2018, as a result of what the Board members said to her during executive session. Grievant contends that she was encouraged by the Board to file this grievance as she had been "done dirty and lied to."

14. Grievant was ranked eightieth out of eight-one in the Aide classification on the January 15, 2016 Service Personnel Seniority List. Grievant was the least senior regular Aide employed by Respondent. It is noted that the person occupying the eighty-first position was an ECCAT, not a regular Aide.[5]

15. Grievant has not been reemployed by Respondent since being RIF'd and placed on the preferred recall list. There were five Aides, including Grievant, who were RIF'd in February 2016.[6] Some of those who were RIF'd at the same time as Grievant have been reemployed by Respondent, and even RIF'd again.[7] Upon information and belief, at the time of the level three hearing in this matter, there were three people on the preferred recall list ahead of Grievant.[8] Meaning, those three people had more seniority than Grievant and were required to be recalled to employment before Grievant could be so recalled.

16. The only witnesses called at the level three hearing were Grievant and Ms. Thompson. Mr. Dials was not called as a witness by either party.

Discussion

Motion to Dismiss

At the commencement of the level three hearing, Respondent, by counsel, orally

[5] *See,* Respondent's Exhibit 1, Service Personnel Seniority List dated January 15, 2016.
[6] *See*, Respondent's Exhibit 1, Service Personnel Seniority List dated January 15, 2016.
[7] *See*, testimony of Elizabeth Thompson, level three hearing.
[8] *See*, Respondent's Exhibit 2, spreadsheet.

moved the undersigned to dismiss this grievance as untimely filed. The issue of timeliness had been raised at level one of the grievance process as well. Upon hearing the arguments of both parties, the ALJ held the motion in abeyance, and instructed counsel to address the issue of timeliness in their proposed Findings of Fact and Conclusions of Law following the hearing. The ALJ informed the parties that she would rule on the same in the level three decision. Grievant addressed her opposition to the motion to dismiss in her post-hearing submissions. However, Respondent did not mention the motion to dismiss in its submissions.

Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. "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 and Human Res*., Docket No. 92-HHR-486 (May 17, 1993). As Respondent is asserting the affirmative defense of timeliness, it bears the burden of proof. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *See Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See also Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

The Public Employees Grievance Board is an administrative agency, established

by the Legislature, to allow a public employee and his or her employer to reach solutions to problems which arise within the scope of their employment relationship. *See* W. VA. CODE § 6C-2-1, *et seq*. There are established and recognized constraints for filing and pursuing a grievance in accordance with the West Virginia grievance statutes and applicable regulations. To be considered timely, and, therefore, within the jurisdiction of the Grievance Procedure, a grievance must be timely filed within the time limits set forth in the grievance statute. If proven, an untimely filing will defeat a grievance and the merits of the grievance need not be addressed. *See Lynch v. W. Va. Dep't of Transp.,* Docket No. 97-DOH-060 (July 16, 1997), *aff'd, Circuit Court of Kanawha County,* No. 97-AA-110 (Jan. 21, 1999). If the respondent meets the burden of proving the grievance is not timely, the grievant may attempt to demonstrate that he should be excused from filing within the statutory time lines. *See Kessler v. W. Va. Dep't of Transp.,* Docket No. 96-DOH-445 (July 28, 1997).

WEST VIRGINIA CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." W. VA. CODE § 6C-2-3(a)(1). Further, WEST VIRGINIA CODE § 6C-2-4(a)(1) sets forth the time limits for filing a grievance, stating as follows:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing . . . .

Id. The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of*

Empl. Programs, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998). *See Rose v. Raleigh County Bd. of Educ*., 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989).

The Supreme Court has repeatedly admonished the lower courts to uphold the legislative intent of simple, expeditious and fair grievance procedures, and to give such procedures flexible interpretation in order to carry out the legislative intent. *See Duruttya v. Board of Educ*., 181 W.Va. 203, 382 S.E.2d 40 (1989) (finding a grievant had substantially complied with the grievance process although the grievance had been filed with the incorrect entity), *Spahr v. Preston County Bd. of Educ*., 182 W. Va. 726, 391 S.E.2d 739 (1990) (applying a flexible interpretation to find a grievance timely filed several months after the challenged grievable event), *Hale v. Mingo County Bd. of Educ.*, 199 W. Va. 387, 484 S.E.2d 640 (1997) (holding an intervenor may make affirmative claims for relief as well as asserting defensive claims). The grievance process is not "to be a procedural quagmire where the merits of the cases are forgotten." *Spahr*, 182 W. Va. at 730, 391 S.E.2d at 743. Justice Starcher sums up the Court's philosophy in *Hale*:

> [i]n *Spahr, supra*, we upheld a circuit court's determination that a grievance was timely filed several months after the challenged grievable event because the employees did not initially know of the actual facts relating to their grievance. *Spahr,* 182 W.Va. 726, 391 S.E.2d 739 (1990). *Spahr* and *Duryutta, supra* teach that the timeliness of a grievance claim is not necessarily a cut-and-dried issue because a tribunal must apply to the timeliness determination the principles of substantial compliance and flexible interpretation to achieve the legislative intent of a simple and fair grievance process, as free as possible from unreasonable procedural obstacles and traps.

Hale, n.10, 199 W. Va. at 393, 484 S.E.2d at 646.

In this matter, Grievant filed her grievance months after being informed that she was being RIF'd. This is well beyond the time period for filing her grievance. However, given the unique chain of events in this matter, involvement of the members of the Logan County Board of Education, and applying the Court's philosophy in *Hale*, it appears clear that Grievant's late filing should be excused and this grievance should not be barred as untimely filed. Viewing this case through the lens of substantial compliance, flexible interpretation, simplicity, and fairness mandates allowing the Grievant to proceed on the merits. Therefore, Respondent's Motion to Dismiss is denied.

Merits

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (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). "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). Where the evidence equally supports both sides, a party has not met its burden. *Id.*

Grievant makes a number of arguments in her proposed Findings of Fact and

Conclusions of Law. She argues that Respondent, via Ms. Thompson, fraudulently induced her into not asserting her procedural rights following her RIF, including her right to a hearing challenging the RIF. Grievant also argues the following: that Respondent should be estopped from claiming that she waived her right to a RIF hearing because she reasonably relied to her detriment on the statements made by Thompson; that Respondent should be estopped from its RIF of Grievant under the principle of equitable estoppel; that she was wrongfully and unlawfully RIF'd because there was no lack of need for her position; and that the Respondent unlawfully posted her position without complying with West Virginia Code § 18A-4-8b(q) as it filled the position with a regular employee who was not on the preferred recall list.

Respondent denies Grievant's claims, and asserts it properly RIF'd Grievant, pursuant to West Virginia Code § 18A-4-8b(j), and other applicable statutes, and placed her on the preferred recall list. Respondent asserts that Grievant has not been recalled to work because of her having the least Aide seniority in the county. Respondent denies that Ms. Thompson told Grievant that if there were enough students coming to CMS, her RIF would be rescinded and she would get her position back. Respondent asserts that Ms. Thompson provided Grievant the February 2, 2016, RIF letter at their meeting on that date, and that she explained the RIF process and content of the letter to Grievant. This letter gave Grievant notice of her right to a hearing. Respondent further argues that even if Ms. Thompson had given Grievant such incorrect information, it would have constituted an *ultra vires* act, and Respondent would not be bound by her statements.

"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). "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." *Trimboli v. Dep't of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997) (citations omitted). "Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Id.* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

West Virginia Code § 18A-4-8b(h) states as follows: "[a]ll decisions by county boards concerning reduction in work force of service personnel shall be made on the basis of seniority, as provided in this section." Further, "[t]he seniority of a service person is determined on the basis of the length of time the employee has been employed by the county board within a particular job classification. For the purpose of establishing seniority for a preferred recall list as provided in this section, a service person who has been employed in one or more classifications retains the seniority accrued in each previous classification." W. Va. Code § 18A-4-8b(i).

Further, West Virginia Code § 18A-4-8b(j) states as follows:

> (j) If a county board is required to reduce the number of service personnel within a particular job classification, the following conditions apply:

(1) The employee with the least amount of seniority within that classification or grades of classification is properly released and employed in a different grade of that classification if there is a job vacancy;

(2) If there is no job vacancy for employment within that classification or grades of classification, the service person is employed in any other job classification which he or she previously held with the county board if there is a vacancy and retains any seniority accrued in the job classification or grade of classification.

West Virginia Code § 18A-4-8b(k) states as follows:

> (k) After a reduction in force or transfer is approved, but prior to August 1, a county board in its sole and exclusive judgment may determine that the reason for any particular reduction in force or transfer no longer exists.
>
> (1) If the board makes this determination, it shall rescind the reduction in force or transfer and notify the affected employee in writing of the right to be restored to his or her former position of employment.
>
> (2) The affected employee shall notify the county board of his or her intent to return to the former position of employment within five days of being notified or lose the right to be restored to the former position.
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> (3) The county board may not rescind the reduction in force of an employee until all service personnel with more seniority in the classification category on the preferred recall list have been offered the opportunity for recall to regular employment as provided in this section.
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> (4) If there are insufficient vacant positions to permit reemployment of all more senior employees on the preferred recall list within the classification category of the service person who was subject to reduction in force, the position of the released service person shall be posted and filled in

accordance with this section.

The substance of the conversation between Grievant and Ms. Thompson during their February 2, 2016, meeting is in dispute, and this conversation is at the center of this grievance. Grievant asserts that Ms. Thompson intentionally mislead her by telling her that if enough special needs students were enrolled at CMS for the coming school year, her RIF would be rescinded, and she could return to her position. Thereafter, Grievant, on her own, confirmed with a teacher that more special needs students would be coming to CMS for the 2016-2017 school year. Grievant asserts that to her detriment, in reliance upon Ms. Thompson's statements, she did not appeal or challenge her RIF because there were enough special needs children and she had been told that her RIF would be rescinded accordingly. She thought she would be getting her job back. Ms. Thompson denies making such statements. Instead, Ms. Thompson testified that she went over the content of February 2, 2016, RIF letter with Grievant during their meeting, and some of West Virginia Code § 18A-4-8b(k)(3), which addresses rescission of a RIF. Ms. Thompson further testified that she explained the RIF process to Grievant during the meeting. Mr. Dials was the only other witness to the disputed conversation, and neither party called him as a witness.

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. *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29,

1995)*; Perdue v. Dep't of Health & Human Res.*, Docket No. 93-HHR-050 (Feb. 4, 1994).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and, 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the administrative law judge should consider the following: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and, 4) the plausibility of the witness's information. *See Id.; Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Grievant appeared in person and testified at the level three hearing. Grievant answered the questions asked of her, and she was not evasive. Grievant demonstrated the appropriate demeanor. Respondent declined the opportunity to question Grievant. As Grievant is seeking to be reinstated into her position through this grievance, she has an interest in its outcome which is a motive to be untruthful. However, Grievant was credible. Grievant appears to genuinely believe that Ms. Thompson told her that if enough students came to CMS, her RIF would be rescinded, and she would get her job back.

Ms. Thompson appeared in person and testified at the level three hearing. She was adamant that she did not tell Grievant that her RIF would be rescinded if enough students came to CMS. Ms. Thompson appeared knowledgeable on the subjects of RIF and transfer and testified accurately about the statutory requirements involved. Ms. Thompson has no real interest in the outcome of this proceeding; however, her actions

and decisions are being challenged by this grievance. This could be perceived as bias, or a motive to be untruthful. At times during her testimony, Ms. Thompson seemed calm and professional. At other times, she appeared frustrated by both Respondent's counsel and Grievant's counsel. She appeared to be annoyed by their questions and confused as to why she was being asked them. She appeared exasperated many times during the hearing and seemed somewhat hostile with Grievant's counsel at least once. Such behaviors negatively impact her credibility. However, looking at Ms. Thompson's testimony as a whole, it appears that Ms. Thompson and both counsel were not communicating very well at times. The RIF and transfer process is controlled by a complicated statutory framework. Ms. Thompson has a great deal of experience with RIF and transfer and appears to have far less experience testifying in a legal proceeding. Also, the complex RIF and transfer process is very familiar to Ms. Thompson, and not to most others. Such appears, at times, to have resulted in poor communication between Ms. Thompson and counsel. These factors also appear to be the source of Ms. Thompson's demeanor issues, rather than a lack of credibility.

The evidence presented suggests that both Grievant and Ms. Thompson were credible. Grievant is adamant that Ms. Thompson made false statements to her which lead her not to challenge her RIF. There was only one other witness to the conversation, and neither party called him to testify. Only the testimonies of Grievant and Ms. Thompson were presented as evidence of the substance of the conversation. Grievant has the burden of proof in this matter, and she offered in her case-in-chief only her own testimony in support of her allegations about what Ms. Thompson told her. No one called the one other witness to the conversation, and the conversation is not known to have

been recorded or otherwise memorialized. It is simply Grievant's word against Ms. Thompson's. "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)).

Based upon the evidence presented, rather than intentionally misinforming Grievant, or making false representations, it appears more likely that Grievant misunderstood something that Ms. Thompson said about the statutory requirements and the rescission of RIFs during their February 2, 2016, meeting. Given the complexity of RIF and transfer, this would be easy to do. The RIF process is now somewhat routine to Ms. Thompson, and she does not appear to appreciate that RIF and transfer can be confusing for many. This was demonstrated during Ms. Thompson's level three hearing testimony, and likely caused some of her own frustration, and contributed to Grievant misunderstanding. Accordingly, Grievant's claims of fraudulent inducement, detrimental reliance, and equitable estoppel fail.

Even if Ms. Thompson had improperly lead Grievant to believe that she would retain her job if there were enough special needs students coming to CMS, Ms. Thompson's actions would be considered an *ultra vires* act, and Respondent would not be bound by her actions. "'*Ultra vires* acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to repeat such violative acts. *Guthrie v. Dep't of Health and Human Serv.,* Docket No. 95-HHR-277 (Jan. 31, 1996). *See Parker v. Summers County Bd. of Educ.,* 185 W. Va. 313, 406 S.E.2d 744 (1991); *Franz v. Dep't of Health and Human*

Res., Docket No. 98-HHR-228 (Nov. 30, 1998). The rule is clear. The 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. *Syl. Pt. 2, W. Va. Pub. Employees Ins. Bd. v. Blue Cross Hosp. Serv., Inc*., 174 W. Va. 605, 328 S.E.2d 356 (1985); *Allen v. Dep't. of Transp. and Division of Personnel*, Docket No. 06-DOH-224 (January 31, 2007).' *Buckland v. Division of Natural Res.,* Docket No. 2008-0095-DOC (Oct. 6, 2008)." *Fields v. Mingo County Bd. of Educ.,* Docket No. 2013-1130-MinED (Feb. 4, 2014).

Grievant argues that there was no lack of need for her position at CMS; therefore, she should not have been RIF'd. In support of this position, Grievant cites the fact that her position remained at CMS and was filled by someone else. The evidence presented demonstrated that at the time in question, Respondent determined that it needed to cut nine Aide positions in the county based upon lack of need. Grievant was the least senior Aide in the county; therefore, she was subject to the reduction in force. The Respondent did not decide that there was a lack of need at CMS; it was a lack of need in the county school system. Respondent resolved four of the cuts, which resulted in five Aides being RIF'd, one of whom being Grievant. Some of those RIF'd were recalled to work, but in order of seniority. Grievant cannot be recalled until all those with greater seniority have been recalled.

Grievant also argues that Respondent violated West Virginia Code § 18A-4-8b(q) by filling her position at CMS with a regularly employed employee who was not on the preferred recall list. West Virginia Code § 18A-4-8b(q)states that "[n]o position opening may be filled by the county board, whether temporary or permanent, until all service

personnel on the preferred recall list have been properly notified of existing vacancies and have been given an opportunity to accept reemployment." *Id.* The position Grievant had held at CMS was posted June 17-24, 2016. This posting was identified as JP 2017-92.[9] According to the minutes of the meeting of the Logan County Board of Education on, July 14, 2016, Regina Stevens was hired to fill this position. Ms. Stevens is noted to have transferred into the CMS Itinerant Special Needs/Supervisory Aide position from the same position at Verdunville Elementary School effective August 15, 2016.[10] West Virginia Code § 18A-4-8b(a) and (b)(1)-(3) state as follows:

> (a) A county board shall make decisions affecting promotions and the filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight [18A-4-8] if this article, on the basis of seniority, qualifications and evaluation of past service.
>
> (b) Qualifications means the applicant holds a classification title in his or her category of employment as provided in this section and is given first opportunity for promotion and filling vacancies. Other employees then shall be considered and shall qualify by meeting the definition of the job title that relates to the promotion or vacancy, as defined in section eight of this article. If requested by the employee, the county board shall show valid cause why a service person with the most seniority is not promoted or employed in the position for which he or she applies. Qualified applicants shall be considered in the following order:
>
> (1) Regularly employed service personnel who hold a classification title within the classification category of the vacancy;
>
> (2) Service personnel who have held a

[9] *See*, Grievant's Exhibit 5, Job Postings June 17-24, 2016.
[10] *See*, Grievant's Exhibit 6, July 14, 2016, Logan County Board Meeting Minutes, Personnel Schedule.

> classification title within the classification category of the vacancy and whose employment has been discontinued in accordance with this section;
>
> (3) Regularly employed service personnel who do not hold a classification title within the classification category of vacancy. . . .

Id.

Respondent did not violate West Virginia Code § 18A-4-8b(q) when it filled Grievant's position. West Virginia Code § 18A-4-8b(b)(1)-(3) sets forth the order in which qualified applicants are to be considered. Based upon the evidence presented, when Grievant's position was posted, Reginia Stevens applied for the same. The evidence presented is that Ms. Stevens was regularly employed by Respondent as an Itinerant Special Needs/Supervisory Aide, the same classification as the vacancy recreated by Grievant's RIF, when she applied for the position at CMS. Ms. Stevens had not been RIF'd, she had more seniority than Grievant, and she was employed at another school in the county. Pursuant to § 18A-4-8b(b)(1) and (2), she was to be considered for the position before those on the preferred recall list.

Grievant has failed to prove that Respondent's actions were arbitrary and capricious, or in violation of any statute, rule, or policy. Further, Grievant has failed to prove her claims regarding fraudulent inducement, detrimental reliance, and equitable estoppel by a preponderance of the evidence. Accordingly, for the reasons set forth herein, this grievance is denied.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. While this grievance was filed beyond statutory the time period, given the

unique circumstances presented herein, Grievant's late filing is excused and this grievance is not barred as untimely filed.

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

3. "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).

4. "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." *Trimboli v. Dep't of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997) (citations omitted). "Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Id.* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

5. “All decisions by county boards concerning reduction in work force of service personnel shall be made on the basis of seniority, as provided in this section.” W. Va. Code § 18A-4-8b(h).

6. “If a county board is required to reduce the number of service personnel within a particular job classification, the following conditions apply: (1) The employee with the least amount of seniority within that classification or grades of classification is properly released and employed in a different grade of that classification if there is a job vacancy . . . .” W. Va. Code § 18A-4-8b(j)(1).

7. “After a reduction in force or transfer is approved, but prior to August 1, a county board in its sole and exclusive judgment may determine that the reason for any particular reduction in force or transfer no longer exists.

> (1) If the board makes this determination, it shall rescind the reduction in force or transfer and notify the affected employee in writing of the right to be restored to his or her former position of employment.
>
> (2) The affected employee shall notify the county board of his or her intent to return to the former position of employment within five days of being notified or lose the right to be restored to the former position.
>
> (3) The county board may not rescind the reduction in force of an employee until all service personnel with more seniority in the classification category on the preferred recall list have been offered the opportunity for recall to regular employment as provided in this section.
>
> (4) If there are insufficient vacant positions to permit reemployment of all more senior employees on the preferred recall list within the classification category of the service person who was submit to reduction in force, the position of the released

> service person shall be posted and filed in accordance with this section."

W. Va. Code § 18A-4-8b(k).

8. 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. *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995)*; Perdue v. Dep't of Health & Human Res.*, Docket No. 93-HHR-050 (Feb. 4, 1994).

9. The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and, 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the administrative law judge should consider the following: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and, 4) the plausibility of the witness's information. *See Id.; Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

10. "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)).

11. "No position opening may be filled by the county board, whether temporary or permanent, until all service personnel on the preferred recall list have been properly notified of existing vacancies and have been given an opportunity to accept reemployment." W. Va. Code § 18A-4-8b(q).

12. "Qualifications means the applicant holds a classification title in his or her category of employment as provided in this section and is given first opportunity for promotion and filling vacancies. Other employees then shall be considered and shall qualify by meeting the definition of the job title that relates to the promotion or vacancy, as defined in section eight of this article. If requested by the employee, the county board shall show valid cause why a service person with the most seniority is not promoted or employed in the position for which he or she applies. Qualified applicants shall be considered in the following order:

> (1) Regularly employed service personnel who hold a classification title within the classification category of the vacancy;
>
> (2) Service personnel who have held a classification title within the classification category of the vacancy and whose employment has been discontinued in accordance with this section . . . ."

W. Va. Code § 18A-4-8b(b)(1)-(2).

13. Grievant failed to prove by a preponderance of the evidence that Respondent violated any statute, rule, or policy in her reduction in force. Further, Grievant failed to prove by a preponderance of the evidence that her claims of fraudulent inducement, detrimental reliance, and equitable estoppel. Grievant failed to prove her

claim that Respondent violated W. Va. Code § 18A-4-8b(q) by filling the vacancy created by her RIF with an employee who was regularly employed by Respondent and who was not on the preferred recall list.

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: May 9, 2018.

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Carrie H. LeFevre
Administrative Law Judge