THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SAMMY RAY BURDETTE,

Grievant,

v. **Docket No. 2018-1251-KanED**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Sammy Ray Burdette, filed a level one grievance against his employer, Kanawha County Board of Education, dated May 25, 2018, stating as follows: "Respondent failed to renew Grievant's contract as a substitute teacher for the 2018-2019 school year. On May 3, 2018 Grievant requested a statement of reasons and a hearing. Respondent has declined to provide either. Grievant alleges a violation of W. Va. Code 18A-2-8a & 18A-2-12a." As relief sought, "Grievant seeks renewal of his contract as a substitute teacher, compensation for lost wages with interest, retroactive seniority, and all other benefits, pecuniary and nonpecuniary, lost as a result of the nonrenewal of his contract of employment."

On July 12, 2018, the parties informed the Grievance Board by email that they had agreed to waive this matter to level three. Given that the parties agreed in writing to this waiver, the matter was scheduled for hearing at level three on October 9, 2018, as provided in the Notice of Hearing issued on August 6, 2018. On October 1, 2018, counsel for Respondent filed a Motion to Dismiss for failure to state a claim upon which relief can be granted. By email that same date, the Grievance Board informed counsel for Grievant that if he wished to respond to the motion to dismiss, he had until October

5, 2018, to submit the same. Grievant submitted his Response to the motion to dismiss on October 3, 2018. On October 5, 2018, the Grievance Board informed counsel for the parties that the level three hearing would proceed as scheduled and that the parties should be prepared to address the pending Motion to Dismiss at the commencement of the hearing and should also be prepared to go forward on the merits of the grievance. The level three hearing was conducted on October 9, 2018, before the undersigned administrative law judge at the Grievance Board's office in Charleston, West Virginia. Grievant appeared in person and by counsel, John E. Roush, Esquire, American Federation of Teachers-WV, AFL-CIO. Respondent, Kanawha County Board of Education, appeared by counsel, James W. Withrow, Esquire. Upon hearing the arguments of the parties, the ALJ held the pending Motion to Dismiss in abeyance to be addressed in the parties post-hearing submissions, and that she would address the motion to dismiss in the level three decision. This matter became mature for consideration on November 13, 2018, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a Substitute Teacher pursuant to a one-year contract. Respondent informed Grievant by letter that it was not rehiring him, or renewing his contract, for the next school year. In that same letter, Respondent stated that Grievant may request a written statement of reasons for his not having been rehired and a hearing before the Board. Grievant requested the same and Respondent did not comply. Grievant argues that Respondent's actions violate various statutes and improperly denied him due process. Respondent denied Grievant's claims and

asserted that its actions were proper pursuant to the contract. Grievant failed to prove his claims by a preponderance of the evidence. Accordingly, the 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. At the times relevant herein, Grievant was employed by Respondent as a Substitute Teacher. Grievant was so employed by Respondent pursuant to one-year contracts for the 2016-2017 school year and the 2017-2018 school year.

2. Grievant signed Respondent's form "Contract of Employment for Substitute Teacher" on August 8, 2016, for the school year 2016-2017 which included the following provision: "[t]his contract shall terminate at the end of the school year designated above."[1]

3. Grievant was employed by Respondent as a substitute teacher during the 2017-2018 school year. A contract for the same exists; however, it lacks Grievant's signature. The contract bears the signatures of two Board members, but it is not notarized. Nonetheless, this contract contains the following provision: "[t]his contract shall terminate at the end of the school year designated above."[2]

4. By letter to Grievant dated May 2, 2018, Superintendent Ronald E. Duerring stated the following: "[p]ease be advised that your Substitute Employee Contact was not recommended for renewal for the 2018-2019 school year. You may, within ten days of receiving this letter, request a written statement of reasons for not having been rehired and may request a hearing before the Board. Thank you for your

[1]*See*, Grievant's Exhibit 4, 2016-2017 "Contact of Employment for Substitute Teacher."
[2]*See*, Grievant's Exhibit 3, 2017-2018 "Contract of Employment for Substitute Teacher."

service to Kanawha County Schools. Sincerely, Ronald E. Duerring, Ed.D., Superintendent."[3]

5. By letter dated May 3, 2018, Grievant, by counsel, requested a statement of reasons for having not been rehired, and requested a hearing before the Board.[4]

6. Respondent did not provide Grievant with a statement of reasons for having not been rehired, and did not grant him a hearing before the Board.

7. Grievant did not have a continuing contract for employment with Respondent.

8. Grievant was not dismissed from his employment with Respondent.

9. Grievant filed this grievance on May 25, 2018.

10. At the level three hearing, the parties introduced no evidence of any Kanawha County Schools policies pertaining to the request for a statement of reasons for having not been rehired, or the granting of hearings before the Board.

Discussion

Motion to Dismiss

"Each administrative law judge has the authority and discretion to control the processing of each grievance assigned such judge and to take any action considered appropriate consistent with the provisions of W. VA. CODE § 6C-2-1 *et seq*." W. VA. CODE ST. R. § 156-1-6.2 (2008). "Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." W. VA. CODE ST. R. § 156-1-3 (2018). "The preponderance standard generally requires

[3]*See,* Grievant's Exhibit 1, May 2, 2018, letter.
[4]*See*, Grievant's Exhibit 2, May 3, 2018, letter.

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).

Respondent asserts that Grievant has failed to state a claim upon which relief can be granted. Essentially, Respondent argues that Grievant cannot prove the merits of his claim. Such is not cause to grant a motion to dismiss. The merits of a case are addressed at level three by an evidentiary hearing. A review of the statement of grievance demonstrates that Grievant has stated a claim upon which relief could be granted. Grievant asserts violations of West Virginia Code §§ 18A-2-8a and 18A-2-12a. This is a claim upon which relief can be granted if Grievant meets his burden of proof. Accordingly, the Respondent's Motion to Dismiss is denied.

Merits

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), ***aff'd***, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

Grievant argues that Respondent's decision to not renew his contract violates a number of statutory provisions and that he was denied due process. Respondent denies Grievant's claims and asserts that Grievant had a series of one-year contracts

each of which expired by its own terms at the end of the school years. Therefore, there was no statutory violation.

"'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 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).

An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

"'[T]he "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*,

196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.,* 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Res.,* Docket No. 93-HHR-322 (June 27, 1997), ***aff'd*** Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), ***aff'd*** Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

It is undisputed that Grievant had a one-year contract of employment as a substitute teacher with Respondent for the 2017-2018 school year that specifically stated that the contract would terminate at the end of the school year. Further, the contract stated that, "[u]nless granted by Board policy the Substitute Teacher has no substantive or procedural right to re-employment." Grievant had signed similar such standard contracts in years prior. Neither party introduced any policies as evidence at the level three hearing in this matter. Grievant's contract terminated at the end of the 2017-2018 school year and Respondent opted not to rehire him for the next year. There has been no evidence presented to suggest that Respondent was required to rehire Grievant or that he had any type of continuing contract. No reason has been given as to why Respondent decided not to renew Grievant's contract, and Grievant has made no allegations of discrimination, reprisal, harassment, favoritism, or other such claim.

Grievant makes a number of arguments in his proposed Findings of Fact and Conclusions of Law. However, Grievant's primary argument is that Respondent denied him due process. Grievant cites no statute that applies specifically to substitute teacher contract non-renewals. Instead, Grievant argues that as a substitute teacher, he was "school personnel" as defined in West Virginia Code § 18A-1-1(a) and that West Virginia Code § 18A-2-12a(b)(6) guarantees him due process in all matters concerning employment. However, West Virginia Code § 18A-2-12a(b)(6) does not apply to this situation. That statute applies to job performance evaluations and "[d]ecisions concerning the promotion, demotion, transfer or termination of employment," not contract non-renewal. Grievant has not been disciplined. He was not terminated from his employment. Grievant's contract was for one year and it expired by its own terms. He was not rehired for the next school year. There was no promise of future employment. Grievant also appears to argue that because certain statutes provide probationary employees and regular full-time employees with due process when their contracts are terminated or they are not hired, he is entitled to due process in his contract non-renewal. Again, Grievant's arguments fail. These statutes do not apply in this situation. Grievant is not a probationary employee, nor is he a regular employee. Grievant was a substitute teacher with a one-year contract that expired at the end of the school year.

Lastly, Grievant argues that as Respondent offered him the opportunity to request a written statement of reasons for his non-renewal and a hearing before the Board on the issue, such is evidence that Respondent had a practice or procedure providing such and he was denied the same. Grievant then asserts that Respondent is

bound to follow its own procedures pursuant to *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977). Grievant presented no evidence that any such policy exists. Grievant is merely speculating in this argument. Respondent failed to address this issue in its proposed Findings of Fact and Conclusions of Law.

Respondent informed Grievant that he could request a written statement of reasons and a hearing before the Board. Grievant requested the same, but Respondent did not provide the statement or a hearing. It is totally unclear why the Respondent included this in its May 2, 2018, letter. Grievant has presented no evidence that any such policy or procedure requiring the same existed, or that Respondent was required to grant his requests. The language about the request for the written statement and hearing in the letter could just as easily have been the result of someone using the wrong form letter when writing to Grievant. Based upon other cases that have come before the ALJ, she notes that it appears to be a common practice for Respondent to use form letters in employment matters. Accordingly, for the reasons set forth herein, the ALJ cannot conclude that Grievant met his burden of proving his claims by a preponderance of the evidence or that Respondent's decision regarding rehiring Grievant was arbitrary and capricious. Therefore, the grievance is DENIED.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true

than not." *Leichliter v. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), ***aff'd***, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

2. "'County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious.' Syl. pt. 3, *Dillon v. Wyoming County 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).

3. An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), ***aff'd*** Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

4. Grievant failed to prove by a preponderance of the evidence that Respondent violated any rule, policy, procedure, or law in its decision not to renew his one-year contract, or that such was arbitrary and capricious.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its administrative law judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The civil action number should be included so that the certified record can be properly filed with the circuit court. *See also* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: January 3, 2019.

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Carrie H. LeFevre
Administrative Law Judge