WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

PAM WARD,
Grievant,

v. **Docket No. 2019-0222-RalED**

RALEIGH COUNTY BOARD OF EDUCATION,
Respondent.

D E C I S I O N

Pam Ward, Grievant, filed this grievance against her employer the Raleigh County Board of Education ("Board"), Respondent, protesting restricted opportunity to make additional wages. The original grievance was filed on August 3, 2018, providing:

> Around June 14, 2018 grievant asked Principal if she could change her summer work schedule at Woodrow Wilson HS four different days during summer to allow her to sub at another school & earn extra money. At first Principal agreed, but later in the day said "No." On July 16, 2018 grievant confirmed Principal had allowed another custodian to change schedule to earn extra pay in violation of WV Code 18-A-4-5(b)[*sic*].

For relief, Grievant requested that Respondent "pay her for the four days she was denied to earn extra money, and be done uniformly, as required by WV Code 18-A-5(b)[*sic*]."[1] A hearing was held at level one on October 2, 2018. The grievance was denied at that level by a written decision dated October 8, 2018.[2] The decision explained that the

[1] At the level three hearing, Grievant's counsel clarified that the original grievance contained a typographical error that needed to be corrected. More specifically, the applicable code provision was stated as W.Va. Code §18A-4-5(b), but it should have been stated as §18A-4-5b. Counsel also clarified that this grievance should also include an alleged violation of W.Va. Code § 6C-2-2. Counsel for Respondent had no objection to the error being corrected or to citing the additional statutory provision.

[2] At level one, Grievant was represented by Rod Stapler, Field Staff for the West Virginia School Service Personnel Association (WVSSPA). At levels two and three, Grievant was represented by George B. "Trey" Morrone III, Esquire, General Counsel for WVSSPA.

Woodrow Wilson High School principal did not approve Grievant's request to switch four of her contract days in June 2018 so that she could use those days to substitute for an absent custodian at another school. Instead, the Principal expressly conditioned any such change on approval by the Deputy Superintendent of Schools, which was never given. The level one Decision also noted that some of the days to which Grievant proposed switching her work schedule were Saturdays, for which schedule adjustments would, in any event, never be allowed. Finding that no other 230-day custodians were allowed to cancel and reschedule any of their 230 contract days so that they could substitute for absent custodians, the Superintendent concluded that Grievant was not treated differently than other 230-day custodians during the Summer of 2018. Grievant appealed to level two on October 17, 2018, and a mediation session was held on January 8, 2019. An *Order Placing Grievance in Abeyance* was entered on January 10, 2019. Grievant appealed to level three on March 20, 2019. A level three hearing was held before the undersigned Administrative Law Judge on July 30, 2019, at this Grievance Board's Beckley office. Grievant personally appeared and was represented by counsel, George B. "Trey" Morrone III, Esquire (WVSSPA). Respondent appeared through Serena Starcher, Assistant Superintendent, and was represented by Howard E. Seufer, Jr., Esquire, Bowles Rice LLP. Grievant and Dr. Starcher both testified at the hearing, as did a central office secretary/accountant, Shana Casto; Woodrow Wilson High School principal Rockey Powell; and Woodrow Wilson High School custodians Michael Robinson and Jason McMillan. This matter became mature for decision upon receipt of the parties Proposed Findings of Fact and Conclusions of Law documents submitted by postmark date of September 16, 2019.

Synopsis

Grievant is regularly employed by Respondent as a Custodian III with a 230-day contract. Under her 230-day contract, Grievant was required to work five (5) days during June, 2018. (June 14, 15, 18, 25 and 26). Grievant was contacted by the central office person overseeing the summer assignments and offered the opportunity to work additional days as a substitute (i.e., June 15, 18, 25 and 26, 2018) at another school and earn extra money. Several days overlapped. Grievant desired and requested but was not provided proper authorization to alter her working days. Grievant contends that she was unfairly or improperly denied the opportunity or benefit of four days' pay.

While select identifiable agents of Respondent are to some degree capable of authorizing the type of schedule alterations Grievant desires, Respondent persuasively maintains it does not knowingly authorize the type of working day schedule change proposed by Grievant. Respondent is not discriminating against Grievant in not providing Grievant the flexibility to double-dip on scheduled workdays nor is it established that Grievant is entitled to the prospective monetary relief. Grievant has failed to establish by a preponderance of the evidence that she was unlawfully denied opportunity, benefit or compensation which other similarly situated employees are permitted to avail themselves. This Grievance is DENIED.

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

Findings of Fact

1. Grievant is a regularly employed Custodian III[3] with a 230-day contract. At the commencement of this grievance, Grievant was assigned to Woodrow Wilson High School (WWHS). (Grievant has since obtained a custodian position at Independence Middle School.)

2. Respondent's 230-day custodians are all scheduled to work twenty-five (25) days before the 200-day contract term of other service employees, and five days in June, after the end of the 200-day term. The 230-day custodians' exact schedule for the five days in June is not finalized until it is known when school will end for students. By law, students must have 180 days of instruction in a school year. Even though before a school year begins a board adopts a calendar showing when it is anticipated that school will end for students and 200-day teachers, the date can change as a result of school days having to be cancelled for weather and other unavoidable causes, e.g., work stoppage.

3. On June 14, 2018, after the 230-day custodian schedule for June was finalized, Grievant sought to be excused from having to work on four scheduled work days in June: Friday, June 15; Monday, June 18; Monday, June 25; and Tuesday, June 26.

4. Grievant sought to earn extra money by serving as a substitute custodian during an upcoming four-day absence of another school's custodian. Grievant proposed that she be allowed to make up the four days of her regular contract on days in June when neither she nor any other 230-day custodian was scheduled to work: Saturday, June 16;

[3] "Custodian III" means a person employed to keep buildings clean and free of refuse, to operate the heating or cooling systems and to make minor repairs. W.VA. Code §18A-4-8(i)(32).

Friday, June 22; Saturday, June 23; and Wednesday, June 27. *L-3 Testimony Grievant and Secretary/Accountant McDaniel.*

5. On June 14, 2018, Paulette Massley, the central office switchboard operator who assigns work for Respondent, notified Grievant of a specific opportunity to work four (4) additional days at Beckley-Stratton Middle School (BSMS) (June 15, 18, 25 & 26, 2018).

6. The four (4) substitute days at BSMS conflicted with Grievant's four (4) remaining June workdays at WWHS, so Grievant informed Ms. Massley that she would need to try to switch her workdays in June.

7. Grievant contacted WWHS Principal Rockey Powell to get approval to re-arrange and change her June workdays to allow her to work the four (4) additional substitute days at BSMS, the first day being the very next day (June 15, 2018).

8. Principal Powell, among other information, told Grievant that any such schedule change would have to be approved by Serena Starcher, Assistant Superintendent of Schools.

9. Principal Powell, directed Grievant to specifically contact Assistant Superintendent Starcher to get approval. Principal Powell knew that Assistant Superintendent Starcher was out of town at the time he directed Grievant to contact her.

10. Assistant Superintendent Starcher is the school official responsible for custodian schedules. She can approve changes in scheduled work days for the 230-day custodians. She did not approve Grievant's proposed working days alteration(s). *L-3 Starcher testimony*.

11. Grievant tried to reach Assistant Superintendent Starcher by telephone but was unsuccessful. On June 14, 2018, after work, Grievant traveled to the Board office to try to see Assistant Superintendent Starcher in her office, but Dr. Starcher was out of town on business. *L-3 Testimony.*

12. After arriving at the central office, Grievant learned that Assistant Superintendent Starcher was out of town and Grievant was directed to Shana McDaniel (whom Grievant believed to be Assistant Superintendent Starcher's assistant).

13. Shana McDaniel is Assistant Superintendent Starcher's secretary. Grievant may have been under the mistaken belief that Ms. McDaniel was Assistant Superintendent Starcher's assistant.

14. Grievant was aware that Assistant Superintendent Starcher was the school official responsible for custodian schedules. Grievant explained her proposed schedule change to Shana McDaniel, a secretary/accountant who works with Dr. Starcher on custodian matters.

15. Ms. McDaniel reviewed Greivant's request with her. Ms. McDaniel informed Grievant that two of the dates on which Grievant proposed to make up the four regular work days fell on Saturday, and under no circumstances would Assistant Superintendent Starcher allow custodians to work days of their regular contract terms on weekends. By the conclusion of their conversation certain days were specifically eliminated as potential substitutional work days.

16. Grievant could not move her WWHS work days to Sundays (June 17 & 24), West Virginia Day (June 20), or the day before and after West Virginia Day (June 19 and 21). Grievant would not be permitted to work at WWHS on June 17, 19, 20, 21 or 24.

17. Grievant notified Principal Powell by text message that the "Board office said it was ok."

18. Principal Powell sent a text to Grievant asking for the changes and she reported that her workdays at WWHS would be on June 16, 22, 23 and 27.

19. Principal Powell asked Grievant, "Did you ok this with Dr. Starcher", and Grievant responded, "Yep."[4]

20. At the level three hearing, Principal Powell testified that the texting conversation with Grievant occurred on June 14. He identified and vouched for screenshots of the texting conversation from his phone. They were admitted into evidence as Respondent's Exhibit 1.

21. When Principal Powell asked Grievant if she had obtained Dr. Starcher's approval, he had already spoken to Assistant Superintendent [Dr.] Starcher and he knew that Grievant had not spoken directly to Dr. Starcher.[5]

22. Principal Powell informed Grievant that, "I cannot approve this until Dr. Starcher approves it in writing or email."

23. Assistant Superintendent Starcher was in New York City on June 14, 2018. Principal Powell contacted her to see whether Grievant had requested and received permission to alter her regular work schedule in order to undertake the four days of paid work as a substitute custodian.

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[4] Grievant testified that she understood Principal Powell's initial instruction was to get approval from the "board office," and that she sought permission from Assistant Superintendent Starcher's office.

[5] Principal Powell tends to reference Assistant Superintendent Starcher as Dr. Starcher. The semantic for the sake of this matter is not an issue, the person being identified is known to the parties and is mutually recognized by each. Assistant Superintendent [Dr.] Starcher is known and recognized in this decision as either Dr Starcher or Assistant Superintendent.

24. Assistant Superintendent Starcher informed Principal Powell that she had not communicated with Grievant. Further, Starcher explained that no custodians were permitted to work days of their regular contracts on weekends, and that she did not allow 230-day custodians to substitute during their employment term for other absent custodians. *L-3 Testimony Starcher and Powell*.

25. Secretary/accountant McDaniel was not authorized nor did she approve the schedule changes Grievant desired. Ms. McDaniel specifically informed Grievant that Assistant Superintendent Starcher had the final say for all custodian schedule changes. (Ms. McDaniel explained in her testimony, "I'm just a secretary. It is not my place to approve changes.") *L-3 testimony.*

26. Principal Powell notified Grievant that she could not rearrange her WWHS workdays because she did not get permission directly from Dr. Starcher.

27. Grievant's request to rearrange her WWHS workdays was denied. Grievant notified the central office the morning of June 15, 2018, that she would be unable to work the four (4) additional days at BSMS.

28. Assistant Superintendent Starcher testified at the level three hearing. Assistant Superintendent Starcher explained that Grievant would not have been permitted to work on any Saturday (June 16, 23 & 30), any Sunday (June 17 & 24), West Virginia Day (June 20), or the day before and after West Virginia Day (June 19 and 21).[6] Further, it is understood that it is more likely than not that Assistant Superintendent Starcher would have approved Grievant to exchange her days to work *on available days*, but that it was

[6] During her testimony, Assistant Superintendent Starcher indicated that Grievant may not have been permitted to work on June 28 or June 29, because those days were necessary to prepare payroll before the end of the school year.

Principal Powell's decision to deny Grievant's request to rearrange her WWHS workdays.

L-3 Testimony

29. Principal Powell did not authorize Grievant to rearrange her WWHS regularly scheduled workdays for non-scheduled days.

30. While no additional pay is involved, Respondent allowed four identified custodians to exchange scheduled workdays for other days in order to go on vacation and to attend family engagements:

a. Michael Green, a custodian at Hollywood Elementary School, was permitted to exchange his June 18 workday for June 27, in order to go out of town for a family engagement.

b. Earl Jones, a custodian at Cranberry-Prosperity Elementary School, was permitted to exchange his June 14 and June 15 workdays for June 22 and 27, in order to be out of town for a pre-scheduled trip.

c. Cathy Snow, a custodian at Beckley-Stratton Middle School, was permitted to exchange her June 18 workday for June 22, in order to go on vacation.

d. Ross Thompson, a custodian at Beckley-Stratton Middle School, was permitted to exchange his June 18 workday for June 22, in order to go on vacation.

G Ex 10

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018). "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 of proof. *Id.*

Grievant's complaint is that she was not excused from having to perform her regular job on four days that were part of every 230-day custodian's work schedule in June of 2018, and she was not permitted to make up that work on four days that were not part of every 230-day custodian's schedule. Her purpose in seeking the change in her regular work schedule was to make herself available to substitute on the four scheduled dates for a custodian at another school so that she could make money over and above her regular salary. Grievant argues three legal theories in support of her claim that she was unfairly or improperly denied the opportunity or benefit of exchanging regularly scheduled workdays for non-scheduled days, while other similarly situated employees were permitted to do so. The three theories advanced by Grievant are: (1) lack of uniformity; (2) discrimination; and/or (3) favoritism.[7] To prevail on any of these three theories, Grievant must prove that she is being treated differently from similarly situated employees performing like or substantially similar duties.[8]

[7] In response to not being allowed the "schedule change," Grievant contends that Respondent violated the uniformity rule of West Virginia Code §18A-4-5b, which requires a showing that a similarly situated employee was compensated differently. She additionally contended that the denial violated the anti-discrimination provision of West Virginia Code § 6C-2-2.

[8] For purposes of this case, "schedule change" is interpreted as (1) relieving an employee of a scheduled work day, without loss of pay; (2) allowing the employee to make that day up on a day she was not already scheduled to work, and (3) enabling her, therefore, to earn extra money by undertaking a paid assignment on a day when she otherwise would have been required to perform her regular duties. Any other meaning of "schedule change" is irrelevant to this grievance. See Respondent's fact/law proposal.

A county board of education is required to afford uniform benefits to all employees performing like assignments and duties. W. Va. Code 18A-4-5b, states:

> The county board of education may establish salary schedules [,] which shall be in excess of the state minimums fixed by this article. These county schedules shall be uniform throughout the county with regard to any training classification, experience, years of employment, responsibility, duties, pupil participation, pupil enrollment, size of buildings, operation of equipment or other requirements. Further, **uniformity shall apply to all** salaries, rates of pay, **benefits**, increments or compensation for all persons regularly employed and performing like assignments and duties within the county. (Emphasis added)

Grievant argues that Respondent afforded a benefit (exchanging work days/shifts) to other employees performing like assignments and duties, yet denied her the same benefit. Grievant's lack of uniformity theory is consistent with her arguments of discrimination/favoritism.

This Grievance Board is authorized by statute to provide relief to employees for discrimination, and favoritism as those terms are defined in W. VA. CODE § 6C-2-2. "Discrimination" is defined by statute as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). "Favoritism" is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee" unless agreed to in writing or related to actual job responsibilities. W. VA. CODE § 6C-2-2(h). Grievant tends to use the term discrimination more readily than favoritism but the terms many times are the flip side of the same coin. In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

(a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chadock v. Div. of Corr.,* Docket No. 04-CORR-278 (Feb. 14, 2005).

In the instant case, Grievant attempts to compare herself to five (5) other individuals who are employed as custodians. All five were "allegedly" afforded the benefit of changing their regularly daily work schedule and/or work shift by exchanging scheduled work days/shifts for non-scheduled work days/shifts. Respondent argues that there exists significant differences and each has little to no significance with the instant matter. Four of the five employees permitted by Respondent to exchange workdays did not seek to work additional days to earn additional money. Instead, their exchange requests were made to accommodate their vacation schedules and/or family events. Grievant highlights the fact that some custodians were afforded the benefit of exchanging regularly scheduled work days/shifts for non-regularly scheduled work days while Grievant was not. With regard to four of the five employees highlighted, the undersigned agrees with Respondent's contention that the facts and type of scheduled work alteration highlighted has limited to no significance application to the instant concerns. Just the existence of an authorized change in a custodian's regular schedule isn't enough to establish the difference in treatment. Grievant needs to establish a

significant variance in treatment or a violation of benefit uniformity. The sense in which a "schedule change" has meaning in this grievance: relieving an employee from his or her regular job on days s/he was already scheduled to work, permitting him or her, instead, to make up that work on days when s/he was not already scheduled to work, and allowing the employee to use the days on which s/he was originally scheduled, to work a substitute assignment.

Turning to the remaining identified comparison employee, Michael Robinson, a number of significant similarities between he and Grievant do tend to exist. On June 25, 2018, Michael Robinson a Custodian III employed by Respondent was afforded the opportunity to work additional work (i.e., Tamar Slay Basketball) to earn additional money, from 9-4 on July 1-3, 2018. G Ex 3 The Tamar Slay Basketball event was an extra-duty assignment. July 2, 2018 was a regularly scheduled workday. Mr. Robinson's daily work shift conflicted with the Tamar Slay Basketball event (9:00 a.m. to 4:00 p.m.). NEVERTHELESS, custodian Robinson worked the three day long basketball tournament.

Custodian Robinson was called upon to testified at the level three hearing.[9] The witness was hesitant to provide definitive facts. He was reluctant to confirm known and suspected facts. The witness suffered from a polite but curious and inconvenient ability

[9] 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 and Human Res./Huntington State Hosp*., 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. Additionally, the administrative law judge should consider 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 Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*. The testimony of all witnesses was provided direct attention and assessed with the identified factors in consideration.

to recall facts of particular interest. The basis for the witnesses inability to recall pivotal and trivial information might be attributable to several contributory factors. The witness was sure to establish his dental excuse for not performing his regular duties on July 2, 2018, but suffered an inability to recall who, when or if he was originally granted permission to adjust his regular work shift to work the tournament. The undersigned understands the point that Grievant is attempting to make. Custodian Robinson did not work his regular shift on July 2, 2018, and seven days later, on July 9, 2018, Assistant Superintendent Starcher approved an excused absence for Mr. Robinson. *See* G Exs 1, 2 and 9. However, it is not established to any reasonable degree of certainty that Respondent knowingly approved Mr. Robinson to double dip on July 2, 2018. It is also more likely, than not, custodian Robison pulled a fast one on Respondent. Assistant Superintendent Starcher testified that after the fact it came to the attention of her office that Mr. Robinson did not work his regular shift on July 2, 2018. Ultimately, Mr. Robinson supplied Respondent with information to justify sick leave. It is not established that the totality of custodian Robinson's actions were fully known and properly sanctioned by responsible administrative personnel.[10] Mr. Robinson burned a day of his accrued paid personal leave to cover his 7.5 hours of regular duty.

Whether a convenient coincidence or well-planned maneuver custodian Robinson did not work his regular scheduled shift but did work an extra duty assignment,[11] the

[10] In order to make custodian Robinson available to work the Tamar Slay Basketball event Principal Powell authorized custodian Robinson to work his regular assignment at an alternative time on that same day. Grievant was not intentionally relieved of his regular duty assignment.

[11] Respondent asserts that the extra duty Grievant was asked to perform arose from what Respondent characterizes as "substitute summer work," whereas the extra duty Mr. Robinson was asked to perform arose from what Respondent characterizes as an "extra-duty assignment." The

central issue is focused on how differently Grievant and Mr. Robinson were treated when they each sought to perform additional work for additional pay. Grievant has been unable to present persuasive evidence that 230-day custodians are relieved from having to work on scheduled work day and allowed to reschedule that regular work day for another date in order to undertake a different paid assignment. Respondent presented testimony specifically providing this has never knowingly happened. *L-3 testimony Assistant Superintendent Starcher and Shana Casto.*

Grievant contends that Respondent's conduct lacks uniformity and that it constitutes discrimination or favoritism. Grievant failed to show that she was denied uniform benefits and compensation afforded to other 230-day custodians. Discretion is an option not a mandatory right. Grievant knew full well that she needed Dr. Starcher's permission to change her regular work schedule. Principal Powell told her so, as did Ms. McDaniel. Grievant herself acknowledged as much when, later on June 14, in a text conversation with Principal Powell, he posed the questions, "Were you able to talk to Mrs. Starcher?" and "Did you okay this with Dr. Starcher?" Grievant replied, "Yep." This was an untruthful answer. By her own admission, Grievant had never spoken with or otherwise communicated with Dr. Starcher about the proposed schedule change, and Dr. Starcher never approved it. *Testimony of Principal Powell; also see R Ex 1.* Confronted with the screenshots and her misrepresentation to Principal Powell about Assistant Superintendent Starcher having approved the schedule change, Grievant did not deny that the screenshots were accurate. She stated only that she did not "recall" whether she

undersigned acknowledges the argument but without comment on its merits is under the good faith belief this matter can be properly resolved without addressing the distinction.

sent the message or not. In contrast, Grievant claimed to remember, and testified in detail about, the conversations she said she had earlier on the afternoon of June 14 with Principal Powell, Secretary/Accountant McDaniel, and other Board employees. Yet she claimed not to remember whether she sent the text message to her Principal soon thereafter.

Respondent does not knowingly permit its 230-day custodians to work during their 230-day employment term as substitutes for other custodians. It is not established that Respondent discriminated against Grievant in not allowing her to perform substitution assignment on days she was scheduled to perform her own duties. Nor is it determined to be an obligation that Respondent grant all requests by its employees solely because it will be financially beneficial the employee. Grievant has failed to establish by a preponderance of the evidence that she was unlawfully denied opportunity, benefit or compensation which other similarly situated employees are permitted to avail themselves.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. The subject of this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 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. 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. Pursuant to WEST VIRGINIA CODE § 18A-4-5b, boards of education are required to provide uniform benefits and compensation to similarly situated employees, meaning those who have like classifications, ranks, assignments, duties, and actual working days. *Cutright v. Lewis County Bd. of Educ.*, Docket No. 05-21-335 (Jan. 18, 2006); *Covert v. Putnam County Bd. of Educ.*, Docket No. 99-40-463 (Feb. 29, 2000).

3. Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its 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 view. *Bedford County Memorial Hosp. v. Health and Human Serv.,* 769 F.2d 1017 (4th Cir. 1985). 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).

4. In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, West Virginia Code § 6C-2-2, an employee must prove:

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

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chadock v. Div. of Corr.,* Docket No. 04-CORR-278 (Feb. 14, 2005).

5. Grievant has failed to establish by a preponderance of the evidence that she was unlawfully denied opportunity, benefit or compensation which other similarly situated employees are permitted to avail themselves.

6. Grievant has failed to establish by a preponderance of the evidence that she was entitled to the requested relief.

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 (2018).

Date: October 29, 2019

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Landon R. Brown
Administrative Law Judge