

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**REVA WALLACE,
Grievant,**

v.

Docket No. 2018-1331-WayED

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

DECISION

Reva Wallace, Grievant, filed this grievance against the Wayne County Board of Education ("WCBOE"), Respondent, protesting the terms of her employment as a high school principal. The original grievance was filed on June 13, 2018, and the grievance statement provides:

WV § 6C-2-2 Discrimination; Grievance; Pay Uniformity, Arbitrary and Capricious activity. Grievant is a high school principal with a 220 day contract. All other High School Principals in the county have a 240 day contract.

Relief Sought:

240 day contract, backpay and any related benefits.

On or about June 25, 2018, a conference was held at level one and the grievance was denied at that level by a decision dated May 1, 2019. Grievant appealed to level two on May 6, 2019 and a mediation session was held on August 9, 2019. Grievant appealed to level three on August 14, 2019. A level three hearing was held before the undersigned Administrative Law Judge on January 29, 2020, at the Grievance Board's Charleston office. Grievant appeared in person and was represented by Ben Barkey, WV Education Association. Respondent was represented by its legal counsel, Leslie Tyree, Esquire. At the conclusion of the level three hearing, the parties were invited to submit written proposed fact/law proposals. Both parties submitted Proposed Findings

of Fact and Conclusions of Law, and pursuant to a requested extension this matter became mature for decision on March 16, 2020, on receipt of the last of these proposals.

Synopsis

Grievant, a retired principal who was previously employed as a regular full-time principal, filed a grievance against her employer, Wayne County Board of Education, Respondent, contesting that she was improperly denied a 240-day contract during her employment. Grievant's contention that the Principalship at Tolsia High School is the only high school principal position in the county with a 220-day contract and such disposition is unlawful. Grievant bid upon and accepted the position as a 220-day contract. Grievant has not been discriminated against or been the victim of favoritism with regard to contract terms, nor did she demonstrate that the identified statutory uniformity provision has been violated. It is not established by a preponderance of the evidence that Respondent has exceeded its authority in choosing to implement a 220-day contract for the high school principal position in discussion. 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, Reva Wallace, was employed by Respondent, Wayne County Board of Education, as an Assistant Principal at Tolsia High School during the 2014-2015 school year.

2. The former Principal of Tolsia High School, Shane Carey left his position in September of 2014 and during the 2014-2015 School Year, Grievant was appointed by Respondent as the principal for the remainder of the school year. Grievant became the Interim Principal of Tolsia High School.

3. Grievant bid on the Tolsia High School position as a 220-day contract.

4. The Principal position at Tolsia High School was again posted the following year, 2015-2016, as a 220-day contract.

5. County Boards of Education approve personnel items such as postings, rescinding of postings, transfers and hirings on Board agendas at County Board meetings. Minutes are taken at all County Board of Education meetings and these minutes are later approved as the official Board Minutes of previous meetings which are documents that verify the actions taken by the Board during the previous Board meetings.

6. Grievant was awarded the principal position and approved for such employment by the Wayne County Board of Education, Respondent, as a 220-day contract. Grievant remained in the position until her retirement.

7. Grievant filed the instant grievance on June 13, 2018, alleging that her 2017-2018 school year contract should have been a 240-day contract.

8. Grievant retired on October 9, 2018, however remains employed as a substitute for Respondent.

9. Principals, like all professional school personnel are paid pursuant to the State Minimum Salary Schedule for teachers as outlined in West Virginia Code § 18A-4-2.

10. Grievant's daily rate was established pursuant to the calculation in West Virginia Code § 18A-4-2, calculating the years of experience and degree level to ascertain a daily rate plus any additional supplement a county may decide to add for their employees.

11. Based on the State salary schedule and additional supplements Grievant had a total daily rate of \$359.82 per day worked. Thus the Grievant was paid \$79,160.40 per year on a 220-day contract.

12. West Virginia Code does not speak to how many days must be in a principal's contract.

13. The principal position at Tolsia High School has been both a 220 and 240-day position over the last ten years. Since at least 2006 the contract for the Principal of Tolsia High School was for 220 days with the exception of one time period wherein the contract was raised to 240 days.

a. Matt Stanley held the position of Principal of Tolsia High School from July 1, 2006 until February 6, 2013 with a 220-day contract.

b. Shane Carey held the position of Principal of Tolsia High School from July 1, 2013 until September 3, 2014 with a 240-day contract which was later reduced back to 220 days.

14. Specifically when Shane Carey bid to vacate the position the County Board of Education voted to reduce the position back to a 220-day position prior to posting.

15. On September 2, 2014, Respondent voted to reduce the position to 220 days as evidenced by the board minutes for the Board meeting held on September 2, 2014 and also shown on the minutes of September 16, 2014. See R Ex 5.

16. The position of Principal for Tolsia High School was posted as a 220-day

posting, originally posted September 9 through September 15, 2014 and was later rescinded as evidenced by the Wayne County Board of Education minutes dated September 16, 2014.

17. The position of Principal of Tolsia High School was posted again from October 28 to November 3, 2014 as a 220-day position.

18. Both times the Principal position at Tolsia High School was posted in 2014, the posting was for 220 days. Grievant bid on the Tolsia High School position fully aware it was 220-day contract.¹ Effective November 19, 2014 Grievant was transferred from assistant principal/Interim Principal at Tolsia High School to Principal at Tolsia High School as evidenced by the November 18, 2014 Wayne County Board of Education minutes. See R Ex 4

19. Current Wayne County Board of Education Superintendent, Todd Alexander is responsible for reviewing employee contracts and has reviewed Grievant's 220 contract days several times to determine whether or not more days were needed for her contract.

20. Superintendent Alexander testified that upon accepting the position of Superintendent of Wayne County Schools in 2017 the county was in dire financial condition and was on the West Virginia Department of Education's official financial "watch list".

¹ Grievant testified that her original acceptance of the 220-day contract was made with the understanding that there would be an additional vice principal assisting at the school. For a time there was an additional vice principal at the school but subsequent to major county wide alterations (budget cuts) the position was eliminated and/or the individual serving in that capacity was reassigned.

21. In August of 2017, Grievant sent a letter to Superintendent Alexander seeking to move to another position as the Assistant Principal at Spring Valley High School. (G Ex 4) Superintendent Alexander offered the Assistant Principal position to Grievant. Grievant then indicated that she had a “possible solution”. The solution she offered was to stay in her current position if the Board would change her contract to 240 days. Superintendent Alexander advised her that he would not be able to change her position to a 240-day contract.

22. Grievant rejected Superintendent Alexander’s offer of another job in 2017 and voluntarily chose to stay in her 220-day position as Principal of Tolsia High School.

23. Superintendent Alexander testified that the county was in a dire financial condition and could not offer additional money to Grievant, he clearly explained that upon his review of Grievant’s duties, number of students, and staff he believed 220 days is sufficient to perform the duties of the position.

24. In Wayne County Schools approximately 80 positions were cut along with various programs due to financial concerns.²

25. Superintendent Todd Alexander established that upon Grievant’s retirement the position of Tolsia High School Principal was again posted as a 220-day position and that the position to this day remains a 220-day position. Current Principal of Tolsia High School Greg Miller holds the same 220-day contract as Grievant held during her employment.

² With regard to Grievant, the difference in pay between a 220-day contract at \$79,160.40 and a 240-day contract of \$86,356.80 is a \$7196.40 per year cost to the county.

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). *Burden of Proof* "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, the party bearing the burden has not met its burden. *Id.*

"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 is so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the*

Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

Reva Wallace, Grievant, was employed by Wayne County Board of Education, Respondent, as the Principal of Tolsia High School initially on an interim basis then as the duly appointed principal. Grievant was employed in the position with a 220-day contract. Grievant contests that her employment should have been pursuant to a 240-day contract with all the respective benefits. Grievant avers the terms of her employment were discriminatory and improper in that all other high school principals in the county are/were paid pursuant to a 240-day contract. Grievant's argument(s) include but are not necessarily limited to alleging that the action of Respondent represent arbitrary and capricious activity and violate applicable pay uniformity principles (statute). Grievant seeks prospective loss wages.³ Respondent maintains there is no requirement that Principal's must have a mandatory number of contract days. The need of the school is paramount. Respondent maintains it is within its purview to establish a 220-day contract for the Principal of Tolsia High School.

³ Grievant filed the instant Grievance on June 13, 2018 alleging that her 2017-2018 school year contract should have been a 240-day contract, Grievant retired October 9, 2018. The relevant pay periods in question are presented as June 13, 2017 to October 9, 2018. Grievant maintains she missed twenty days of employment opportunity in the first year and approximately 6 days in the partial year for a total of 26 days. See Grievant's fact/law proposals.

In 2014 the Wayne County Board of Education explicitly voted to implement the Principal position at Tolsia High School as a 220-day position evidenced by Board minutes and relevant Board meeting(s). See R Exs 2-5. The position of Principal for Tolsia High School was posted as a 220-day posting, originally posted September 9 through September 15, 2014 and reposted again from October 28 to November 3, 2014. Both times the principal position at Tolsia High School was posted in 2014, the posting was for 220-day position. Grievant testified that her original acceptance of the 220-day contract was made with the understanding that there would be an additional vice principal assigned to her school. This did occur but after an unspecified time and a change in county administration the position was reduced. Pursuant to Respondent, the rationale for the alteration in administrative personnel was due to Wayne County, along with numerous other school systems being devastated by budget constraints. There were budget cuts for multiple reasons. Alterations in school personnel were made to compensate for less money being allocated to school programs. Alterations were not isolated to Grievant's school, concessions and program adjustments, they were county wide.

In 2017, Wayne County school system was in dire financial condition and was on the West Virginia Department of Education's official financial "watch list". There was a loss of student enrollment and budgetary funds. During relevant years, approximately 80 positions were cut along with programs due to financial concerns. Grievant was aware that Wayne County School system was experiencing fiscal difficulty. It is not established that Respondent's action of designating the principalship at Tolsia High

School as a 220-day position was an arbitrary and capricious decision. West Virginia Code does not speak to how many days must be in a Principal's contract. Grievant bid on the position fully aware it was 220-day contract. Responsible agents of Respondent did not misrepresent to Grievant that the position was slated to become a 240-day position.

It was represented that there are three high schools in Wayne county school system. Superintendent Alexander testified he reviewed Grievant's 220 contract days several times to determine whether or not more days were needed for her contract. Superintendent Alexander believes Grievant's contract is appropriate and sufficient based on the size of her school compared to the other two high schools in Wayne County.

- a. Spring Valley High School has approximately 1000 students and a principal with a 240-day contract.
- b. Wayne High School has approximately 665 students and a principal with a 240-day contract.
- c. Tolsia High School has approximately 391 students and a principal with a 220-day contract.

Superintendent Alexander testified that the two larger high schools have a much more difficult time scheduling among other things for the school year and need the additional contract days in order to manage various duties. Superintendent Alexander opined that in addition all the other things that go along with a larger student body including sporting events, extra-curricular events, more parents as well as many more staff persons to manage, these factors all contribute to a larger school needing additional contract days for their principal. Superintendent Alexander's testimony make it clear that upon his review of Grievant's duties, number of students, and staff a 220-day contract is sufficient

to perform the duties of the position. Determining the working conditions of professional school personnel is within the purview of Respondent's authority.

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). 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 also 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 circumstance of this matter, it is not established that by employing Grievant in a 220-day contract Respondent has discriminated against Grievant. The position was slated as 220-day position, regardless of who is serving as principal. Rational reasoning

and explanation was provided to convincingly justify establishing and maintaining the principalship at Tolsia High School as a 220-day contract position. Further, Grievant freely signed the 220-day contract with Respondent. It is not established that employing Grievant in a 220-day contract is discriminatory and/or favoritism conduct.

Grievant maintains despite anything and/or everything else that may have transpired, the uniformity provision of W. VA. CODE § 18A-4-5b have been violated. In essence Grievant argues Respondent was required to employ her with the same amount of working days as every other high school principal in the county. The undersigned isn't persuaded this is accurate. The cited CODE SECTION states, in pertinent part, "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[.]" The uniformity provision requires county boards of education to provide uniform benefits and compensation to similarly situated employees, meaning those who have 'like classifications, ranks, assignments, duties and actual working days.' *Bd. of Educ. v. Airhart*, 212 W. Va. 175, 569 S.E.2d 422 (2002); *Covert v. Putnam County Bd. of Educ.*, Docket No. 99-40-463 (Feb. 29, 2000); *Stanley v. Hancock County Bd. of Educ.*, Docket No. 95-15-217 (Sept. 29, 1995).

In the circumstances of this matter, the undersigned is not convinced that Grievant's contention is a proper enforcement of the identified uniformity provision(s), W. VA. CODE § 18A-4-5b. Principals, like all professional school personnel are paid pursuant to the State Minimum Salary Schedule for teachers as outlined in West Virginia Code § 18A-4-2. Grievant's daily rate was established pursuant to the calculation in West

Virginia Code § 18A-4-2, calculating the years of experience and degree level to ascertain a daily rate plus any additional supplement a county may decide to add for their employees. West Virginia Code does not speak to how many days must be in a principal's contract. The position Grievant bid upon has been evaluated several times to determine whether or not more days were needed. Grievant knowingly bid on the position as a 220-day contract, was awarded the principal position and duly approved for such, by Respondent, as a 220-day contract. Grievant remained in the position until her retirement. Respondent established to reasonable degree of certainty rational justification for establishing the principalship at Tolsia High School as a 220-day contract. County boards of education have some discretion in matters relating to the hiring, assignment, and working conditions of professional school personnel. Actual working days is recognized as an employment variable, not as a uniformed benefit, in the circumstance of this matter. Grievant is not be entitled to relief under W. VA. CODE § 18A-4-5b.

Grievant alleged but did not prove by a preponderance of the evidence that the Respondent engaged in an arbitrary and capricious activity by assigning a 220-day contract to the principal position at the county's smallest high school while granting 240-day contracts to principals of larger schools. Further, Grievant did not prove by a preponderance of the evidence that Respondent has exceeded its authority in assigning a 220-day contract to the principal position in discussion.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant has the burden of proving her grievance by a preponderance of the evidence. See W. VA. CODE R §156-1-3. *Burden of Proof* 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, a party has not met its burden of proof. *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 Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986).

3. Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is

recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

4. It is not established that Respondent's actions of establishing the principalship at Tolsia High School as a 220-day contract position was arbitrary and capricious conduct.

5. 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 also 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).

6. It is not proven by a preponderance of the evidence that Respondent discriminated against Grievant.

7. W. VA. CODE § 18A-4-5b in pertinent part, "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[.]" The uniformity provision requires county boards of education "to provide uniform benefits and compensation only to similarly situated employees, meaning those who have 'like

classifications, ranks, assignments, duties and actual working days.’ *Bd. of Educ. v. Airhart*, 212 W. Va. 175, 569 S.E.2d 422 (2002); *Covert v. Putnam County Bd. of Educ.*, Docket No. 99-40-463 (Feb. 29, 2000); *Stanley v. Hancock County Bd. of Educ.*, Docket No. 95-15-217 (Sept. 29, 1995).

8. Grievant did not establish by a preponderance of the evidence that Respondent’s failure to have identical working days for all high school principals of the county, in the circumstance of this grievance, was in violation of the uniformity provisions of W. VA. CODE § 18A-4-5b.

9. Grievant is not entitled to the relief requested pursuant to the uniformity provisions of W. VA. CODE § 18A-4-5b.

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: April 24, 2020

Landon R. Brown
Administrative Law Judge