THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JOHN M. DUTKO, et al,
Grievants,

v. **Docket No. 2021-2021-CONS**

BERKELEY COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievants, John Dutko, Chris Davis, Elizabeth Prather, Eugene Whitworth, Malisa Redmond, Joe Skelly, Stacey Barrett, and Gina Whitworth are school service personnel employed by the Berkeley County Board of Education. Grievants allege being assigned contact with students during periods of high rates of COVID-19 when other employees of the Berkeley County Board of Education were not assigned to duties that resulted in contact with students during the fall of the 2020-2021 school year. Grievants seek to be made whole in every way, including cessation of discrimination and unsafe work assignments.

This grievance was denied at level one following a conference by Level One Decision dated January 26, 2021, and issued by Jason L. Schooley, Ed.D., Assistant Superintendent of Human Resources. A level two mediation session was conducted on March 28, 2021. A level three evidentiary hearing was conducted before the undersigned by Zoom conferencing originating at the Grievance Board's Westover office. Grievants appeared by their representative, Gordon Simmons, West Virginia School Service Personnel. Respondent appeared by its counsel, Kimberly S. Croyle, Bowles Rice LLP.

This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on October 29, 2021.

Synopsis

Grievants work with students who are provided special education and related services by Berkeley County Schools. Grievants allege that they were assigned contact with students during the pandemic while others employed by Respondent were not assigned such contact. Grievants failed to prove any discrimination in the case. Grievants failed to prove any basis to deny in-person education to special education students during the pandemic.

The following Findings of Fact are based upon the record of this case.

Findings of Fact

1. Grievants work as aides or bus operators with students who are provided special education and related services by Berkeley County Schools.

2. Grievants claim that they had to serve special education students in-person while other while other employees were permitted to do their jobs remotely.

3. As of early September 2020, communications between the Berkeley County Board of Education and the West Virginia Department of Education confirmed that special education students could be taught in-person, even in counties designated "orange" or "red" COVID-19 status. Both state and federal regulations prohibit a local education agency to deny a student a free appropriate public education.

4 The School Re-entry Metrics & Protocols, developed by Governor Justice, the West Virginia Department of Education, and the West Virginia Department of Health and Human Resources, provided a tool to determine whether schools could hold in-

person instruction. Following these directives, those students with the greatest needs were provided instruction in the classroom, at least a few days a week.

5. Grievants provide services to these students.

6. By letter dated January 4, 2021, State Superintendent of Schools, Clayton Burch and the President of West Virginia Board of Education, Miller Hall, emphasized to the West Virginia Association of School Administrators the importance of live teaching and the need for students to be back in school.

7. The West Virginia Board of Education adopted a policy in January 2021 which declared that the "West Virginia Board of Education desires to return students to in-person learning and to ensure that students, teachers, and staff can do so safely. The Board recognizes that in-person learning is the best mode in which to foster a student's intellectual, social-emotional, and physical growth and well-being."

8. The West Virginia Department of Education did not provide waivers based on COVID-19 status for services to students who require special education.

9. Grievants serve students that require in-person education at least some of the time during all time periods related to this case.

10. State and federal regulations prohibit an education agency such as the Berkeley County Board of Education to deny a student a free appropriate public education.

11. Since the grievance was filed, the Governor and State Board of Education mandated the return to school for all students. All Berkeley County Schools' employees have fully returned to in-person instruction.

12. No Grievants were denied leave when requested, nor did the record contain evidence that any Grievant suffered from a disabling condition that prevented them from working. Grievants only described their fear that they would contract COVID-19 as a reason for their belief that their working conditions were unsafe.

Discussion

This grievance does not involve a disciplinary matter. Consequently, Grievants bear the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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).

Grievants argue that they filed this action to forestall any unchecked repetition of callous indifference to the health and safety of both students and school personnel that could be inevitable result of an uncritical appraisal of Respondent's actions during the initial COVID-19 outbreak. Grievants also argue that they are the victims of discrimination. Respondent counters that all of their schools have returned to in-person instruction rendering this action moot. Respondent also argues that nothing about returning to in-person instruction was arbitrary and capricious.

For purposes of the grievance procedure, discrimination is defined 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). In order to establish a discrimination 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'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant failed to make a record or offer any evidence that would establish that they were treated any differently than similarly-situated employees. The record does support a finding that Respondent only required Grievants to engage in duties that were contained in their job descriptions. In that respect, Grievants have not been treated differently than any other school service personnel. Grievants' main complaint is that "there is no indication that any of Respondent's decision-makers made themselves subject to direct contact with students or anyone else infected with COVID-19." Once again, this was merely an accusation without any evidence to support the assertion. In any event, the administration would not be similarly situated to the Grievants for the purpose of a discrimination claim under the above statute.

Grievants argue that Respondent's return to in-person instruction of special needs students was unreasonable. 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); *Burgess v. Div. of Highways*, Docket No. 2019-0576-DOT (Nov. 22, 2019).

No one will dispute that the pandemic over the past two years has been a trying time for all, but the undersigned recognizes the need for public education to be available for all students. West Virginia Department of Education Policy 2419 requires a free, appropriate public education be available to all students, including those eligible for special education services. The State Department of Education in its directive to county boards of education on re-entry into the school system declared that special education services to students with special needs would continue, even when counties were in orange or red status. The Berkely County Board of Education was still required to provide special education and related services in spite of the pandemic. Respondent's position that the requirement to provide these services could not be accomplished through remote learning cannot be viewed as unreasonable.

Grievants failed to demonstrate by a preponderance of the evidence that they were required to do any duties that fell outside of their job descriptions. In addition, Grievants

did not demonstrate by a preponderance of the evidence any basis to demy in-person education to special needs students during the pandemic. The Berkeley County Board of Education did not act arbitrarily or beyond its discretion when it followed directives by the West Virginia Department of Education and required Grievants to provide in-person services to special education students during periods of the pandemic. The record established that since the filing of this grievance, all students and employees have returned to the classroom, which makes this action moot.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. This grievance does not involve a disciplinary matter. Consequently, Grievants bear the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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).

2. For purposes of the grievance procedure, discrimination is defined 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). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

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Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

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); *Burgess v. Div. of Highways*, Docket No. 2019-0576-DOT (Nov. 22, 2019).

4. Grievants failed to prove by a preponderance of the evidence that they were the victims of discrimination.

5. Grievants failed to prove by a preponderance of the evidence that the action by Respondent concerning in-person instruction was arbitrary and capricious.

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: December 14, 2021

Ronald L. Reece
Administrative Law Judge