THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LAWRENCE "TONY" UNDERWOOD,
Grievant,

v. **Docket No. 2020-1511-BroED**

BROOKE COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Lawrence "Tony" Underwood, was employed by Respondent, Brooke County Board of Education, as a Computer Repair Technician, a service position with no degree requirement. Grievant's position was eliminated through a reduction in force (RIF). Shortly thereafter, Respondent posted a Technology Systems Specialist position, which had a degree requirement.

On June 15, 2020, Grievant filed a grievance stating: "In violation of WV CODE 18A-2-2, 18A-4-7a[1], 6C-2-2(d), 6C-2-2(o), and 5-11-9. Grievant applied for and did not receive a Computer Service Specialist position. Grievant is more senior than other applicant and as a person of color, feels he has experienced racism and the decision was retaliatory in nature." As relief, Grievant seeks "to be placed in the Computer Specialist position and receive back pay, benefits, and interest."

A level one conference occurred on September 10, 2020. On September 24, 2020, a level one decision denying the grievance was issued. Grievant appealed to level two on September 24, 2020. A mediation took place on February 18, 2021. Grievant appealed to level three on March 9, 2021.

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[1]WV Code 18A-4-7a covers professional personnel; 18A-4-8b covers service personnel. Both touch on RIF. It appears that Grievant intended the latter.

A level three hearing was held online before the undersigned and the West Virginia Public Employees Grievance Board on August 25, 2021. Grievant appeared and was represented by Ben Barkey, West Virginia Education Association. Respondent was represented by Kimberly Croyle, Esquire, Bowles Rice, LLP. This matter became mature for decision on October 8, 2021. Each party submitted Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a Computer Repair Technician (CRT), a position without a degree requirement. This and two other technology positions were eliminated through a reduction in force (RIF). Grievant was not selected for the Technology Systems Specialist (TSS) position that replaced them. Grievant claims his RIF and non-selection were improper because his duties were identical to the TSS and he had more seniority than the applicant selected. Grievant contends that Respondent was arbitrary and capricious, and motivated by retaliation and discrimination, in eliminating his position and replacing it with one requiring a degree. Respondent counters that, unlike the CRT, the TSS can do needed work on its network and requires a degree. Grievant failed to prove by a preponderance of evidence that Respondent's actions were retaliatory, discriminatory, or arbitrary and capricious. Accordingly, 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, Lawrence "Tony" Underwood, was employed in a service position as a Computer Repair Technician (CRT) by Respondent, Brooke County Board of Education.

2. Grievant's duties entailed repairing computer hardware and software.

3. Respondent employed four technology support positions for the 2019-2020 school year. These were divided into two professional and two service positions.

4. In the Spring of 2020, as part of a reorganization and realignment of its technology department, Respondent eliminated through a reduction in force (RIF) all but one of its technology positions. One of the RIF'd positions was occupied by Grievant.

5. Shortly thereafter, Respondent posted a new Technology Systems Specialist (TSS) position for the 2020-2021 school year, making both of Respondent's remaining technology positions professional ones.

6. Professional positions have certification and licensing requirements.

7. Dr. Stephanie Zimmer is Respondent's Director of Technology and had been for two years prior. Dr. Zimmer was directed to RIF three technology positions and to later post a technology position. Dr. Zimmer chose which three position would be RIF'd and decided to make the new position a TSS.

8. Dr. Zimmer chose TSS because only a TSS could perform all the work of the CRT position and work on Respondent's network. Respondent's other professional technology position could also maintain the network. Dr. Zimmer determined that the

volume of network maintenance necessitated more than one employee working on it. (Dr. Zimmer's testimony)

9. The TSS posting listed the following qualifications:

> Hold a minimum of an Associates Degree from an accredited institution of higher education, as defined in § 126-136-4.5.
>
> Eligible for Initial Temporary Authorization for Technology Systems Specialist, as defined by State Board Policy 5202.
>
> Possess a minimum of two basic level technology certificates or one advanced level certification as approved by WVDE.

10. West Virginia Department of Education Policy 5202 requires:

> 11.9.p. Initial Temporary Authorization for Technology Systems Specialist (TSS). The TSS is a person assigned to support and maintain local area networks, servers, computer workstations, or other computer related systems or technologies. All individuals working as TSS must hold an authorization. The Temporary Authorization for TSS is valid for one year and shall expire on June 30 and may only be renewed one time. The applicant for licensure must provide evidence of completing the following criteria: hold a minimum of an AA from an accredited IHE; and receive a recommendation from the employing county superintendent.
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> 11.9.q. Permanent Authorization for TSS. The applicant for licensure must provide evidence of completing the following criteria: hold a minimum of an associate's degree AA from an accredited institution of higher education IHE; complete all training as required by the employing county; and receive the recommendation of the employing county superintendent.
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> W. VA. CODE ST. R. § 126-136-4.5 (2020).

11. Only Grievant and employee Gregory Sheperd applied for the TSS position.

12. Although Grievant had more seniority than Mr. Sheperd, he did not have any professional seniority. Nor did Grievant, when he applied, have an Associate's Degree or meet the requirements for even an initial temporary authorization as a TSS. (Testimony of Corey Murphy, Deputy Superintendent and Personnel Director)

13. Mr. Sheperd met the TSS qualifications with his Master's Degree and permanent TSS certification.

14. Mr. Sheperd was awarded the TSS position because he was the only qualified applicant.

Discussion

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 grieves the reduction in force (RIF) of his Computer Repair Technician (CRT) position and its reorganization into a Technology Systems Specialist (TSS) position that requires a degree. He also grieves his non-selection for the TSS position. When Grievant clarified at level three that his grievance primarily entails his challenge to the RIF and replacement of his position with a TSS position, Respondent moved to dismiss this claim as untimely. "[When an] employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of

demonstrating such untimely filing by a preponderance of the evidence. ... *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 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)." *Higginbotham v. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997).

Respondent contends that Grievant first raised his RIF claim at level three. However, the evidence shows that Grievant included RIF in his grievance when he cited West Virginia Code 18A-4-7a. This cite covers RIF procedures (albeit for professional personnel). 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*:

> In *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.

Grievant revealed his intent to grieve his RIF in citing code thereon. It is evident that Grievant viewed his non-selection and RIF as inexorably connected. Denying Grievant a decision on his RIF claim simply because he did not more clearly delineate it in his grievance embodies the type of procedural quagmire cautioned against by the West Virginia Supreme Court. Respondent failed to prove by a preponderance of the evidence that Grievant's RIF claim was untimely.

As for the merits, Grievant argues that Respondent was arbitrary and capricious in eliminating his service position, which did not require a degree, in favor of a professional position that required a degree. He asserts that Respondent's actions were motivated by racial discrimination and retaliation. Grievant implies that Respondent must return the position to the service classification. Grievant's CRT position performed various computer repair functions. Respondent eliminated this and two other technology positions, leaving Respondent with just one technology position. Shortly thereafter, Respondent posted the TSS position. WVDE Policy 5202 requires a

TSS applicant to have a degree, making it a professional position.[2] Grievant applied but was not selected because he did not yet have a degree.

Respondent contends it has the discretion to eliminate positions and create new positions as needed. "'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).

Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *See 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)). "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).

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[2]"'Professional person' or 'professional personnel' means those persons or employees who meet the certification requirements of the state, licensing requirements of the state, or both, and includes a professional educator and other professional employee[.]" W. VA. CODE § 18A-1-1(b)

Grievant does not contest that Respondent has leeway to RIF positions and create new ones based on need. Rather, he attempts to refute Respondent's rationale for creating a new position by arguing that the new TSS position performs the same functions as his CRT position. Respondent concedes that a TSS covers the same tasks as the CRT position occupied by Grievant but claims that, unlike the CRT, a TSS can also do needed maintenance of its network. It contends that work on its network can only be done by professional personnel.

As the Director of Technology for Respondent, Dr. Zimmer made the decision to RIF the three technology positions and later post the professional TSS position. Respondent told Dr. Zimmer to RIF three technology positions but did not tell her which ones. She chose to keep a professional position as the sole technology position because it could work on Respondent's network issues. When she was then directed to hire a new technology position, she chose TSS because only a TSS could do the work of the CRT position and work on Respondent's network. While the remaining technology position could also work on the network, Dr. Zimmer determined that the volume of network maintenance required multiple personnel. Grievant failed to refute Dr. Zimmer's testimony that only professional personnel are qualified to work on the network and that Respondent's network issues necessitated more than one employee addressing them. Grievant failed to prove by a preponderance of the evidence that Respondent's decision to create a second professional technology position, rather than a service one, was arbitrary and capricious.

Grievant asserts that Respondent's actions were in retaliation for his prior Grievances. "No reprisal or retaliation of any kind may be taken by an employer against

a grievant or any other participant in a grievance proceeding by reason of his or her participation. Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination." W. VA. CODE § 6C-2-3(h). Reprisal is defined as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." W. VA. CODE § 6C-2-2(o).

To demonstrate a prima facie case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

> (1) That he engaged in protected activity;
> (2) That he was subsequently treated in an adverse manner by the employer or an agent;
> (3) That the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and,
> (4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

See Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994).

Grievant provided unrefuted testimony that he had a history of filing grievances against Respondent. "The filing of grievances … is a protected activity." *Poore v. W. Va. Dep't of Health and Human Resources/Bureau for Children and Families*, Docket No. 2010-0448-DHHR (Feb. 11, 2011). The elimination of Grievant's position and the formation of a new position that Grievant was unqualified for is adverse treatment. "[T]he critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that

his protected activity was a 'significant,' 'substantial' or 'motivating' factor in the adverse personnel action." *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994). Dr. Zimmer was the official tasked with deciding which technology positions to RIF and which to post. There was no evidence that Dr. Zimmer was aware of the prior grievances when she decided to RIF Grievant's position and create a TSS position.

An inference can be drawn that Respondent's actions were the result of a retaliatory motive if the adverse action occurred within a short time period of the protected activity. S*ee Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); *Warner v. Dep't of Health & Human Res*., Docket No. 2012-0986-DHHR (Oct. 21, 2013). Grievant did not set forth the timeframe of his prior grievances. He thus failed to demonstrate a *prima facie* case of reprisal by a preponderance of the evidence.

Grievant contends that Respondent's actions were motivated by racial discrimination, implying this should result in the reinstatement of his position. While Grievant may have remedies for racial discrimination in other venues, discrimination for purposes of the grievance process has a very specific definition. "'Discrimination' means 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). Grievant did not present any testimony that he was treated differently than any particular employee. He thus failed to prove discrimination by a preponderance of evidence.

As for his non-selection, Grievant does not dispute that he lacked the requisite degree when he applied for the TSS position. Nor does he contest that the TSS posting

and West Virginia Department of Education Policy 5202 required a TSS applicant to have a degree. He claims, however, that Respondent acted improperly in eliminating his position and creating a new position that required a degree. As previously discussed, Grievant did not prove by a preponderance of the evidence that the elimination of his position and the creation of the new TSS position was arbitrary or capricious, or motivated by retaliation or discrimination. In filling the TSS position, Respondent was required to choose someone with a degree. Respondent selected the only qualified applicant, Mr. Sheperd. Grievant did not prove by a preponderance of the evidence that he was qualified for the TSS position when he applied.

Accordingly, this grievance is DENIED.

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. Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *See 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)). "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).

4. Grievant did not prove by a preponderance of the evidence that Respondent was arbitrary or capricious when it eliminated his CRT service position and created a professional TSS position that required a degree. Nor did he prove by a preponderance of the evidence that Respondent was arbitrary or capricious in not selecting him for the TSS position.

5. To demonstrate a prima facie case of reprisal, the Grievant must establish by a preponderance of the evidence the following elements:

> (1) That he engaged in protected activity;
> (2) That he was subsequently treated in an adverse manner by the employer or an agent;

> (3) That the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and,
> (4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

See Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Conner v. Barbour County Bd. of Educ*., Docket No. 93-01-154 (Apr. 8, 1994).

6. Grievant did not prove retaliation by a preponderance of the evidence.

7. Discrimination for purposes of the grievance process has a very specific definition. "'Discrimination' means 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).

8. Grievant did not prove discrimination by a preponderance of the evidence.

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: November 3, 2021

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Joshua S. Fraenkel
Administrative Law Judge