**MELANIE FILES, .**

**.**

**Grievant, .**

**.**

**v. . DOCKET NO. 94-32-1096 .**

**MORGAN COUNTY BOARD OF EDUCATION, .**

**.**

**Respondent. .**

**D E C I S I O N**

This is a grievance by Melanie Files (Grievant) concerning the manner in which a "citizen's complaint" involving one of her students was handled by her employer, the Morgan County Board of Education (MCBE). This grievance was submitted at Level I on October 19, 1994. Following denial at Level I, Grievant appealed to Level II where a hearing was held on November 10, 1994. After her grievance was denied at Level II, Grievant appealed directly to Level IV as provided under W. Va. Code §18-29-4(c). Grievant further elected to waive her right to a hearing at Level IV and have this grievance decided upon the basis of the record developed below. (See footnote 1) Respondent filed a timely brief dated March 15, 1995, andthis matter became mature for decision on receipt of correspondence from Grievant on March 21, 1995, indicating that neither she nor her representative would be filing a brief.

Grievant complains that MCBE made a decision on August 8, 1994, granting a citizen's appeal at Level III of the procedures provided under State Board of Education Policy 7211, (See footnote 2) but failed to provide her with official notice of the decision until September 9, 1994. (See footnote 3) (Grievant received unofficial notice of the ruling through a newspaper article which she saw on August 12, 1994.) As a result of the decision on this appeal, Grievant was required to accept late work from a student as "makeup work." However, no entry regarding this matter was made in her personnel file.

The Level II decision in this matter essentially concluded that the grievance evaluator, as a

designee of the Superintendent, was without authority to reverse a decision by the Board of Education. Thus, no decision on the merits of this grievance was rendered at Level II. Level IV provides an opportunity for de novo review of the merits of the grievance, rather than a purely appellate review of the Level II decision. Thus, the undersigned administrative law judge will attempt to review the merits of this grievance, despite a record that is less than fully illuminating. Grievant asks that MCBE "rescind its prior ruling" and "any reference to this matter not be found in my personnel file." As there is no evidence that any reference to this matter has ever been included in her personnel record, that portion of her grievance need not be addressed in this decision. See Harrison v. Cabell County Bd. of Educ., 351 S.E.2d 604 (W. Va. 1986).

Here, MCBE made a determination that a student would be allowed to make up work that was not submitted on time. There is no evidence that this decision was made contrary to the procedure authorized by State Board of Education Policy 7211. (See footnote 4) This is a matter which falls within the sound discretion of the county board and which requires a showing that MCBE's decision on the underlying complaint was arbitrary and capricious, in order for Grievant to prevail. See Pockl v. Ohio County Bd. of Educ., 406 S.E.2d 687 (W. Va. 1991); Hill v. Kanawha County Bd. of Educ., Docket No. 94-20-537 (Mar. 22, 1995).

Moreover, Grievant's exception to MCBE's decision on the citizen's appeal at issue merely involves a differing interpretation of MCBE's regulations and policies governing student and teacher responsibilities and student evaluation. Such policies, portions of which were quoted by Grievant in her initial submission, substantially concern academic considerations, matters which properly fall within the sound discretion of the local board of education. A government agency's determination regarding matters within its expertise is entitled to substantial weight. Princeton Community Hosp. v. State Health Planning, 328 S.E.2d 164 (W. Va. 1985). See also Lincoln County Bd. of Educ. v. Adkins, 188 W. Va. 430, 424 S.E.2d 775 (1992); Smith v. Bd. of Education of County of Logan, 176 W. Va. 65, 341 S.E.2d 685 (1985).

In grievances of this nature, Grievant has the burden of proving the merits of her allegations by a preponderance of the evidence. Stout v. Harrison County Bd. of Educ., Docket No. 93-17-081 (Apr. 12, 1994); Randolph v. Harrison County Bd. of Educ., Docket No. 17-88-001-2 (June 30, 1988). Given the minuscule evidence developed in the record below and the deference to which boards of education are reasonably entitled in deciding academic issues, Grievant has failed to demonstrate

that MCBE violated any law, rule or regulation so as to entitle her to any form of relief under the grievance procedure for public education employees, W. Va. Code §§ 18-29-1 et seq. See generally Hill, supra.

In addition to the foregoing discussion, the following findings of fact and conclusions of law are appropriate in this matter:

**FINDINGS OF FACT**

1. On August 8, 1994, MCBE decided a citizen's complaint under State Board of Education Policy 7211 which involved one of Grievant's students.

2. Grievant was aware of the hearing conducted by MCBE into the citizen's complaint sometime in August 1994, but was unable to attend due to a conflict with courses she was taking during the summer.

3. On September 9, 1994, Grievant was officially notified that MCBE had rendered a decision in the citizen's complaint in favor of the student.

4. On October 19, 1994, Grievant filed a formal grievance at Level I of the statutory grievance procedure for education employees seeking to have MCBE rescind its August 8, 1994, ruling in favor of the student and to have any reference to this matter removed from her personnel file.

5. There is no reference to this matter in Grievant's personnel file.

**CONCLUSIONS OF LAW**

1. Grievant has the burden of proving each element of a grievance of this nature by a preponderance of the evidence. Stout v. Harrison County Bd. of Educ., Docket No. 93-17-081 (Apr. 12, 1994); Randolph v. Harrison County Bd. of Educ., Docket No. 17-88-001-2 (June 30, 1988).

2. As no reference to the outcome of the citizen's complaint at issue is contained in Grievant's personnel file, her claim to have any such reference removed from her file involves a hypothetical issue inappropriate for resolution by this Board. See Harrison v. Cabell County Bd. of Educ., 351 S.E.2d 604 (W. Va. 1986);Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. § 4.18.

3. Grievant has failed to demonstrate by a preponderance of the evidence that MCBE's determination of a citizen's complaint in favor of one of her students was arbitrary and capricious.

See generally Pockl v. Ohio County Bd. of Educ., 406 S.E.2d 687 (W. Va. 1991).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Morgan County or the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

**LEWIS G. BREWER**

**Administrative Law Judge**

**Dated: April 20, 1995**

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*Footnote: 1Subsequent to the parties' agreement to submit this matter for decision on the basis of the Level II record, this grievance was reassigned from Administrative Law Judge Sue Keller to the undersigned for administrative reasons.*

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*Footnote: 2Administrative notice is taken of the State Board of Education's "Appeals Procedure for Citizens," Policy 7211, 126 C.S.R. 188 (1983). This procedure was established pursuant to the Board's general authority to supervise the public schools under W. Va. Code § 18-2-5.*

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*Footnote: 3A copy of the decision on the citizen's appeal at issue was not included in the record below.*

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*Footnote: 4While Grievant complains that she was not promptly notified of MCBE's decision on the complaint as required by MCBE's written Student Grievance Procedure, such failure, whether based on malfeasance or misfeasance, would not warrant the remedy of rescission of a decision favorable to the student. Indeed, individual school employees are not contemplated as "parties" to proceedings conducted pursuant to Policy 7211. See Policy 7211 § 4.4, 126 C.S.R. 188 (1983).*