KAREN CANFIELD,

Grievant,

v. **Docket No. 97-DOE-508**

WEST VIRGINIA DEPARTMENT OF EDUCATION,

Respondent,

D E C I S I O N

This is a grievance by Karen Canfield (Grievant) submitted pursuant to W. Va. Code §§ 18-29-1, et seq., alleging that Respondent West Virginia Department of Education (WVDOE) improperly refused to reinstate her to a position at the Barboursville School upon notice that she wished to return from an approved leave of absence. Grievant initiated this grievance on June 11, 1997, through correspondence from her attorney. The grievance was denied at Level I on July 1, 1997, and grievant appealed to Level II where an evidentiary hearing was conducted on September 17, 1997. Dr. Michael Valentine, the Superintendent's designee, issued a decision denying the grievance at Level II on October 16, 1997. Grievant by-passed Level III, as authorized by W. Va. Code § 18-29-4(c), and appealed to Level IV on November 18, 1997. A Level IV hearing was conducted in this Grievance Board's office in Charleston, West Virginia, on December 18, 1997. As agreed at the conclusion of that hearing, this matter became mature for decision on January 27,1998, following receipt of the Level II hearing transcript, and proposed findings of fact and conclusions of law from each party.

The following findings of fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record, including the transcript of the Level II hearing, the testimony of the witnesses who appeared at Level IV, and documentary evidence admitted at Levels II and IV.

FINDINGS OF FACT

1. Grievant was employed by Respondent West Virginia Department of Education (WVDOE)

as a teacher at the Barboursville School, which is located in Cabell County, West Virginia. Grievant is certified to teach Physical Education, K-12. J Ex 8 at L II.

2. The Barboursville School is a residential facility for seriously emotionally disturbed youth operated by the West Virginia Department of Health and Human Resources (DHHR) through a private contractor, Shawnee Hills, Inc. WVDOE provides educational programs in such DHHR-operated institutions pursuant to W. Va. Code § 18-2- 13h.

3. Prior to her employment by WVDOE at the Barboursville School, Grievant was employed by the Tucker County Board of Education for eight years. In the course of her employment with Tucker County, Grievant taught physical education, and a number of other subjects under appropriate permits, including science and social studies.

4. On February 8, 1996, the West Virginia Board of Education adopted a new WVDOE Employee Handbook applicable to WVDOE personnel employed in institutional education programs, including Grievant, effective July 1, 1996. See J Ex 10 at L II. 5. The revised WVDOE Employee Handbook contains the following provisions related to leaves of absence:

> **Educational Leave of Absence**
>
> The Department may grant an educational leave of absence subject to terms and conditions stipulated by the Superintendent and the Board.

Medical Leave of Absence Without Pay

> An injured or ill employee is granted a medical leave of absence without pay not to exceed six (6) months in a twelve (12) month period provided the employee makes written application to the State Superintendent no later than fifteen (15) calendar days following the expiration of any personal and/or annual leave time the employee may choose to utilize.
>
> and
>
> The employee's absence is due to an illness or injury which is substantiated by a physician's written statement that:

a. verifies that the employee is unable to perform his/her duties;

and

b. gives a tentative date for the employee to return to work;

and

the physician verifies that the disability is not of such nature as to render the employee permanently unable to perform his/her duties.

A written statement from the physician verifying the need for continuing medical leave of absence must be submitted by the employee at the end of each month in which the employee has been on medical leave of absence.

While on a medical leave of absence without pay, an employee does not earn personal or annual leave and time spent on this leave does not count as service with the state. An employee on medical leave of absence without pay is eligible to return to his/her former position unless this position is eliminated due to lack of funding or reduction in force.

During a medical leave of absence the employee is required to pay the premium currently being deducted to maintain medical/basic life insurance benefits; the Department is obligated to pay its proportionate share for one year. The employee is also required to pay her or his optional or dependent life insurance premiums when granted a medical leave of absence.

Leave of Absence - Personal

An individual hired for permanent employment may be granted a personal leave of absence without pay subject to the discretionary approval of the State Superintendent and the State Board provided:

1. The employee makes written application for such leave to the

State Superintendent;

and

2. The State Superintendent and the State Board determine that the Department's personnel needs are not compromised by the granting of such leave.

The period of a personal leave of absence should normally not exceed one year but may be granted for a shorter period at the discretion of the State Superintendent and the Board. Unless specifically authorized by the State Superintendent and State Board, a personal leave of absence is from employment from (sic) the Department and not from a specific position. The employee returning from such leave will be placed in a position for which he or she is qualified, if available, but not necessarily the same position. The Department reserves the right to fill, modify, or eliminate a vacant position if required by business needs or a lack or loss of funding.

Exception:

A personal leave of absence will be granted for an employee during the extended school term with the provision that he or she will have the right to return to the same position, provided that, the Department is able to fill the vacant position with a qualified replacement for the period of the leave.

While on a personal leave of absence without pay, an employee does not earn personal or annual leave. Time spent on a personal leave of absence is excluded as qualifying years of service credit with the state unless the leave of absence is for military reasons.

The employee is required to pay his or her share of the premium and the Department's share of the premium to maintain medical/basic life insurance when granted a personal leave of absence. The employee is also required to pay her or his optional or dependent life insurance while on a personal leave of absence.

J Ex 4 at L II at pp. 16-18.

6. The previous WVDOE Employee Handbook, superseded on July 1, 1996, contained the following language in regard to leaves of absence:

LEAVE OF ABSENCE

> An employee may apply, in writing, for medical, or educational leave of absence. Upon written approval from the State Superintendent and upon approval of the West Virginia Board of Education, a leave of absence may be granted for a period of time not to exceed one year, however, such leave may be renewed on an annual basis.
>
> Except for medical leave, a leave of absence is from departmental employment and not from a specific position. The employee who returns from such leave will be placed in an available position for which he/she is qualified, but not necessarily in the same position.
>
> Sick or annual leave will not be accumulated while an employee is on a leave of absence without pay.

J Ex 10 at L II.

7. On August 9, 1996, Grievant submitted a request for a leave of absence without pay as follows:

> I am hereby requesting an extended personal leave of absence from my position with the West Virginia Department of Education.
>
> I fully understand that my leave of absence is from the Department and not my specific position as a teacher at The Barboursville School.
>
> It is also my understanding that when I return from my leave that I will be placed in a position for which I am qualified, if one is available, but not necessarily the same position I occupied before my leave.
>
> I am aware that such a leave of absence may not exceed one calendar year.

J Ex 5 at L II.

8. The request described in Finding of Fact Number 7, above, was prepared for Grievant to sign by the Secretary at the Barboursville School, in accordance with instructions from Frank Andrews, WVDOE Director of Institutional Education Programs, that Grievant needed to sign the letter as a condition of obtaining a leave of absence. Grievant personally prepared a separate request to the State Superintendent of Schools, Dr. Henry Marockie, dated August 9, 1996, which stated the following:

> I'm requesting a one year leave of absence, effective Monday, Aug. 26, 1996.

> During this time, I will be developing educational and residential programming for severely emotionally disturbed students. This experience will not only allow me to deal with other perspectives of education, but will also increase my knowledge in developing more effective programs. I believe a leave of absence, if granted, will improve my teaching upon return to Barboursville School.

G Ex A at L IV.

9. On August 27, 1996, Dr. Marockie wrote to Grievant approving her requested leave of absence as follows:

> Your letter requesting a personal leave of absence without pay, beginning August 26, 1996, has been received and reviewed by appropriate Department staff. Based upon their recommendation, I am pleased to grant your request for a leave of one year. Upon written request, this leave may be extended upon my approval and that of the State Board of Education.
>
> The Employee Handbook provides that when you desire to return to work, you are to notify the Department (i.e. The State Superintendent with copies to your immediate supervisor, the Assistant Superintendent, and the personnel office), in writing of your intention and the date you desire to return. Further, you should be aware that the employee who returns from such leave will be placed in an available position for which he/she is qualified, but not necessarily in the same position. Neither sick nor annualleave will be accumulated while an employee in (sic) on a leave of absence without pay.

J Ex 6 at L II.

10. Grievant was employed as Director of Programming at the Ohio Center in Ironton, Ohio, from August 11, 1996, until her termination on November 1, 1996.

11. On November 12, 1996, WVDOE posted a vacancy notice for the physical education teaching position previously held by Grievant at the Barboursville School. See J Ex 3 at L II. Effective January 10, 1997, WVDOE hired a new employee to fill the posted vacancy at the Barboursville School. See J Ex 7 at L II.

12. On April 8, 1997, Grievant wrote to the State Superintendent requesting to return from her personal leave of absence, and resume her former position as a physical education teacher at the Barboursville School.

13. On April 11, 1997, Frank D. Andrews, Executive Director for WVDOE's Office of Institutional Education Programs, responded to Grievant's request as follows:

> Dr. Marockie has requested that I reply to your letter of April 8, 1997 concerning your request to return from a personal leave of absence to your former position as a physical education teacher at the Barboursville School.

> The Employee Handbook for institutional education programs states, "Unless specifically authorized by the State Superintendent and the State Board, a personal leave of absence is from employment from the Department and not from a specific position. The employee returning from such leave will be placed in a position for which he or she is qualified, if available, but not necessarily the same position. The Department reserves the right to fill, modify, or eliminate a vacant position if required by business needs or a lack or loss of funding." In this regard, as a result of a need to provide high quality physical education and health education services at the Barboursville School, the Department has filled your previous position. At this time, a position for which you are qualified is not available, therefore, the Department will be unable to comply with your request for reemployment.
>
> Your name will be placed on a list to receive vacancy notices. If you have any questions, please feel free to call me at. . . .

J Ex 2.

14. The WVDOE Employee Handbook makes the following provision for staff licensure:

> Professional educators employed by the State Board of Education to provide services in correctional, health, and human service facilities shall hold a valid teaching license endorsed in the assigned areas of responsibility.

J Ex 4 at L II at p. 24.

15. As of the date Grievant's leave of absence expired in August 1997, WVDOE had only one teacher vacancy. That position, which happened to be located at the Barboursville School, required certification in social studies, which Grievant does not hold.

16. WVDOE considers Grievant to continue as an employee on leave of absence, and eligible for any vacancies within the Department for which she is qualified, in accordance with the WVDOE Employee Handbook.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6. Grievant raises several arguments in support of her contention that she should have been reinstated to a position at the Barboursville School upon notifying WVDOE that she wished to return from her personal leave of absence. One

theory is that she was entitled to reinstatement in accordance with W. Va. Code § 18A-2-2a. That Code Section makes the following provision for leaves of absence:

> (a) Any teacher who is returning from an approved leave of absence that extended for a period of one year or less shall be reemployed by the county board with the right to be restored to the same assignment of position or duties held prior to the approved leave of absence. Such teacher shall retain all seniority, rights and privileges which had accrued at the time of the approved leave of absence, and shall have all rights and privileges generally accorded teachers at the time of the reemployment.
>
> (b) An employee shall notify the county board at least ten working days prior to beginning such a leave of absence. The county board shall approve such leave of absence for any teacher or service personnel who requests an extended leave of absence without pay for any period of time not exceeding one year for the purpose of pregnancy, childbirth or adoptive or infant bonding. An employee shall not be required to use accumulated annual leave or sick leave prior to taking an extended leave of absence.
>
> (c) Such employee who returns from an approved leave of absence for the purpose of pregnancy, childbirth or adoptive or infant bonding which lasted for a period of one year or less than one year shall be reemployed with the right to be restored to the same assignment of position or duties and benefits held prior to the approved leave of absence. Such employee shall retain all rights and privileges generally accorded employees at the time of the reemployment.

The language contained in subsection (a), above, if applicable, appears to entitle Grievant to reinstatement to her previous position. However, it is highly speculative whether Grievant would have ever been granted a discretionary leave of absence had WVDOE considered W. Va. Code § 18A-2-2a applicable to her request. See Abston v. Putnam County Bd. of Educ., Docket No. 97-40-057 (July 28, 1997). Moreover, WVDOE granted the leave of absence at issue in accordance with the terms of its EmployeeHandbook because it does not consider W. Va. Code § 18A-2-2a applicable to employees in Grievant's situation. Grievant counters by alleging that the Employee Handbook provision is invalid to the extent it acts to rescind rights granted under W. Va. Code § 18A- 2-2a. WVDOE submits that § 18A-2-2a does not apply to its employees who work in institutional settings pursuant to W. Va. Code § 18-2-13h.

The statute upon which Grievant relies is contained in Chapter 18A of the W. Va. Code entitled "School Personnel." W. Va. Code § 18A-1-1(a), at the beginning of the chapter, defines "school personnel" to mean "all personnel employed by a county board of education whether employed on a regular full-time basis, an hourly basis or otherwise. School personnel shall be comprised of two

categories: professional personnel and service personnel." The record in this matter establishes that Grievant is employed by WVDOE, not a county board of education. (See footnote 1)

This determination is reinforced by W. Va. Code §§ 18-2-13h (which authorizes WVDOE to provide educational programs in institutions such as the Barboursville School) and 18A-4-17 (which governs the compensation of WVDOE employees such as Grievant). See Carpenter v. W. Va. Dept. of Educ., Docket No. 93-DOE-372 (Dec. 30, 1993). In pertinent part, W. Va. Code § 18A-4-17(c) states as follows:

> Nothing contained in this section shall be construed to mean that professional personnel and service personnel employed by the department of education to provide educational and support services to residents in state department of health and human resources facilities, corrections facilitiesproviding services to juvenile and youthful offenders and the West Virginia schools for the deaf and blind are other than state employees. (Emphasis added.)

This specific language, in addition to Grievant's failure to come within the definition of "school personnel" contained in W. Va. Code § 18A-1-1(a), establishes that the terms of Grievant's employment are not subject to the provisions of W. Va. Code § 18A-2-2a. See St. Clair v. RESA-V, Docket No. RESA-88-186 (Apr. 27, 1990); Sark v. RESA IV, Docket No. 89-RESA-131 (Aug. 30, 1989). (See footnote 2)

Grievant alternatively argues that if she is not statutorily entitled to return to the same position she previously held at the Barboursville School, she became entitled to reinstatement in accordance with the terms of the correspondence exchanged between Superintendent of Schools Marockie and herself. In particular, Grievant argues that the language in Dr. Marockie's letter, "the employee who returns from such leave will be placed in an available position for which he/she is qualified, but not necessarily in the same position," extends a more substantial benefit to Grievant, and Grievant should benefit from the language of the "contract" created by Dr. Marockie's acceptance of her offer. This theory is not persuasive.

The primary obstacle to acceptance of Grievant's contention is that on August 9, 1996, Grievant signed a request for personal leave of absence, stating her understanding of the terms for such leave, in specific language that tracks the WVDOE Employee Handbook then in effect. Cf. J Ex 4 & J Ex 5 at L II. Grievant's personal application (G ExA at L IV), the formal application which she signed at the insistence of Mr. Andrews (J Ex 5 at L II), and Dr. Marockie's letter granting the leave of absence (J Ex 6 at L II) must all be read in pari materia. Such a reading makes it abundantly clear

that the conditions for Grievant's reinstatement to the position she previously held at Barboursville are limited, a circumstance the undersigned is convinced Grievant recognized when she was asked to sign the letter prepared for her at the school.

The second obstacle is that Dr. Marockie's letter, considered in the light most favorable to Grievant, is no worse than ambiguous. The undersigned finds that the most reasonable interpretation of Dr. Marockie's letter indicates that Grievant's reinstatement upon return from her approved personal leave of absence is conditioned upon a position being available, and Grievant holding the necessary qualifications for that position. The record in this matter indicated that those conditions did not exist when Grievant's leave of absence ended.

Finally, when the terms of WVDOE's Employee Handbook dealing with leaves of absence for educational, medical and personal reasons are read in pari materia, consistent with the testimony of Mr. Andrews, the primary author of those provisions, Grievant's right to reinstatement upon return from her leave of absence was limited to certain narrow circumstances which have not yet come to pass. In particular, Grievant failed to establish that she is "qualified" for any position vacancy which has arisen within WVDOE since her leave of absence ended, by demonstrating that she holds the minimum certifications required for such position. Accordingly, WVDOE has thus far honored its side of the agreement by recognizing Grievant as an employee on continued leave of absence untilsuch time as a vacancy for which she is qualified arises, and she accepts that position, or Grievant resigns her employment with WVDOE.

Grievant also failed to demonstrate that the terms of WVDOE's Employee Handbook applicable to Grievant's right to reinstatement upon return from a personal leave of absence abrogate any statute, rule, policy, or regulation applicable to employees in Grievant's status. Further, Grievant has not shown that adoption or application of such provisions in the circumstances presented by this grievance represent an arbitrary and capricious action, or an abuse of the substantial discretion accorded WVDOE in such matters.

In addition to the foregoing discussion, the following conclusions of law are appropri ate in this matter:

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, the grievant has the burden of proving each element of her

grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. In accordance with W. Va. Code § 18A-4-17, WVDOE employees who provide educational services to residents of the Barboursville School and similar health and human resources facilities pursuant to W. Va. Code § 18-2-13h are state employees, not employees of a county board of education. As a state employee, Grievant does not fall under the definition of "school personnel" in W. Va. Code § 18A-1-1(a), and the provisions in W. Va. Code § 18A-2-2a pertaining to leaves of absence by teachers do not apply toGrievant's employment. See St. Clair v. RESA-V, Docket No. RESA-88-186 (Apr. 27, 1990); Sark v. RESA IV, Docket No. 89-RESA-131 (Aug. 30, 1989).

3. Grievant's personal leave of absence, approved by State Superintendent of Schools Henry Marockie on August 27, 1996, gives Grievant a right to return to employment with WVDOE, but not necessarily to her same position, unless that position is vacant, and not necessarily at the Barboursville School, unless a position is vacant at that location, and Grievant holds the minimum qualifications for the position.

4. The provisions of WVDOE's Employee Handbook which specify the terms under which WVDOE employees employed in institutional education programs may obtain approval for a discretionary personal leave of absence, do not represent an abuse of WVDOE's substantial discretion to determine terms of employment for such personnel, nor is their application in the context of this grievance an arbitrary and capricious application of that authority. See Glick v. Logan County Bd. of Educ., Docket No. 97-23-435 (Jan. 29, 1998); Hill v. Kanawha County Board of Education, Docket No. 94-20-537 (Mar. 22, 1995), aff'd sub nom. Hill v. Raglin, Cir. Ct. of Kanawha County, No. 95-AA-106 (Jan. 8, 1997). See generally Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982).

5. WVDOE did not violate Grievant's rights under W. Va. Code § 18A-2-2a, or act contrary to any other applicable statute, policy, rule or regulation, when it refused to reinstate her to the position she previously held at the Barboursville School in accordance with her written request and the expiration of her personal leave of absence.

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell 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: March 31, 1998

Footnote: 1

Whether or not the Barboursville School is a "public school" has no bearing on whether Grievant is employed by the WVDOE rather than a county board of education. Grievant's suggestion that WVDOE operates the Barboursville School as a "special school district" somewhat analogous to a de facto fifty-sixth county, while an ingenious legal argument, is not supported by any legal precedent applicable to this grievance.

Footnote: 2

Like employees of regional educational service agencies, employees of the state board of education are specifically authorized to use the grievance procedure for education employees. W. Va. Code § 18-29-2(a). See Carpenter, supra.