SHERRY BLAKE,

Grievant,

v. **DOCKET NO. 01-20-470**

KANAWHA COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

In her grievance filed at Level I on June 29, 2001, Grievant Sherry Blake states:

> Grievant, a regularly employed secretary, was employed in the Respondent's central office and held a 261-day employment term. Grievant's contract was terminated for the purpose of modifying her employment term and reducing her pay grade from a Secretary III-A to a Secretary II as part of an overall reduction-in-force within the secretarial classification effective for the 2001- 02 school year. Grievant is currently employed at Respondent's Garnet Career Center and holds a 240-day employment term. The Respondent posted two 261-day secretarial vacancies in the Respondent's central office (Student Affairs and Human Resources) on June 28, 2001. These positions were awarded to more senior secretaries who were not affected by the reduction-in-force. The Grievant contends that the Respondent should have rescinded the termination of her 261-day contract and instated her to one of these vacancies. In the alternative, Grievant contends that the more senior 261-day Secretary IIIA who had been designated to take Grievant's position should have been instated into one of those vacancies instead. This would have permitted Grievant's reinstatement to her position as Secretary IIIA with a 261-day employment term in the Department of Technology.

As relief, Grievant seeks “instatement, reinstatement of a Secretary III-A designation and a 261-day contract, retroactive wages, benefits, and interest on all monetary sums.” Grievant's immediate supervisor was unable to resolve this issue at Level I, and a Level II decision issued by Kanawha County Schools Superintendent Ronald Duerring's designee, Kathryn Hudnall, denied the grievance at that level following a hearing held on July 19, 2001. Level III was waived, and a Level IV hearing was convened in the Grievance Board's Charleston office on September 18, 2001. Grievant was represented by John Roush, Esq. of the West Virginia School Service Personnel Association, and Respondent was represented by its attorney, James Withrow, Esq. The parties agreed to submit their proposed findings of fact and conclusions of law by October 15, 2001, and the issues became mature for a decision at Level IV upon receipt of those briefs.

The basic facts as stated in the Statement of Grievance are not disputed and are stated here based on a preponderance of the evidence contained in the record:

FINDINGS OF FACT

1. During the 2000-2001 school year, Grievant was employed by Respondent as a Secretary IIIA in its Technology Office on a 261-day employment term. Grievant is currently employed for the 2001-2002 school year as a Secretary II at Respondent's Garnet Adult Center with a 240-day employment term.

2. During the 2000-2001 school year, Grievant was the second-least senior Secretary IIIA employed by Respondent on a 261-day contract, however she had more seniority than several Secretary II's employed on 240-day contracts.

3. Due to a decrease in student enrollment, Respondent made a decision to reduce the number of 261-day Secretary IIIA positions in its Community Education Program by three.

4. As one of the three least senior Secretary IIIA's, Grievant was released from her job and transferred to a Secretary II position. One of the more senior Secretary IIIA's whose position was eliminated from the Community Education Program transferred into Grievant's former position.

5. In June, 2001, after these personnel transactions were finalized, Respondent posted two 261-day Secretary IIIA vacancies in its Human Resources and Community Education offices that arose when the incumbents of those jobs accepted other jobs through their own volition. The Community Education Secretary was one of the displaced senior Secretary IIIA's who had assumed that position after a retirement, and so did not “bump” a less senior employee. (See footnote 1)

6. Both of these jobs were posted after the more senior displaced Secretary IIIA's were notified of the shuffle but before they assumed their new jobs.

7. Although Grievant bid on both Secretary IIIA postings, she was not awarded either job due to her insufficient seniority.

DISCUSSION

Grievant argues that the reason for her transfer from a 261-day Secretary IIIA position to a 240-day Secretary II posting became invalid upon the subsequent posting of two 261-day Secretary IIIA positions. In order to sort out the interrelated personnel transactions that affected Grievant's transfer, it is necessary to define the terminology applied to those transactions. “When a board of education seeks to reduce employmentcosts, the board may decide that the schools' best interests require

either the elimination of some service personnel jobs or the retention of all service personnel jobs but with reduced employment terms." Lucion v. McDowell County Bd. of Educ. 191 W. Va. 399; 446 S.E.2d 487 (1994). In this case, the Board decided to eliminate three Secretary IIIA jobs, a process also known as a "Reduction in Force" or "RIF." If a board of education decides to reduce the number of jobs for service personnel, the board must follow the reduction in force procedures of W. Va. Code 18A-4-8b. Lucion, *supra.* A "Transfer," on the other hand, occurs when an employee is released from her current job and employed in a different job of that same classification or another classification. Hence, Grievant's change from a Secretary IIIA position to a Secretary II position was a transfer.

Although the facts as to what happened to Grievant are not disputed, the application of a change in the Code controlling how Respondent must react to those facts is more problematic. West Virginia Code § 18A-4-8b was amended effective April 14, 2001, by the addition of subsection (k), as follows:

> If, prior to the first day of August after a reduction in force or transfer is approved, the reason for any particular reduction in force or transfer no longer exists as determined by the county board in its sole and exclusive judgment, the board shall rescind the reduction in force or transfer and shall notify the affected employee in writing of his or her right to be restored to his or her former position of employment. Within five days of being so notified, the affected employee shall notify the board of his or her intent to return to his or her former position of employment or the right of restoration to the former position shall terminate: Provided, That the board shall not rescind the reduction in force of an employee until all employees with more seniority in the classification category on the preferred recall list have been offered the opportunity for recall to regular employment as provided in this section. If there are insufficient vacant positions to permit reemployment of all more senior employees on the preferred recall list within the classification category of the employee who was subject to reduction in force, the positionof the released employee shall be posted and filled in accordance with this section.

Three criteria must be met before this provision will allow a displaced employee to return to her former position after a RIF or transfer: 1) The county board decides the reason for the RIF or transfer is no longer necessary; 2) The county board reaches that decision before the August first next following the RIF or transfer; and 3) no employees on the preferred recall list with more seniority are eligible to be placed in that position. Further, the code leaves the determination of whether the RIF or transfer is still necessary up to the "sole and exclusive judgment" of the county Board.

In this case, there was both a RIF and a transfer; the RIF made the transfer necessary. Respondent determined there was a need to eliminate three Secretary IIIA positions. Following the procedure codified in § 18A-4-8b, it released the three least-senior Secretary IIIA's in its employ, one of which was Grievant. The employees who formerly held the positions that were eliminated were

laterally transferred into the vacancies opened by the release of the least-senior Secretaries. There being no further vacancies in that same classification, Grievant was, pursuant to § 18A-4-8b(j), transferred to a position in a different classification, Secretary II.

If Respondent had reached the decision that the RIF was no longer necessary, and if there were no employees on the preferred recall list with more seniority than the employee whose position was originally reduced, only then would the senior Secretary IIIA who assumed Grievant's prior position have the right to be restored to her former position, if she chose to exercise that right and did so in a timely manner. If this had happened,then Grievant's transfer out of her position would have become unnecessary, and if there were no more senior personnel on the preferred recall list, Grievant would be entitled to claim her former job. However, Grievant's representative argues that another event made Grievant's transfer to a lower classification unnecessary: the posting of two Secretary IIIA positions when two existing jobs became vacant. This argument goes beyond the scope of the new amendment. Because the code leaves that decision solely up to the board, extrinsic evidence of necessity is not the sole factor, and also, even if the transfer were rescinded, Grievant would not be entitled to return to her job unless her former job became vacant. This would only happen if the other Secretary IIIA exercised her right to return to her former position. The amendment only addresses restoring Grievant to her former position, and does not address restoring her to her former classification in general. Further, If Grievant's transfer were adjudged unnecessary by Respondent, she would still be subject to the rights of more senior employees who may be on the preferred recall list.

There is no evidence that Respondent had adjudged the RIF to be unnecessary, nor that the posting of the two vacancies was in fact a recission of the RIF. With the judgment of whether the RIF and subsequent transfers were necessary in the sole discretion of the Respondent, the undersigned may not substitute his own judgment, but must look at whether Respondent abused its discretion by making an arbitrary and capricious decision.

"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 itcannot 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 Resources, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 198 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)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982)." Trimboli, *supra*.

Grievant herself testified that the reason for the RIF was a decrease in student enrollment, and the Respondent needed to cut some positions. The two vacancies that later arose, however arose because the employees in those jobs decided to move to different jobs, not because student enrollment increased and two new positions were added. There was the same number of Secretary IIIA positions after the RIF and before the postings as there were after the postings. Further, Grievant's transfer was based on the fact that another, more senior Secretary IIIA was entitled to her position, and that person is still there. Respondent could not conclude, therefore, that Grievant's transfer had become unnecessary, since the reason continues to exist. Grievant's argument that the posting of two vacancies in her former classification entitled her to return to her old position based on W.Va. Code § 18A-4-8b is not supported by the plain meaning of the Code. Grievant's entitlement to be restored to her former position is dependent on whether Respondent had rescinded the RIF that necessitated the transfer of the employee who replaced her and that employee exercised her right to return to her former position.

Grievant argues that the Grievance Board's decision in Brown v. Logan County Bd. of Educ., (See footnote 2) compels the Respondent to rescind the RIF and transfer on the theory that the reason for the RIF and/or transfer ceased to exist. In that case, the following rule was espoused:

> When a teacher's transfer, otherwise valid but not initiated by her, loses its stated justification prior to the end of the school-year in which the transfer was processed, absent some extraordinary circumstance, the employee is entitled to instatement into the position he would have held but-for the transfer. A county board of education's failure to offer such is, absent the referenced extraordinary circumstance, an abuse of discretion. When the stated justification is lost after the close of the aforementioned school-year, the county board's decision to not offer automatic reinstatement will not, again absent extremely compelling cause, be deemed an abuse of discre tion.

Brown, *supra*. See also, Kuhns v. Hancock County Bd. of Educ., Docket No. 91-15-360 (Dec. 30, 1991).

This was the state of the law prior to the amendment of W.Va. Code § 18A-4-8b. Grievant argues that the amendment was merely a codification of the existing rule from Brown, but there are very important differences: where Brown used compulsory language,the amendment is more discretionary, placing the determination of necessity in the "sole and exclusive judgment" of the Board. W.Va. Code 18A-4-8b(k). Too, even if Respondent had to determined the transfer was not necessary, Grievant would not automatically be entitled to reinstatement. Unlike the Brown progression of cases, the new Code requires a look at the preferred recall list before the displaced educator is afforded the option of being restored to her former position. No evidence was presented that establishes that no person on the preferred recall list would be entitled to Grievant's position instead of her.

Further, Respondent could not legally transfer Grievant into one of the two Secretary IIIA vacancies that arose after the RIF was accomplished. W.Va. Code § 18A-4- 8b(g) requires county boards to post "all job vacancies of established existing or newly created positions." These jobs must be filled based on seniority, qualifications and evaluation of past service. W.Va. Code § 18A-4-8b(a). The Board is allowed no room to use its own discretion as to how to fill vacancies of existing positions, but must follow the Code requirements of posting and competitively filling the opening.

The following conclusions of law support this discussion:

CONCLUSIONS OF LAW

1. Because this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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 §§ 18-29-2, 18-29-6. 2. "When a board of education seeks to reduce employment costs, the board may decide that the schools' best interests require either the elimination of some service personnel jobs or the retention of all service personnel jobs but with reduced employment terms." Lucion v. McDowell County Bd. of Educ. 191 W. Va. 399; 446 S.E.2d 487 (1994). In this case, the Board decided to eliminate three Secretary IIIA jobs, a

process also known as a “Reduction in Force” or “RIF.” If a board of education decides to reduce the number of jobs for service personnel, the board must follow the reduction in force procedures of W. Va. Code 18A-4-8b. Lucion, *supra.* A “Transfer,” on the other hand, occurs when an employee is released from her current job and employed in a different job of that same classification or another classification.

3. West Virginia Code § 18A-4-8b was amended effective April 14, 2001 by the addition of subsection (k), as follows:

> If, prior to the first day of August after a reduction in force or transfer is approved, the reason for any particular reduction in force or transfer no longer exists as determined by the county board in its sole and exclusive judgment, the board shall rescind the reduction in force or transfer and shall notify the affected employee in writing of his or her right to be restored to his or her former position of employment. Within five days of being so notified, the affected employee shall notify the board of his or her intent to return to his or her former position of employment or the right of restoration to the former position shall terminate: Provided, That the board shall not rescind the reduction in force of an employee until all employees with more seniority in the classification category on the preferred recall list have been offered the opportunity for recall to regular employment as provided in this section. If there are insufficient vacant positions to permit reemployment of all more senior employees on the preferred recall list within the classification category of the employee who was subject to reduction in force, the position of the released employee shall be posted and filled in accordance with this section. Three criteria must be met before this provision will allow a displaced employee to return to her position after a RIF or transfer: 1) The county board decides the reason for the reduction in force or transfer is no longer necessary; 2) The county board reaches that decision before the August first next following the RIF or transfer; and 3) no employees on the preferred recall list with more seniority are eligible to be placed in that position.

4. Inasmuch as W.Va. Code § 18A-4-8b (2001) is inconsistent with the rule of law outlined in Brown v. Logan County Bd. of Educ., Docket No. 90-23-177 (Oct. 31, 1990) and related cases, (See footnote 3) it is the controlling authority for recission of reductions in force and transfers.

5. Grievant did not meet her burden of proving that the RIF that necessitated her transfer was rescinded nor that she would have been entitled to her former position had it been rescinded.

6. "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 Resources, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary andcapricious actions have been found to be closely related to ones that are

unreasonable. State ex rel. Eads v. Duncil, 198 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)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982)." Trimboli, *supra*.

7. Grievant did not meet her burden of proving that the Respondent's failure to rescind the RIF and subsequent transfers was arbitrary and capricious.

8. W.Va. Code § 18A-4-8b(g) requires county boards to post “all job vacancies of established existing or newly created positions.” These jobs must be filled based on seniority, qualifications and evaluation of past service. W.Va. Code § 18A-4-8b(a). The Board is allowed no room to use its own discretion as to how to fill vacancies of existing positions, but must follow the Code requirements of posting and competitively filling the opening.

For the foregoing reasons, this grievance is hereby **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. 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 sonamed. 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 appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Dated: October 29, 2001 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1 *The third displaced Secretary IIIA elected not to exercise her bumping rights and accepted a shorter-term position.*

Footnote: 2 *Grievant's brief cites Docket No. 91-23-043, but I believe the case that this argument is based on is Docket No. 90-23-177 (Oct. 31, 1990).*

Footnote: 3

E.g. Barberio v. Harrison County Board of Education, Docket No. 89-17-351 (Feb. 13, 1990); Kuhns v. Hancock County Bd. of Educ., Docket No. 91-15-360 (Dec. 30, 1991); Hollins v. Wyoming County Bd. of Educ., Docket No. 92-55-263 (Mar. 18, 1993); Berry v. Logan County Bd. of Educ., Docket No. 95-23-421 (Mar. 29, 1996).