SHEILA FRANCIS,

Grievant,

v. DOCKET NO. 02-55-051

WYOMING COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Sheila Francis filed this grievance on October 4, 2001 stating,

> Grievant, had been reemployed by the Respondent from the preferred roster in a half-time Cook I position at Wyoming East High School. Grievant subsequently requested a leave of absence for medical reasons. The Respondent posted the Grievant's position on a permanent basis and denied her request for leave. The Grievance alleges that the Respondent has violated her constitutional right to continued employment with the Respondent, West Virginia Code 18A-2-8, 18A-4-15(c), and has engaged in arbitrary and capricious conduct in denying her request for medical leave.

As relief, Grievant seeks “instatement into the half-time Cook I position at Wyoming East High School, retroactive wages, benefits and regular employment seniority, and interest on all monetary sums.”

The grievance was denied at Levels I and II, and Level III was waived. However, at the Level II hearing, the issue of termination was resolved, and Grievant was thereafter placed into a comparable position to her satisfaction. The Statement of Grievance and Relief Sought were therefore amended at Level IV to reflect the outstanding issues, with no objection by Respondent, as follows:

> Grievant, a regularly employed cook, requested a medical leave of absence from the Board of Education for the 2001-2002 school year. Respondent never approved this leave of absence and posted Grievant's position as a permanent vacancy. This and other conduct led Grievant to believe she had been terminated. At the Level II hearing, Grievant was advised she had not been terminated. Grievant requested reinstatement shortly thereafter and was placed in a position.

As relief, Grievant now seeks “compensation for all lost wages and benefits from the beginning of

the school year through her reinstatement."

A Level IV hearing was held on May 8, 2002, at which John E. Roush, Esq., WVSSPA Representative, represented Grievant and Gregory W. Bailey, Esq., of Bowles Rice McDavid Graff & Love, PLLC, represented Respondent. The parties agreed to submit their proposed findings of fact and conclusions of law by June 10, 2002, and to submit any reply briefs by June 17, 2002, whereupon the matter became mature for decision.

I find the following facts have been proven by a preponderance of the evidence:

FINDINGS OF FACT

1. Grievant is regularly employed by Respondent as a cook. For the 2001-2002 school year, she was employed half-time at Wyoming East High School (WEHS).

2. In June, 2001, Grievant's husband was transferred to Australia to work at a mine there for a year. Grievant approached her supervisor about getting a leave of absence, stating she had some medical problems, and if she could get the leave she could go to Australia to be with her husband and get the problems treated there. Grievant was told how to make a request for leave.

3. Grievant also asked her assistant principal about the leave, and was told to write a letter to Superintendent Frank Blackwell requesting the leave "and just to see what they said about it at that point." [Lvl. II Tran., p. 18]. 4. On June 1, 2001, Grievant submitted a letter to Mr. Blackwell stating:

> Please present my request to the board for a leave of absence for one year. I am requesting this for personal as well as medical reasons. Leave will be from Aug. of 2001 to Aug. of 2002. I really appreciate your attention to this matter.

[Lvl. II Respondent's Exhibit No. 1].

5. On June 28, 2001, Grievant was contacted by Mr. Blackwell's secretary, Karen Brooks, who told Grievant at Mr. Blackwell's direction that she must submit evidence of medical necessity from her physician to support the request.

6. Grievant submitted an "Excuse Slip" from her physician, Dr. Charles A. Taylor, II, D.P.M., dated July 24, 2001, that stated in its entirety:

> Above patient was under my care from Dec. 3, 1999 thru Jan. 2001 for plantar fascitis and cacaneal spur. Treatment options are: injections, orthotics, surgical excision of spur or plantar fascia release.

[Lvl. II Grievant's Exhibit No. 2, p. 2.].

7. Although Grievant knew the Board would not be able to act on her request one way or the other until after school started in September, Grievant left for Australia in August, 2001. After she left, she repeatedly called Mr. Blackwell's office and the Board office to see if a decision had been made, even though she knew the Board would not meet until later.

8. Mr. Blackwell presented the request to the Board along with Grievant's supporting documentation. The Board determined that the information was inadequate to support the request. On August 13, 2001, Grievant called Mr. Blackwell's office from Australia, and spoke to Ms. Brooks, who told her the Board wanted more detailed information. Grievant told her she would try to get an appointment with a doctor inAustralia. Ms. Brooks told her the information would be needed by the end of September, in time for it to be presented at the next Board meeting on October 1, 2001.

9. On September 3, 2001, Grievant faxed a “Statement of Necessity for Medical Leave of Absence” signed by Dr. M.C. French of Thirroul, New South Wales, Australia. The statement, on a West Virginia Public Employees Insurance Agency form, indicates that Grievant was seen by Dr. French on August 30, 2001, and certifies that Grievant “is unable to work during the month of August, 2001,” and that she “is expected to be able to return to work during the month of August, 2002.” It lists the nature of her illness as “1) Anxiety- depression - new therapy being under introduction; 2) Bilateral - calcaneal - spur - awaiting - surgery.” [Lvl II. Respondent's Exhibit No. 3] (See footnote 1) .

10. The Board reconsidered Grievant's request and new doctor's statement at its September 10, 2001 meeting, and denied the request.

11. On September 11, 2001, Respondent posted a Service Personnel Position Announcement for “One-Half Time Cook I - Wyoming County East High School.” [Lvl. IV Grievant's Exhibit No. 3]. This was the job Grievant had been expected to return to for the 2001-2002 school year.

12. On September 28, 2001, Mr. Blackwell wrote Grievant at her Australia address to inform her that the request had been denied by the Board. He stated, “The basis of the Board's action rested upon the overriding fact that you are out of the countryand unavailable for work, regardless of the condition of your health.” [Lvl. II Grievant's Exhibit No. 2].

13. Grievant learned by calling a friend that her job had been posted, and later by calling Mr. Blackwell that her leave request had been denied. (See footnote 2)

14. When the 2001-2002 school year began, Grievant was in Australia. She had a round trip ticket by which she could have returned at any time, but she did not return in time to begin the school year. She did not report that she was available for work until the Level II hearing.

15. Another of Respondent's employees had in the past requested a personal leave of absence in order to go to Australia to be with her husband, and this request for personal leave was denied. That employee then submitted evidence that proved a medical leave of absence was necessary for the same amount of time, and that request for a medical leave of absence was approved.

DISCUSSION

Having reviewed all the credible evidence thoroughly, I find that Grievant abandoned her job in order to take a trip to Australia and in an amazing display of gratitude for Respondent's forbearance, now seeks payment for work she did not do. Grievant's theory evidently is that Respondent had some duty, beyond informing her that her leave of absence had not been approved, to inform Grievant that she would need to appear for work and do the job for which she was hired. Although Grievant's conduct could easily have resulted in serious discipline, no action was taken against Grievant by Respondentfor her conduct, so she bears the burden of proving that she is entitled to the relief she requests by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "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 and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

In August, 2001, Grievant knew her husband was to go to Australia for a year for work purposes, and Grievant wanted to go along. Knowing that another employee had not had a leave of absence approved for similar reasons in the past, Grievant attempted to concoct a medical reason for her year-long absence, based on a legitimate medical condition (See footnote 3) she had at the time. However, she presented no evidence that her condition, bone spurs on both her heels, actually necessitated a year-long absence for treatment.

Grievant argues that Respondent caused her to believe her continuing contract had been terminated when it posted her former cook position at WEHS. In making this argument, Grievant fails to recognize that she is responsible for her own actions and their consequences. She informed

Respondent that she did not wish to work at her job from August, 2001 to August, 2002. She filed a request for medical leave of absence unsupported by any proof of medical necessity. She moved to Australia. She was informed that the leave of absence was not approved, and that it would not be consideredagain until October, 2001, after the start of the school year. She submitted medical documentation that, even if taken at face value, still did not establish a medical necessity for her leave of absence. Despite having a ticket by which she could return at any time, and despite knowing her leave request had not been approved and would not be approved before she should be at work, she stayed in Australia, and failed to report to work at the beginning of the 2001-2002 school year. Grievant presented no authority, and the undersigned can find no previous Grievance Board cases, to support the contention that Respondent should pay Grievant for failing to do her job despite knowing she was not excused from her duties.

Grievant also argues that Respondent arbitrarily denied Grievant's request. A county board of education is not required to grant a leave of absence except "for the purpose of pregnancy, childbirth or adoptive or infant bonding . . . ." W. Va. Code §18A-2- 2a(b). “Decisions on whether to grant a leave of absence requested by an employee for reasons other than those addressed by statute is ordinarily a matter within the sound discretion of the board of education. Abston v. Putnam County Bd. of Educ., Docket No. 97-40-057 (July 28, 1997); *See* Pockl v. Ohio County Bd. of Educ.. 185 W. Va. 256, 406 S.E.2d 687 (1991).” West v. Putnam County Bd. of Educ. Docket No. 97-40-524 (Mar. 20, 1998).

Grievant's request was not for one of the enumerated reasons, so Grievant was not entitled to the leave, and Respondent was free to exercise its discretion in deciding whether to grant the request. Of course, Respondent must exercise that discretion in a manner that is not arbitrary or capricious. The arbitrary and capricious standard of review of county board of education decisions requires a searching and careful inquiry into thefacts; however, the scope of review is narrow, and the undersigned may not substitute his judgment for that of the board of education. *See generally*, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). A board of education's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985);

Carr v. Monroe County Bd. of Educ., Docket No. 99-31-483 (Mar. 9, 2000).

No local policy regarding leaves of absence was placed in evidence, and the statute does not specify standards by which non-paternal leave of absence requests must be evaluated. However, Grievant claimed that the leave was necessary for her to have and recover from surgery on her feet, so Respondent reasonably required medical evidence that the leave was necessary for these reasons. Grievant instead provided vague information from a doctor who had not seen her for several months that stated surgery was one treatment option, and later from another doctor with whom she had had one appointment, who concurred that surgery was one treatment option. Nothing in the supporting information provided by Grievant to Respondent indicated that Grievant must convalesce for an entire year even if she had already been scheduled for the surgery. Instead, Respondent reasonably concluded that Grievant simply wanted to spend a year in Australia, and that since she was already there instead of working as she should have been, she was not available to work whether or not the surgery was a factor. (See footnote 4) The following conclusions of law supplement this discussion:

CONCLUSIONS OF LAW

1. This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "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 and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

2. A county board of education is not required to grant a leave of absence except "for the purpose of pregnancy, childbirth or adoptive or infant bonding . . . ." W. Va. Code §18A-2-2a(b). “Decisions on whether to grant a leave of absence requested by an employee for reasons other than those addressed by statute is ordinarily a matter within the sound discretion of the board of education. Abston v. Putnam County Bd. of Educ., Docket No. 97-40-057 (July 28, 1997); *See* Pockl v. Ohio County Bd. of Educ.. 185 W. Va. 256, 406 S.E.2d 687 (1991).” West v. Putnam County Bd. of Educ. Docket No. 97-40-524 (Mar. 20, 1998).

3. Grievant's request for a leave of absence was not for one of the enumerated reasons for which a county board of education must grant the requested leave. Respondent was free to exercise

its sound discretion as to whether the request should be granted.

4. Respondent must exercise its discretion in a manner that is not arbitrary or capricious. The arbitrary and capricious standard of review of county board of educationdecisions requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the board of education. *See generally*, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). A board of education's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Carr v. Monroe County Bd. of Educ., Docket No. 99-31-483 (Mar. 9, 2000).

5. Respondent's decision to deny Grievant's leave request was not arbitrary or capricious, and was not an abuse of its discretion.

For the foregoing reasons, this grievance is hereby **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Wyoming 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 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 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.

Date: June 26, 2002 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

The undersigned is inclined to give little weight to this document, given that no original version was produced for evidence, and given the fairly clear inconsistencies in the handwriting use to fill in the dates and the "Nature of illness" section.

Footnote: 2

The letter he mailed to her took two or three weeks to reach her, so she had not received it at the time she called.

Footnote: 3

Extensive medical records detailing her condition were made a part of the record at Level II as Grievant's Exhibit No. 1, but none of this information was available to Respondent at the time it made its decision, and even had the records been available, they do not state a year-long absence was necessary. Therefore, these records do not support the argument that Respondent should have granted Grievant's request based on medical documentation.

Footnote: 4

Grievant had not at the times relevant to this grievance, and still has not, scheduled surgery to relieve her condition.