BETTY ANN MITCHELL,

Grievant,

v. Docket No. 03-52-191

WETZEL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

___Betty Ann Mitchell ("Grievant"), employed by the Wetzel County Board of Education ("WCBE") as a teacher, filed a grievance directly to level four on July 3, 2003, following her dismissal for unsatisfactory performance. Grievant seeks reinstatement, back pay and benefits, and expungement of the dismissal charges from her employment record. A level four hearing was conducted in the Grievance Board's Wheeling office on September 30, 2003, at which time Grievant was represented by Wray V. Voegelin, Esq., of Cassidy, Myers, Cogan, Voegelin & Tennant, L.C., and WCBE was represented by Larry Blalock, Esq., of Jackson & Kelly, P.L.L.C. The matter became mature for decision upon receipt of the parties' proposed findings of fact and conclusions of law on or before November 1, 2003.

The facts of this matter, derived from a preponderance of the credible evidence, are set forth as follows.

Findings of Fact

1. Grievant has twenty-four years of teaching experience and has been continuously employed by WCBE since 1979. Grievant is certified in mathematics, chemistry, and general science, grades 7 - 12, and was assigned as a math teacher at Paden City High School (PCHS) during the 2002-2003 school year. 2. Grievant has suffered from both physical and mental ailments which caused her to be absent a substantial number of days during the 2000-2001, 2001-2002, and 2002-2003 school years. Grievant was diagnosed as suffering from bipolar depression, and experienced difficulty in identifying the correct medication to control her symptoms. As a result, she was absent fifty-five days of the 2002-2003 school year.

3. In April 2002, then-WCBE Assistant Superintendent, Dr. Paul E. Barcus, Jr., observed

Grievant's classroom performance. A second observation was delayed because Grievant was absent from school the remainder of that academic year.

4. The first instructional day during the 2002-2003 school year was August 26, 2002. On August 28, 2002, Superintendent Barcus conducted his second observation of Grievant's performance, and, on August 29, 2002, completed a performance evaluation for the period of April 22 through August 29, 2002. Grievant was rated "unsatisfactory" in four of six categories, and was placed on an improvement plan September 6, 2002. Corrective action was to be demonstrated by October 4, 2002, or earlier.

5. Grievant was absent seventeen days between September 6 and October 4, 2002.

6. Grievant's absence continued through October 11, 2002. On that day a meeting was conducted by Superintendent Barcus with PCHS Principal Warren Grace, Assistant Superintendent Robyn Fitzsimmons, West Virginia Education Association Representative Owens Brown, Grievant, and her father. During this meeting, Superintendent Barcus advised Grievant that there was little or no community support for her return to work, and suggested that she "might want to consider seeking a teaching position in another school system as a new start might be in her own best interests andemotional well-being." Superintendent Barcus also advised Grievant that she would be required to submit to an evaluation by a psychiatrist engaged by WCBE before returning to work. Grievant complied with the request, and returned to work on October 14, 2002.

7. Superintendent Barcus conducted an observation of Grievant's classroom performance on October 31, 2003. Grievant was the only teacher in the Wetzel County school system observed by the Superintendent during the 2002-2003 school year.

8. On November 1, 2002, Principal Grace gave Grievant a letter which states in pertinent part:

Given the fact that you are currently on an improvement plan, and that we have received numerous complaints of parents of your students regarding your apparent lack of classroom management and supervisory skills, I am strongly recommending that you consider resigning from your teaching position at our community high school. . . I have enclosed a letter of resignation for your serious consideration.

9. The resignation letter composed by Principal Grace for Grievant's signature stated, in

part:

Due to my chronic illness, I am unable to attend school on a regular basis to fulfill my duties as teacher of mathematics at Paden City High School. Therefore, please accept this letter of resignation from my teaching position.

10. As of November 1, 2002, Principal Grace had neither observed nor evaluated Grievant under the September 6, 2002, improvement plan.

11. Principal Grace observed Grievant on November 4, 2002, and a second improvement plan was drafted. This plan was scheduled to conclude on January 21, 2003. 12. Assistant Superintendent Robyn Fitzsimmons observed Grievant on November 19, 2002, and completed an evaluation of her performance on November 25, 2002. Grievant was rated "unsatisfactory" in four of six categories.

13. On December 10, 2002,Grievant was observed by Barbara Stout, Director of Adolescent Education.

14. Sometime in early December, Grievant was suspended for three days, without pay, for willful neglect of duty and incompetency, as a result of damage done to her classroom. The suspension was upheld by the Grievance Board in Mitchell v. Wetzel County Board of Education, Docket No. 02-52-417 (Mar. 28, 2003).

15. On or about January 2, 2003, WCBE received two letters from students in Grievant's classes, expressing concern that they were not being taught the basics for higher math classes, and asking for help.

16. Principal Grace observed Grievant on January 3, 2003, and Ms. Stout completed an evaluation January 9, 2003, in which Grievant was rated "unsatisfactory" in all categories.

17. On January 14, 2003, Grievant's improvement plan was revised, and extended to April 30, 2003.

18. In August 2002, Grievant applied for a posted position of 7th and 8th grade mathematics teacher at New Martinsville School. Grievant was not selected, but was found to be the most qualified applicant, and ordered instated to the position, in a level four grievance decision, Mitchell v. Wetzel County Board of Education, Docket No. 02-52-341 (Feb. 26, 2003). At the request of Superintendent Barcus, Grievant agreed to stay at Paden City High School for the remainder of the school year. 19. Grievant was observed by Superintendent

Barcus on February 24, and by Principal Grace on March 6, prior to receiving an evaluation on March 28, 2003, rating her "unsatisfactory" in four of six categories.

20. Assistant Superintendent Fitzsimmons observed Grievant's classroom on April 8, 2003, and Director Stout observed her on April 25, 2003. Grievant was rated "unsatisfactory" in five of six categories on an evaluation dated April 28, 2003.

21. A second revised improvement plan was implemented on May 5, 2003, to run through June 9, 2003. Grievant was subsequently observed by Superintendent Barcus on May 13, and received an "unsatisfactory" evaluation on June 3, 2003.

22. Observations by Ms. Stout and Ms. Fitzsimmons on June 5 and 6, respectively, were followed by an "unsatisfactory" evaluation on June 10, 2003.

23. Superintendent Barcus issued a letter dated June 11, 2003, advising Grievant that he would recommend her termination to the Board.

24. On June 25, 2003, WCBE approved the recommendation that Grievant be dismissed for unsatisfactory performance.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. It may not be determined by the number of the witnesses, but by thegreater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. In other words, "[t]he 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 employer has not met its burden. Id.; See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712

(1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

The authority of a county board of education to suspend or dismiss an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8, i.e., immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of *nolo contendere* to a felony charge. Further, this authority must be exercised reasonably, not arbitrarily or capriciously. Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). See Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

W. Va. Code §18A-2-8 provides that termination based on 'unsatisfactory performance' must be predicated upon an employer evaluation, pursuant to W. Va. Code 18A-2-12, which provides, in part:

A professional whose performance is considered to be unsatisfactory shall be given notice of deficiencies. A remediation plan to correct deficiencies shall be developed by the employing county board of education and the professional. The professional shall be given a reasonable period of time forremediation of the deficiencies and shall receive a statement of the resources and assistance available for the purposes of correcting the deficiencies. . . .

Provisions for a written improvement plan, which shall be specific as to what improvements, if any, are needed in the performance of the professional and shall clearly set forth recommendations for improvements, including recommendations for additional education and training during the professional's recertification process.

The West Virginia State Board of Education has interpreted these provisions in Policies 5300 and 5310. Policy No. 5300 provides that teacher evaluations are to be conducted on a regular basis, that evaluations be "open and honest," and that the teacher "be given an opportunity to improve deficient performance prior to any adverse personnel actions." State Board of Education Policy 5310 requires that this opportunity to improve be formally provided in the form of an improvement plan which is "implemented in a manner consistent with the goal of raising the deficient performance to an acceptable level."

Thus, the burden of proof in this case is upon WCBE to prove by a preponderance of the evidence the charges of unsatisfactory performance, and that it complied with Policies 5300

and 5310 by informing the employee of the deficiencies and affording her a reasonable period of time to improve. Perkins v. Greenbrier County Bd. of Educ., Docket No. 94-13-019 (Aug. 12, 1994). WCBE asserts that the dismissal was appropriate, and was processed in compliance with the relevant statutes and administrative policies. Specifically, Grievant was fully apprised of her deficiencies and given a reasonable period of time to improve, yet failed to achieve the goals outlined in the improvement plans to remediate her unsatisfactory performance.

Grievant argues that the decision to terminate her employment was not based upon open and honest evaluations as required by Policy 5300, but upon extraneous factors related to her absences, depression, and a perceived lack of community support. Grievant alleges that the dismissal was arbitrary and capricious, and WCBE failed to establish by a preponderance of the evidence that she had engaged in unsatisfactory performance which directly and substantially effected the system in a permanent and non-correctable manner.

The evidence supports WCBE's claim that Grievant was notified of her deficiencies, and given a period of time to improve. However, Grievant is equally correct in her assertion that the decision to terminate her employment was arbitrary and capricious. 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 and capricious actions have been found to be closely related to ones that are unreasonable. 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." 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 anadministrative law judge may not simply substitute her judgment for that of school administrators. *See generally*, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982)." Trimboli, supra.

At level four, Superintendent Barcus testified that Grievant was not dismissed due to her illnesses, but for her unsatisfactory performance when she was at work. While his intent may have been such, the illness and performance are so intertwined, review of one without the other results in an incomplete evaluation of the situation. Grievant had a high absenteeism rate for several years, and was absent nearly one-third of the 2002-2003 academic year. It would have been difficult for her and the substitute teachers to provide consistent, high-quality instruction, or to maintain classroom control in this situation. **(See footnote 1)**

Superintendent Barcus further testified that it was difficult, sometimes impossible, to secure a certified math substitute, and that he had received parental comments/complaints regarding Grievant's performance. Grievant's attendance record establishes that a substitute teacher could not be located three of the days Grievant was absent. No parents testified either at the dismissal hearing or the level four hearing, and the nature of their comments was not expounded upon by the Superintendent, who only stated that some parents requested that their children be transferred to another class. He did not state how many parents made that request, or whether Grievant was the only teacher who generated such requests. No information was provided by WCBE as to whether the students assigned to Grievant's classes were found to be deficient in their math skills compared to students in other classes The suggestion by Superintendent Barcus that Grievant may want to start fresh in another system, and the letter of resignation produced by Principal Grace for Grievant's signature, are clear signals that they wanted Grievant out of the WCBE system. Given this attitude, together with her ongoing medical problems, the fact that Grievant did not perform to expectations is no surprise. Finally, Grievant was deprived of the opportunity to start over in another school when Superintendent Barcus requested that she not transfer until the following year, thereby keeping her in a situation which clearly was not improving.

Both parties have compelling interests in this matter. While the school system must employ competent teachers, Grievant has twenty-four years invested in a career she wishes to continue. While a board of education is not required to continue providing plans of improvement ad infinitum, the evidence establishes that WCBE acted in an arbitrary and capricious manner when it terminated Grievant's employment without considering many of the relevant factors previously addressed herein. Given the facts and the circumstances in this

matter, WCBE must reinstate Grievant, at the New Martinsville School, with back pay and benefits. If Grievant continues to be disabled by her medical conditions, and cannot perform her duties on a satisfactory level, further action will be appropriate.

In addition to the findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). 2. A board may suspend or dismiss any person in its employment at any time for immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge. A termination based on unsatisfactory performance must be predicated upon an employer evaluation and an opportunity to improve, pursuant to W. Va. Code §§18A-2-8; 18A-2-12, and State Board of Education Policy 5300.

3. 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 and capricious actions have been found to be closely related to ones that are unreasonable. 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." 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 school administrators. *See generally*, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982)." Trimboli, supra. 4. WCBE acted in an arbitrary

and capricious manner when it terminated Grievant's employment, given the unique circumstances surrounding this matter.

Accordingly, this grievance is GRANTED, and WCBE Ordered to instate Grievant to the New Martinsville School, with back pay and benefits.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wetzel 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

DATE: NOVEMBER 20, 2003 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.There is no evidence that a medical leave of absence was ever requested or suggested.