E. FAITH GEMMER,

Grievant,

v. **DOCKET NO. 03-54-302**

WOOD COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievant Faith Gemmer filed this grievance against her employer, Wood County Board of Education (Respondent) on June 17, 2003, stating: “The Title I Aide position at Kanawha Elem. was cut by the Title I Director in October due to lack of funding. With the influx of additional funding and the new allocations issued by the director in May of the same school year, the aide should be reinstated in accordance with State Law 18A-4- 8b(k).”

Having been denied at all lower levels, a level four hearing was held in the Grievance Board's Charleston office on February 2, 2004. Grievant was represented by counsel, John Roush of the WVSSPA, and Respondent was represented by counsel, Dean Furner of Spilman Thomas & Battle, PLLC. This matter became mature for decision on March 8, 2003, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Based on a preponderance of the relevant, credible evidence contained in the record and adduced at the hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant is employed by Respondent as a classroom Aide. She has been in the Title I program at Kanawha Elementary School (KES) for about 12 years.

2. In October, 2002, Dr. Frank Bono, Respondent's Title I Director, predicted that KES would lose some Title I funds for the 2003-2004 school year, because of a projected decrease in students

receiving free or reduced meals. Due to the expected loss of funds, he determined that a reduction in force of the Title I personnel would be necessary.

3. Rather than eliminating a highly qualified professional position, such as the half-time Title I Math teacher, which would render the entire county ineligible for all Title I funds, Dr. Bono determined that a Title I Aide position should be reduced in force.

4. Grievant's position was identified as the one that should be eliminated.

5. Grievant “bumped” an Aide in a kindergarten classroom at KES, who was transferred to another school so Grievant could be transferred to that Aide's position.

6. In the spring of 2003, Dr. Bono found out that his initial projections were incorrect, and that KES would actually receive more Title I funding for the 2003-2004 school year than it had in the past. The actual allocation of funds was made in July, 2003, at which time Respondent knew for certain the funding level had not been cut.

7. With the additional funds available for the 2002-2003 school year and the savings from the elimination of Grievant's Aide position, Respondent hired a new, full-time Title I math teacher, rather than restoring Grievant's Title I Aide position.

DISCUSSION

Grievant alleges a violation of W. Va. Code § 18A-4-8b(k), which states in pertinent part: “If, prior to the first day of August after a reduction in force or transfer is approved, thereason 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.” [Emphasis added.]

A large majority of the evidence adduced at both level three and level four detailed the goals of the No Child Left Behind Act (NCLB), the relative benefits of teachers and aides, the excellent work Grievant performed in her Title I-funded Aide position in KES' computer lab, and even the merits of subject-specific training and education on an educator's ability to deliver a subject. Almost all of this information is entirely irrelevant to the question at hand. There was very little actual evidence of the facts that would support or refute Grievant's claim that W. Va. Code § 18A-4-8b(k) had been violated, but the essential facts are fairly simple and appear to be undisputed.

Grievant's Aide position was funded by Title I monies, and Respondent expected a decrease in those funds. It made the decision to reduce in force Grievant's position rather than a professional position. Respondent's stated purpose for this action was the expected decrease in Title I funding. Instead of the expected decrease, Respondent received an increase in funding. Rather than rescinding its decision to eliminate Grievant's position, as the statute requires, Respondent decided that it could combine the money saved by the elimination of Grievant's position with the additional money it was to receive, and use that to hire another full-time professional.

The actual logistics of the transactions are not in the record: there are no Board meeting minutes and no letter to Grievant informing her of her transfer and the reasonstherefor. The actual date of Grievant's transfer is not in evidence. (See footnote 1) The Title I director made these decisions, but the record does not reveal how they were passed on to the Superintendent or the Board. "Three criteria must be met before [W. Va. Code § 18A-4- 8b(k)] 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 [no longer exists][(See footnote 2)]; 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." Blake v. Kanawha County Bd. of Educ., Docket No. 01-20-470 (Oct. 29, 2001).

Obviously, since there is no evidence at all of the Board's deliberations in this matter, there is no direct evidence of what it decided was the reason for the transfer and no evidence that it decided the reason no longer existed. However, Respondent does not dispute Grievant's proffered version of events, and its actions and intent may be inferred from the results.

"County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel; nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Egan v Bd. of Educ., 185 W. Va. 302, 406

S.E.2d 733 (1991); Bd. of Educ. v. Enoch, 186 W. Va. 712, 414 S.E.2d 630 (1992); Cahill v. Mercer County Bd. of Educ., 195 W. Va. 453 465 S.E.2d 910 (1995). Even when, as in this case, the county board is given the authority to make a determination in "its sole and exclusive judgment," that broad grant of discretion must still be exercised reasonably, rather than arbitrarily. 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." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). "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 [his] judgment for that of a board of education." Trimboli, *supra*, Blake, *supra*.

It is unreasonable to base a decision on a fact that does not exist, which is what Respondent did here. It expected a decrease in funds, but there was no decrease in funds. It predicated Grievant's transfer on this decrease in funds. While we have no direct evidence that the board decided the reason for Grievant's transfer no longer existed, the uncontroverted fact is that it did not, and Respondent knew this prior to August 1. It would be arbitrary and capricious for the Board to decide otherwise.

Under W. Va. Code § 18A-4-8b(k), all of the Board's discretion is granted with respect to that one decision; once that decision is made it has no discretion to stay its course; it “shall” rescind the reduction in force or transfer its false assumption was basedupon. In this case, it did not. While the actions it did take are reasonable and in the interests of the schools, they directly contravene the express provision of W. Va. Code § 18A-4-8b(k). It is well established that the word "shall," in the absence of language in the statute showing contrary intent on the part of the legislature, should be afforded a mandatory connotation. Martin, et al., v. Raleigh County Bd. of Educ., Docket No. 02-41-212 (Sep. 13, 2002). Further, “School personnel laws and regulations are to be strictly construed in favor of the employee.” Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (W. Va. 1979).

There was no evidence presented on the status of personnel on the preferred recall list, and one of the requisites for Grievant to be returned to her position is that there are no employees on the preferred recall list with more seniority eligible to be placed in that position. Therefore, although Grievant has proven her allegation, she is not automatically entitled to return to her former position. Respondent must make the determination that there were no more senior aides on the preferred recall list at the time it received the Title I funding allocation.

The following conclusions of law support this decision:

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. “School personnel laws and regulations are to be strictly construed in favor of the employee.” Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (W. Va. 1979).

3. “If the reason for any particular reduction in force or transfer no longer exists prior to August 1, a board of education shall rescind the reduction in force or transfer and notify the affected employee in writing of his or her right to be restored to his or her former position of employment. W. Va. Code § 18A-4-8b(k).” Wayts v. Wetzel County Bd. of Educ., Docket No. 03-52-264 (Dec. 22, 2003).

4. It is well established that the word "shall," in the absence of language in the statute showing contrary intent on the part of the legislature, should be afforded a mandatory connotation. Martin, et al., v. Raleigh County Bd. of Educ., Docket No. 02-41- 212 (Sep. 13, 2002); Nelson v. Public Employee Ins. Bd., 171 W. Va. 445, 300 S.E.2d 86 (1982); Jackson v Grant County Bd. of Educ., Docket No. 97-12-224 (Oct. 16, 1997).

5. “Three criteria must be met before [W. Va. Code § 18A-4-8b(k)] 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.” Blake v. Kanawha County Bd. of Educ., Docket No. 01-20-470 (October 29, 2001).

6. The decision as to whether a reason for a reduction in force or transfer no longer exists must be made reasonably, and not arbitrarily and capriciously.

7. 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 implausiblethat 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 a board of education. *See generally*, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982)." Trimboli, *supra*, Blake, *supra.*

8. Respondent knew its reason for Grievant's transfer had ceased to exist by the following August 1, and it would have been arbitrary and capricious to decide otherwise.

9. Respondent was obligated to rescind Grievant's transfer if there were no employees on the preferred recall list with more seniority who were eligible to be placed in Grievant's former position.

For the foregoing reasons, this grievance is hereby **GRANTED in Part**. Respondent is ordered to restore Grievant to her previous position if there are no employees on the preferred recall list with more seniority that are eligible to be placed in that position. If such employee does exist, that employee must be placed in the position.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Wood 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: March 30, 2004 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

In fact, there is no real evidence that Grievant actually was transferred. Since she was simply reassigned to a different classroom in the same school, it would appear she was not. However, she testified that she was transferred and Respondent did not refute this assertion. Since the statute Grievant bases her position on would be irrelevant if she had not been transferred, it is presumed Respondent would have made this argument if it could have.

Footnote: 2

The original version of this sentence was, "The county board decides the reason for the reduction in force or transfer is no longer necessary." Since the undersigned authored that conclusion and now recognizes the sentence makes little grammatical sense, I have taken the liberty of editing it to read more accurately.