TIMOTHY BUTLER,

Grievant,

v. **Docket No. 03-11-284**

GILMER COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Timothy Butler ("Grievant") initiated this proceeding on August 11, 2003, alleging entitlement to a full-time principal position for the 2003-2004 school year. He seeks instatement, back pay, seniority, and benefits. The grievance was denied at level one on August 21, 2003. A level two hearing was held on September 3, 2003, and the grievance was denied in a decision dated September 10, 2003. Level three consideration was waived, and Grievant appealed to level four on September 17, 2003. A hearing was held in Elkins, West Virginia, on December 17, 2003, at which Grievant was represented by counsel, Loren B. Howley, and Respondent was represented by counsel, Kimberly S. Croyle. This matter became mature for consideration upon receipt of the parties' fact/law proposals on February 2, 2004.

The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievant has been employed by Respondent Gilmer County Board of Education ("GCBOE") as a teacher and principal for approximately 27 years. 2. Grievant was principal of Normantown Elementary School from September 2000 through June of 2003.

3. In the spring of 2003, due to budgetary constraints, Superintendent Sue Waggoner proposed a restructuring of the elementary school principal positions in the county. The proposal involved the elimination of some central office positions and assignment of those duties to the principals of Normantown, Sand Fork and Troy Elementary Schools. The principal positions would be

posted with reduced contract terms and the addition of the new duties. It was contemplated that the positions would be half- time principals and half-time central office duties. Pursuant to the original proposal, the Normantown Elementary principal would also take on the responsibilities of Special Education Director.

4. By letter dated March 10, 2003, Grievant was notified by Superintendent Waggoner that he was being considered for transfer for the 2003-2004 school year "[d]ue to a restructuring of Gilmer County Schools administrative personnel" and the elimination of the full-time principal position at Normantown Elementary School. Due to his certification, Grievant was to be transferred to a teaching position at Normantown Elementary.

5. At a Board hearing on March 25, 2003, Grievant was provided the opportunity to challenge his proposed transfer. At that hearing, both Grievant and Superintendent Waggoner extensively discussed the finances of GCBOE, positions which could be eliminated, and the combination of the elementary school principals' duties with central office duties. 6. By letter dated April 7, 2003, Superintendent Waggoner notified Grievant that the Board had approved his transfer as recommended.

7. Grievant filed a level one grievance on May 2, 2003, challenging his transfer and the proposed reconfiguration of administrative positions by GCBOE.

8. At a Board meeting in early June, 2003, Grievant addressed the Board extensively regarding the Superintendent's proposal regarding combining the principals' positions with central office duties. Grievant voiced his concern that the central office duties were far too specialized to be performed by principals, and proposed that they be posted as extracurricular contracts. He also proposed that the principals' contract terms be reduced, and that they be assigned less extensive central office duties, such as those previously performed by secretaries.

9. On an unspecified date in late May or early June, 2003, Grievant withdrew his grievance challenging his transfer, because he did not feel qualified to serve as the Director of Special Education.

10. On June 16, 2003, the principal of Glenville Elementary School submitted his resignation. His position had not been previously placed on the transfer list, because that school had higher enrollment than the other elementary schools in the county. Therefore, the Superintendent did not believe it was possible to make that position a half-time principal, due to the high enrollment of the

school.

11. On June 18, 2003, GCBOE posted the principal positions for Normantown, Glenville, Sand Fork and Troy Elementary Schools. Each position was for a contract term of 205 days (reduced from 230), and each included specific central office duties. TheNormantown position included the responsibility of “E-rate contact,” and the Glenville position included the added responsibility of “WVEIS contact.”

12. The E-rate duties had been performed by Superintendent Waggoner during the previous school year. E-rate involves an application process by which schools receive discounts for Internet and phone services. The individual responsible for E-rate must complete several very lengthy forms, which are revised and resubmitted throughout the process. Superintendent Waggoner believed that she had spent at least 50 hours performing these duties during the school year, and she did not believe that she had given this task all the attention it needed.

13. Grievant applied for the posted principals' positions, but was not selected to fill any of them.

14. Although GCBOE changed its proposal regarding the specific duties to be assigned to the elementary school principal positions, it did reduce central office positions and reassign duties to principals for the 2003-2004 school year.

15. After the retirement of Glenville Elementary School's principal, Grievant was the most senior principal in the county.

16. Grievant initiated a new grievance by request for informal conference on July 7, 2003, “concerning my employment for the 2003-2004 school year at Normantown Elementary School.”

Discussion

Grievant has the burden of proving each element of his 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 § 18-29-6.

Respondent contends that, as to Grievant's transfer, he has had the opportunity to litigate this issue, chose to withdraw his grievance, and that this portion of his grievance is untimely. The burden of proof is on the respondent asserting that a grievance was not timely filed to prove this affirmative

defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory timelines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997). Code § 18-29-4(a) provides, in pertinent part:

Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Kessler, supra. See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989). Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990), discussed the discovery rule of W. Va. Code § 18-29-4, stating in Syllabus Point 1 that "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance." As to Grievant's proposed transfer and the reasoning behind it, there can be no question that by April 7, 2003, Grievant knew of the facts giving rise to this issue. However, the instant grievance, initiated in early July, 2003, was prompted by the posting of the four elementary school principals' positions on June 18, 2003. Grievant alleges that, because of the Glenville Elementary principal's retirement, he was entitled to a lateral placement in that position as the most senior principal. Alternatively, Grievant argues that on June 18, 2003, it became clear that the justification for his transfer had changed, and Respondent clarified its need for a full-time principal at Normantown Elementary School, rather than the half-time position combined with central office duties which had been proposed during Grievant's transfer hearing.

Grievant's first contention regarding his right to a “lateral” placement in the Glenville Elementary position is governed by the provisions of W. Va. Code § 18A-4-7a, which provides, in pertinent part:

> Whenever a county board is required to reduce the number of professional personnel in its employment, the employee with the least amount of seniority shall be properly notified and released from employment . . . .

> If an employee subject to release holds certification and/or licensure in more than one lateral area and if such employee's seniority is greater than the seniority of any other employee in one or more of those areas of certification and/or licensure, the employee subject to release shall be employed in the professional position held by the employee with the lease seniority in any of those areas of certification and/or licensure[.]

In addition, subsection (m) of the statute provides that professional personnel whose seniority is insufficient to allow them continued employment during a reduction in force ("RIF") are to be placed upon a preferred recall list. Grievant contends that, although his transfer was complete, and his placement in a teaching position had already been approved by the Board prior to June 18, he should have been placed in the Glenville Elementary position as the most senior principal on preferred recall. However, the simple fact of the matter is that Grievant was *not* on preferred recall at the time of the retirement. The above-cited portions of W. Va. Code § 18A-4-7a are clearly designed to ensure that employees who hold multiple certifications will have ample opportunities to retain employment whenever a reduction in force occurs. In this case, as a certified classroom teacher, Grievant was properly transferred into a teaching position, rather than being placed on the preferred recall list. As stated above, the issue of the propriety of Grievant's transfer is untimely, and Grievant has chosen not to litigate that issue by withdrawing his grievance regarding it. Accordingly, any contention that he should have been placed on preferred recall in April of 2003, as opposed to a transfer into a teaching position, is untimely. Likewise, Grievant's contention that he should have been placed on preferred recall *as a principal* at the same time he was transferred into a teaching position is also untimely, as all of these events occurred in March and April of 2003, and this grievance was not filed until July. (See footnote 1)

The undersigned finds that Respondent acted properly when it posted the Glenville Elementary School principal's position. W.Va. Code § 18A-4-7a(o) requires county boards to post "openings in established, existing or newly created positions." These positions must then be filled pursuant to the specific criteria set forth in that statute. Therefore, theBoard 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. Grievant was allowed the opportunity to apply for that position, and he has not challenged his non-selection.

However, the issue of whether or not the need for Grievant's transfer ceased to exist after the transfer had been approved presents a much more difficult question. Also, since the events which Grievant has based this belief upon did not occur until June 18, 2003, his grievance in that regard is timely. Yet another portion of W. Va. Code § 18A-4-7a addresses this issue, stating as follows:

> If, prior to the first day of August of the year a reduction in force is approved, the reason for any particular reduction in force 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 released employee in writing of his or her right to be restored to his or her position of employment. . . . Notwithstanding any other provision of this subdivision, if there is another employee on the preferred recall list with proper certification and higher seniority, that person shall be placed in the position[.]

W. Va. Code § 18A-4-7a(j)(4).

This statute was recently amended, and has yet to be interpreted by this Grievance Board. However, the statute governing transfers and reductions in force of service personnel, W. Va. Code § 18A-4-8b, was also amended to include identical language to that contained in the statute quoted above. In a case which involved a situation quite similar to the instant case, this Grievance Board held that:

> 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.

Blake v. Kanawha County Bd. of Educ., Docket No. 01-20-470 (Oct. 29, 2001).

Grievant contends that Respondent changed its plan to make the elementary school principals half-time positions, combined with central office duties, which is evidenced by the postings on June 18, 2003. Therefore, he argues that, since his previous position as Normantown Elementary School principal was posted as a full-time position, the reason for his transfer no longer existed. (See footnote 2) However, Respondent contends that the budget deficit, and the consequent elimination of some central office positions, was the reason for Grievant's transfer and never changed at any time. Although the principal positions were not posted literally as “half time,” as originally discussed, they were altered in contract length and were combined with central office duties, which are not normally

assigned to school principals. As to Grievant's specific position at Normantown Elementary, it was combined with duties previously performed at the central office, albeit by the Superintendent. Therefore, Respondent contends, the reason for Grievant's transfer still existed when the postings came out on June 18, 2003.

As discussed in Blake, *supra*, the RIF/transfer statutes contain specific language that the determination of whether or not the action is no longer necessary is left to the sole discretion of the board of education, and an administrative law judge may not substitute her own judgment, but must look at whether Respondent abused its discretion by making an arbitrary and capricious decision. "Generally, an action is considered arbitrary andcapricious 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, 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*.

Respondent's contention that the underlying reason for the RIFs and transfers continued to exist throughout the events giving rise to this grievance is supported by the evidence of record. Although the original configuration was altered somewhat by the time the postings came out, the fact of the matter remains that central office positions were eliminated, duties were assigned to other employees--including principals--and the principals' contract terms were reduced. Considering the abundant discretion afforded to the Board in this matter, the undersigned simply cannot conclude that it was arbitrary and capricious for Respondent to conclude that a need still existed to restructure theelementary school positions and post them accordingly. It has previously been held by this

Grievance Board that the combination of two positions into one job with new and altered duties constitutes the creation of a new position, which must be posted pursuant to W. Va. Code § 18A-4-7a. See Bays v. Fayette County Bd. of Educ., Docket No. 93-10-439 (Aug. 23, 1994); Fletcher v. Berkeley County Bd. of Educ., Docket No. 02-87-017-02 (May 15, 1987). It was within Respondent's discretion to conclude that the modified principal's positions were newly created, and the undersigned will not disturb that finding.

The following conclusions of law support the decision reached.

Conclusions of Law

1. Because this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his 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 § 18-29-6.

2. A grievance must be initiated within fifteen days of the occurrence of the event upon which it is based. W. Va. Code § 18-29-4(a).

3. Grievant's claims regarding his transfer in April of 2003 to a teaching position are untimely.

4. “Three criteria must be met before [Code § 18A-4-7a(j)(4)] will allow a displaced employee to return to [his] 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; and3) 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.” Blake v. Kanawha County Bd. of Educ., Docket No. 01-20-470 (Oct. 29, 2001).

5. "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).

6. Grievant has failed to prove by a preponderance of the evidence that Respondent's failure to rescind his transfer was arbitrary and capricious or an abuse of the Board's broad discretion.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Gilmer 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. 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: February 27, 2004 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Also, it is undisputed that the Glenville Elementary School principal had more seniority than Grievant at the time of Grievant's transfer, so Grievant has claimed no right to "bump" into that position during the transfer process.

Footnote: 2

Grievant has not argued that the retirement of Glenville Elementary's principal caused the reason for his transfer to cease to exist.