ALICE RITTENHOUSE,

Grievant,

v. Docket No. 05-21-023

LEWIS COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Alice Rittenhouse ("Grievant"), employed by the Lewis County Board of Education ("LCBE") as a teacher, filed a level one grievance on November 5, 2004, in which she alleged a violation of W. Va. Code § 18A-4-14. For relief, Grievant requested that her students not remain in her classroom during her planning period, and compensation for the time the students were in her room. The grievance was denied at level one. An evidentiary hearing was conducted at level two, at which time Grievant amended her grievance to assert that principal Steve Hall acted in an arbitrary and capricious manner, and withdrew her request for compensation. The grievance was subsequently denied. LCBE waived consideration at level three, and appeal to level four was made on January 26, 2005. A level four hearing was conducted on March 23, 2005, at which time Grievant was represented by Frank Caputo, Staff Representative, American Federation of Teachers, and LCBE was represented by Harry M. Rubenstein, Esq., of Kay Casto & Chaney. The grievance was again amended to include a claim of discrimination. The grievance became mature for decision on April 18, 2005, the due date for submission of proposed findings of fact and conclusions of law.

The following facts have been derived from a preponderance of the evidence made part of the record at the level two and level four hearings.

Findings of Fact

___1.___Grievant has been employed by LCBE as one of four pre-school teachers at Peterson Central Elementary School at all times pertinent to this grievance.

2. Each teacher is assigned a Supervisory Aide, and each follow a similar daily schedule.

3. Grievant is provided a daily planning period at the end of the instructional day, from

2:15 until 3:00 p.m., and an additional planning period twice weekly when her students attend a physical education class.

4. The Supervisory Aides are assigned evening bus duty at the time the teachers are provided their daily planning periods.

5. The pre-school students who have to wait for a bus are supervised by the aides in one of the pre-school classrooms. Each classroom is used on a four-week rotating basis.

Discussion

Grievant argues that she is effectively deprived of her planning period, as provided by W. Va. Code § 18A-4-14, those weeks bus duty is assigned to her room. LCBE asserts that Grievant is provided a daily, duty-free planning period, and denies any statutory violation has occurred. As 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 (2004); 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. "The preponderance standard generally requires proof that a reasonable personwould accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993).

Grievant testified that the pre-kindergarten curriculum is presented via learning centers placed at various locations in her classroom. While the students are waiting for their buses, they want to use the centers and talk with her, disrupting her planning time. Grievant concedes that the students cannot be placed with the general student population due to their age and size, but suggests that other areas, such as the gymnasium, are available. She does not dispute LCBE's assertion that she is not required to remain in her room during her planning period, but states that she chooses not to leave because she may be needed in case of an emergency, and so that she may have access to all of her materials. As an alternative, Grievant has offered to transport several activities to another area for the children. She argues that Principal Hall's refusal to accept her suggestion was arbitrary and capricious, and because not all teachers have students in their rooms, the decision also constitutes discrimination.

___Certainly, Grievant is provided a daily planning period as contemplated by W. Va. Code § 18A-4-14, which states in pertinent part:

(2) Every teacher who is regularly employed for a period of time more than one-half the class periods of the regular school day shall be provided at least one planning period within each school instructional day to be used to complete necessary preparations for the instruction of pupils. Such planning period shall be the length of the usual class period in the school to which such teacher is assigned, and shall be not less than thirty minutes. No teacher shall be assigned any responsibilities during this period, and no county shall increase the number of hours to be worked by a teacher as a result of such teacher being granted a planning period subsequent to the adoption of this section (March 13, 1982).

Grievant indicates that her planning time is not without responsibility since she must insure that her educational materials are not misused or abused, and because the students want to interact with her. Principal Hall testified that there are ten to fifteen students in the room at the time, with four Aides. (See footnote 1) **Surely, Grievant could designate which items may be used, and the Aides could limit the students' activities. They should also distract the students to allow Grievant her planning time. Finally, Principal Hall noted that Grievant is not required to remain in her room during this time. Thus, while Grievant's safety concerns are commendable, there appears to be no basis for concern, and she has no responsibility to the students at this time.**

Addressing Grievant's claim that there are other vacant areas where the students could wait for their buses, Principal Hall testified that was true, but on an irregular basis. Further, he stated that it is his belief that having the students remain in the classroom is conducive to additional learning. This appears to be the case since the students work with the learning centers during that time. Principal Hall additionally noted that while it was possible to move several learning centers to another area, it was not practical to do so. At level four, both Dr. Carol Williams, Director of Special Services, and Judi Coffman, Director of Curriculum and Federal Programs, testified that in their opinions, other options were not as satisfactory as that implemented by Principal Hall. Generally, an agency'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). 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 [the employer]." Blake v. Kanawha County Bd. of Educ., Docket No. 01-20-470 (Oct. 29, 2001). Principal Hall's rationale for his decision was logical, practical, and in the best interest of the students. Grievant has failed to prove that the use of the classrooms for bus duty was arbitrary and capricious.

Finally, Grievant argued that the action is discriminatory because not all the teachers at Peterson Central Elementary School have bus duty students in their rooms during their planning periods. Discrimination is defined by W. Va. Code §18-29-2(m) as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." In The Board of Education of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004), theWest Virginia Supreme Court of Appeals held a grievant must establish a case of discrimination by showing:

> **(a) that he or she has been treated differently from one or more similarly-situated employee(s);**
>
> **(b) that the different treatment is not related to the actual job responsibilities of the employees; and,**
>
> **(c) that the difference in treatment was not agreed to in writing by the employee.**

Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

Grievant is accurate that not all teachers have to share their classroom with the bus

students; however, Principal Hall testified that not all teachers have access to their classrooms during their planning periods, and the pre-kindergarten schedule is entirely different from the rest of the school. Because all pre-kindergarten teachers are treated the same, and the reason for the action was job related, LCBE has not engaged in discrimination under this set of facts.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law. **(See footnote 2)**

Conclusion of Law

1. As 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 (2004); 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. "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 Res., Docket No. 92-HHR-486 (May 17, 1993).

2. Grievant is entitled to a planning period during the instructional day, when she is assigned no other responsibilities, as set forth in W. Va. Code § 18A-4-14, which states in pertinent part:

(2) Every teacher who is regularly employed for a period of time more than one-half the class periods of the regular school day shall be provided at least one planning period within each school instructional day to be used to complete necessary preparations for the instruction of pupils. Such planning period shall be the length of the usual class period in the school to which such teacher is assigned, and shall be not less than thirty minutes. No teacher shall be assigned any responsibilities during this period, and no county shall increase the number of hours to be worked by a teacher as a result of such teacher being granted a planning period subsequent to the adoption of this section (March 13, 1982).

3. Grievant has been provided a planning period without additional responsibilities, as required by statute.

4. Generally, an agency'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 reacheda 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). 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).

5. The decision to place the pre-kindergarten students in one of the classrooms while they wait for their buses to arrive was not arbitrary and capricious.

6. Discrimination is defined by W. Va. Code §18-29-2(m) as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

7. An employee attempting to prove discrimination under the education statute need only establish that he/she was treated differently from a similarly situated employee, and the action was neither job related nor agreed to by the grievant. Bd. of Educ. v. White, 605 S.E.2d 814 (W. Va. 2004).

8. LCBE has not engaged in discrimination under the facts of this case.

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Lewis County. Any such appeal must be filed within thirty (30) days ofreceipt 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: MAY 20, 2005

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.Grievant estimated that on Tuesdays and Thursdays the number is closer to twenty-seven students. Of course, not all the students are there the full amount of time as they leave incrementally upon the arrival of the buses.

Footnote: 2

[2]LCBE raised the issue of timeliness at level four. The level two decision does not address the issue, and no transcript of the proceedings was available due to a mechanical malfunction. Because it is impossible to determine whether the issue was raised at that level, as is required by W. Va. Code § 18-29-3, this matter will not be considered.