# THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

**MATTHEW MILLS and**

**PATRICIA MILLS,**

**Grievant,**

**v.** **DOCKET NO. 06-50-234**

**WAYNE COUNTY**

**BOARD OF EDUCATION,**

**Respondent.**

## DECISION

Grievants, Matthew Mills and Patricia Mills filed separate grievances. The filing at Level IV indicates both grievances were filed on July 10, 2006. However, Joint Exhibit 1 of the Level II hearing for both Grievants indicate their grievances were filed on August 26, 2006. (See footnote 1) In a letter dated August 26, 2006, Mr. Mills indicates he is grieving “unfair hiring practices regarding substitute placements for the 2005-2006 school year.” He specifically states he is grieving the appointment of Shawna Lewis at Wayne County Middle School as the mathematics teacher, which he feels was arbitrary, capricious, and discriminatory.

In Mrs. Mills' August 26, 2006 letter, she states she is also grieving “unfair hiring practices regarding permanent substitute placements for the 2005-2006 school year.” Mrs. Mills specifically states she feels the placement of Tasha Justice at Wayne ElementarySchool was arbitrary, capricious and discriminatory. Neither of these letters provided a statement of relief sought. The grievances were denied at the lower levels.

When Grievants appealed to Level IV, they did so by attaching an identical, two page letter to the grievance forms. Therefore, these grievances were consolidated at LevelIV. (See footnote 2) A Level

IV hearing was held at the Grievance Board's Charleston office on September 29, 2006. At that hearing, Mr. Mills indicated he was grieving the appointment of Shawna Lewis as math teacher at Wayne Middle School; Tara Messer as science teacher at Crum Middle School, and Caleb Dyer as science teacher at Wayne High School. Mr. Mills' relief sought as stated on the record at Level IV is pay for the position and benefits of the position. Mrs. Mills seeks benefits of the position.

This case became mature on October 30, 2006, the deadline for filing proposed findings of fact and conclusions of law.

## Synopsis

Grievant Matthew Mills argues Respondent discriminated against him by not posting the various positions listed above. He argues the positions were materially identical to regular teaching positions. He cites violations of *W. Va. Code* §§ 18A-4-5b and 18A-2- 3(a). Grievant Patricia Mills asserts Respondent discriminated against her because she was not placed in a position at Wayne Elementary as a long-term substitute teacher.

With respect to Mr. Mills, Respondent argues all the substitute teachers appointed to those positions were qualified to teach and had endorsements in the areas to be taught, and therefore there is no discrimination because these decisions were not arbitrary and capricious. With respect to Mrs. Mills, Respondent asserts her grievance is moot since she was a long term substitute teacher at Dunlow Elementary School. Based on a preponderance of the evidence, I find the following material facts have been proven:

## Findings of Fact

1. Patricia Mills was employed by Respondent as a long-term substitute at Dunlow Elementary for the 2005-2006 school year.

2. Mrs. Mills received a salary while working at Dunlow Elementary. Her salary would not have changed if she had been working at Wayne Elementary.

3. Mrs. Mills received the same benefits of a long-term substitute working at Dunlow Elementary that she would have received if she had worked at Wayne Elementary.

4. Long-term substitutes are not subject to a reduction in force (“RIF”).

5. Dunlow Elementary is further from Mrs. Mills' home than Wayne Elementary.

6. Mr. Mills was employed by Respondent as a substitute teacher on a day-to- day, as needed basis for the 2005-2006 school year.

7. Mr. Mills does not possess a teaching degree and is not a certified professional educator with license and certification. Mr. Mills does hold a long-term substitute teacher's permit with endorsements for teaching Chemistry 9-12, Physics 9-12, and Mathematics 5-12.

8. Shawna Lewis was placed at Wayne Middle School as a long-term substitute teacher in mathematics for the 2005-2006 school year. Ms. Lewis has a degree in education. To obtain that degree, Ms. Lewis took classes in mathematics geared toward teaching the subject. Ms. Lewis has also taken and passed the PRAXIS I pre- specialization in math test, the PRAXIS II math content test, and the PRAXIS test. 9. Ms. Lewis held a long term substitute teaching certificate with endorsements for teaching Mathematics 5-9, Elementary Education K-6, and Early Education PK-K.

10. Grievant had twelve hours of college math courses geared to toward his degree in engineering.

11. Caleb Dyer was placed at Wayne County High School as a long-term substitute in biology for the 2005-2006 school year. Mr. Dyer has a Bachelor's biology degree in the education field. He has been issued a professional provisional teaching certificate with an endorsement in biological sciences for grades 9-AD (See footnote 3).

12. Mr. Dyer is a professional educator.

13. Tara Messer was placed at Crum Middle School as a long-term substitute science teacher. At the time of placement, Ms. Messer was in the process of obtaining her long term substitute teacher's permit which was issued on October 12, 2005, and made retroactive effective September 9, 2005. Her endorsements were in Biological Sciences 9-AD, General Science 5-AD and Elementary Education K-6.

14. At the end of the 2005-2006 school year, these three positions were posted.

**Discussion**

This grievance does not challenge a disciplinary action, so Grievants bear the burden of proof. Grievants' 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'tof Health and Human Res.*, 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.

**Patricia Mills**

Mrs. Mills is grieving because she believes the position at Wayne Elementary should have been posted so she could bid on it. However, it was filled by a long term substitute, Tasha Justice. Mrs. Mills was a long term substitute at Dunlow Elementary. While at Dunlow Elementary she received the same salary she would have if she had been at Wayne Elementary. Mrs. Mills received any/all benefits available to long term substitute employees. Therefore, Mrs. Mills did not suffer any damages. When the undersigned brought this to Mrs. Mills' attention, Mrs. Mills clarified that it was her belief the position at Wayne Elementary should have been posted so she could bid on it and receive medical benefits, tuition reimbursement, and RIF protection.

At the close of all the evidence, Respondent made a motion to dismiss Mrs. Mills' grievance because it was moot and no relief could be provided to her. The undersigned adjourned, took the motion under advisement, and then granted Respondent's motion on the record.

“Without some allegation of personal injury, a grievant is without standing to pursue the grievance. *Lyons v. Wood County Bd. of Educ.*, Docket No. 89-54-501 (Feb. 28, 1990). *Beard v. Bd. of Directors/Shepherd College*, Docket No. 99-BOD-268 (Apr. 27, 2000); *Elliott v. Randolph County Bd. of Educ.*, Docket No. 98-42-304 (May 26, 1999); *Farley v. W. Va. Parkways Econ. Dev. Auth.*, Docket No. 96-PEDTA-204 (Feb. 21, 1997). A general claim of unfairness or an employee's philosophical disagreement with a policy does not,in and of itself, constitute an injury sufficient to grant standing to grieve. *See Olson v. Bd. of Trustees/Marshall Univ.*, Docket No. 99-BOT-513 (Apr. 5, 2000), citing *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997).” *Vance v. Jefferson County Bd. of Educ.*, Docket No. 02-19-030R (Nov. 20, 2002).

Mrs. Mills failed to present any evidence of harm. Her philosophical disagreement with Respondent and the way it chose to fill the position at Wayne Elementary does not constitute an injury sufficient to grant standing to her.

In Grievants' proposed findings of fact and conclusions of law, Mr. Mills asked the undersigned to reconsider her original decision. As was stated above, Grievants bear the burden in this matter, and in this instance Mrs. Mills has failed to prove an injury. Therefore, Mrs. Mills' grievance is dismissed for failure to state a claim upon which relief may be granted.

**Matthew Mills**

Grievant appears to have approached this grievance by asserting any conceivable argument, relevant or not. Since he has advanced numerous arguments, each will be addressed below.

**I. Appointed Positions**

Grievant argues Respondent's selections for the long-term substitute appointments were arbitrary and capricious. However, he has failed to meet his burden of proof and demonstrate he was more qualified for these long-term, substitute positions than the individuals who received the positions. 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 a board of education. *See generally*, *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982)." *Trimboli*, *supra*, *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

Generally speaking, it is clear when looking at the qualifications of the successful appointees, Respondent assessed its need and attempted to fill the position with the employee who was most qualified. This Grievance Board has previously held that county boards of education have substantial discretion in matters relating to the hiring,assignment, transfer, and promotion of school personnel. *Dillon v. Bd. of Educ. of County of Wyoming*, 177 W. Va. 145, 351 S.E.2d 58 (1986).

Grievant did not meet his burden of proof and demonstrate he was more qualified for these long-term, substitute positions than the individuals who received them. Because evidence has been presented on three positions, the undersigned will address them each in turn.

### A. Mathematics at Wayne Middle School

Shawna Lewis was placed at Wayne Middle School as a long-term substitute to teach mathematics. Ms. Lewis had a degree in education and had previously held a Professional Teaching Certificate. Ms. Lewis had successfully taken the PRAXIS I pre- specialization in math test, the PRAXIS II math content test and the PRAXIS test. Her college courses had prepared her for teaching mathematics.

Mr. Mills has a mathematics endorsement on his substitute teacher's permit. However, that endorsement only required him to have 12 hours of college math courses. Mr. Mills' courses were in furtherance of obtaining an engineering degree, whereas Ms. Lewis' courses were in preparation for teaching math. Clearly, Ms. Lewis was more qualified for this position.

### B. Science Position at Crum Middle School

This position was occupied by Tara Messer as a long-term substitute for general science, grades 6-8 at Crum Middle School. Ms. Messer was in the process of obtaining her long-term substitute teaching permit. It was issued on October 12, 2005, and made retroactive to September 6, 2005. Her endorsements include Biological Sciences 9-AD. By contrast, Mr. Mills' endorsements are in Chemistry and Physics, 9-12. Since his endorsement does not cover the appropriate grade, Mr. Mills was not qualified for the long- term substitute position at Crum Middle School.

### C. Science Position at Wayne High School

Caleb Dyer was placed as a long term substitute at Wayne High School to teach biology for the 2005-2006 school year. Mr. Dyer possesses a bachelor's biology degree in the education field. He has been issued a professional provisional teaching certificate with an endorsement of the teaching of biological sciences for grade 9-AD. He was qualified as a professional teacher for this position. By contrast Mr. Mills only possesses a teaching permit. Clearly, Mr. Dyer was more qualified than Grievant to fill that position.

## II. Discrimination

Grievant claims he was discriminated against because these long-term substitute positions were not posted, yet they were materially identical to regular teaching positions and Respondent did not comply with *W. Va. Code* § 18A-4-5b. (See footnote 4)

In order to establish a claim of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must

show:

(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.

*The Bd. of Educ. of the County of Tyler v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

Grievant has failed to present any evidence to establish a claim of discrimination. While the Grievance Board in *Mills v. Wayne County Bd. of Educ*., Docket No. 05-50451 (May 12, 2006), determined some long-term substitute positions in the county were materially identical to full-time teaching position, the undersigned does not have any evidence to determine whether these specific positions were identical to full-time teaching positions. Regardless, Respondent posted these specific positions for the 2006-2007 school year.

It is interesting to note, Grievant never requested these positions be posted. Instead, he is requesting pay for the position, and argues discrimination because the positions were not posted. This argument is perplexing because had the positions been posted, Grievant would not have been qualified and would have been unable to bid on them. Clearly, there was no discrimination.

**III. Additional Argument**

Grievant also asserts these positions were not substitute positions within the meaning of *W. Va. Code* § 18A-2-3(a). Grievant presented virtually no evidence concerning how these positions came into being. Therefore, since it is Grievant's burden of proof to establish all claims, this argument must be denied due to insufficient evidence.

Grievant also alleges that because Caleb Dyer, a regular full-time employee, was considered for the appointed positions, Respondent should have followed *W. Va. Code* §18A-4-7a, which Grievant argues makes seniority the deciding factor. First, Grievant oversimplifies the wording of the Code which states that, “The county board shall make decisions affecting the hiring of new classroom

teachers on the basis of the applicant with the highest qualifications." The Code then lists seven factors to be considered. It goes on to say that if, after considering these factors, the person with the most seniority is not chosen, the applicant may request a written statement of reasons he/she did not receive the position.

Grievant believes this *Code* section is relevant because he argues that he, as a day- to-day substitute teacher, has more seniority than those chosen to fill the long-term substitute positions. However, Grievant has neglected to realize he cannot claim the two years he has worked as a day-to-day substitute teacher as seniority. *W. Va. Code* § 18A- 4-7a(f) clearly states that seniority is determined "on the basis of the length of time the employee has been employed as a regular full-time certified and/or licensed professional educator." Grievant has never been a regular full-time certified or licensed professional educator. As such, his argument on this issue is moot.

The following conclusions of law support this discussion:

**Conclusions of Law**

1. This grievance does not challenge a disciplinary action, so Grievants bear the burden of proof. Grievants' 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'tof Health and Human Res.*, 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. "Without some allegation of personal injury, a grievant is without standing to pursue the grievance. *Lyons v. Wood County Bd. of Educ.*, Docket No. 89-54-501 (Feb. 28, 1990). *Beard v. Bd. of Directors/Shepherd College*, Docket No. 99-BOD-268 (Apr. 27, 2000); *Elliott v. Randolph County Bd. of Educ.*, Docket No. 98-42-304 (May 26, 1999); *Farley v. W. Va. Parkways Econ. Dev. Auth.*, Docket No. 96-PEDTA-204 (Feb. 21, 1997). A general claim of unfairness or an employee's philosophical disagreement with a policy does not, in and of itself, constitute an injury sufficient to grant standing to grieve. *See Olson v. Bd. of Trustees/Marshall Univ.*, Docket No. 99-BOT-513 (Apr. 5, 2000), citing *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997)." *Vance v. Jefferson County Bd. of Educ.*, Docket No. 02-19-030R (Nov. 20, 2002).

3. Mrs. Mills failed to present evidence of injury sufficient to grant her standing.

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

5. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. *Dillon v. Bd. of Educ. of County of Wyoming*, 177 W. Va. 145, 351 S.E.2d 58 (1986).

6. Grievant did not prove Respondent's decisions were arbitrary and capricious.

7. In order to establish a claim of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

> (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.

*The Bd. of Educ. of the County of Tyler v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

8. Grievant did not prove discrimination. 9. Grievant did not prove Respondent violated any statute, rule, or provision in filling these positions.

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 Wayne County. Any such appeal must be filed within thirty 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 28, 2007**

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**Wendy A. Campbell**

**Administrative Law Judge**

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Footnote: 1

*Grievant requested to begin the grievance process at Level II, and Respondent agreed. Grievant then requested these grievances be placed in abeyance pending the Level IV decision of another grievance filed by Mrs. Mills. Mills v. Wayne County Bd. of Educ., Docket No. 05-50-280 (May 22, 2006). Respondents agreed to this as well. That grievance was denied.*

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Footnote: 2

*These grievances were consolidated prior to receiving the lower level record, and because the Level IV filings were identical, it was assumed the issues were identical as well.*

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Footnote: 3

*This is the abbreviation used on the certificates to indicate the certification is through to adult.*

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Footnote: 4

*This is the uniformity statute for service personnel and as such does not apply to this case. Therefore, it will not be discussed.*