THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DAWN L. BISHOP,
Grievant,

v. **DOCKET NO. 2010-0012-PreED**

PRESTON COUNTY BOARD
OF EDUCATION,
Respondent.

DECISION

Grievant Dawn L. Bishop filed this grievance directly at level three on July 2, 2009, challenging Respondent's determination that she was a probationary employee and its subsequent decision not to renew her contract. She alleges she was slandered, was improperly suspended and then terminated, was denied due process, and that she was discriminated against due to her disability. She seeks to be reinstated to her position, to be awarded all back pay and benefits, attorney fees and costs, and "punitive damages, apology by Preston County Board of Education, and all Superintendents involved, and any other relief this administrative body has to order."

A level three hearing was held in the Grievance Board's Westover office on October 26 and 27, 2009. Grievant was represented by Steven L. Shaffer, Esq., and Respondent was represented by Gregory W. Bailey, Esq. The matter became mature for decision on November 30, 2009, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant contends she held a continuing contract, but failed to prove she had completed three years of acceptable employment as required to convert her contract status

from probationary to continuing. Grievant was suspended prior to Respondent giving her notice of its intent not to renew her contract, but her challenge to the suspension was untimely. Grievant did not prove that Respondent's decision not to rehire her under a continuing contract was arbitrary and capricious, and her Grievance is therefore denied.

Findings of Fact

Based on a preponderance of the evidence, I find the following material facts have been proven:

1. Grievant applied for and was awarded the position of Treasurer/Chief School Business Official, beginning regular full-time employment under a "Teacher's Probationary Contract of Employment" on January 30, 2006, for the remainder of the 2005-2006 school year. This contract specified an employment term of 110 days.

2. Grievant was awarded a second probationary contract on March 23, 2006, for the 2006-2007 school year.

3. Grievant was awarded a third probationary contract on April 23, 2007, for the 2007-2008 school year.

4. The Notice of Vacancy for the Treasurer/Chief School Business Official, posted December 12, 2005, did not mention any requirement that the treasurer was required to post a performance bond.

5. On November 14, 2008, Grievant recieved a letter from then-Superintendent John Lofink, notifying her that "As a result of the number and nature of the noncomliance items contained in the Audit report of the Preston County Board of Education for the fiscal year ending June 30, 2007, performed by the West Virginia State Auditor's Office, I have determined to suspend you with pay pending the completion of an investigation into the

apparent deficiencies arising from the performance of your responsibilities as treasurer of Preston County Board of Education and the person in charge of the financial affairs of the Board. . . . You will be provided with further notification of your employment status upon completion of the above mentioned investigation."

6. The suspension was continued by the Board at a meeting held December 8, 2008. Grievant did not file a grievance challenging her suspension.

7. From the time of her hire until after the audit in 2008, Grievant never executed a bond. Respondent did not pay for the bond, as it was not informed that Grievant had signed the necessary papers until after she was already suspended.

8. On March 10, 2009, the West Virginia State Board of Education intervened in the operation of Preston County Schools, and replaced Superintedent Lofink with Gus E. Penix.

9. Grievant requested a statement of reasons for the decision not to rehire her for the 2009-2010 school year. Superintendent Gus Penix provided the reasons by letter dated May 21, 2009. He listed Grievant's failure to execute a performance bond within 60 days of her appointment as treasurer, citing that under W. VA. CODE § 6-2-4 "your failure to give the bond as required resulted in the office of treasurer being deemed vacant by operation of law."

10. Superintendent Penix also listed as a reason Grievant's questionable trustworthiness, citing the facts that after she learned of the negative audit and after she learned of her suspension, she came to the office after work hours and had her husband shred a large number of documents.

11. It was not unusual for Grievant to work in the office after hours or on weekends, nor was it unusual for her husband, a non-employee of Respondent, or her mother, a central office employee, to assist her.

12. Grievant is a paraplegic, and is unable to do many of the routine tasks of her position without assistance, including the routine shredding of sensitive documents that are no longer needed.

13. On November 9, 2008, a Sunday just after Grievant learned that an audit of the School Board would present negative findings, she worked in her office directing her husband to shred numerous documents.

14. Grievant was given written notice that she would be suspended on November 14, 2008, and came to the office to discuss that with then-Superintendent Lofink. She then stayed after hours and had numerous other documents shredded, after asking Mr. Lofink if she could stay in the building until someone came to pick her up.

15. A State Police investigation instigated at the request of the Preston County Prosecuting Attorney failed to find that Grievant did anything illegal in shredding the documents.

16. It is unknown exactly what documents were destroyed and whether they were essential to the investigation into the negative audit, as Grievant kept no log or other record of what was destroyed.

Discussion

This case presents several interrelated questions that must be answered in a particular order to establish the relationship between the parties and the standard of review to be applied to the actions of Respondent. Of primary importance is the determination of

whether Grievant was a probationary employee or whether she had a continuing contract at the time of her separation from employment.

I. Continuing Contract Status

Whether or not Grievant was employed under a continuing contract or was instead still a probationary employee is a non-disciplinary issue. As such Grievant has the burden of proving her claim by a preponderance of the evidence.[1] The only authority provided by Grievant for establishing that Grievant should have received a continuing contract rather than a probationary contract when she was issued her fourth contract, is W. Va. Code 18A-2-2, which operates to convert a teacher's probationary contract to a continuing contract after three years of employment. The problem with Grievant's argument, and with the contracts Respondent offered her, however, is that she was not a teacher.[2] "'Teacher' means a teacher, supervisor, principal, superintendent, public school librarian or any other person regularly employed for instructional purposes in a public school in this state[.]"[3] Grievant's position as Treasurer and Chief School Business Official does not fit into that category.

Employment of a Treasurer for the school board is controlled by W. Va. Code § 18-9-6:

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[1]Procedural Rules of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008).

[2]Neither party seemed to notice the provision in these contracts stating "This contract shall terminate if, at the beginning of any school term, the Teacher does not hold a valid Teacher's certificate . . ." Grievant never held a teacher's certificate.

[3] W. VA. CODE §§ 18-1-1(g), 18A-1-1.

> On or before the first Monday in May each county board of education shall upon recommendation of the county superintendent appoint a treasurer for the board. The treasurer is the fiscal officer of the board, or an employee commonly designated as the person in charge of the financial affairs of the county board, or the county sheriff: Provided, That once a board of education has appointed a treasurer other than the sheriff, the sheriff may not be named treasurer of the board in a subsequent year. Upon appointment this person shall be titled and referred to as treasurer of the board of education. For the faithful performance of this duty, the treasurer shall execute a bond, to be approved by the board of education, in the penalty to be fixed by the board of education, not to exceed the amount of school funds which it is estimated the treasurer will handle within any period of two months. The premium on the bond shall be paid by the board of education.

WEST VIRGINIA CODE § 18A-1-1 classes school personnel as either professional or service personnel. Professional personnel are those who meet certification or licensing requirements of the State for their positions. No certification or licensing is required by § 18-9-6, and "Chief School Business Official" is undefined by the CODE, so the Preston County Treasurer position is a service personnel position.[4]

> "Service person" or "service personnel", whether singular or plural, means a nonteaching school employee who is not included in the meaning of "teacher" as defined in section one, article one, chapter eighteen of this code and who serves the school or schools as a whole, in a nonprofessional capacity, including such areas as secretarial, custodial, maintenance, transportation, school lunch and aides. Any reference to "service employee" or "service employees" in this chapter or chapter eighteen of this code means service person or service personnel as defined in this section;[5]

Service personnel continuing contracts are controlled by W. VA. CODE § 18A-2-5, which makes continuing contract status a matter of law after three years of employment: "After three years of acceptable employment, each service personnel employee who enters

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[4]This is not to say all Treasurers are service personnel - "Treasurer" is an office, not a personnel class title.

[5]W. VA. CODE § 18A-1-1(e).

into a new contract of employment with the board shall be granted continuing contract status[.]"

Contrary to Grievant's assertion, it is not the issuance of a fourth contract that creates "tenure," but the completion of three years of acceptable employment. WEST VIRGINIA CODE § 18A-4-8 defines an employment term for service personnel as not "less than ten months. A month is defined as twenty employment days: Provided, That the county board may contract with all or part of these service personnel for a longer term."[6]

Grievant was employed for 110 days her first year (2005-2006), because she started a little more than halfway through a 240-day employment term, or 5.5 months. Her subsequent contracts were for full terms of 240 days each, commencing July 1. At the end of the 2006-2007 year, therefore, she had accrued 17.5 months of acceptable employment. At the end of the 2007-2008 school year, she had 29.5 months of acceptable employment. She started the 2008-2009 school year, and was suspended on November 14, 2008, after 99 days of further employment, for a total of 34.45 months, or 2.87 years of employment. It is self evident that a period of employment while on suspension is not "acceptable employment," and does not count for purposes of determining continuing contract status. Thus, Grievant had not attained continuing contract status at that time.

Even if Grievant's work history were evaluated under the continuing contract standard for teachers, the fact that she did not work more than 133 days under her first contract means that she would not be credited with a year of employment for tenure purposes. In *Harkins v. Ohio County Bd. of Educ.*, 179 W. Va. 373, 369 S.E.2d 224

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[6] In other words, according to the legislature's math, a year has 13 months.

(1988), the Court, in relying on a decision by the State Superintendent of Schools, found authoritative the rule that "One must work 133 days in order to receive credit for a year of teacher's experience for pay increment purposes. *See* State Superintendent's Interpretations 'Teacher--Salary.' March 11, 1966 (SDE) and October 1, 1968 (36). This same measure often is used for determining tenure when a teacher has earned tenure (i.e., continuing contract status)."

II. Suspension

The suspension of an employee is a disciplinary matter, the proper basis for which Respondent bears the burden of proof, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence.[7] However, Respondent asserts this Grievance is untimely with respect to the suspension. The burden of proof is on a respondent to prove untimeliness by a preponderance of the evidence.[8] If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory time lines.[9]

If the date of Grievant's suspension is to be used as the end date of her term of acceptable employment, the issue of whether she was properly suspended become paramount. However, Grievant did not timely challenge her suspension. She did not file a grievance on that issue, and as Respondent asserts, by the time she filed this grievance over the non-renewal of her contract, it was too late. Pursuant to the requirements of W.

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[7] *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

[8] *Craig v. Dep't of Health & Human Res.*, Docket No. 98-HHR-334 (June 24, 1999); *Hale & Brown v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996).

[9] *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 29, 1997).

VA. CODE § 6C-2-4(a)(1), a grievance must be filed within fifteen days of the event upon which it is based.[10]

Grievant was suspended November 14, 2008, and filed this grievance on July 2, 2009, significantly more than fifteen days after the event. Grievant's challenge to her suspension is untimely. Grievant did not provide any excuse for her failure to file, and despite her clarion recall of many details of her case, stated she could not recall if she filed a grievance over the suspension or the extension of her suspension. In any event, there is no record of a prior grievance being filed. For these reasons, the suspension will be presumed to have been valid, as it was never challenged through the grievance or any other process.

III. Non-Renewal

The nonrenewal of a contract is not a termination and is not a disciplinary matter; thus, an employee whose contract was not renewed has the burden of proof by a preponderance of the evidence.[11] The West Virginia Supreme Court of Appeals held in *Baker v. Hancock County Bd. of Educ.*[12] that the nonrenewal of a probationary contract at the end of the school year, even for cause, is governed by WEST VIRGINIA CODE § 18A-2-8a, and WEST VIRGINIA CODE § 18A-2-8 does not apply. Grievant was a probationary

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[10] *Seeley v. Upshur County Bd. of Educ.*, Docket No. 2008-1718-UpsED (Sept. 30, 2009).

[11] *McClain v. Jackson County Bd. of Educ.*, Docket No. 04-18-182 (Feb. 28, 2005); *Loundman-Clay v. Higher Educ. Policy Comm'n*, Docket No. 02-HEPC-013 (Aug. 29, 2002); *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).

[12] 207 W. Va. 513, 543 S.E.2d 378 (2000).

service employee. As Respondent argues, Grievant has the burden of proving the reason for the non-renewal of her contract were arbitrary and capricious. [13]County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious.[14] WEST VIRGINIA CODE § 18A-2-8a gives broad discretion to the county board when determining whether or not to rehire a probationary employee, and to prove her case, Grievant must establish Respondent's decision to not renew Grievant's contract was arbitrary and capricious.[15]

Grievant requested and received a statement of reasons for the Board's decision not to rehire her for the school year beginning July 1, 2009. The reasons listed in the letter to Grievant, dated May 21, 2009, were: 1) her failure to obtain the necessary performance bond required of all Treasurers; and 2) her destruction of documents after she received notice of an adverse financial audit and after receiving notice of her suspension. It is noteworthy that the adverse audit was not in and of itself a reason for the decision not to renew Grievant's contract.

Grievant asserts she did not know a bond was required, and that it was the Board's duty to obtain the bond. Respondent asserts Grievant essentially abandoned her position

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[13]*Holly, supra; Hanshaw, supra.*

[14]*Syl. Pt. 3, Dillon v. Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986). *See Rogers v. Logan County Bd. of Educ.*, Docket Nos. 99-23-196/246 (Nov. 16, 2002).

[15]*Beheler v. Logan County Bd. of Educ.*, Docket No. 98-23-276 (Dec. 11, 1998). *See Miller v. Bd. of Educ.*, 190 W. Va. 153, 437 S.E.2d 591 (1993); *Pockl v. Ohio County Bd. of Educ.*, 185 W. Va. 256, 406 S.E.2d 687 (1991); *Rogers, supra.*.

by failing to execute a bond, citing W. Va. Code § 6-2-4. That code section relates to bonds of county appointees when bond is required by statute, and states:

> If any person elected or appointed to any office, or position, of whom an official bond is required, shall fail to give the bond within the time prescribed by law, the office or position shall be deemed vacant; and any person who shall enter into or discharge any of the duties pertaining to such office or position, before he shall have given the bond required by law, shall forfeit not less than fifty nor more than one thousand dollars.

The circumstances surrounding the bonding of Grievant become relevant here, as Grievant contends it was the Board's responsibility to get her bonded, and that she did not know of the bond requirement because it was not listed in the job posting. In his statement of reasons for not rehiring Grievant, Superintendent Penix states that Grievant did not even attempt to obtain a bond until after she learned of the negative audit and after the decision had been made to suspend her. A Treasurer for a county board of education is required by W. Va. Code § 18-9-6 to execute a bond for the faithful performance of his or her duty. The Code states, "the treasurer shall execute a bond" the premium for which shall be paid by the board of education. West Virginia Code § 6-2-1 requires such bond to be executed within 60 days of appointment; and as cited above, the position is deemed vacant if a bond is not posted within the required time.

Under the law, Preston County Schools had no treasurer for almost the entire time Grievant had been performing the duties of that position. Nothing in the code places the duty of posting a bond on the school board; the code only requires the board to pay for it. Nothing in the job description, Grievant's various contracts, or any policy or procedure placed in the record of these proceedings moves that duty from the Treasurer to the Board. As a matter of law, Grievant was obligated to execute the bond within 60 days of her hiring, and nobody could have done it for her.

Grievant contends the school board had a person working in the central office whose job it was to obtain bonds for school employees who are required to have them, and that this person failed to do so for her. However, former Superintendent Lofink credibly testified that he advised Grievant, shortly after she was hired, that she must obtain a bond, and told her where she could get one.

Rebecca Bernatowicz, an insurance agent for Hartley Insurance Agency in Kingwood, works with the school board to obtain bonds for its employees. Her liaison with the Board is Pat Foster, Accounts Payable Supervisor. Ms. Bernatowicz provided Ms. Foster with a bond application to give to Grievant in June 2006, but never received it back. She also sent some bonding information directly to Grievant in 2008. Ms. Foster gave the bond application to Grievant in 2006, Grievant never submitted it to the insurance company. It was not until the school board was being audited in 2008 that the issue of Grievant's missing bond came to the attention of Ms. Foster, because the auditors asked for a copy. Ms. Foster had no supervisory duties over Grievant, and it was not her job to ensure that Grievant posted the required bond; Ms. Foster was just to help get the application where it needed to go.

Grievant is simply not credible when she asserts she did not know there was a problem with her bond. She testified both that she did not know she needed a bond because it was not listed in the job posting, and that she did not know she was not bonded until Mr. Lofink asked her about it. There is no way Grievant could have not known she never executed a performance bond. She did not dispute that Ms. Foster provided her with the application in 2006. And for a person to work in the office of Treasurer for close to three years without knowing the Treasurer must be bonded is not believable. Grievant

seeks to transfer responsibility for her inaction to everyone else but herself, but the Respondent was reasonable in basing its decision not to rehire her on this failure of a basic qualification for office.

It is irrelevant that both then-Superintendent Lofink and Board President George Keim were also unbonded, as the testimony in this case revealed. Obviously, the same *de facto* vacancy in office existed for them while they were unbonded. Those facts do not make Grievant's lack of bond any more acceptable. Grievant appears to believe she was discriminated against because she was singled out for her lack of bond.

"Discrimination" as used in the grievance procedure means "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees."[16] In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

(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.[17]

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[16]W. VA. CODE § 6C-2-2(d).

[17]*Frymier v. Higher Education Policy Comm'n*, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.,* Docket No. 2008-1594-DOT (Dec. 15, 2008); *Midcap v. Marshall County Bd. of Educ.,* Docket No. 2009-0028-MarED (Aug. 5, 2009).

Grievant is not similarly situated with either the elected President of the Board of Education or the Superintendent of schools. She is not in the same position and does not have the same responsibilities. She was a probationary employee and they were not. Grievant has not established that she was discriminated against. Further, Respondent is correct in its argument that Grievant had essentially abandoned the office of Treasurer when she allowed the position to become vacant by operation of law 60 days after she started the job. That she continued to work in the position illegally, and all the while leaving Respondent without the protection of a bond, further supports Respondent's position.

The second reason Respondent declined to rehire Grievant was her questionable trustworthiness, as evidenced by her destruction of documents around the time of the adverse audit and her suspension. Grievant contends she did nothing improper, and that document shredding was routine for her position. She argues that Respondent did not prove she destroyed any documents that she should not have, and that her actions were not intended to destroy evidence of wrongdoing, but merely to clean out her office so that someone working in her place would not be hampered by the clutter. Respondent concedes that document destruction *per se* is not a problem, but that the timing and method of Grievant's actions rendered them suspect.

Grievant is correct that there is no physical evidence of wrongdoing on her part. That is often a problem when a person is accused of destroying evidence. However, the decision not to renew her contract was not based on an accusation that she had improperly destroyed any particular documents, but was based on the appearance of impropriety and the demonstrated lack of judgment. Grievant never seemed to grasp that. She was the Treasurer of a school board that was facing an investigation into a negative audit, and

which was also apparently about to be taken over by the State Board of Education. She knew her record keeping was about to be sharply scrutinized, and she decided to make that job much harder by shredding a large volume of records. Although it was apparently routine for her to work weekends and with the assistance of her mother or husband, her explanation of the timing of the two days cited in the Statement of Reasons does not withstand a rationality test. Respondent was, on the other hand, extremely reasonable in questioning Grievant's shredding activity, and did not err in finding that her lack of judgment, at least, impinged on her competency in the office of Treasurer.

Grievant has not met her burden of showing the reasons for Respondent's decision not to rehire her were arbitrary and capricious.

The following conclusions of law support this discussion:

Conclusions of Law

1. Grievant has the burden of proving the non-disciplinary aspects of her claim by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008).

2. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

3. The burden of proof is on a respondent to prove untimeliness by a preponderance of the evidence. *Craig v. Dep't of Health & Human Res.*, Docket No. 98-HHR-334 (June 24, 1999); *Hale & 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 time lines. *Kessler v. W. Va. Dep't of Transp.*, Docket No. 96-DOH-445 (July 29, 1997).

4. The nonrenewal of a contract is not a termination and is not a disciplinary matter; thus, an employee whose contract was not renewed has the burden of proof by a preponderance of the evidence. *McClain v. Jackson County Bd. of Educ.*, Docket No. 04-18-182 (Feb. 28, 2005); *Loundman-Clay v. Higher Educ. Policy Comm'n*, Docket No. 02-HEPC-013 (Aug. 29, 2002); *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).

5. WEST VIRGINIA CODE § 18A-2-8a gives broad discretion to the county board when determining whether or not to rehire a probationary employee, and to prove her case, Grievant must establish Respondent's decision to not renew Grievant's contract was arbitrary and capricious. *Beheler v. Logan County Bd. of Educ.*, Docket No. 98-23-276 (Dec. 11, 1998). *See Miller v. Bd. of Educ.*, 190 W. Va. 153, 437 S.E.2d 591 (1993); *Pockl v. Ohio County Bd. of Educ.*, 185 W. Va. 256, 406 S.E.2d 687 (1991); *Rogers v. Logan County Bd. of Educ.*, Docket Nos. 99-23-196/246 (Nov. 16, 2002).

6. "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 Res.*, 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 (W. Va. 1982)." *Trimboli, supra.*

7. A service employee's probationary contract is, by operation of law, converted to a continuing contract only after three years of acceptable employment. W. VA. CODE § 18A-2-5. Grievant had not completed three years of acceptable employment at any time relevant to this Grievance, so she did not have a continuing contract. Grievant was a probationary service employee.

8. Respondent met its burden of proving Grievant's challenge to her suspension was untimely. A grievance must be filed within fifteen days of the event upon which it is based. *Seeley v. Upshur County Bd. of Educ.*, Docket No. 2008-1718-UpsED (Sept. 30, 2009). This grievance was not filed within fifteen days of Grievant's suspension, and she offered no evidence to excuse her delay in filing.

9. Grievant did not meet her burden of proving that Respondent's reasons for electing not to rehire her were arbitrary and capricious, or otherwise unreasonable under the circumstances.

10. A Treasurer for a county board of education is required by W. VA. CODE § 18-9-6 to execute a bond for the faithful performance of his or her duty. The Code states, "the treasurer shall execute a bond" the premium for which shall be paid by the board of education. WEST VIRGINIA CODE § 6-2-1 requires such bond to be executed within 60 days of appointment; and as cited above, the position is deemed vacant if a bond is not posted within the required time.

11. Grievant was solely responsible for executing a performance bond, and her failure to do so within 60 days of taking office as Treasurer left that position vacant after that time.

12. "Discrimination" as used in the grievance procedure means "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d).

13. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

(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. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.,* Docket No. 2008-1594-DOT (Dec. 15, 2008); *Midcap v. Marshall County Bd. of Educ.,* Docket No. 2009-0028-MarED (Aug. 5, 2009).

14. Grievant did not meet her burden of proving that Respondent discriminated against her in basing its decision, in part, on Grievant's failure to execute a performance bond as required by law.

For the foregoing reasons, this grievance is hereby **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

January 21, 2010

M. Paul Marteney
Administrative Law Judge