THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DONNA F. MOORE,
Grievant,

v. **Docket No. 2012-1414-HarED**

HARRISON COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Donna Moore, filed this grievance on June 14, 2012, relating to the assignment of school nurses to be effective at the beginning of the 2012-2013 school year. Grievant seeks the postponement of possible school assignments for one year in order to give the nursing staff time to work together on alternative assignments. She also seeks final decision on all assignments to be made by the Coordinator of Health Services, considering staff input, and not by non-health oriented individuals who are lacking the ability and knowledge to perform this task. She asks for legal explanations for all decisions made regarding this grievance, and resolution of this issue before the beginning of the 2012-2013 school year.

This grievance was denied at level one following a hearing on July 17, 2012, and by decision dated August 7, 2012, authored by Superintendent Susan Collins. On the day of the hearing, Superintendent Collins delayed the start of the new nursing assignments until November 5, 2012. A level two mediation session was held on November 19, 2012. The grievance was placed in abeyance by order dated November 26, 2012, to allow the parties additional time to attempt settlement of the matter. An order of unsuccessful

mediation was entered on February 13, 2013. Grievant perfected her appeal to level three on February 22, 2013. A level three hearing was conducted before the undersigned Administrative Law Judge on June 6, 2013. Grievant appeared in person and by her counsel, Joseph W. McFarland, Jr, Esquire. Respondent appeared by its counsel, Susan L. Deniker, Steptoe & Johnson, PLLC. This matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on July 16, 2013.

Synopsis

Grievant alleges that she, as Coordinator of Health Services, should have sole decision making authority regarding the assignment of school nurses in Harrison County. Grievant asserts that the nine school nurses reassigned during the 2012-2013 school year are entitled to notification of a pending transfer on or before March 1 of the year in which the transfer will take place. Grievant lacks standing to grieve the lack of notice of transfer on behalf of her fellow nurses. Grievant's claim lacks merit because school nurses are itinerant employees to whom the notice provisions do not apply. Grievant did not prove by a preponderance of the evidence that Respondent acted in an arbitrary and capricious fashion concerning the assignments.

The following findings of fact are based on the record of the case.

Findings of Facts

1. Grievant is employed by the Harrison County Board of Education as the Coordinator of Health Services, with duties covering all schools within Harrison County.

2. In 2011, an Educational Efficiency Review of Harrison County Schools was

prepared by MGT of America, Inc., as directed by the West Virginia Board of Education. The report was issued on December 29, 2011.

3. The Final Report found that "[t]he current nursing assignments and task time line do not maximize health service availability to individual students on assigned campuses . . . Focus groups and interviews revealed that school assignments are unrelated to campus proximity, meaning they may be on opposite sides of the district, and do not ensure maximum access to assigned campuses."

4. Respondent directed that nursing assignments for the 2012-2013 school year be changed. The objective was to ensure that nurses would be assigned to schools based upon geographic location in order to reduce travel time and maximize the nurses' presence within their assigned schools. On March 28, 2012, the Harrison County Board of Education directed Superintendent Collins to develop such a schedule for nurse assignments.[1]

5. On April 20, 2012, Grievant received a memo from Superintendent Collins to Dr. Victor Fisher, Supervisor of Special Services, directing that nursing assignments were to be re-drawn for the 2012-2013 school year. Dr. Fisher shared this memo with Grievant and instructed her to develop the requested schedule.

6. Grievant refused to develop the requested schedule.

7. On April 29, 2012, Grievant sent a letter to Superintendent Collins stating that she would not comply with the reassignment request and suggested that reassignments be postponed until the 2013-2014 school year.

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[1]While not entirely relevant to the controlling issues in this grievance, the record did establish by a preponderance of the evidence that the school nurses are itinerant status employees.

8. On May 2, 2012, Dr. Fisher and Assistant Superintendent Mike Moore met with Grievant and a few other school nurses to discuss creating the reassignment plan. The nurses expressed their displeasure with being reassigned and indicated that they would not offer input in creating the plan. Dr. Fisher informed the group that if the nurses did not create the plan, a plan would be put into effect without their assistance.

9. Superintendent Collins, Assistant Superintendent Wendy Imperial, and Dr. Fisher worked together to draft a tentative schedule. In creating the schedule, they considered the following: the nurses' previous assignments to maintain some stability; enrollment at each of the twenty-three buildings; and the geographic location of schools in both terms of efficiency of coverage, travel time and established relationships with students.

10. On May 25, 2012, Dr. Fisher and Assistant Superintendent Moore met with Grievant and all other school nurses to discuss the proposed reassignment plan. The nurses were encouraged to, and did, give input as to the clustering of the schools in certain assignments. When the school assignment schedule was finalized, all of the nurses, except Grievant, were permitted to select their own assignment based upon seniority. Grievant's assignment was selected for her because she was assigned fewer schools than the other nurses to give her time to complete her administrative duties.

11. Dr. Fisher and Assistant Superintendent Moore allowed the nurses to select their assignments based upon seniority because this method was used in the past in assigning other itinerant groups of employees.

12. In response to the concerns of Grievant and some of the nurses, the Harrison County Board of Education decided to postpone the effective date of the assignment

changes from the beginning of the 2012-2013 school year until November 5, 2012, to give the nurses additional time to plan for the transition.

13. No other school nurses have grieved their assignments.

14. The record established that, in the past, Grievant had changed nurses' assignments without providing them with transfer notices. Grievant has been reassigned over the years without a transfer notice.

Discussion

Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant asserts that, in her capacity as Coordinator of Health Services, she should have decision making authority regarding the assignment of school nurses in Harrison County. She also asserts that the nine school nurses reassigned during the 2012-2013 school year are entitled to notification of a pending transfer on or before March 1 of the

year in which the transfer will take place. Irrespective of the applicability of the notice requirement, Grievant argues that the assignment of nurses was arbitrary and capricious, and contrary to the health and welfare of the student patients.

Respondent denies that any notice of the decision to reassign the nurses to different schools was required and the provisions of WEST VIRGINIA CODE § 18A-2-7 do not apply. In addition, Grievant lacks standing to challenge the transfer of nurses without what she believes to be appropriate notice. The undersigned agrees. First, Grievant does lack standing to challenge transfer notice requirements for her fellow nurses.[2] The record is clear that Grievant's complaint does not concern the lack of notice to herself, but the lack of notice to the other nurses. In any event, Grievant's claim fails because the school nurses are itinerant status employees who can be transferred to different schools to meet the needs of the students. The record also established that the nurses had input in their reassignments and consented to such assignments.[3] Grievant is a coordinator, which is a county-wide position with duties covering every school within Harrison County, it would appear that her reassignment is not one that requires transfer notice pursuant to WEST VIRGINIA CODE § 18A-2-7.[4]

Finally, Grievant's claim concerning the authority of Respondent to reassign the school nurses is denied because county boards of education have substantial discretion

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[2] *See Reidel v. WVU*, Docket No. 07-HE-395 (Feb. 24, 2009).

[3] *See Sisler v. Pocahontas County Bd. of Educ.*, Docket No. 2008-1284-PocED (Jan. 16, 2009).

[4] *See Zirk v. James Rumsey Technical Inst.*, Docket No. 99-MCVTC-341 (Feb. 29, 2000).

in matters related to hiring, assignment, transfer and promotion of school personnel. Grievant did not meet her burden of proof and establish any legal support for her position that she is entitled to have sole discretion in assigning nurses within the county, or that Respondent acted in an arbitrary or capricious manner.[5] The record reflects that as a result of an independent audit, which reported that the nurses should be spending more time working in the schools with students, the Respondent directed school administrators to revamp the school nurse assignment in a more efficient manner resulting in nurses having more time in the schools to which they had been assigned. Grievant was given ample opportunity to participate in the reassignment plan, yet refused to do so. The record established that Grievant has been given and will be allowed input into future nursing assignment decisions.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R.

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[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 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)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

1 § 3 (2008); *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).

2. "Standing, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy." *Wagner v. Hardy County Bd. of Educ.*, Docket No. 95-16-504 (Feb. 23, 1996); *See Jarrell v. Raleigh County Bd. of Educ.*, Docket No. 95-41-479 (July 8, 1996). When an individual is not personally harmed, there is no cognizable grievance. *Long v. Kanawha County Bd. of Educ.*, Docket No. 00-20-308 (Mar. 29, 2001); *Cremeans v. Board of Trustees*, Docket No. 96-BOT-099 (Dec. 30, 1996); *Pomphrey v. Monroe County Bd. of Educ.*, Docket No. 94-31-183 (July 1, 1994); *Mills v. W. Va. Dep't of Transp.*, Docket No. 92-DOH-053 (Apr. 24, 1992).

3. County boards of education have substantial discretion in matters relating hiring, assignment, transfer and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interest of the schools, and in a manner which is not arbitrary and capricious. *State ex rel. Melchiori v. Bd. of Educ.*, 188 W. Va. 575, 425 S.E.2d 251 (1992).

4. Grievant lacks standing to challenge the reassignment of other nurses by Respondent.

5. Grievant did not prove by a preponderance of the evidence that the reassignment decision regarding the nurses by Respondent was an arbitrary and capricious act. Grievant failed to establish by a preponderance of the evidence a violation of any law, policy, rule or regulation relating to her claim that she should have sole decision making authority for the assignment of school nurses.

Accordingly, this grievance is **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).

Date: August 16, 2013

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Ronald L. Reece
Administrative Law Judge