

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KATHRYN NICHOLS, et al.,

Grievants,

v.

Docket No. 2015-0970-CONS

CALHOUN COUNTY BOARD OF EDUCATION,

Respondent,

and

KELLI WHYTESELL AND JEANNIE LEA BENNETT,

Intervenors.

DECISION

Grievants, Kathryn Nichols, Carla Taylor, and Bonnie Sands, filed expedited level three grievances against their employer, Respondent, Calhoun County Board of Education, in February 2015. Grievants Nichols and Taylor filed identical statements of grievance dated February 18, 2015, which stated as follows: "[t]he Calhoun County Board of Education approved a plan to eliminate all Central Office positions without providing any evidence of need or cost savings in violation of West Virginia Code Section 18A-2-2." Grievant Nichols sought the following relief: "[t]he decision to eliminate all Central Office positions be reversed, the Calhoun County Board of Education be mandated to follow the law, and the Grievant be made whole." Grievant Sands' statement of grievance was dated February 26, 2015, and stated as follows: "WV § 18A-2-2; WV § 18A-2-7; WV § 18A-4-7a. Calhoun County Board of Education approved a plan to reduce administrative positions without providing any evidence of cost saving or need." As relief sought, Grievant Sands requested "[r]eduction in Force action reversed. Reinstatement

of contract and placed back in position of Instructional Technology Supervisor. Any lost back pay, interest and related benefits." These grievances were initially assigned individual docket numbers, but were consolidated by the Grievance Board by Order entered May 15, 2015. By Order entered June 26, 2015, Kelli Whytsell and Jeannie Lea Bennett were granted intervenor status.

The level three grievance hearing was held on September 28, 2015, September 29, 2015, December 2, 2015, and December 3, 2015, at the Grievance Board's office in Charleston, West Virginia, before the undersigned administrative law judge. Grievants Nichols and Taylor appeared in person and by counsel, Mark W. Carbone, Esquire, Carbone & Blaydes, PLLC. Grievant Bonnie Sands appeared in person and by her representative, Ben Barkey, West Virginia Education Association. Respondent, Calhoun County Board of Education, appeared by counsel, Richard S. Boothby, Esquire, of Bowles Rice, LLP. Intervenors Whytsell and Bennett appeared in person and by their representative, Mike Hennessey, West Virginia Education Association. This matter became mature for consideration on February 1, 2016, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law. It is noted that Intervenors submitted no proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievants were employed by Respondent in its Central Office as full-time administrators. Facing a large budget deficit, the superintendent recommended to the Respondent the termination of all Central Office employee contracts so that the staff could be reorganized to reduce the number of positions by 1.5 to save money. After personnel hearings requested by Grievants, Respondent voted to accept the recommendations of

the superintendent, thereby terminating the current contracts held by the Grievants. Two Grievants were eventually transferred into other positions, and one Grievant's employment was terminated. Following the vote to terminate Grievants' current contracts, the reorganization of the Central Office was completed. Grievants claim no statutory or procedural violations regarding their reductions in force or transfers. Grievants argue that there can be no elimination of positions without reduction in need, and that the Board's actions in accepting the recommendations of the superintendent were arbitrary and capricious. Respondent denies all of Grievants' claims, and argues that Grievants' contracts were properly terminated in order to allow for the reorganization of the Central Office as a way to save money. Grievants failed to prove their claims by a preponderance of the evidence. Therefore, this grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant Kathryn Nichols was formerly the Director of Special Programs working in the Central Office of the Calhoun County Board of Education. She had held that position for seven years. Further, this position was 96% federally funded, and 4% locally county funded.

2. Grievant Carla Taylor was formerly the Director of School Improvement working in the Central Office of the Calhoun County Board of Education. She had held that position for seven years. Grievant Taylor held a 230-day contract in this position.

3. Grievant Bonnie Sands was formerly the Supervisor of Technology working in the Central Office of the Calhoun County Board of Education. She held that position

for seven years. Grievant Sands held a 230-day contract.

4. Timothy Woodward is the Superintendent of Calhoun County Schools. He was hired into that position in May 2014. Mr. Woodward had not been a superintendent before his hiring in Calhoun County. However, Mr. Woodward has served as Director of Special Education for Hardy County Schools. Mr. Woodward had also been a principal in Pendleton County, West Virginia, as well as a teacher and administrator in Virginia.¹

5. At the time Mr. Woodward was hired as Superintendent, and until events leading up to this grievance, the following positions existed in the Central Office: Superintendent (annual salary \$80,000.00); Director of School Improvement (annual salary \$55,140.00); Director of Special Programs (annual salary \$74,294.60); Treasurer (annual salary \$60,594.00); Supervisor of Transportation/Facilities (annual salary \$52,111.00); Supervisor of Technology (annual salary \$51,290.00); and Attendance Director (annual salary \$27,416.00).

6. During the last several years, Calhoun County had been operating under a deficit. The estimated deficit for the 2014-2015 school year was \$1.8 million. This was the largest deficit of any county school system in West Virginia.

7. In or about October 2014, Calhoun County was required to submit a three-year Budget Deficit Reduction Plan to the State Board of Education/State Department of Education. This plan contained a number of measures to be implemented over the course of three years (2015, 2016, 2017) to reduce the deficit. The following measures were listed as to be implemented during the second year of the plan (2016):

- Continue the reductions made in year I;
- Elimination of extracurricular and coaching

¹ See, testimony of Timothy Woodward.

supplements. (\$60,000);

- Move Football games to Saturday in order to reduce Utility Cost;
- RIF 2 sewer plant operators to 1 operator savings of (sic)²
- Restructure Board Office to stream line central office effectiveness and reduce needed employees by 1 Supervisor;
- Continue to collaborate with State CFO to continue to implement cost savings measures;
- Continue to remain in formula on both Professional and Service personnel side;
- Write a waiver to use Step VII for operational expenses up to 50%;
- Seek permission to use Step VII for employee Salaries without employing a TIS;
- Enter into a shared service agreement with Gilmer County to TIS and Technology position as Calhoun and Gilmer will have a total of 5 schools in two years;
- Dispose of excess property that is creating expense such as Old Arnoldsburg Elementary;
- Enter in Nutrition Consortium with 19 other counties;
- Begin inventory and evaluation of school HVAC systems and begin preventative maintenance plan by implementing school dude;
- Upgrade CEFPP and write MIP for any HVAC needs for any preventative maintenance needs.³

8. The "3 Year Deficit Reduction Plan" submitted to the State Board of Education contained no details about each of the proposed cost savings measures, or how they will be implemented. The plan was formatted simply as a list.

9. At a Cabinet Meeting⁴ held on or about November 14, 2014, Superintendent Woodward mentioned the reorganization of the Central Office, but gave no details of any

² There appears to be a typographical error in this item as there is nothing following the words "savings of."

³ See, Grievants' Exhibit 4; Respondent's Exhibit 16.

⁴ Cabinet Meetings were meetings that Superintendent Woodward would conduct periodically with Central Office staff, and the principals of the two elementary schools and the Middle/High School.

plan for said reorganization.

10. The State Board of Education met on January 14-15, 2015, at which time Calhoun County's deficit reduction plan was considered. No details about the proposed cost saving measures, other than what was written on the "3 Year Deficit Reduction Plan" document, were provided to the State Board of Education. Nonetheless, Respondent's "3 Year Deficit Reduction Plan" was approved by the State Board of Education at said meeting.

11. By letters dated January 21, 2015, Superintendent Woodward informed Grievants Nichols and Taylor that he was proposing the termination of their current contracts, replacement of those contracts with 200-day teacher contracts, and considering them for transfer for the 2015-2016 school year. The letters further contained the following explanation for this action:

Due to the Board's difficult financial situation and my desire for a different administrative structure, a plan for reorganizing the central office administrative staff may be proposed for the 2015-2016 school year. This plan does not include maintaining your current position in its current form. However, prior to considering any such proposal, the Board, by certain deadlines imposed by West Virginia law, must first consider all related transfers, contract terminations, and contract replacements.⁵

12. By letter dated January 21, 2015, Superintendent Woodward informed Grievant Sands that he would be recommending that her contract of employment be terminated at the close of the 2014-2015 school year, and that her name be placed on a preferred recall list for the following reasons:

Due to the Board's difficult financial situation and my desire for a different administrative structure, a plan for reorganizing

⁵ See, Respondent's Exhibits 17 & 22.

the central office administrative staff may be proposed for the 2015-2016 school year. This plan does not include maintaining your current position in its current form. However, prior to considering any such proposal, the Board, by certain deadlines imposed by West Virginia law, must first consider all related transfers, contract terminations, and contract replacements.⁶

Unlike Grievants Nichols and Taylor, Grievant Sands was not considered for transfer to another position.

13. The January 21, 2015, letters informed each of the Grievants that these recommendations would be made at the Board of Education meeting scheduled for February 5, 2015, at 6:30 p.m. In response to these letters, each of the Grievants requested a hearing before the Board, and were granted the same.⁷

14. Grievants were granted personnel hearings before Respondent Board on their reductions in force ("RIF")/transfers at a special meeting held on February 5, 2015.

15. At the beginning of the February 5, 2015, personnel hearings before the Board, Superintendent Woodward testified that the administrative position contract terminations, in addition to other measures, were being sought in an effort to reduce the budget deficit. Superintendent Woodward also informed the Board that the county was "on target in the instructional professional formula," but "over the ratio in the non-instructional professional ratio," meaning administrative positions. He further testified that if the Board approved the personnel actions he was seeking, he planned to reconfigure the Central Office administrative positions to reduce the same by 1.5 positions to bring them within the ratio.⁸ It is noted that the reorganization plan for the Central Office was

⁶ See, Respondent's Exhibits 25 & 26.

⁷ See, Respondent's Exhibit 18.

⁸ See, Lower Level Record, Tab 1, pp. 2-4.

not revealed during the February 5, 2015, hearings. However, Superintendent Woodward estimated that the proposed changes to the Central Office would yield a savings of between \$60,000 and \$90,000.⁹

16. During the February 5, 2015, hearings, Superintendent Woodward testified as follows regarding his communications with the State Department and Joe Panetta, Chief Operations Officer of the Department of Finance and Administration of the West Virginia Department of Education, about his three-year plan:

MR. WOODWARD: I spoke with Mr. Panetta yesterday on the phone. He is going to be coming to our board work session, and I was quite pleased with what I heard. He said this was the first time in about four or five years that he had actually seen that we were heading and taking action and heading in the right direction in terms of not allowing the deficit to grow. He's going to be speaking to the board to that situation on February 13 at the board work session, and he's going to be giving my board some details on how the actions that we're taking and the proposed actions are working and are taking us in the right direction. Obviously, I spoke to him in detail about the re-organization plan, and he said this is something that counties in our situation—all counties—should be looking at being able to do, and that is[,] take a strong look at their board office and see if there's a possibility of being able to create these plans that save positions."¹⁰

17. Joe Panetta had not reviewed the details of the reorganization plan, and explained that it was not in his expertise to give an opinion on how to combine job duties and responsibilities. Mr. Panetta only reviewed the financial aspects of the "3 Year Budget Reduction Plan." The State Board of Education had not approved any specific plan of reorganization.¹¹

⁹ See, Lower Level Record, Tab 2, p. 5.

¹⁰ See, Lower Level Record, Tab 1, pp. 7-8.

¹¹ See, testimony of Joe Panetta.

18. Mr. Woodward admitted at the February 5, 2015, hearings and at the level three hearing in this matter that he did not review all of the job postings and job responsibilities for all of the Central Office positions when determining how the positions would be combined to allow for the elimination of the 1.5 positions. Further, Superintendent Woodward was not aware that Grievant Taylor's job responsibilities included Early Childhood.¹²

19. Superintendent Woodward did not seek up-to-date listings of the Central Office positions' job duties and responsibilities before pursuing personnel actions addressed at the February 5, 2015, hearings.

20. At the February 5, 2015, personnel hearings, the Board was given at least some documentation regarding the current costs of the Central Office compared to projected costs of Central Office personnel minus the 1.5 positions, and some comparisons of the number of Calhoun County's administrative staff with that of several other counties, but not all 55 West Virginia counties.

21. As a result of the February 5, 2015, personnel hearings before the Respondent Board, the contracts of all Central Office employees, aside from Superintendent, were terminated.

22. Karen Kirby served as the Respondent's half-time attendance director during the 2014-2015 school year. At the February 5, 2015, board meeting, Ms. Kirby's retirement from this half-time position was approved and became effective at the end of the school year. Ms. Kirby was paid \$27,916.00 for the year she served as Attendance

¹² See, Lower Level Record, Tab 2, p. 6; testimony of Timothy Woodward, 7/10/2015.

Director.¹³

23. By letter dated February 6, 2015, Grievant Sands was informed that the Calhoun County Board of Education voted to terminate her contract at the end of the 2014-2015 school year.

24. By letters dated February 9, 2015, Grievants Nichols and Taylor were informed that termination of their contracts effective June 30, 2015, was recommended to the Board at the February 5, 2015, meeting, and that they would be notified when the final recommendation for their assignments for the 2015-2016 school year was made and approved by the Board.¹⁴

25. By letter dated June 16, 2015, Superintendent Woodward informed Grievant Nichols that the Board voted to give final approval to assign her to the position of 1st Grade Elementary Teacher at Arnoldsburg Elementary School for the 2015-2016 school year.¹⁵

26. By letter dated June 16, 2015, Superintendent Woodward informed Grievant Taylor that the Board voted to give final approval to assign her to the position of Assistant Principal/Athletic Director at Calhoun County Middle/High School for the 2015-2016 school year.¹⁶

27. Superintendent Woodward based his figures on the reorganization plan's cost savings effect solely on the current costs of the Central Office positions, subtracting out the cost of 1.5 positions. Mr. Woodward did not obtain any kind of financial analysis

¹³ See, Respondent's Exhibit 1.

¹⁴ See, Respondent's Exhibits 20 & 23.

¹⁵ See, Respondent's Exhibit 21.

¹⁶ See, Respondent's Exhibit 24.

of his proposed reorganization plan to determine cost savings. He relied on the numbers provided to him, upon his request, by Treasurer Daniel Minney.¹⁷

28. Superintendent Woodward has never asserted that any lack of need for the positions in the Central Office existed. He has asserted that a reorganization of the Central Office was needed as a cost savings measure, and that positions would be combined so that all needs would be met.

29. At a board meeting held on February 23, 2015, Superintendent Woodward presented his plan to reorganize the Central Office beginning with the 2015-2016 school year. This plan eliminated all of the current job titles in the Central Office, other than that of the Superintendent, and reduced the number of administrators from 5.5 to 4. The reorganization plan provided for the following administrative positions in the Central Office: Assistant Superintendent/Attendance Director; Chief Operational Officer for Administrative Services; Chief Operational Officer for Student Services; and Treasurer/Assistant to Superintendent. The Respondent Board voted to approve the proposed reorganization plan.¹⁸ The half-time Attendance Director position that Ms. Kirby held was one of those positions eliminated. The duties of the Attendance Director were then assigned to the Assistant Superintendent.

30. On March 9, 2015, Notices of Vacancy were posed for the Assistant Superintendent/Attendance Director (261-day contract), Chief Operational Officer for Administrative Services (240-day contract), and Chief Operational Officer for Student

¹⁷ See, Lower Level Record, Tab 2, pg. 32; Level Three testimony of Dan Minney.

¹⁸ See, Grievants' Exhibit 3; Respondent's Exhibits 5, 10, 12, & 13; testimony of Timothy Woodward; testimony of Daniel Minney.

Services. (240-day contract).¹⁹ It is unknown when the Treasurer/Assistant to Superintendent position was posted. That position was originally called "Treasurer/Associate Superintendent" and was posted as such. However, that posting was taken down and reposted as "Treasurer/Assistant to Superintendent." It is noted that "Associate Superintendent" requires certification, but "Assistant to Superintendent" does not.²⁰

31. Intervenor Jeannie Bennett was hired for the position of Chief Operational Officer for Student Services with a salary of \$64,818.40.²¹ Curtis Garretson was hired as the Chief Operational Officer for Administrative Services with a salary of \$56,065.40.²² Daniel Minney was hired as the Treasurer/Assistant to Superintendent with a salary of \$66,659.00. Intervenor Kelli Whytsell was hired as the Assistant Superintendent/Attendance Director with a salary of \$75,000.00.²³

32. Daniel Minney has no certification to allow him to hold a superintendent position.

33. Except for Daniel Minney, none of the individuals hired for the new Central Office positions had worked in the Central Office.

34. Grievant Sands was unemployed from July 1, 2015, through October 2, 2015, when she was hired by Calhoun County Board of Education as the Assistant Principal of Calhoun County Middle/High School.

35. Grievant Nichols is currently employed as the principal of a juvenile

¹⁹ See, Respondent's Exhibits 5, 12, & 13.

²⁰ See, testimony of Daniel Minney; Respondent's Exhibit 1.

²¹ See, Respondent's Exhibit 8; testimony of Jeannie Bennett.

²² See, Respondent's Exhibit 8; testimony of Curtis Garretson.

²³ See, Respondent's Exhibit 7; testimony of Kelli Whytsell.

detention school in Mineral County, West Virginia, which is operated by the West Virginia Department of Education. Her salary for the 2015-2016 school year was \$90,000.00.

36. Grievant Taylor is currently employed as the Director of Curriculum for the Roane County Board of Education under a 240-day contract. She was hired for this position in June 2015. It is unclear from the evidence what her salary is in this position, but it is less than \$62,595.00, her former salary in Calhoun County.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievances by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). See also *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).

The Respondent Board voted to accept the recommendation of the Superintendent to terminate the Grievants' contracts following personnel hearings on February 5, 2015, opening the way to reorganize the Central Office to cut 1.5 positions. Grievants' contracts

were terminated effective June 30, 2015. Grievants argue that the Respondent's decision to approve the elimination their positions in order to reorganize the Central Office was arbitrary and capricious. It is noted that after the Respondent Board voted to terminate their current contracts, Grievants Nichols and Taylor were later transferred into other positions within the county school system with new contracts; however, Grievant Sands did not receive a transfer. As such, Grievant Sands' employment with the Respondent was terminated, and she was placed on the preferred recall list. Respondent counters that it properly terminated Grievants' contracts through the RIF/transfer process, and that its decisions were not arbitrary and capricious. Respondent argues that these personnel actions were taken to save money as part of the deficit reduction plan.

First, it is to be noted that the Grievants have not alleged any notice or procedural errors in the RIF/transfer process. Accordingly, there is no need to address the required statutory procedures to be followed for the same. Further, Grievants have not alleged any error in the selection of those hired to fill the four new positions, and Grievants are not seeking reinstatement into any of those new positions. Grievants Nichols and Taylor are not alleging any error as to where they transferred following their contract terminations. Likewise, Grievant Sands is not alleging that she should have been allowed to "bump" any other employee instead of being placed on the preferred recall list. Grievants are challenging the board action taken against them at the February 5, 2015, personnel hearings, that being the termination of their then current contracts, so that the Central Office could be reorganized in order to cut 1.5 positions, and to create new administrative positions to cover the duties of the Central Office. Grievants' positions in the Central Office were eliminated, or abolished, and four new positions were eventually

created to staff that office.

Respondent argues that Grievants cannot challenge the reorganization plan itself as they did not file a grievance after the reorganization plan was announced. However, the record of the lower level proceedings establishes that while the plan itself was not yet known to the Board at the time of the February 5, 2015, hearings, the notices the employees received, as well as the testimony of Superintendent Woodward at those hearings, were clear that the superintendent was seeking the elimination of Grievants' positions so that he could reorganize the Central Office to cut positions in an effort to save money. Therefore, the reason for the Grievants' contract terminations was the reorganization. To this extent, the personnel actions and the reorganization cannot be separated entirely, and the details of the reorganization that eventually occurred is relevant. While Grievants take issue with the eventual reorganization, they do not appear to simply challenge the reorganization plan. Grievants' arguments are somewhat confusing, but they appear to argue that the decision to reorganize, or to allow the reorganization, and the decision to terminate their current contracts were arbitrary and capricious, and that the details of the eventual reorganization plan demonstrate the same. Grievants did not grieve the actual reorganization plan.

Grievants raise a number of challenges to the board action taken on February 5, 2015. In their Statements of Grievance, the Grievants allege that the Respondent Board voted to eliminate their position without evidence of cost savings or need. Grievants Nichols and Taylor also state the following in their proposed Findings of Fact and Conclusions of Law:

[t]he Grievants have filed this grievance because the decision to reorganize the Central Office was not based on a reduction

in a need for the services provided by the Central Office employees, but simply for financial reasons, at best, or some type of retribution against the previous employees of the Central Office, at worst.²⁴ The decision to reorganize was arbitrary and capricious. . . . The Calhoun County Board of Education voted to eliminate the Grievants' positions based upon the belief that the reorganization of the Central Office would save the School System money without taking into consideration the deminimis (sic) amount of savings, without knowing the impact upon the students of Calhoun County and without the proper methodology used to create the reorganization plan. Therefore, the plan was, under West Virginia law, arbitrary and capricious.²⁵

Grievant Sands also argues that,

[c]learly the decision was arbitrary and capricious and lacked the type of detail the board would have needed to make an informed decision on the termination. Basically, the board voted for a plan, half of which did not occur, where all items related to cover duties currently performed by grievant Sands had not been implemented. The board based this decision on an inadequate list of job duties provided to them by a superintendent who never spoke with them in any detail about their current job duties. Since the board made a decision based on a plan that was, at best, half implemented, the termination should be rescinded. The justification for making this termination work, all the other related items to the technology services in the deficit reduction plan, never materialized and therefore the termination should be rescinded.²⁶

Grievant Sands also alleged that Superintendent Woodward misled the Board into believing that the reorganization plan, which they had not yet seen, had been approved by Joe Panetta at the West Virginia Department of Education which influenced their votes in favor of terminating Grievant Sands' contract.²⁷

²⁴ It is noted that Grievants have not raised favoritism or reprisal claims in this matter, and such are not addressed in their post-hearing submissions.

²⁵ See, pp. 9-11.

²⁶ See, Grievant Sands' Proposed Findings of Fact and Conclusions of Law, pg. 3.

²⁷ See, Grievant Sands' Proposed Findings of Fact and Conclusions of Law, pg. 3.

Before going any further, the undersigned must state that there appears to be confusion in this matter about "the plan." There was more than one plan mentioned during the level three hearing in this matter, as well as during the lower level proceedings. To be clear, there was a "3 Year Deficit Reduction Plan" or "deficit reduction plan" that was presented to, and approved by, the State Board of Education in or about January 2015 which consisted of a bullet pointed list of actions to be taken by the Respondent Board over the course of three years to reduce its deficit. One of the sections of the "3 Year Deficit Reduction Plan" entitled "Year 2 (2016)," contained a bullet point stating "[r]estructure Board Office to steam line central office effectiveness and reduce needed employees by 1 Supervisor."²⁸ The budget deficit reduction plan and the reorganization plan are not one and the same. The reorganization was just one of many actions listed in the "3 Year Deficit Reduction Plan" to be done to save money. The actual reorganization plan was not presented to the Respondent Board until February 23, 2015, long after the February 5, 2015, personnel hearings. The only things that the Respondent Board voted on during the February 5, 2015, personnel hearings were whether to approve the recommendations of the superintendent to terminate the contracts of the Grievants (and others) in order to clear the way for the superintendent to introduce a reorganization plan. The Respondent Board did not vote on the deficit reduction plan; such had already been submitted to and approved by the State Board prior to the personnel actions that prompted these grievances. As of the time of the February 5, 2015, personnel hearings,

²⁸ See, Respondent's Exhibit 16, Minutes of the West Virginia Board of Education, January 14, 2015.

the Respondent Board had not been given the reorganization plan.²⁹ The Board had been provided some documentary evidence regarding the costs and projected savings, along with Superintendent Woodward's testimony that if the recommended personnel actions were approved, he planned to reorganize the Central Office to cut 1.5 positions which would result in a savings of \$60,000 to \$90,000.

"County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl. pt. 3, *Dillon v. Wyoming County Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986). "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." *Trimboli v. Dep't of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997) (citations omitted). "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." *Id.* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

Grievants claim no violation of statute; they argue only that the board's actions

²⁹ It has been Respondent's position that, legally, a reorganization plan could not be given to the board prior to the personnel hearings because ". . .it is unlawful for a school board to approve of any plan or policy that has the effect of predetermining the outcome of employee transfer hearings and contract termination hearings," citing *Martin, et al., v. Barbour County Bd. of Educ.*, Docket No. 2008-1178-CONS (Sept. 30, 2008).

were arbitrary and capricious. Grievants Nichols and Taylor focus their arguments on three main issues: financial considerations, lack of reduction in need, and lack of due diligence. Grievant Sands argues that the Board lacked the details and information needed to make an informed decision about the personnel actions, and was misled by Superintendent Woodward. The undersigned will attempt to address each of these concerns.

Grievants Nichols and Taylor argue that the Respondent Board did not consider the "*de minimis*" financial savings when it voted to approve the personnel actions against them. In other words, they assert that the Board failed to consider just how little the reorganization would save if implemented. Grievants Nichols and Taylor also point out that many of the items listed on the 3 Year Budget Deficit Plan were not implemented, which they assert, "belies the seriousness of the Superintendent's approach to the financial situation." Additionally, they argue that this reorganization was not geared at reducing the budget as Grievant Nichols' position was 96% federally funded, and no savings could result from reorganizing her position. From this, they assert that reorganization was a "veiled attempt to terminate Ms. Nichols without following the normal procedures."

The evidence presented indicates that the Board was given at least some documentation of current costs versus projected savings at the February 5, 2015, hearings, along with hearing testimony from Superintendent Woodward and remarks of counsel regarding the possible reorganization before they voted on the superintendent's recommendations.³⁰ Further, the evidence suggests that somewhere around \$55,000 to

³⁰ See, Respondent's Exhibit 1, Grievant's Exhibit 1, testimony of Timothy Woodward.

\$60,000 may have been saved by the eventual reorganization.³¹ Grievants Nichols and Taylor appear to concede that in their arguments. Further, all of the Grievants' former duties are still being done by someone in the Central Office, and the federal funding cited by Grievants is still there. However, the federal funding is just not paying for 96% of the cost of the "Director of Special Programs" as that position no longer exists, and is instead funding part of one of the new positions. It is certainly possible that cost savings could have been achieved without this reorganization, but that does not matter. Reorganization is the method Respondent chose in an effort to save at least some money, and that appears to have occurred. The reorganization required the termination of the Grievants' contracts because the combination of duties to cover the needs of the Central Office would result in new positions being created. The undersigned does not doubt that cost savings could have been achieved through other methods, and that the reorganization could have been done differently. However, none of that matters. The issue is whether the Board's actions taken on February 5, 2015, were arbitrary and capricious. Given the evidence presented, the undersigned cannot find that the Board's actions in terminating the Grievants' contracts to allow for the Central Office to be reorganized were arbitrary and capricious. Grievants correctly point out that if the savings were \$60,000 that is about 3% of the deficit. However, that is still a savings, and that was the reason given for the personnel actions taken against the Grievants.

Grievants Nichols and Taylor further argue that positions such as theirs cannot be eliminated for financial reasons without a "concomitant showing of reduction in need for the services provided" citing *Boner v. Kanawha County Board of Education*, 197 W. Va.

³¹ See, Grievant's Exhibit 3; testimony of Daniel Minney; testimony of Timothy Woodward.

176, 475 S.E.2d 176 (1996); therefore, the termination of their contracts and eventual transfers were arbitrary and capricious. Respondent has not alleged any reduction in need of services in the Central Office. On the contrary, Respondent has made it abundantly clear that the personnel actions were only taken to save money, and that the Central Office positions were reconfigured to cover all needs. In the *Boner* case, the county board made the decision to eliminate all of the full-time homebound teachers without any reduction in the need for their services, and instead replaced them with hourly-paid employees solely to save money. See *Id.* The West Virginia Supreme Court of Appeals ruled that

[a] board of education is prohibited from abolishing the positions of full-time homebound teachers and replacing the instructional services performed by those teachers with hourly-paid employees when no concomitant showing of reduction in need for such instruction has been made on the grounds that such a plan clearly operates in contravention of the contractual scheme of employment contemplated by West Virginia Code § 18A-2-2 (1993) along with the attendant benefits of such contracts.

Id. at Syl. pt. 1. The instant case can be distinguished from *Boner*. First, *Boner* had nothing to do with the reorganization of a central, or administrative, office; it dealt with teachers providing instructional services to homebound students. The board, in that case, eliminated full-time teaching positions only to replace them with cheaper hourly-paid employees to save money. Here, however, there was no such action. In an effort to save money, given its \$1.8 million deficit, the Respondent Board took personnel actions to eliminate all current Central Office positions, so that there could be a reorganization of the Central Office staff to reduce the number of positions by 1.5. The Central Office staff were not simply replaced by hourly-paid employees. New positions were created to carry

out the services of the Central Office. All of the duties and responsibilities remained; the personnel system for performing these duties was reconfigured. Instead of 5.5 positions performing these duties, four positions were created to do it all. The four new positions were full-time positions with contracts, and they were posted and filled pursuant to statute. This is an entirely different situation than that of *Boner*. Moreover, the *Boner* case does not say that reduction in need is required for any and all contract terminations, nor does any statute.

Grievants Nichols and Taylor also argue that the Board's actions were arbitrary and capricious because it made the decision to terminate their current contracts and move toward reorganization without questioning or analyzing Superintendent Woodward's recommendations. The argument being, had the Respondent done so, it would have learned that Superintendent Woodward conducted no real financial analysis before making his recommendation for reorganization, that he failed to consult anyone besides their legal counsel for assistance in developing the plan or combining positions, and that he had not even read the job descriptions, or postings, for the Central Office positions before determining how they would be combined.³² Grievants also pointed out that the Board failed to ask any questions regarding what impact, if any, the reorganization would have on the students. Grievant Sands appears to share in these concerns, but argued that Superintendent Woodward misled the Board into believing that the State Board of Education had approved of his reorganization plan, with his statement about ". . . [o]bviously, I spoke to him [Panetta] in detail about the re-organization plan, and he said

³² Superintendent Woodward testified that he casually spoke to other superintendents about reorganizing at meetings or conferences, but that he held no formal meetings or discussions with any of them about his plan to reorganize the Central Office.

this is something that counties in our situation—all counties—should be looking at being able to do, and that is[,] take a strong look at their board office and see if there's a possibility of being able to create these plans that save positions.”

While the evidence presented established that Superintendent Woodward did no comprehensive financial analysis, job analysis, or consulted anyone besides Respondent's counsel before deciding to recommend reorganization to the Board, Grievants presented no evidence that such was required by any law or policy. Yes, traditional wisdom suggests that analysis and consultation with ones more experienced would be prudent before embarking on such an endeavor, but there appears to be no requirement for the same. Further, while Grievants Nichols and Taylor argue that the Respondent Board's failure to inquire into Superintendent Woodward's methodology violated their due diligence, again no law or policy required them to do so. As for Grievant Sands' argument that Superintendent Woodward misled the Board, such is not entirely clear. While an inference can be drawn from his statement to the Board at the February 5, 2015, hearing that Mr. Panetta approved the reorganization plan itself, meaning the combination of jobs and the new positions, Superintendent Woodward did not explicitly say that. As such, the undersigned cannot find that Superintendent Woodward intentionally misled the Board into voting to approve his recommendation.

Also, in support of their lack of due diligence claim, Grievants Nichols and Taylor cite the case of *Riffel v. Wayne County Board of Education*, Docket No. 2015-1030-WayED (Nov. 2, 2015). In that case, the county superintendent recommended to the board the elimination of a full-time Occupational Therapy Assistant position based upon lack of need, asserting that the OT services could be provided by the full-time Registered

Occupational Therapist with possible occasional use of a contract professional, which would also result in cost savings. The board accepted the recommendation of the superintendent. See *Id.* In that case, the Grievance Board found that there was a need for two full-time OT professionals to provide the required services to the students, and that the reason given for eliminating the grievant's position was invalid; therefore, the decision was arbitrary and capricious. See *Id.* In making its decision, the Grievance Board noted that the superintendent did not base her recommendation of lack of need on reliable data, and did not compare her county with that of similarly situated counties. Therefore, her reasoning was flawed. See *Id.*

Grievants are correct to point out that there are similarities between *Riffle* and the instant matter; however, *Riffle* can be distinguished. First, *Riffle* involved the elimination of one position based solely upon lack of need. The Grievance Board found that the evidence presented did not support a finding of lack of need. On the contrary, the Grievance Board found that there was a need for the eliminated position and that the superintendent based her recommendation to the board on a faulty analysis. In the instant matter, there has never been an allegation of lack of need. The reason given for the elimination of all of the Central Office positions to allow reorganization to save money. The need is still there. The Board was attempting to serve all of the needs of the Central Office for less money. While it appears that Superintendent Woodward's recommendation to reorganize the Central Office was based on his questionable comparisons to other counties and lack of complete financial and job analyses, his recommendation still resulted in financial savings. Again, it is possible that there was a better way to achieve cost savings in the Central Office, certainly one that would have

resulted in less upheaval, litigation, and legal expense, but that is not the point. The question is whether the Board's actions in terminating the contracts of the Grievants in order to open the way for reorganization to reduce costs given the budget deficit was arbitrary and capricious. The undersigned simply cannot find, based upon the evidence presented, that it was.

Grievants also made allegations that there is no way the reorganized positions can do everything that are now in their job descriptions. Grievant Sands alleged that her former job duties are not being handled in an efficient manner, if at all. These things may be true, but, again, they have nothing to do with whether the Board's actions were arbitrary and capricious. Further, Grievants Nichols and Taylor's failed to prove by a preponderance of the evidence that their claim that the reorganization was a veiled attempt to get rid of the former Central Office staff. Yes, some evidence was presented to suggest that Superintendent Woodward may have had some issues with Grievants Nichols and Taylor prior to his recommending reorganization, but they did not meet their burden of proof. The facts are clear that there was a huge deficit and that the Respondent Board was being directed by the State Board of Education to make changes to reduce costs. In light of the same, reducing staff positions is a logical solution.

The undersigned is very troubled by a number of facts surrounding the reorganization, such as the original posting of the position of Associate Superintendent/Treasurer, which was pulled and reposted as "Assistant to the Superintendent"/Treasurer when it was learned that Mr. Minney lacked the certification to hold a superintendent position. Also, the reorganized structure has Mr. Minney parallel to Ms. Whytsell, Assistant Superintendent, while Mr. Minney lacks the certifications

evaluate at least some of the positions now under his supervision. The undersigned is also troubled that some of the savings realized by the reorganization may have been offset, or reduced, by having to pay more to Grievants Nichols and Taylor when they bumped lower paid teachers when they were transferred. It is also very troubling that some of the items listed on the "3 Year Deficit Reduction Plan" were scrapped or not implemented even though the Board thought they would be when they made the decision to terminate the Grievants' contracts. However, this case ultimately comes down to whether the Board's actions in terminating the contracts on February 5, 2015, were arbitrary and capricious, and based upon the evidence presented, the undersigned cannot find such. Boards of education have a great deal of discretion, and while the reorganization of the Central Office may have been surprising to the employees of the Calhoun County Board of Education, given Respondent's extreme financial problems and that some savings was achieved, it was not arbitrary and capricious.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). See also *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. "County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this

discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syl. pt. 3, *Dillon v. Wyoming County Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986).

3. "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." *Trimboli v. Dep't of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997) (citations omitted). "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." *Id.* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

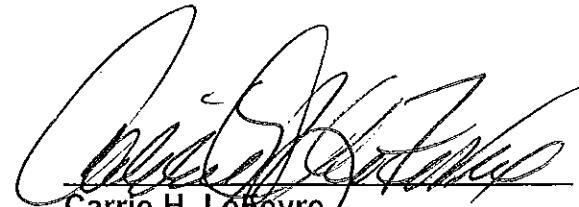
4. Grievants failed to prove by a preponderance of the evidence that the Board's decision to terminate their contracts to allow for the reorganization of the Central Office as a cost savings measure was not supported by the evidence, or that the decision was arbitrary and capricious.

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 (eff. July 7, 2008).

DATE: July 15, 2016.



Carrie H. Lefevre
Administrative Law Judge

**THE WEST VIRGINIA
PUBLIC EMPLOYEES GRIEVANCE BOARD**

**KATHRYN NICHOLS, et. al.,
Grievants,**

v.

Docket No. 2015-0970-CONS

**CALHOUN COUNTY BOARD OF EDUCATION,
Respondent, and**

**KELLI WHYTSSELL and JEANNIE LEA BENNETT,
Intervenors.**

CERTIFICATE OF SERVICE

THE UNDERSIGNED certifies the attached **DECISION** has been sent to the following persons and addresses by United States Certified Mail, postage prepaid:

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Certified sent this 15th day of July, 2016.

Jennifer A. Pritchard
Jennifer A. Pritchard
Secretary II