

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**JONATHAN BALDWIN et al.,
Grievants,**

v.

Docket No. 2017-1190-CONS

**DEPARTMENT OF EDUCATION/OFFICE OF
INSTITUTIONAL EDUCATION PROGRAMS,
Respondent.**

DECISION

This consolidated grievance was initially filed by individual Grievants,¹ educators and service personnel, who work for the West Virginia Department of Education (“WVDE”), Office of Institutional Education Programs (“OIEP”) at the Donald R. Kuhn Juvenile Center (“DRKJC”) in Julian, West Virginia. The grievance(s) were filed against Respondent WVDE, Grievants’ employer, on or about September 15, 2016, protesting the alteration(s) and reduction in the amount of their yearly compensation. Attached to the standard grievance form, each Grievant attached two typed pages specifying the statement of grievance and information Grievants’ perceived relevant to the dispute (document incorporated by reference). At the request of Grievants, their grievances were consolidated and considered in one proceeding.

A level one conference was convened by agreement of the parties on October 11, 2016. An eleven-page decision was issued at that level on November 1, 2016. Grievants had asserted many legal theories of illegality and requested a variety of reliefs. The

¹ Grievants were initially identified as Keith Anderson, Johnathan Baldwin, Robin Carr, Maureen Dillard, Jacqueline Eye, Marsha Gresham, Kathy Jarrell, Jerry Racer, Brandi Sanders, Cynthia White and Ruth White. Keith Anderson is no longer a participating Grievant.

grievance was denied-in-part and granted-in-part. Grievants prevailed with regard to the sole issue that they had not received sufficient notice of the pay reduction pursuant to Wage Payment and Collection Act.² Grievants appealed to level two on various dates in November 2016 and a mediation session was held on February 1, 2017. Grievants appealed to level three on February 10, 2017. A level three hearing was held before the undersigned Administrative Law Judge on April 28, 2017, at the Grievance Board's Charleston office. Grievants appeared in person and at the beginning of the hearing, it was communicated that Johnathan Baldwin would primarily be responsible for presenting the concerns of the group.³ Grievant Baldwin acted as the primary spokesperson; however, each Grievant was specifically afforded the opportunity to testify. Respondent appeared by WVDE representative Terry Harless, Chief Financial Officer, with legal counsel Sherri Goodman Reveal, Esquire. This grievance matter became mature for decision upon receipt of the last of the parties' "proposed findings of fact and conclusions of law" on or about on May 30, 2017, the assigned mailing date for the submission of the parties' proposals. No request was received requesting an extension for submission of fact/law proposals. Both parties submitted fact/law proposals.

² It was determined that Grievants are paid in arrears and were entitled to one full pay period prior to the change in their rate of pay pursuant to W. Va. Code § 21-5-9. For the instant Grievants this translates to real time of approximately four weeks' notice.

³ Keith Anderson did not attend the level three hearing and it was responsibly communicated that Mr. Anderson did not wish to proceed with this grievance at level three. Keith Anderson is dismissed from the instant grievance.

Synopsis

This grievance arose out of the West Virginia Department of Education, Respondent reducing Grievants' rate of pay to be consistent with the reductions in pay their counterparts employed by the Boone County Board of Education experienced. The reduction occurred several months after the State of West Virginia moved from issuing salary checks twice a month (semi-monthly) to every two weeks (bi-weekly). These two events, coupled with the practice of paying salaries in arrears, has caused much confusion, discord and misunderstandings.

Grievants contend that Respondent has acted unlawfully and wish for their prior yearly salaries to be restored. Respondent contends that in accordance with what has been interpreted as applicable controlling statutes and regulations, it was determined that the salary rate for personnel employed by the WVDE needed to be the equivalent of the salary paid by the county board in the county where each agency facility is located, whether this was an increase or a decrease in pay. The instant matter was the first time a county board reduced salaries supplements. It is not established that Respondent acted in an illogical or irresponsible manner. The facts are regrettable, the circumstances are undesirable, and extremely problematic; nevertheless, it is not determined illegal and/or unlawful for Respondent to timely adjust Grievants yearly salary.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievants are teachers and service personnel at the Donald R. Kuhn Juvenile Detention Facility (DRKJC), a juvenile detention facility operated by the Division of Juvenile Services in Boone County, West Virginia.

2. Boone County was advised by the West Virginia Department of Education to reduce teachers and all teacher salaries as a means of balancing their budget. This reduction of pay was an unprecedented event for Boone County Schools.

3. The reduction in county school board employees' salaries was not a popular budgeting maneuver. The implementation of salary reduction of employees was a much-debated issue. Ultimately, Boone County Board of Education employees' salaries were reduced.

4. The Donald R. Kuhn education staff is employed by the West Virginia Department of Education, not Boone County Schools system. There are six OIEP education programs at juvenile facilities located in various other West Virginia counties. R Ex 2 Grievants are state employees employed by West Virginia Department of Education.

5. While Grievants are not Boone County employees, they are paid what the Boone County Board of Education pays its employees.

6. Each year, Respondent checks the salary schedules of each county where OIEP has an education program at a facility to determine if there has been a salary change, which in the past was always an increase. If there is a variable/change, the

WVDE Finance Department then calculates the increase as applied to OIEP staff working in that county.

7. Respondent uses the county pay scale of the county where each institutional facility is located to determine/establish the salary of their employees in the various institutions throughout the state. Respondent's employees receive the equivalent of the salary supplements paid by the county board in the county where each facility is located. Thus, while Grievants are not Boone County employees, they are paid what the Boone County Board of Education pays its employees.

8. With respect to teachers, salary schedules set out the annual pay determined by the teacher's degree and years of teaching experience. R Ex 4 Calculations are also necessary because the county schedules are based on a 200-day work schedule. OIEP teachers have a 240-day work schedule.⁴

9. While the amount of pay that Respondent's employees in various counties receive is greatly influenced by what the particular County Board pays, the timing of salary payments for them is controlled by State practices.

10. The State of West Virginia pays its employees in arrears by one pay period.

11. Prior to June 2016, State employees were paid twice a month. The semi-monthly pay system resulted in 24 pay days per year. R Ex 7 An individual with a \$30,000 salary would gross \$1,250 per paycheck (30,000 divided by 24). Under the bi-weekly pay system used by KRONOS, a new statewide program, a State employee is

⁴ The Code directs that OIEP employees receive the "equivalent" of a salary supplement paid by the county. The WVDE did not simply reduce DRKJC staff salaries by \$4,000. Its calculations considered the difference in days worked.

now paid on Friday, every two weeks, for a total of 26 pay days. R Ex 8 The gross pay per paycheck for a \$30,000 salary is \$1,154 (rounding up from 84 cents).

12. State employee pay dates converted from semi-monthly to bi-weekly in June 2016. The last semi-monthly pay date was May 31, 2016. The first bi-weekly pay date was June 10, 2016, which covered the pay period of Saturday, May 14, 2016, through Friday, May 28, 2016.

13. Previously Grievants alleged the following issues and relief sought:

- (a) Their September 30, 2016 paycheck, which they characterized as a “bonus” paycheck, was calculated inaccurately; it should have been calculated on their higher rate of pay before their salary was reduced. The relief sought is to be reimbursed for the difference.
- (b) The Boone County BOE was required to reduce its employees’ pay because of an extreme fiscal crisis; the WVDE has no such crisis. They seek restoration of their former salaries, which had originally been approved for the fiscal year 2016-17.
- (c) If the Grievants were required to be paid what the Boone County BOE staff is being paid, then WVDE should have been paying their optical and dental insurance premiums, because Boone County paid its employees’ premiums until July 2016. The relief they seek is the restitution of premiums the Grievants have had to pay prior to the 2016-2017 fiscal year.
- (d) Boone County BOE reduced its county supplement paid to its staff at a flat rate; the WVDE did not. The relief sought is a similar flat rate reduction.

14. The Boone County Board of Education experienced severe financial issues during fiscal year 2016 due to drops in coal severance tax collections. It was unable to pay \$1.6 million in bills or meet payroll towards the end of the 2015-2016 fiscal year without assistance from the State. The WVDE directed Boone County BOE to revise the budget it submitted for fiscal year 2016-2017 or be taken over by the WVDE pursuant to W. Va. Code § 18-2E-5(m)(4). At a board meeting held on July 18, 2016, the Boone

County BOE reduced the county supplements it had been paying for staff salaries back to the 1984 budget.

15. Respondent initially thought that the Boone County BOE salary reductions would not impact the salaries for the DRKJC employees. Jacob Green, Special Assistant to the Chief Officer, and head of OIEP in consultation with the WVDE's counsel, Mary Catherine Tuckwiller conveyed that tentative opinion to the Grievants.

16. Nevertheless, following further examination and discussion within the WVDE, it was determined that the OIEP was required to pay the "equivalent of the salary supplements paid by the county board," whether this was an increase or a decrease in pay.⁵

17. On August 30, 2016, Jacob Green, Special Assistant to the Chief of Technical Education, met personally with the Donald R. Kuhn educational staff to hand deliver a letter notifying Grievants that their salaries would be reduced beginning on the September 16, 2016 checks. R Ex 1

18. The hand delivered August 30, 2016 correspondent, cited W. VA. CODE § 18A-4-17(a) and indicates that Respondent must reduce Grievants' salaries to that of Boone County Salary scale, the letter in pertinent provides:

West Virginia Code § 18A-4-17, Section(a), which states that:

"The minimum salary scale for professional personnel and service personnel employed by the state department of education to provide education and support services to residents of state department of health and human resources facilities, corrections facilities providing

⁵ The specifics of this determination are not clear, e.g., the totality of the administrative personnel involved in the analysis of the situation and which accountable administrator(s) were responsible for making the final determination regarding the agency's positioning.

services to juvenile and youthful offenders, in the West Virginia schools for the deaf and the blind and in public community and technical colleges providing middle college services is the same as set forth in sections two, three and eight-a of this article. Additionally, those personnel shall receive the equivalent of salary supplements paid to professional and service personnel employed by the county board in the county wherein each facility is located, as set forth in sections five-a and five-b of this article. Professional personnel and service personnel in these facilities who earn advanced classification of training after the effective date of this section shall be paid the advanced salary from the date the classification of training is earned. The professional personnel shall be certified, licensed or trained, and shall meet other eligibility classifications as may be required by the provisions of this chapter and by state board regulations for comparable instructional personnel who are employed by county boards. The professional personnel shall be paid at the equivalent rate of pay of teachers as set forth in section two of this article, but outside the public support plan, plus the equivalent of the salary supplement paid to teachers employed by the county board in the county in which each facility is located, as set forth in section five-a of this article.”

Therefore, the West Virginia Board of Education must comply with this statute and reduce salaries for employees of the Donald R. Kuhn Juvenile Center to the approved Boone County Salary Schedule for School Year 2016-2017.

G Ex 5 / R Ex 1

19. Consistent with Respondent’s routine practice of adjusting the salaries of OIEP employees working at institutions whenever a county board of education votes a change of pay in the new fiscal year, Terry Harless, WVDE’s Chief Financial Officer, Division of Finance and Administration, made salary reductions for the WVDE employees working at DRKJC in Boone County. The salary adjustment began with the pay period starting Saturday, August 20, 2016 through Friday, September 2, 2016.

20. Wage and hour rules and regulations stipulates that an employer is to provide employees with due notice of change prior to the application of the change.

Applicable regulations stipulate an employer is to provide notice a full pay period prior to application of the salary alteration. Currently the applicable State of West Virginia pay period is two weeks in length commencing on a Saturday through Friday.

21. The first paycheck of Grievants with the reduced salary rate was September 16, 2016.

22. The State of West Virginia and its governmental agencies pay employees in arrears. The September 16, 2016 pay check compensated for the pay period of August 20, 2016 through September 2, 2016. The effective date of the decrease in Grievants' rate of pay was August 20, 2016.

23. An August 30, 2016 correspondence provided written notification of the intended alteration in Grievants' yearly compensation. R Ex 1 The notice came two weeks before the September 16, 2016 pay date, yet because of payments in arrears, the Donald R. Kuhn staff (Grievants) did not receive a "full pay period's notice of reduction" of their salaries.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Grievants voiced their objection to Respondent’s actions of reducing their individual yearly compensation and to some degree the payment schedule.⁶ It is the WVDE’s position that the mandate of W. Va. Code § 18A-4-17(a) is nondiscretionary, that is, it pays what Boone County BOE pays its employees, whether the change represents an increase or decrease. This was the first time a county board reduced salaries, instead of increasing them. It is understood that Grievants are opposed to the agency’s action of reducing the amount of their yearly pay to be consistent with their counterparts employed by the Boone County Board of Education. At one time Grievant’s argument was described as:

- (1) Inaccurate rate on “extra” September 30, 2016 paycheck; relief sought is to be paid restitution/reimbursed for the difference in the amount the Grievants should have received for the time worked before the change in pay periods.
- (2) Incomparable link to the Boone County Fiscal Crisis; relief sought is the restoration of the Grievants’ salaries, which had been originally approved for fiscal year 2016-17.

⁶ Grievants tended to commingle issues: alteration in salary, rationale for action(s), compensation considerations, lawful notice, schedule of salary payment, and legally recognized damages. Grievants dissatisfaction with the State switching from salary checks twice a month (semi-monthly) to every two weeks (bi-weekly) is a totally distinct matter from reducing the amount of Grievants’ yearly compensation to be consistent with their counterparts employed by the Boone County Board of Education. Grievants too readily commingle their opinions and non-debatable issues. The undersigned will attempt to distinguish issues properly in litigation before this Grievance Board.

- (3) Inconsistent comparison to Boone County BOE employees, because of the WVDE's prior failure to provide the Grievants with optical and dental insurance; relief sought is the restitution of premiums the Grievants have had to pay.
- (4) Inequitable impact on Donald R. Kuhn Educational Teachers because Boone County BOE reduced its supplement at a flat rate; the relief sought is a reduction only in the amount of the 1984 county supplement.
- (5)⁷ Insufficient notice of pay reduction; relief sought is reimbursement to the Grievants for the full amount that they would have earned for the August 22-September 2, 2016 pay period, payable on September 2, 2016.

(See L-1 Decision). It is ambiguous whether Grievants' current appeal fully encompasses the entirety of the aforementioned arguments.⁸ Also see FOF 13, *supra*. Grievants rely heavily on what might be perceived as pseudo equity argument(s), detrimental reliance and alleged lost opportunity damages. It is also noted that Grievants are of the stated belief that "since the budget had already been set for the current fiscal year and they were notified of the Board's intentions/desire to leave Grievants' salaries "as is" in addition to the fact that the W. Va. Code § 18A-4-5a states, "counties may fix higher salaries for teachers placed in special instructional assignments," Respondent has the flexibility to have continued their salary, as budgeted, for at least an additional fiscal year.⁹

⁷ This portion of Grievants grievance was granted by the level one decision. Yet Grievants are still unclear and/or apparently dissatisfied with the relief granted. Confusion among Grievants and the degree of available damages is readily evident. Grievants put forth notable effort attempting to establish the prospect of lost opportunity damages. This is regrettable. Grievants do not accept the prescribed remedy as sufficient for untimely notice.

⁸ This Grievance Board has long held that elements or allegations of the grievance which are raised, but not pursued or developed will be considered abandoned. *Church v. McDowell County Bd. of Educ.*, Docket No. 33-87-214 (Nov. 30, 1987). Failure to pursue an argument either at the level three hearing or in post-hearing written argument is subject to being deemed abandoned and unlikely to be addressed.

⁹ Grievants contend they are entitled to more than the difference in salary for the time period their salary was reduced without sufficient lawful notice of salary alteration. Grievants tend

The undersigned Administrative Law Judge is tasked with addressing the contested issues in litigation; nevertheless, it is deemed prudent to acknowledge/highlight ancillary facts and associated subject matter:

In 1993, the West Virginia Legislature amended W. Va. Code § 18A-4-17 to provide salary adjustments for various professionals beginning July 1, 1994. It was recognized that certain personnel were to be paid on the scale of the county school district in which they worked. *Huss v. WV Division of Rehabilitation* Docket No. 96-RS-483 (Jul 31,1997). The Boone County Board of Education experienced severe financial issues during fiscal year 2016; it was unable to pay \$1.6 million in bills or meet payroll towards the end of the fiscal year without assistance from the State. To balance its budget for fiscal year 2017, the School Board reduced the county supplements it had been paying for staff salaries back to the 1984 budget. It also stopped paying dental and health insurance. These decisions were made at a Boone County BOE meeting on July 18, 2016. The Office of Institutional Education Programs (OIEP) officers and West Virginia Department of Education (“WVDE”), initially thought that the Boone County BOE salary reductions would not impact the salaries for DRKJC employees, and that tentative opinion was communicated to the instant Grievants. Ultimately, it was determined that the OIEP was required to pay the “equivalent of the salary supplements paid by the county board,” whether this was an increase or a decrease in pay, citing W. Va. Code § 18A-4-17(a). Grievants were informed by hand-delivered letters on August 30, 2016, notifying them

to want the full amount of the difference in the two salary amounts, not just the reimbursement of the amount that they would have earned for the August 22-September 2, 2016 pay period.

that their salaries would be decreased, effective with the September 16, 2016 paycheck. This check compensated for the pay period beginning August 20, 2016 through September 2, 2016.

Respondent reduced Grievants' salaries to be consistent with Boone County salary supplements for the 2016-2017 school year. Grievants are of the opinion that the reduction in salary as applied to them was not mandated, warranted by fiscal hardship of Respondent, and/or administered equitably. More directly stated:

- Grievants highlight that while the Boone County BOE was required to reduce its employees' pay because of an extreme fiscal crisis; WVDE has no such crisis. They seek restoration of their former salaries, which had originally been approved for the fiscal year 2016-17.
- Grievants suggest that there is a convenient inconsistent comparison to Boone County BOE employees. Grievants highlight if they were required to be paid what the Boone County BOE staff is being paid, then WVDE should have been paying their optical and dental insurance premiums.¹⁰
- Boone County BOE reduced its county supplement paid to its staff at a flat rate, Respondent did not. Grievants contend the salary reduction was more harshly levied against them as WVDE employees.¹¹

One of the contentions presented by Grievants is the argument that Respondent's 2016-2017 WVDE budget had been set and approved for the fiscal year beginning July 1, 2016, the Office of Institutional Education Programs indicated to the employees of the Donald R. Kuhn Center that they had the money to fulfill the allocated salary obligations;

¹⁰ Up until the beginning of fiscal year 2017, Boone County BOE paid dental and optical insurance premiums for its staff. WVDE does not and has never paid dental and optical insurance premiums for any of its employees, including those working in institutions through OIEP. Grievants seek restitution of the premiums they have had to pay prior to the 2016-2017 fiscal year.

¹¹ Grievants find WVDE's calculation of the reduced salary amount to be dubious. WVDE did not simply reduce DRKJC staff salaries by \$4,000. Respondent's calculations took into account the difference in days worked.

therefore, a need to cut salaries did not exist. The fact that Grievants' salaries were budgeted by Respondent at a higher rate in May or June 2016 than the amount Grievants are now scheduled to receive is not as relevant as Grievants would assert.¹² In the circumstance of this matter, the contention has limited, if any legal significance. While it is true that Respondent's 2016-2017 WVDE budget had been set and approved for the fiscal year beginning July 1, 2016, this argument is without much weight. The fact that an agency has prepared for upcoming expenses does not bestow upon the employee some inalienable right to the totality of the funds earmarked for salaries, barring all other potential occurrences. Grievants are not entitled to the relief requested under this argument.

It is the Respondent's position that the mandate of W. Va. Code § 18A-4-17(a) and related regulations if correctly applied are nondiscretionary, that is, it must pay what Boone County BOE pays its employees, whether the change represents an increase or decrease. Respondent argues that the statutory section does not use discretionary language, such as the WVDE must pay "at least" or "no less than" what the county board pays. Respondent highlights that the Code says OIEP personnel "shall receive the equivalent of salary supplements paid to professional and service personnel employed by the county board in the county where each facility is located."

¹² WVDE must prepare its proposed budget for the Legislature in the Spring of each year. It assumes that a county supplement will remain unchanged. If a county passes an unanticipated supplement increase in July, the WVDE must pay this increase to the OIEP employees who work at facilities located in that county regardless. The converse is present in the instant matter. WVDE did not anticipate a decrease in employees' wages and therefore Respondent may find itself with a budget surplus.

The determination that Respondent was required to pay the “equivalent of the salary supplements paid by the county board,” whether this was an increase or a decrease in pay was not communicated as proficiently as one might hope. It is further disturbing that Respondent has ineffectively described the process and the principle administrative personnel ultimately responsible for the agency’s determination regarding WVDE employees working at DRKJC in Boone County.¹³ The undersigned ALJ does not accept as fact that Chief Financial Officer Terry Harless, in and of himself, was the sole administrator responsible for determining Respondent’s interpretation and implementation of the instant issue. The notion is specifically rejected as an established fact. Respondent’s posture on the issue is of established record, e.g., R Ex 1, but what agency operational checks and balances were utilized to arrive at this determination is a mystery.

Grievants argue that the reduction was more discretionary than Respondent concedes and to add injury to insult Grievants are of the belief that the reduction was disproportionately applied to their salaries. The undersigned is in partial agreement with

¹³ The West Virginia Board of Education is an entity created by Article XII of the Constitution of the State of West Virginia. Its responsibility is to exercise general supervision of the free schools of the State. (See Article XII, Section 2). The Department of Education is created pursuant to West Virginia Code §18-3-9, which provides that the State Superintendent shall have the authority to employ assistants and other such employees as may be necessary to carry out his constitutional authority. Department staff work under the direction of the State Superintendent of Schools for the general supervision of the free schools in the State and implementing the policies of the Board and other necessary tasks as determined by the State Superintendent or his designees. Among a vast variety of activities, the WVDE operates schools in correctional facilities and DHHR facilities. The employees are at-will, but fall under the salary mandates found in W. Va. Code §18A-4-17. Respondent has numerous administrators, a legal division and a variety of operational checks and balances, it is a State agency with a plethora of authority and responsibility.

Grievants. Reasonable men may differ on the flexibility of W. Va. Code § 18A-4-17(a). The language could be interpreted to set a minimum not the exclusive amount for Grievants yearly compensation (e.g., the minimum salary scale plus the equivalent of the salary supplement paid). Thus, not mandating the reduction, Respondent has seen fit to implement. Nevertheless, Respondent's ultimate interpretation, explanation and prior conduct with regard to the issue must be given notable weight unless arbitrary, capricious or clearly erroneous.

The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (citing *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). "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 his judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

It is ambiguous what administrative process was used and/or which responsible administrators signed off on the final determination but Respondent's determination is not clearly wrong. Further, the record did not establish that the management decisions complained of in this grievance were arbitrary and capricious.¹⁴ Thus the undersigned is

¹⁴ 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 is so implausible that it cannot be ascribed to a

limited in his ability to interject a specific interpretation where discretion is present.¹⁵ Grievants failed to prove that Respondent's action of reducing their salaries to be consistent with Boone County salary supplements for the 2016-2017 school year is an unlawful use of authority.

Regarding Respondent's failure to pay premiums for Grievants' optical and dental insurance when Boone County BOE did for its employees, Chief Financial Officer Terry Harless testified that Respondent is not obligated to provide for the same benefits provided by the county. The language in W. Va. Code § 18A-4-17(b) states that professional personnel will be "afforded all the rights, privileges and benefits established for professional personnel under this article." Unlike paragraph (a), paragraph (b) is not tied to what a particular county does. It talks about rights and benefits established under this article, that is, Chapter 18A, Article 4. There are certain sections under Article 4 that are permissive; they give a county the power to pay for certain benefits for its personnel, such as dental or optical.¹⁶ Other sections are mandatory for all county board of

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). 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))." See generally *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

¹⁵ While this may be the first time a county board reduced salaries, instead of increasing them, Respondent owes a duty to its employees. It may be beyond the undersigned's authority to completely define that obligation, nevertheless, it is safe to say an organization such as the WVDE (Respondent) owes its vigilant employees due respect for services rendered. A governmental state agency should be forthright with its employees regarding issues that have a direct effect on their livelihood.

¹⁶ Section 18A-4-5a states that counties "may provide" benefits from local funds such as dental and optical insurance. Up until the beginning of fiscal year 2017, Boone County BOE paid

education employees—such as the establishment of a leave bank, under § 18A-4-10(b). Subsection (b) accords DRKJC employees statewide mandatory rights and benefits, not discretionary benefits paid by some counties. Respondent also cites, *Carpenter v. West Virginia Department of Education*, Docket No. 93-DOE-372 (Dec. 30, 1993), a prior Grievance Board decision ruling that OIEP teachers at a Wood County facility were not entitled to the same optical/dental insurance benefits that Wood County Board of Education employees received. Respondent's standing on this issue is rational and persuasive, Grievants are not entitled to the relief requested pursuant to this argument.¹⁷

Grievants are of the opinion that they were individually impacted more harshly than the Boone County employees. Boone County BOE reduced its wage supplement at a flat rate. WVDE did not simply reduce DRKJC staff salaries by \$4,000. Respondent's calculations took into account the difference in days worked. Grievants find WVDE calculation of the reduced salary amount to be dubious. Grievants' argument was less than persuasive. Respondent's calculation of the applicable reduction for Grievants salary adjusted for the equitable difference between a 200-day contract and that of a 240-day contract is not established to be improper or unlawful. The mathematical alteration is not established to be harsher than a flat rate.

Lastly, and perhaps not an issue in legal contention but readily viable to Grievants, is resolution of the relief to which Grievants are entitled. Grievants are aware of relevant

dental and optical insurance premiums for its staff. The WVDE does not and has never paid dental and optical insurance premiums for any of its employees, including those working in institutions through OIEP.

¹⁷ Respondent also noted that this claim, seeking reimbursement from the start of employment for the WVDE's failure to pay optical and dental insurance to DRKJC staff is untimely.

notice requirements. West Virginia Wage Payment and Collection Act requires advance notice to an employee of any changes in the rate of pay:

§21-5-9. Notification, posting and records.

Every person, firm and corporation shall:

(1) Notify his employees in writing, at the time of hiring of the rate of pay, and of the day, hour, and place of payment.

(2) Notify his employees in writing, or through a posted notice maintained in a place accessible to his employees of any changes in the arrangements specified above prior to the time of such changes.

The Division of Labor issued regulations setting a specific period of time for such advance notice [emphasis supplied]:

§42-5-4. Employer Responsibilities; Required Employee Notifications; Required Posting of the Wage and Hour Abstract.

4.1. An employer shall establish a work week, a pay period, and a pay day, and shall notify employees in writing or by a posted notice accessible to all employees of the employer.

4.2. When an employer changes an employee's rate of pay, pay period, place or method of payment, time of payment, or any other term of employment, the employer shall furnish a written notice to the affected employee at least *1 full pay period* prior to the effective date of the change.

The effective date of the decrease in Grievants' rate of pay was August 20, 2016, Respondent did not provide written notification until August 30, 2016. The notice came two weeks before the September 16, 2016 pay date, but because of payments in arrears, the September 16 pay date compensated for the August 20 to September 2 pay period.

Grievants are also aware that the November 1, 2016 Level one decision duly determined that Respondent did not provide adequate notice prior to implementing the salary adjustments. What Grievants seemingly do not accept is what amount of damages each is entitled because of inadequate legal notice. Grievants tend to want much more than the difference between their 2016 salary and their lower 2017 salary

from August 20, 2016 through September 16, 2016.¹⁸ It is understood that Grievants are upset and disappointed regarding the turn of events; nevertheless, they are not entitled to what could be described as lost opportunity damages. Grievants spent an abnormal amount of effort attempting to demonstrate that if they had been informed prior to July 1, each would have had the ability to seek alternative employment prior to the implementation of the salary reduction and Respondent should be held responsible for all lost wages. It is not established that Respondent knew the ultimate determination prior to July 1, 2016. The undersigned is not convinced that Respondent was without options regarding the reduction of Grievants' yearly compensation but Respondent is not liable for prospective job opportunities Grievants may have had, but did not pursue, because they were unaware of the upcoming reduction in their salary.

Grievants were not given sufficient notice of the change in their rate of pay pursuant to W. Va. Code § 21-5-9, and this part of their grievance was granted, Grievants are entitled to the remedy prescribed by applicable statute, they are not granted lost wages. See Level One Decision. Grievants failed to prove that Respondent's action, of reducing their salaries to be consistent with Boone County salary supplements for the 2016-2017 school year, is an unlawful use of authority. Grievant's failed to demonstrate they are entitled to be reimbursed for optical and dental premiums they paid prior to July 2016. The facts are regrettable, the circumstances are undesirable, and extremely problematic; nevertheless, it is not determined illegal and/or unlawful for Respondent to timely adjust Grievants yearly salary. It is again recognized that Respondent failed to

¹⁸ Grievants submit they should be paid at the higher rate of pay for the entire fiscal year.

provide adequate notice. WVDE failed to give timely notice of a pay reduction and therefore must compensate Grievants for the loss of pay until the notice given became legally effective.¹⁹ Grievants are due the difference between their 2016 salary and their lower 2017 salary for the time period from August 20, 2016 through September 30, 2016, plus interest.

Conclusions of Law

1. The subject of 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 Board, 156 C.S.R. 1 § 3 (2008).

2. “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). 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)).

¹⁹ The level one decision held that the Grievants would be entitled to the pay differential through September 30, 2016. The date may be debatable; however, given the confusion surrounding these events, Respondent has indicated and conceded it is willing to abide by this date determination.

3. The “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001)(citing *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). “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 his judgment for that of [the employer].” *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

4. Grievants failed to establish by a preponderance of the evidence that Respondent’s overall action of reducing their annual salaries, to be consistent with Boone County salary supplements, for the 2016-2017 school year is unlawful and/or an abuse of authority.

5. Grievants are not entitled to be reimbursed for optical and dental premiums they have paid prior to July 2016. *Carpenter v. West Virginia Department of Education*, Docket No. 93-DOE-372 (Dec. 30, 1993).

6. Grievants failed to establish that Respondent’s calculated their reduced salary amount(s) improperly or more harshly than the amount Boone County employees were assessed.

Accordingly, it is recognized and specifically acknowledged that Grievants were not given sufficient notice of the change in their rate of pay and that this portion of their grievance remains **granted**. See November 1, 2016 Level One Decision. Grievants

are entitled to be compensated the difference between their former salary and their reduced salary for the pay periods from August 20, 2016, to September 30, 2016, with interest. With regard to the instant appeal, it is determined that 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: July 20, 2017

Landon R. Brown
Administrative Law Judge