STEVE BURFORD, et al.,

Grievants,

v v.

Docket No. 03-20-256

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants, Steve Burford, John Pearson, and John Kutil filed this grievance on May 31, 2003, against their employer the Kanawha County Board of Education ("KCBOE" or "Board"). Their Statement of Grievance reads:

> Grievants are employed as regular Electronic Technicians II's. They were formerly assigned to KCS['s] television studio. All were placed on the transfer list and told that the work they perform would be done by students and employees of other entities. It also appears that a professional employee of Respondent is currently engaged in performing those duties. Grievants allege that Respondent violated West Virginia Code §§ 18A-4-8, 18A-1-1, & 18A-4-8b.
>
> Relief sought: Grievant[s] seek reinstatement to their former positions at KCS television station.

At Level I the immediate supervisor was without authority to render a decision, and the grievance was denied at Level II. Grievants appealed to Level III, and KCBOE waived participation at this level. Grievants appealed to Level IV on August 26, 2003. A Level IV hearing was held on January 12, 2004, and this case became mature for decision on February 9, 2004, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

Grievants assert Respondent has violated W. Va. Code §§ 18A-4-8, 18A-1-1, and 18A-4-8b, and notes KCBOE may not utilize professional employees, other entities, or students to perform the duties of service personnel, and "[o]n this basis Grievants are entitled to reinstatement to their previous positions." Grievants' proposed findings of fact and conclusions of law.

Respondent maintains Grievants were properly transferred and remain within their same classification and receive the same salary. KCBOE notes KCS's television station is still operating and is used by high school students as a learning tool as part of their curriculum in the Fine Arts area of study. Additionally, KCBOE avers all the equipment is still there, no outside employees have been hired, and the professional employee who was in charge of the area and the students, is still the professional employee, and she is still in charge of this area.

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 all employed as Electronic Technician II's with KCBOE. For many years they were employed at KCBOE's television station. They maintained and ran the equipment for a variety of programs put on by that channel, and performed instructional and creative duties as well, such as directing and preparing for programs. This television station is housed at Capital High School. The television station has not engaged in distance learning for four to five years, as this is handled by the Technology Department. 2. In the Spring of 2003, Grievants were notified they would be transferred from the television station, as there was to be a reduction-in-force ["RIF"]. Grievants had enough seniority to maintain Electronic Technician II positions, but KCBOE would be using the television station in the students' curriculum, and their services would no longer be needed there. (See footnote 2)

3. All Grievants are currently working as Electronic Technician II's with KCBOE.

4. Grievants believed at the time of their transfers that outside employees would be hired to fill their positions. This belief was incorrect as the equipment is now manned by students as part of their learning process.

5. Karen Taylor was and is the professional educator/media specialist/librarian at CHS assigned to this area. She continues to be in charge of this area, and now receives an additional

$2,000.00 a semester for the time she spends after school hours assisting with programs.

6. The television station's programs are now being operated and managed by students with the assistance of Ms. Taylor.

7. The maintenance contracts on the television station equipment that were in place while Grievants worked there have all been continued. (See footnote 3) 8. There are plans for the television station to be utilized in the educational process for the local colleges, with the expectation of assistance from partners from these colleges as well as local stations in the area. There are no contracts, no outside paid employees, and much of this formulation is still in the planning stages.

Discussion

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 W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. 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). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

The outcome of this case is guided by W. Va. Code § 18A-2-7, relating to service personnel transfers and subsequent placement. See Watts v. Lincoln County Bd. of Educ., Docket No. 98-22-348 (Nov. 30, 1998). This Code Section provides, in pertinent part:

> The superintendent, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter. . . .

This power to transfer employees must be exercised reasonably and in the best interests of school systems and may not be exercised arbitrarily or capriciously. State ex rel. Hawkins v. Tyler County Bd. of Educ., 166 W. Va. 363, 275 S.E.2d 908 (1980).

As previously stated, W. Va. Code § 18A-2-7 grants broad discretion to a superintendent, and gives him the authority to transfer school personnel subject only to the approval of the board. Post v.

Harrison County Bd. of Educ., Docket No. 89-17-355 (Feb. 20, 1990). Further, employees have no right to be assigned to a particular position, and transfers are not based on seniority, but are based on the needs of the school system, as decided in good faith by the superintendent and the board. Hawkins, supra; Post, supra. See Jochum v. Ohio County Bd. of Educ., Docket No. 91-35-396 (Jan. 31, 1992). The standard of review in a transfer is stated in Dillon v. Board of Education of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986). It is well-settled that "[c]ounty boards of education have substantial discretion in matters relating to hiring, assignments, transferring and promotion of school personnel," as long as they exercise this discretion "reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Id. The West Virginia Supreme Court has stated that boards of education have "great discretion. . . to transfer and assign [personnel] to designated schools and [the West Virginia Supreme] Court will not interfere with the exercise of that discretion where such action is taken in good faith for the benefit of the school system and is not arbitrary." Hawkins supra. Thus, whether a transfer was properly conducted is judged by the arbitrary and capricious standard, in the absence of a county policy requiring seniority be considered. Lester v. McDowell County Bd. of Educ., Docket No. 93-33-256 (Jan. 31, 1994); See also Hawkins, supra; LeMastus v. Wyoming County Bd. of Educ., Docket No.55-87-290-4 (Mar. 23, 1988); Tenny v. Barbour County Bd. of Educ., Docket No. 01-87- 166-2 (Nov. 13, 1987).

"Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

Grievants have presented no evidence to demonstrate their transfers were arbitrary and

capricious. KCBOE decided to use the television station in another manner that would result in less service personnel costs, and at the same time increase student learning and participation. While Grievants may disagree with this decision, and the quality of and the type of productions may not be as extensive or as expert as when Grievants manned the controls, this is not the point of an educational access television station. As pointed out by Respondent, there is no requirement for KCBOE to have a television station, and if KCBOE has a television station, the purpose is for student and community learning. Grievants allege there have been violations of W. Va. Code §§ 18A-4-8, 18A-1-1, and 18A-4-8b but did not specify how these Code Sections are at issue. W. Va. Code § 18A-4-8 lists the classifications for service personnel, W. Va. Code § 18A-1-1defines varies employees of a board of education, both service personnel and professional, and W. Va. Code § 18A-4-8b discusses seniority right of service personnel. Grievants note that W. Va. Code § 18A-4-8b requires all newly created position be posted, but no new positions were created in this RIF and transfer. Accordingly, the undersigned Administrative Law Judge finds no violation of these Code Sections.

Grievants also argue students and professional personnel are filling service personnel positions. Conclusion of Law 2 in Dempsey v. Fayette County Board of Education, Docket No. 98-10-357 (December 8, 1998), states, "[t]he contractual scheme of employment for school personnel does not allow for the hiring of contract employees to perform full-time regular duties of school service personnel. State ex rel. Boner v. Kanawha County Bd. of Educ., 197 W. Va. 176, 475 S.E. 2d 176 (W. Va. (sic) 1996)." There is no evidence to suggest any type of contractual scheme is in place at the television station. Ms. Taylor is continuing to fill the position she had before. Because she must work more hours in the evening supervising students, she is paid an additional $4,000.00 a year. Students are engaged in learning activities, and there was no evidence to suggest they are receiving payment for these activities. Grievants' assertions in this regard are unfounded.

The above-discussion will be supplemented by the following Conclusions of Law.

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 W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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). See W. Va. Code § 18-29-6. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

2. W. Va. Code § 18A-2-7, gives the Superintendent the right to transfer employees subject to the approval of the board. See Watts v. Lincoln County Bd. of Educ., Docket No. 98-22-348 (Nov. 30, 1998). Post v. Harrison County Bd. of Educ., Docket No. 89-17-355 (Feb. 20, 1990).

3. The power to transfer employees must be exercised reasonably and in the best interests of school systems and may not be exercised arbitrarily or capriciously. State ex rel. Hawkins v. Tyler County Bd. of Educ., 166 W. Va. 363, 275 S.E.2d 908 (1980).

4. Employees have no right to be assigned to a particular position, and transfers are not based on seniority, but are based on the needs of the school system, as decided in good faith by the superintendent and the board. Hawkins, supra; Post, supra. See Jochum v. Ohio County Bd. of Educ., Docket No. 91-35-396 (Jan. 31, 1992).

5. The standard of review in a transfer is stated in Dillon v. Board of Education of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986). It is well-settled that"[c]ounty boards of education have substantial discretion in matters relating to hiring, assignments, transferring and promotion of school personnel," as long as they exercise this discretion "reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Id. The West Virginia Supreme Court has stated that boards of education have "great discretion. . . to transfer and assign [personnel] to designated schools and [the West Virginia Supreme] Court will not interfere with the exercise of that discretion where such action is taken in good faith for the benefit of the school system and is not arbitrary." Hawkins supra.

6. Thus, whether a transfer was properly conducted is judged by the arbitrary and capricious standard, in the absence of a county policy requiring seniority be considered. Lester v. McDowell County Bd. of Educ., Docket No. 93-33-256 (Jan. 31, 1994); See also Hawkins, supra; LeMastus v. Wyoming County Bd. of Educ., Docket No. 55-87-290-4 (Mar. 23, 1988); Tenny v. Barbour County Bd. of Educ., Docket No. 01-87- 166-2 (Nov. 13, 1987).

7. "Generally, an action is considered arbitrary and capricious if the agency did not rely on

criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action isrecognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

8. Grievants did not meet their burden of proof and demonstrate their transfer was arbitrary and capricious, nor did they establish a violation of any statute.

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. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: March 11, 2004

Footnote: 1

Grievants were represented by John Roush, Esq., from the West Virginia School Service Personnel Association, and the Board was represented by its Attorney James Withrow.

Footnote: 2

Students had always been at the television station as part of their course work.

Footnote: 3

Grievants seemed to think the equipment was not being maintained. No evidence was submitted to support this contention. Additionally, the undersigned Administrative Law Judge can see no reason why Grievants could not be asked to repair any equipment at the television station because this would be part of their current Job Description. See Joint Exh. No. 1.