MICHAEL MILLER, JR.,

Grievant,

v. **DOCKET NO. 05-20-252**

KANAWHA COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievant filed this grievance on May 6, 2005, stating, “Michael Miller is being denied the right to a Mechanics position because Nancy Bowen Kerr is the Supervisor for bus operators at Elkview. She would not be supervising Michael.” He seeks to be placed in the Mechanic/Bus Operator position.

After being denied at level one and two, the matter bypassed level three and was submitted to level four based on the record already developed. Grievant was represented by Anita Mitter of the West Virginia Education Association, and Respondent was represented by counsel, James Withrow. The matter became mature for decision on September 19, 2005, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Issues and Arguments

The facts of the case are not in dispute. This case simply questions whether Respondent's nepotism policy should prevent Grievant from working in a bus terminal as a mechanic/bus operator, where his mother-in-law supervises the bus operators at thesame terminal. Grievant states in his proposed Findings of Fact that “he alleges that since special considerations were made for one employee, that was discriminatory.” However, since discrimination was not alleged in the original statement of grievance, this argument will not be considered.

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

Findings of Fact

1. Grievant is employed by Respondent as a Mechanic/Bus Operator, assigned to the South Charleston bus terminal.

2. A Mechanic/Bus Operator position is open at the Elkview Terminal, for which Grievant is eligible due to his seniority. Grievant has been denied the position due to the county's nepotism policy, although it has not yet been filled because this grievance is pending.

3. The Terminal Supervisor for the Elkview Terminal is Nancy Bowen-Kerr, Grievant's mother-in-law.

4. Respondent's nepotism policy, No. G60, defines the relationship between Grievant and Ms. Bowen-Kerr as “Immediate Family,” and further states: “No person, either by new hire, transfer, reassignment, or assignment as a substitute, shall be placed in any position in which he or she is supervised by or supervises an immediate family member.”

5. The same policy defines “Supervision” as “the authority to direct, recommend scheduling or formally evaluate daily work activities.”

6. Each bus terminal has a Terminal Supervisor, and a Mechanic's Crew Leader and a Transportation Supervisor. 7. In Kanawha County, Mechanics are required to be dual-classified as Bus Operators, so they can be used to fill in when there are no substitute bus operators available to cover bus runs. The extent of their use as bus operators varies widely, depending on the needs of their terminal or as needed elsewhere in the county.

8. The Crew Leader is the immediate supervisor of all the Mechanics in the terminal, and is responsible for their scheduling and evaluations.

Discussion

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. (See footnote 1) “The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” (See footnote 2) While it is true that “School personnel regulations and laws are to be strictly construed in favor of the employee,” (See footnote 3) the present case deals with an interpretation of a county board policy. Grievant has made no attempt to argue that the policy itself is invalid or improper in any way.

This grievance basically deals with Grievant's disagreement with a management decision. This Grievance Board has previously held, "[a] [g]rievant's belief that his supervisor's management decisions are incorrect is not a grievable event unless these decisions violate some rule, regulation,

or statute, or constitute a substantial detriment toor interference with his effective job performance or health and safety." (See footnote 4) Grievant does not allege the decision violates the ant-nepotism policy nor that the policy itself violates some other rule, policy or law. Instead, Grievant alleges the decision to apply the existing policy to his proposed employment situation is wrong. An interpretation of an internal policy is a management decision. Such management decisions are to be judged by the arbitrary and capricious standard.

"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 footnote 5) Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. (See footnote 6) An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." (See footnote 7) The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

Although Grievant bears the main burden of proof, Grievant attempted to adduce evidence at level two of the duties and responsibilities of Ms. Bowen-Kerr, to which testimony Respondent successfully objected, citing the written job description it intended to place in evidence as better evidence of those elements. Respondent then did not offerany evidence in its case and chief, and the document was never offered. (See footnote 8) This means there is very little evidence in the record of how much Ms. Bowen-Kerr would supervise Grievant, but the benefit of the doubt will be resolved in Grievant's favor due to Respondent's oversight in assuming the proof of a more definite job description and then not actually doing so.

If Grievant were working as a Mechanic/Bus Operator at the Elkview Terminal, where Ms. Bowen-Kerr is the Terminal Supervisor, she would not be his immediate supervisor and would only exercise minimal control over his work activities. She would not evaluate his work or assign him mechanic's duties. She plays no part in selecting the person who will fill the position in question. However, as quoted in Grievant's proposed findings and alluded to in testimony, the terminal supervisor “is directly responsible for the supervision of the employees assigned to his/her terminal.”

Anti-nepotism policies in general are a reasonable exercise of a county board of education's discretion. It has been held that “[a] board of education policy that prohibits one spouse from

supervising the other spouse within a county school system is a reasonable exercise of the board's supervisory authority to prevent favoritism, conflicts of interest or the appearance of either." (See footnote 9) Although this case is not about a husband-wife relationship, it is similarly close, but more importantly the interest of the school board is the same: "to prevent favoritism, conflicts of interest or the appearance of either." *id.* Grievant cites *Townsend*and the Grievance Board case of *Albani v. Mineral County Bd. of Educ.*, (See footnote 10) as supporting his position, when in fact those cases both directly oppose it.

While Grievant's working relationship with his mother-in-law would be minimal at the Elkview terminal, it is significant that he is not just a Mechanic, but a Mechanic/Bus Operator. There will be, possibly frequently, times when he is working as a bus operator under the supervision of Ms. Bowen-Kerr. Although testimony suggests that even then, Ms. Bowen-Kerr would call the Crew Leader and have him choose an available mechanic to serve as a substitute driver, Ms. Bowen-Kerr would be directly responsible for supervising Grievant in his "driver" capacity. This level of supervision is expressly contemplated by the policy, which prohibits "assignment as a substitute." Further, the policy is not predicated on actual exercise of control over a particular position, or on intervening levels of supervision, but instead "supervision" is defined as "*authority* to direct." Ms. Bowen-Kerr indisputably has authority over the position in question.

Grievant has also presented evidence that, despite the anti-nepotism policy, he has worked as a substitute bus operator for a driver assigned to the Elkview terminal at least once. This simple fact has no bearing on the outcome of the case, any more than the fact, also in evidence, that Grievant was transferred away from the Elkview terminal when he married into Ms. Bowen-Kerr's family. Grievant did not establish that a general exception to the policy was made in that case, rather than a one-time emergency exception.

The following conclusions of law support this discussion:

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "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 Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

2. "'School personnel regulations and laws are to be strictly construed in favor of the employee.' *Syl. pt. 1, Morgan v. Pizzino*, 163 W. Va. 454, 256 S.E.2d 592 (1979)." *Syl. Pt. 1, Cruciotti v. McNeel*, 183 W. Va. 424, 396 S.E.2d 191 (1990); *State ex rel. Boner v. Kanawha County Bd. of Educ.*, 197 W. Va. 176; 475 S.E.2d 176, (1996)

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. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregardof facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

4. A board of education policy that prohibits one spouse from supervising the other spouse within a county school system is a reasonable exercise of the board's supervisory authority to prevent favoritism, conflicts of interest or the appearance of either." *Townshend v. Board of Educ.*, 183 W. Va. 418, 396 S.E.2d 185 (1990); *Albani v. Mineral County Bd. of Educ*., Docket No. 90-28-016 (Nov. 30, 1990). While an in-law relationship is not as close, the intent of the policy is the same and is similarly reasonable.

5. Grievant did not meet his burden of proving Respondent's application of its anti-nepotism policy was arbitrary and capricious.

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

Any party may appeal this decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty 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.

September 28, 2005

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

See, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21.

Footnote: 2

Leichliter v. W. Va. Dep't of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993).

Footnote: 3

Syl. Pt. 1, Cruciotti v. McNeel, 183 W. Va. 424, 396 S.E.2d 191 (1990); State ex rel. Boner v. Kanawha County Bd. of Educ., 197 W. Va. 176; 475 S.E.2d 176, (1996)

Footnote: 4

Ball v. Dep't of Highways, Docket No. 96-DOH-141 (July 31, 1997); Rice v. Dep't of Transp./Div. of Highways, Docket No. 96-DOH-247 (Aug. 29, 1997).

Footnote: 5

Trimboli v. Dep't of Health and Human Res., Docket No. 93-HHR-322 (June 27, 1997).

Footnote: 6

State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996)

Footnote: 7

Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)).

Footnote: 8

The job description is quoted in Grievant's proposed findings, but the quotes are without an evidentiary basis.

Footnote: 9

Townshend v. Board of Educ., 183 W. Va. 418, 396 S.E.2d 185 (1990).

Footnote: 10

Docket No. 90-28-016 (Nov. 30, 1990).