THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

MELISSA VILLERS,

Grievant,

v. **Docket No. 06-53-069**

WIRT COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Melissa Villers, filed this grievance on December 16, 2005, grieving non- selection as a bus operator. Her requested relief is to be placed in the bus operator position with retroactive seniority and back pay and interest. Grievant also included in the request for back pay compensation for any extra duty assignments, as well as the difference between her current salary as a Cook 2 and that of a bus operator. This grievance was denied at the lower levels. Grievant bypassed Level III, and a Level IV hearing was held on May 15, 2006, at the Grievance Board's Charleston office. Grievant was represented by John Roush, Esq., and Respondent was represented by Kimberly Croyle, Esq., of Bowles Rice McDavid Graff and Love LLP. This case became mature on June 15, 2006, upon the parties' submission of proposed findings of fact and conclusions of law.

Issues and Arguments

Grievant asserts she should have been selected to fill the bus operator vacancy, as she was a regular employee in the school system. She argues she has attempted to obtain certification as a bus operator with only grudging assistance from Respondent. Shealso contends Respondent has engaged in discrimination and favoritism in filling the bus operator positions.

Respondent asserts it does not provide individual training for those seeking certification as a bus operator. Respondent also argues that it provided Grievant with assistance, but could not hire her for the vacancy because she was not yet properly certified to operate a school bus at the time of the vacancies.

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

Findings of Fact

1. Grievant is employed full-time by Respondent as a Cook 2.

2. Grievant decided to become a school bus operator. She acquired her CDL permit.

3. Grievant bid on a bus operator position in October, 2005, but did not receive the position, as she was not qualified.

4. On November 28, 2005, Respondent posted another bus operator position. The necessary qualifications were listed as: CDL license, successful completion of the West Virginia Department of Education requirements for school bus operator, and high school diploma or equivalent. Level II, Exhibit 10.

5. Other required criteria for the certification of bus operators include: the P and S endorsements on the operator's CDL license; Department of Motor Vehicles driving record check; FBI criminal record check; pre-employment and other drug testing; thirty hours of instruction from the West Virginia School Bus Operators Instruction Manual ("Manuel"); at least six hours of instruction on driving a school bus; first aid certification;training in transportation of special education students; county training on the Employee Code of Conduct; physical examination; and successful completion of the School Bus Driver Performance Test and the West Virginia Department of Education's written examination and driving test. Level II, Exhibit 5.

6. Grievant applied for the bus operator position posted on November 28, 2005, along with substitute bus operators Gary McVey and Kenny Dye.

7. Grievant did not hold the necessary certification, and Kenny Dye, the most senior substitute bus operator, was offered the position, as Respondent needed someone who was certified and could begin the bus route.

8. On December 15, 2005, Respondent posted another vacant position for a bus operator. The posting listed the same qualifications as those in the November 28, 2005, posting.

9. Grievant and Gary McVey applied for the position posted on December 15, 2005.

Respondent hired Gary McVey, the only qualified applicant.

10. Respondent needed someone who was certified and could begin the bus route.

11. Grievant did not hold a bus operator certificate, nor did she meet the qualifications for the position.

12. Respondent hires substitute bus operators so they are covered through county automobile insurance and can complete the required behind-the-wheel training. 13. Both Gary McVey and Kenny Dye were hired as substitute drivers. Gary McVey was hired as a substitute bus operator on September 25, 2001, contingent upon obtaining all necessary certifications. Until being hired as substitute drivers, neither manwas employed by the county.

14. Grievant was already a county employee, and therefore, she was covered under the county automobile insurance and could complete the necessary behind-the- wheel training.

15. At the time of the December posting, Grievant had obtained her CDL permit, and had the P and S endorsements. As of December 7, 2005, she had only received six of the required thirty hours of instruction from the Manual.

16. The six hours of instruction from the Manual was provided individually by Doug Hill, Wirt County Transportation Director. The county normally does not provide individual training.

17. The county offered a class three years prior to train substitute bus operators, but Grievant did not attend this class.

18. Grievant attempted to receive the necessary behind-the-wheel training from other counties. Wirt County agreed to allow her to train on one of the county buses.

19. Gary McVey was certified as a bus operator on April 12, 2002. Grievant was certified as a bus operator in March, 2006.

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*, *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'tof 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.*

Grievant argues Respondent engaged in discrimination and favoritism when it did not hire her to

fill the various bus operator positions and instead, on two separate occasions, hired substitute bus drivers. She also asserts Respondent did not assist her in achieving her certification.

"*W. Va. Code* § 18-29-2(m) defines 'discrimination' as 'any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.'" *Hogsett, et al., v. Wayne County Bd. of Educ.*, Docket No. 01-50-056 (Apr. 5, 2001). "[T]o prevail in a claim for discrimination under *W. Va. Code* § 18-29-2(m), an employee must show that he or she has been treated differently from other employees and that the different treatment is not related to the actual job responsibilities of the employees and not agreed to in writing by the employee. Once a claim is established, an employer cannot escape liability by asserting a justification, such as financial necessity, for the discriminatory treatment." *The Bd. of Educ. of the County of Tyler v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004).

"Favoritism means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." *W. Va. Code* § 18-29-2(o).

"County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, thisdiscretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." *Dillon v. Bd. of Educ. of County of Wyoming*, 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. *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)). "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 her judgment for that of a board of education. *See generally*, *Harrison v. Ginsberg*, 169 W.

Va. 162, 286 S.E.2d 276, 283 (1982)." *Trimboli*, *supra*, *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

Respondent's decision to hire both Mr. Dye and Mr. McVey for the regular bus operator positions was not arbitrary and capricious. Grievant was not certified to operate a bus when the two vacancies were posted. This Grievance Board has stated "[i]t is clearthat any person hired to operate a school bus must achieve certification before assuming the duties of the position." *Chapman v. Putnam County Bd. of Educ*., Docket No. 97-40- 560 (June 10, 1998) (citing *Yeager v. Kanawha County Bd. of Educ*., Docket No. 20-88- 050 (Oct. 3, 1988)); *See also Clemmons v. Logan County Bd. of Educ*., Docket No. 04-23- 097 (Aug. 30, 2004), *Harper v. Putnam County Bd. of Educ*., Docket No. 99-40-021 (Apr. 15, 1999) (holding that no one can operate a school bus without certification in hand).

In addition, State Board of Education Policy 4336 states "[n]o person shall be employed by any county board of education to operate any motor vehicle transporting school pupils who has not been certified by the Division of Public Safety and the State Department of Education." Grievant had not completed all the requirements necessary to be certified. As such, she was not qualified to fill the position.

Grievant claims that her non-selection for the two positions was the result of discrimination and favoritism. However, because Grievant was not qualified for either position, she was not similarly situated with Mr. Dye or Mr. McVey. “[T]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]” *The Bd. of Educ. of the County of Tyler v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004). Therefore, Respondent did not engage in discrimination or favoritism.

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

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. "Thepreponderance 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. “[T]o prevail in a claim for discrimination under *W. Va. Code* § 18-29-2(m), an employee must show that he or she has been treated differently from other employees and that the different treatment is not related to the actual job responsibilities of the employees and not agreed to in writing by the employee. Once a claim is established, an employer cannot escape liability by asserting a justification, such as financial necessity, for the discriminatory treatment.” *The Bd. of Educ. of the County of Tyler v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004).

3. “[T]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]” *The Bd. of Educ. of the County of Tyler v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004).

4. “Favoritism means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.” *W. Va. Code* § 18-29-2(o).

5. "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." *Dillon v. Bd. of Educ. of County of Wyoming*, 177 W. Va. 145, 351 S.E.2d 58 (1986). Generally, an action is consideredarbitrary 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).

6. 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)). "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 her judgment for that of a board of education. *See generally*, *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982)." *Trimboli*, *supra*, *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

7. This Grievance Board has stated "[i]t is clear that any person hired to operate a school bus must achieve certification before assuming the duties of the position. . ." *Chapman v. Putnam County Bd. of Educ*., Docket No. 97-40-560 (June 10, 1998) (citing *Yeager v. Kanawha County Bd. of Educ*., Docket No. 20-88-050 (Oct. 3, 1988)); *See also Clemmons v. Logan County Bd. of Educ*., Docket No. 04-23-097 (Aug. 30, 2004), *Harperv. Putnam County Bd. of Educ*., Docket No. 99-40-021 (Apr. 15, 1999) (holding that no one can operate a school bus without certification in hand).

8. State Board of Education Policy 4336 states "[n]o person shall be employed by any county board of education to operate any motor vehicle transporting school pupils who has not been certified by the Division of Public Safety and the State Department of Education."

9. Grievant has failed to prove Respondent violated any statute or policy or otherwise abused its discretion in not hiring her for the bus operator positions.

Accordingly, this grievance is hereby **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wirt 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.

DATE: July 27, 2006

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Wendy A. Campbell

Administrative Law Judge