THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DENNIS GARNER, et al.,
Grievants,

v. **DOCKET NO. 2009-0523-CONS**

MONONGALIA COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievants, Dennis Garner and Jeanie Strader, filed a grievance against their employer, the Monongalia County Board of Education, on October 15, 2008. The statement of grievance reads: "Grievants assert that Respondent removed a portion of their extracurricular assignments and reposted the same as a new extracurricular assignment without their consent, without notice and opportunity for a hearing, and with a resulting loss of pay in violation of W.Va. Code 18A-4-16, 18A-4-8(m), & 18A-4-8b." As relief Grievants sought, "reinstatement of the removed duties and compensation for all lost wages with interest."

A hearing was held at level one on November 12, 2008, and a level one decision denying the grievance was issued on that same date. Grievants appealed to level two on December 19, 2008. A mediation session was held on March 4, 2009. Grievants appealed to level three on June 3, 2009. A level three hearing was held before the undersigned Administrative Law Judge on August 28, 2009, at the Grievance Board's Westover office. Grievants were represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association, and Respondent was represented by Jason

S. Long, Esquire, Dinsmore & Shohl, LLP. This matter became mature for decision on September 24, 2009, upon receipt of the last of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

At the beginning of the 2008-2009 school year, one of the Grievants was transporting a particular special education student to his assigned work site, and the other Grievant was picking him up at his assigned work site and transporting him back to the vocational center. Sometime in September 2008, or earlier, Respondent decided to post the transportation to and from the work site as one extracurricular run, with the bus operator remaining at the work site while the student was there. Neither Grievant could perform this assignment due to their other duties, and apparently, neither bid on the posted run. Both asserted that they were entitled to retain their separate runs transporting this student to or from his work site. Grievants did not demonstrate that they had acquired their assignments through the proper statutory procedure, and, therefore, neither acquired any statutory right to retain the assignment. Grievants also questioned the validity of the rationale provided by Respondent for combining the runs into one run, and having the bus operator remain at the work site. Grievants did not demonstrate that Respondent's actions were arbitrary and capricious or an abuse of discretion.

The following Findings of Fact are properly made from the record developed at levels one and three.

Findings of Fact

1. Grievants are employed by the Monongalia County Board of Education ("MBOE") as bus operators. Grievant Garner has been employed by MBOE for 21 years, and Grievant Strader has been employed by MBOE for 26 years.

2. MBOE has a program in place for special education students which allows them to obtain work experience during the school year. MBOE places these students at four different work locations during the school year, for six weeks each, and provides transportation for the students to and from the work sites. This grievance involves the transportation needs of one particular special education wheelchair bound student, who was not identified by name in the record. This student required transportation to his assigned work site two days a week during both the 2007-2008 and 2008-2009 school years. During the 2007-2008 school year this student went to his work sites in the morning; however, this changed, and during the 2008-2009 school year, this student went to his assigned work sites in the afternoon.

3. During the 2007-2008 school year, Grievant Garner had a mid-day, extracurricular assignment transporting students attending MTEC to Morgantown High School ("MHS"). At some point early in the school year, Grievant Garner talked to his supervisor, Paul Christopher, about a grievance he was considering filing, and about transporting the subject wheelchair bound student from the student's assigned work site to MTEC[1] before he picked up the students at MTEC, as a resolution to the grievance. Another driver had been performing this task. Mr. Christopher and Grievant agreed that

[1] Respondent's Proposed Finding of Fact Number 4 is incorrect in stating that Grievant Garner transported this student *from* MTEC to the work site.

this task should be performed by Grievant Garner, and he began performing this task, and was paid extra for the additional time it took him to perform this work. Grievant Garner did not receive this assignment as the result of the posting and selection process.

4. During the 2007-2008 school year, Grievant Strader had no involvement in transporting the subject wheelchair bound student either to or from an assigned work site.[2]

5. In the Spring of 2008, MBOE gave Grievants notice that their extracurricular assignments were being reduced in force, and posted all the assignments.

6. During the 2008-2009 school year, Grievant Garner was assigned by MBOE to transport students from MHS to MTEC. At the beginning of the school year, through approximately September 29, 2008, he then went on to transport the subject wheelchair bound student from MTEC to his assigned work site two days a week, which added about 15 to 20 minutes to his run, and Grievant Garner was paid extra for this 15 to 20 minutes. The record does not reflect how Grievant Garner acquired the task of transporting this student to his work site.

7. During the 2008-2009 school year, Grievant Strader's regular afternoon run consisted of transporting students from MTEC to MHS. At the beginning of the school year, until about September 29, 2008, she picked up the subject wheelchair bound student at his assigned work site and transported him to MTEC prior to making her regular run from MTEC to MHS. This added about 30 minutes to her run, and she was paid extra for this

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[2] Grievants' Proposed Finding of Fact Number 5 and Respondent's Proposed Finding of Fact Number 2 are both incorrect in stating that during the 2007-2008 school year Grievant Strader transported this child either to or from his assigned work site. Grievant Strader was clear in her testimony that she did <u>not</u> transport this child either to or from his work site during that school year.

30 minutes.[3] The record does not reflect how Grievant Strader acquired the task of transporting this student from his work site to MTEC. This student remained on Grievant Strader's bus as she transported students to MHS.

8. MBOE personnel decided that the subject wheelchair bound student should be transported to and from his assigned work site by the same bus operator, and that the bus operator should remain at the work site for the entire time the student was at the work site, which took about three hours. This extracurricular assignment was posted,[4] and was awarded to Elizabeth Snyder.

9. Neither of the Grievants was able to transport the subject wheelchair bound student both to and from his assigned work site, or remain at the work site, due to their other assignments.[5]

10. The subject wheelchair bound student had attendance issues during the 2008-2009 school year, due to his health and other issues, and he was not assigned a work site for the fourth six week period. On at least two occasions, Ms. Snyder took the student from the work site early due to emergencies with the student.[6]

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[3] Although the parties apparently considered this to be an extracurricular assignment, it could be argued that this was an add-on to Grievant Strader's regular run. As the parties did not address this issue, the undersigned will not either.

[4] The record does not reflect the date of this posting.

[5] The record does not reflect whether either Grievant bid on this posted assignment, but it appears that they did not as they could not have performed the assignment.

[6] The record does not reflect the nature of the emergency, or Ms. Snyder's destination on these occasions.

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 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). "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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

The undersigned has been able to discern two arguments made by Grievants. The first argument is that they had acquired the right to transport the subject wheelchair bound student to and from his assigned work site for the entire 2008-2009 school year, that they had a continuing right to hold the extracurricular assignment so long as it exists, and it still exists. The second argument is that MBOE did not present any justification for changing the assignment to a three hour assignment, and that the additional reason provided by MBOE's witness at level three for this "is a pretext conceived after the fact to justify an otherwise inane move." Respondent argued that it has broad discretion in the creation and combining of positions, that this discretion was exercised in the best interests of the student in this instance, and that Grievants cannot grieve a management decision.

W. VA. CODE § 18A-4-16 provides, in pertinent part, as follows:

> (1) The assignment of teachers and service personnel to extracurricular assignments shall be made only by mutual agreement of the

> employee and the superintendent, or designated representative, subject to board approval. Extracurricular duties shall mean, but not be limited to, any activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly basis: Provided, That all school service personnel assignments shall be considered extracurricular assignments, except such assignments as are considered regular positions, as provided by section eight [§ 18A-4-8] of the article, or extra-duty assignments, as provided by section eight-b [§ 18A-4-8b] of this article.
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> (3) The terms and conditions of the agreement between the employee and the board shall be in writing and signed by both parties.
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> (5) The board shall fill extracurricular school service personnel assignments and vacancies in accordance with section eight-b [§ 18A-4-8b] of this article: Provided, That an alternative procedure for making extracurricular school service personnel assignments within a particular classification category of employment may be utilized if the alternative procedure is approved both by the county board and by an affirmative vote of two thirds of the employees within that classification category of employment.
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> (6) An employee who was employed in any service personnel extracurricular assignment during the previous school year shall have the option of retaining the assignment if it continues to exist in any succeeding school year. A county board of education may terminate any school service personnel extracurricular assignment for lack of need pursuant to section seven [§ 18A-2-7], article two of this chapter. If an extracurricular contract has been terminated and is reestablished in any succeeding school year, it shall be offered to the employee who held the assignment at the time of its termination. . . ..

W. VA. CODE § 18A-4-8b requires that positions be posted and filled. It is clear that this provision was not followed during the 2007-2008 school year, when Mr. Christopher agreed to let Grievant Garner transport the subject student. Neither party presented any evidence of an alternative procedure proper, or to explain how Grievants came to be

transporting this student to or from his assigned work site at the beginning of the 2008-2009 school year. If Grievants did not obtain their assignments through the proper statutory procedure, they did not attain any right to retain the assignment. *Johnson v. Harrison County Bd. of Educ.*, Docket Nos. 02-17-066 &125 (Sept. 5, 2002). It is clear that the assignment was posted at some point in September 2008 or earlier. The undersigned finds it is more likely than not that Grievants were just asked by someone in the Transportation Department to transport this student until the posted position was filled, or that this was a temporary assignment, and neither Grievant acquired any right to the assignment. While this finding seems to dispense with this grievance, Grievant's second argument will also be addressed.

Grievants alleged that MBOE's witness, Director of Transportation Irv Schuetzner, manufactured a reason to pay a bus operator for three hours of work, rather than pay two different bus operators for less than an hour's work. Grievants' argument is not persuasive. The only things that are clear from the record in this case are that most of the participants were confused about the facts, and that many of the facts were not developed. It does not appear that the parties even understood until Ms. Snyder testified at the level three hearing that this was now a three hour assignment. Mr. Schuetzner did not even recall that he had testified at level one.

Mr. Schuetzner testified at the level three hearing that he does not believe that students who are wheelchair bound should be dropped off at a work site and left there without transportation, and while MBOE does leave some wheelchair bound students at assigned work sites without transportation, this particular student had limited verbal communication skills and physical limitations, and was fragile. Mr. Schuetzner agreed that

having Ms. Snyder take the child to and from his work site and wait for the child could be costing more for gasoline and putting more miles on buses than having Grievants drop him off and pick him up, and definitely was increasing personnel costs, but he explained that this was not a financial issue. The primary issue was the welfare of the child. While Mr. Schuetzner did not offer this explanation at the level one hearing, the undersigned does not find his testimony to be contrived. To the contrary, the undersigned concludes that Mr. Schuetzner, like other participants at the level one hearing, was confused about the facts when he gave his explanation. The explanation at level one addresses why the same driver should take the student to and from his work site, but it does not address at all why MBOE would pay the driver to stay with the student. Grievants presented no evidence to dispute Mr. Schuetzner's testimony that this student's situation was such that it was best for the student to have the driver remain on site, and indeed, on at least two occasions, Ms. Snyder had to transport the student from the work site in emergency situations.

County boards have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel, but 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). Superintendents have the authority to "[a]ssign, transfer, suspend or promote teachers and all other school personnel," subject to the approval of the board, and boards of education have the authority "[t]o control and manage all of the schools and school interests for all school activities. . . ." W. VA. CODE § 18-4-10(3) & W. VA. CODE § 18-5-13(1). *See Cox v. Bd. of Educ. of Hampshire County*, 355 S.E.2d 365, 369 (W. Va. 1987). A board of education may redefine the duties of a school service personnel

position, combine them with the duties of another position, or eliminate a position entirely. *Hambrick v. Mercer County Bd. of Educ.*, Docket No. 94-27-293 (Sept. 20, 1994); *Cox, supra.*

"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,* 198 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 undersigned cannot conclude that Respondent's actions were arbitrary and capricious, or an abuse of its broad discretion.

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). "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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. W. VA. CODE § 18A-4-16 provides that extracurricular assignments must be posted and filled pursuant to the provisions of W. VA. CODE § 18A-4-8b.

3. County boards have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel, but 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).

4. A board of education may redefine the duties of a school service personnel position, combine them with the duties of another position, or eliminate a position entirely. *Hambrick v. Mercer County Bd. of Educ.*, Docket No. 94-27-293 (Sept. 20, 1994); *Cox v. Bd. of Educ. of Hampshire County*, 355 S.E.2d 365, 369 (W. Va. 1987).

5. "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,* 198 W. Va. 604, 474 S.E.2d 534 (1996).

6. Grievants did not demonstrate that they had acquired the assignments at issue through the proper statutory procedure, or that they otherwise had any right to retain the assignments.

7. Respondent's actions were not arbitrary and capricious, or an abuse of discretion.

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: November 4, 2009