THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JUDY G. MULLINS,
Grievant,

v. **DOCKET NO. 2009-1341-CONS**

HANCOCK COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Judy G. Mullins, filed two grievances against her employer, the Hancock County Board of Education, on January 9, 2009. The statements of grievance read: (1) "[v]iolation of WV Code 18A-4-16, 18A-4-5b, and unfair and unequal application of Board Policy," and (2) "[v]iolation of WV Code 18A-4-16, 18A-4-5b, and not following past and present practice posting of trips." As relief in each grievance, Grievant sought, respectively: "[p]ayment of 2 hours for a mid-day run on 12/4/2008 that should not have been covered since there was not pre-school at Broadview Elementary that day. . . .," and "(1) [p]ayment of extra-curricular trip[1] scheduled on 12/18/2008 for 12/30/2008 for Weir High Swim Team to Charleston, WV. (2)[c]reation of new policy to address how schools cancel trips after being posted."[2]

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[1] It is clear from the record that this was an extra-duty trip, as defined in W. VA. CODE § 18A-4-8b, not an extracurricular trip, as defined in W. VA. CODE § 18A-4-16.

[2] This latter type of relief is not generally available through the grievance procedure.

The undersigned has no authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or

A hearing was held at level one on each grievance on January 26, 2009, and separate level one decisions denying the grievances were issued on February 12, 2009. Grievant appealed both grievances to level two on February 25, 2009, where they were consolidated. A mediation session was held on April 15, 2009. Grievant appealed to level three on April 30, 2009, and after the level three hearing was set, the parties agreed to submit this matter for decision based upon the record developed at level one. Grievant was represented by Owens Brown, West Virginia Education Association, and Respondent was represented by William T. Fahey, Esquire. This matter became mature for decision on August 25, 2009, the deadline for submission of written Proposed Findings of Fact and Conclusions of Law, which both parties declined to file.

Synopsis

Grievant was assigned a mid-day run scheduled for December 4, 2008, transporting certain pre-school students, in the absence of another bus operator who had accepted an extra-duty trip that day. This run was not needed because all the pre-school students were going to be on the extra-duty trip, but the school did not inform the

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> regulation which mandates such a policy be developed or changed. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997); *Olson v. Bd. of Trustees*, Docket No. 99-BOT-513 (Apr. 5, 2000); *Gary and Gillespie v. Dep't of Health and Human Resources,* Docket No. 97-HHR-461 (June 9, 1999).
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> While this grievance procedure provides state employees with a mechanism to pursue complaints regarding a variety of terms and conditions of employment, it does not empower this Grievance Board with authority to simply substitute its judgment for that of agency management in the day-to-day supervision of its workforce. *See Skaff, supra*.

Board, et al., v. W. Va. Dep't of Health and Human Resources, Docket No. 99-HHR-329 (Feb. 2, 2000).

Transportation Department of this. When the Transportation Coordinator inquired about whether the run would be needed, he was informed that it was not, and the run was cancelled for the day. Grievant's name was placed at the bottom of the rotation list, in accordance with Respondent's standard practice when an assignment is cancelled. Also, Grievant was assigned an extra-duty trip during Christmas break which was cancelled after it was assigned to her. This trip was assigned two weeks in advance, rather than the usual one week in advance, because of the Christmas break. Had it been assigned a week in advance, it would never have been on the list to be assigned. Neither of these situations is addressed by the applicable statutes or Respondent's written procedures. Respondent followed its standard practice, and Grievant did not demonstrate that it acted in an arbitrary and capricious manner.

The following Findings of Fact are properly made from the record developed at level one.

Findings of Fact

1. Grievant is employed by the Hancock County Board of Education ("HBOE"), as a bus operator.

2. In April 2008, HBOE's bus operators voted on and approved, by a two-thirds vote, a procedure for assigning extra-duty trips. HBOE adopted the approved procedure "EEAC" on June 9, 2008. That procedure states, with regard to trip cancellations, "[i[f a trip is cancelled and re-scheduled in the same week, the trip will go to the driver that was originally cancelled from that particular trip." The procedure does not otherwise address trip cancellations.

3. Each week HBOE's Transportation Department prepares "trip sheets" listing the extra-duty trips for the following week needing drivers. There is a separate list of runs which need to be covered because of a temporary absence. On Wednesday of each week, the Secretary for the Transportation Department assigns a driver to each trip or run for the following week from the bus operator rotation lists.

4. The sheets for trips to be taken during the week including December 4, 2008, were prepared, and drivers assigned the preceding week. Four buses were scheduled to take Broadview Elementary School pre-school students and St. Paul Elementary School first and second grade students to West Liberty State College on December 4, 2008. Two of the bus operators assigned to these trips had mid-day runs transporting the Broadview Elementary pre-school students. The Transportation Department was not told by anyone at Broadview Elementary School that these two mid-day runs would not be needed, so bus operators Joann McClain and Don Barr were assigned from the applicable rotation list to cover these two mid-day runs for the two regular drivers. When Ms. McClain declined one of the assignments, it was assigned to Grievant, who was next on the rotation list.

5. On December 1, 2008, one of the bus operators who normally drove one of the mid-day runs talked to Transportation Coordinator Timothy Reinard about whether the mid-day runs would be needed on December 4, as the pre-school students he normally transported on that run would be on the trip to West Liberty State College. Mr. Reinard had not considered this, as he just provides the buses requested by the schools. He called Broadview Elementary and was told that the mid-day runs would not be needed on December 4, because there would be no pre-school students to transport.

6. The two mid-day runs on December 4 from Broadview Elementary were canceled on December 1, 2008, and Grievant was advised on that date that her assignment had been canceled. Grievant's name and Mr. Barr's name were placed at the bottom of the rotation list.

7. It has been the practice of the Transportation Department to prepare three trip sheets the week before Christmas, one for each of the next three weeks, because the Transportation Department is closed over the Christmas break, and the Secretary for the Department does not work during this period.

8. The trip sheet for the week after Christmas 2008, included a trip transporting the Weir High School Swim Team to Charleston, West Virginia, on December 30, 2008. Grievant was next in line on the extra-duty rotation list, and was assigned this trip on the trip sheet on December 17, 2008.

9. On December 18, 2008, Mr. Reinard was told by HBOE's Athletic Director that the Swim Team trip had been canceled. Mr. Reinard notified Grievant of this cancellation on December 18, 2008. Grievant's name was then moved to the bottom of the extra-duty rotation list.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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).

Grievant argued with regard to the December 4, 2008 run that Mr. Reinard should have realized the two mid-day runs would not be needed, and should have never scheduled her for one of the runs. She argued this was Respondent's mistake, and she should not have been penalized for this mistake. She asserted she was entitled to the two hours of pay she would have received had she made the next mid-day run assigned from the rotation list. Respondent argued that mid-day runs are canceled by the schools, and no one at Broadview Elementary told Mr. Reinard that the run would not be needed on December 4. Mr. Reinard followed the proper procedure, and Grievant was immediately notified that the run had been cancelled. Respondent also pointed out that had it done what Grievant suggested, Mr. Barr's name likewise would not have been placed at the bottom of the rotation list, and he would have been offered the next available run, not Grievant.

As to the December 30, 2008 Swim Team trip, Grievant argued that had the extra-duty runs been assigned on a weekly basis, rather than two weeks in advance, this trip would never have been assigned to anyone. She asserted that the policy on trip cancellations was unfair, and she should have stayed in the rotation. Respondent argued it followed the proper procedure.

This grievance involves two distinct situations where a driver is needed for one trip or run, and two distinct statutory provisions. It may be helpful to first explain that extra-duty

trips are trips which are "irregular jobs that occur periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips." W. VA. CODE § 18A-4-8b(f). That CODE Section describes how extra-duty assignments are to be made, stating:

> (A) A service person with the greatest length of service time in a particular category of employment shall be given priority in accepting extra[-]duty assignments, followed by other fellow employees on a rotating basis according to the length of their service time until all such employees have had an opportunity to perform similar assignments. The cycle then shall be repeated.
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> (B) An alternative procedure for making extra-duty assignments within a particular classification category of employment may be used 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.

Both parties acknowledged that the statute does not address the cancellation of a trip after it has been accepted by an employee. HBOE Policy EEAC does not address what occurs when the trip is canceled after it has been assigned.

An absence was created when the regular drivers accepted the extra-duty trips to West Liberty State College on December 4, 2008, which had to be filled by another driver. The proper procedure in this situation is to follow the step-up provisions found in WEST VIRGINIA CODE § 18A-4-15(b), which provides, in pertinent part:

> Substitutes shall be assigned in the following manner: A substitute with the greatest length of service time, that is, from the date he or she began his or her assigned duties as a substitute in that particular category of employment, shall be given priority in accepting the assignment throughout the period of the regular employee's absence or until the vacancy is filled on a regular basis under the procedures set out in section eight-b [§ 8A-4-8(b)] of this article. All substitutes shall be employed on a rotating basis according to the length of their service time until each substitute has had an opportunity to perform similar assignments: **Provided, that if there are regular service employees employed in the same building or work station as the absent**

> **employee and who are employed in the same classification category of employment, the regular employees shall be first offered the opportunity to fill the position of the absent employee on a rotating and seniority basis** with the substitute then filling the regular employee's position. A regular employee assigned to fill the position of an absent employee shall be given the opportunity to hold that position throughout the absence. **For the purpose of this section only, all regularly employed school bus operators are considered to be employed within the same building or working station.**

(Emphasis added). *Mullins v. Hancock County Bd. of Educ.*, Docket No. 07-15-324 (Feb. 29, 2008).

Grievant's frustration with these two assignments is understandable. After the December 4 mid-day run was assigned to Grievant, Mr. Reinard discovered that it was not needed. No one at Broadview Elementary had thought to tell the Transportation Department this, and no one in a position of authority at the Transportation Department saw the problem until after the run had been assigned. The Transportation Department followed its practice, filling the position of the absent employee, and relying upon the school to tell the Department if a bus operator was not needed to fill in. When it was discovered that no one would need to cover this mid-day run, but it had already been assigned, Mr. Reinard treated this as a cancelled run.

Grievant did not demonstrate that Respondent did anything wrong in placing her at the bottom of the rotation list after the December 4 run was cancelled. Neither the applicable statute, nor HBOE policy, address this situation. The question then is whether HBOE acted in an arbitrary and capricious manner. Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its 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 difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). 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 one may disagree with Mr. Reinard's actions, they were not unreasonable. Certainly, this is one situation which could be addressed by HBOE's Policy, with input from the drivers, if possible.

With regard to the December 30 trip, the trip was scheduled and then cancelled, and in such situations HBOE places the name of the person assigned to the cancelled trip at the bottom of the extra-duty rotation list. Grievant does not contest this practice, rather Grievant's complaint arises from the fact that had the trip sheets gone out only a week in advance, the trip would never have been on the trip sheet. However, nothing requires HBOE to schedule trips only one week in advance. While this is the normal practice, it is impossible to schedule the trips one week in advance because of Christmas break. Grievant did not demonstrate she was entitled to any special consideration in this instance.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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. "Pursuant to the provisions of WEST VIRGINIA CODE § 18A-4-15(b), bus operators are to be given the opportunity to "step up" into the position of another absent regular bus operator, on a rotating and seniority basis. *Wolfe v. Monongalia County Bd. of Educ.*, Docket No. 04-30-412 (May 31, 2006)." *Mullins v. Hancock County Bd. of Educ.*, Docket No. 07-15-324 (Feb. 29, 2008).

3. Service personnel with the greatest amount of seniority "shall be given priority in accepting extra[-]duty assignments" on a rotating basis. W. VA. CODE § 18A-4-8b(f)(A). This statute does not address the cancellation of assignments after they have been accepted by the employee.

4. Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its 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 difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). 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).

5. Grievant did not demonstrate that Respondent violated any statute, regulation, rule, policy, or procedure, or that it acted in an arbitrary and capricious manner.

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: October 27, 2009