THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DIANA HOKE,
Grievant,

v. **Docket No. 2008-1661-MnrED**

MONROE COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant is currently employed by the Monroe County Board of Education ("MCBOE") as a cook. Her Statement of Grievance reads:

> Grievant is employed by the Respondent as a Cook. Grievant has trained for and been tested for certification as a school bus operator. Grievant was given the skills test, but did not pass. By certified letter received on May 6, 2008, Grievant was advised that she would not be permitted to take the skills test a second time.[1] Respondent permitted at least one other individual to retest after failing the initial skills test this spring. Grievant contends that she was entitled to the retest after failing the initial skills test this spring. Grievant also contends that permitting other individuals to retest and denying her that opportunity constitutes favoritism and discrimination as defined in West Virginia Code §6C-2-2(g)(1).
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> The Relief Sought is:
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> Grievant seeks the opportunity to retake the skills test. If she passes the test she seeks instatement into any position as a bus operator posted after the May 22, 2008, for which she would have been entitled if she had successfully passed the skills test on May 22, 2008. She also seeks compensation for lost wages with interest for any such position.

By agreement, the parties filed this grievance directly to Level Three on June 4, 2008. Grievant was represented by John Roush, Esq., from the West Virginia School Service Personnel Association, and Ashley Hardesty, Esq., of Bowles Rice McDavid Graff and Love, LLP, represented MCBOE. A Level Three hearing was held on November 20, 2008, and the record was held open for Grievant's phone records. Eventually, the parties

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[1]A copy of this letter is appended hereto. (Footnote in original).

realized these records could not be obtained, and this matter became mature for decision on March 30, 2009, when the parties submitted proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant asserts she should be entitled to retake the skills test for the bus operator position and notes other bus operators were given this opportunity. Respondent contends Grievant's consistent inability to pass the skills test and her numerous failures in attempting to pass the required commercial drivers license ("CDL") test gives MCBOE sufficient reason to decide not to recommend her to retake the skills test. MCBOE notes the two other individuals who were recommended to retake the skills test did not have Grievant's history of failure.

For the reasons discussed below, this grievance must be DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed by MCBOE as a cook.

2. Grievant wanted to become a bus operator and began the process by attempting to obtain her CDL. Grievant failed the CDL test at least six times within a two-month period - on June 23, 2006, June 30, 2006, July 12, 2006, July 27, 2006, August 8, 2006, and August 22, 2006, before she obtained her CDL.[2] Although there were other problems, a consistent problem was her inability to pass the air brakes section of the test.

3. In 2006, Grievant passed the State Board of Education's ("SBOE") written test for bus operators and was recommended to SBOE for the skills portion of this test.

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[2]There is some question in the record whether Grievant failed the CDL test a seventh time on September 29, 2006. Respondent's Exhibit 3 states Grievant failed the "Vehicle Insp. Score" portion, but the record also reveals Grievant was allowed to take the State Board of Education's written skills test for bus operators on September 19, 2006. This inconsistency was not explained in the record.

4. The SBOE skills test consists of two sections: the "Physical Performance Test" and the "Examination for Certification." The "Physical Performance Test" is given first. If at any point in time the candidate fails a section of the exam, the testing stops at that point.

5. On September 19, 2006, Grievant failed Standard 7 of the "Physical Performance Test" - "Installing Tire Chain" and was not allowed to take the "Examination for Certification." Grievant was allowed to retake the test on October 24, 2006. During this testing, Grievant's "pre-trip" portion (the first section of the "Examination for Certification" test) was rated as "poor," and the testing was stopped.

6. After these failures, on November 13, 2006, Superintendent Lynn Guy wrote Grievant noting the next date for training was uncertain. Principal Guy went on to state, "I am concerned about the multiple number of times you have taken the test and the message that sends for the safety of students riding the bus with you as a driver." Respondent Exh. 5.

7. Past practice by the SBOE was that if the individual failed the test two times in twelve months, the individual had to wait twelve months before the individual could retake the training and testing. Testimony Shew and Guy.

8. During the Fall of 2007, Grievant again underwent the training process for bus operator certification and received another 30 hours of classroom training and another six hours of behind-the-wheel training.

9. Both trainers who worked on the behind-the-wheel training with Grievant were concerned about her difficulty in controlling the school bus. Grievant had difficulty with starting and stopping, shifting, backing, pre-tripping, and clutch and air brake skills. The trainers recommended Grievant practice these skills after work, and Grievant indicated she would. Respondent Exh. 4.

10. Grievant did not practice these skills. Testimony Grievant.

11. After Grievant's second round of training, she took the written test on April 25, 2008, and failed it. She was allowed to retake this test the next day and passed.

12. Superintendent Guy recommended Grievant for skills testing with SBOE. Superintendent Guy believed she could not deny Grievant the right to take this test.

13. On April 28, 2008, Grievant passed the "Physical Performance Test,"[3] but she failed the "Examination for Certification" test. Grievant's difficulties were stalling the engine, slipping the clutch, and vehicle roll back. Respondent Exh. 1. Daniel McKinney was Grievant's tester on this portion of the test, and he found her unable to operate the bus safely. Vehicle roll-back was the greatest concern. Testimony McKinney.

14. After this latest failure, Superintendent Guy did not want to recommend Grievant to retake the skills test. She sought clarification from SBOE and was informed it was within her discretion to refuse to recommend an individual for retesting.

15. On May 5, 2008, Superintendent Guy wrote Grievant noting Grievant's training opportunities, her history of failure, and MCBOE's priority of student safety. She informed Grievant she believed she was required to recommend Grievant for skills certification, but this belief was incorrect. Accordingly, Superintendent Guy informed Grievant she would not be allowed to retake the skills test, and MCBOE would not allow her to participate in any further bus operator training sessions. Respondent Exh. 5.

16. It is the responsibility of a board of education to contact SBOE when they have an individual who needs certification as a bus operator, and this recommendation is at the discretion of the county board of education. An individual cannot directly approach SBOE for either training or testing. Testimony Benjamin Shew, Executive Director of Transportation for SBOE.

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[3]Grievant had 10 minutes to install tire chains, and her completion time was 9 minutes and 49 seconds.

17. SBOE Policy 4336 dealing with transportation was recently revised and several past practices were codified in the policy. This policy did not become effective until October of 2008, after the filing of this grievance. The past practice of giving county board of education the discretion to recommend or not recommend the individual for testing is now written in the policy. Testimony Shew. Policy 4336 states at § 15.2.14, "[u]pon successful completion of the online examination, the candidate shall pass additional tests on skills and performance administered at the request of the county. . . ." (Emphasis added).

18. Policy 4336 now states at § 15.2.14.b, "retesting will be done only at the request of the county or institution seeking to employ the candidate." This statement follows the past practice of SBOE. Testimony Shew.

19. Joe Kirk and Richard Riffe took the 2008 training and testing at the same time as Grievant. They had not applied for training and certification before. Their trainers, the same ones who trained Grievant, found them to be competent and safe drivers and believed they would be successful bus operators. Mr. Kirk and Mr. Riffe failed the SBOE skills testing the first time they took it, and MCBOE recommended them for retesting. They passed and have since been hired as substitute bus operators with MCBOE.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. *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). Where the evidence equally supports both sides, the employee has not met her burden. *Id.*

Grievant's argument is essentially that she has been treated differently than similarly situated employees. She is asking to be able to retake the test a second time like Mr. Kirk and Mr. Riffe. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." Favoritism is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." W. VA. CODE § 6C-2-2(d) & (h). In order to establish a discrimination and/or favoritism claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
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> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Educ. Policy Comm., 221 W. Va. 306 , 655 S.E.2d 52 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

During the 2008 testing, Grievant was allowed to take the written test twice, but she was only allowed to take the skills test once. Grievant was allowed to take the skills testing twice during the 2006 testing. Mr. Kirk and Mr. Riffe did not go through the training and testing process prior to 2008, but they were allowed to take the skills test twice in 2008. Grievant avers it is only the 2008 skills testing that should be considered, and thus, she was similarly situated to these two individuals.

Respondent asserts the whole of Grievant's history must be considered, and if this is done, Grievant is not similarly situated. The record reveals Grievant: 1) has had the training twice; 2) had great difficulty passing the CDL examination; 3) had to take the most recent written test twice to pass; and 4) had three opportunities to pass the skills test and failed them all. Accordingly, the undersigned Administrative Law Judge concludes,

Grievant is not similarly situated to the two individuals to whom she compares herself. Grievant did not demonstrate that an applicant with a similar history of failure was given additional retesting opportunities.[4]

Grievant is correct that the W. VA. CODE § 18A-4-83(d) envisions that an applicant will have the opportunity to take the competency examination more than once. W. VA. CODE § 18A-4-8b(d) states, "[a]n applicant who fails to achieve a passing score is given other opportunities to pass the competency test. . . . " This statute does not identify the number of opportunities an applicant must be given. Here, Grievant has been given three opportunities to pass the written portion and three opportunities to pass the skills section. At this point in time, MCBOE refuses to recommend Grievant for further testing, and SBOE will not retest Grievant unless MCBOE, her potential employer, recommends Grievant for retesting. No discrimination has occurred with this set of facts. Grievant was not similarly situated to those to whom she compares herself, and MCBOE's concern about Grievant's ability to perform the job duties is legitimate.

Other case law is supportive of this conclusion. In *Hancock County Board of Education v. Hawken*, 209 W. Va. 259, 546 S.E.2d 258 (1999) (*per curiam*), the West Virginia Supreme Court of Appeals noted "a county school board has great latitude in running the affairs of its school system . . . [and] ha[s] substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel." "[T]his discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." *See Dillon v. Wyoming County Bd. of Educ.*, Syl. Pt. 3, 177 W. Va. 145, 351 S.E.2d 58 (1986). The Court clarified that the phrase "best interests of the schools" meant "what is in the best interest of the children of this State." *Hawken, supra*. The Court also stated in *Ohio County Board of Education v. Hopkins*, 193

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[4]Because Grievant is a regular employee, pursuant to statute, MCBOE would be required to place Grievant in a vacant bus operator position if she becomes certified. See W. VA. CODE § 18A-4-8b(b) & W. VA. CODE § 18A-4-8e (b).

W. Va. 600, 457 S.E.2d 537 (1995), that the transportation of school children has a "special degree of responsibility. . . ."

Further, the cases of *Ohio County Board of Education v. Hopkins*, 193 W. Va. 600, 457 S.E.2d 537 (1995) and *Cox v. Board of Education of the County of Hampshire*, 177 W. Va. 576, 355 S.E.2d 365 (1987)(*per curiam*), are instructive. *Hopkins* cited *Cox,* and stated "we emphasized that the management of a county school transportation system is for the welfare of the children . . . ," and a county board of education has an implicit obligation "to supervise the [transportation] system in a responsible and efficient manner." *Cox* at 370. *See Hopkins, supra*.

Statutes have given superintendents 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, supra*. Additionally, the West Virginia Supreme Court of Appeals has held that a county superintendent's duties include "powers of independent judgment and discretion." *Hall v. Pizzino*, 363 S.E.2d 886, 888 (W. Va. 1980).

Superintendent Guy sought information and guidance from the SBOE and found she was not required to recommend Grievant for retesting. She then used her statutory authority and "powers of independent judgment and discretion" to refuse Grievant further training and testing. *Hall, supra*. This decision must meet 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 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)).

Give the set of facts in this case, the undersigned Administrative Law Judge cannot find that MCBOE was arbitrary and capricious in refusing to provide further training and testing for Grievant.

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, Grievant has the burden of proving her grievance by a preponderance of the evidence. *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). Where the evidence equally supports both sides, the employee has not met her burden. *Id.*

2. Discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees."

3. Favoritism is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." W. VA. CODE § 6C-2-2(d) & (h).

4. In order to establish a discrimination and/or favoritism claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly situated employee(s);
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> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
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> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Educ. Policy Comm., 221 W. Va. 306 , 655 S.E.2d 52 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

5. Grievant has not met her burden of proof and demonstrated either discrimination or favoritism with this set of facts.

6. W. VA. CODE § 18A-4-83(d) states, "[a]n applicant who fails to achieve a passing score is given other opportunities to pass the competency test. . . . " This statute does not identify the number of opportunities an applicant must be given.

7. "[A] county school board has great latitude in running the affairs of its school system . . . [and] ha[s] substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel." "[T]his discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." *Hancock County Bd. of Educ. v. Hawken*, 209 W. Va. 259, 546 S.E.2d 258 (1999) (*per curiam*); *See Dillon v. Wyoming County Bd. of Educ.*, Syl. Pt. 3, 177 W. Va. 145, 351 S.E.2d 58 (1986). The "best interests of the schools" means "what is in the best interest of the children of this State." *Hawken, supra*.

8. The transportation of school children has a "special degree of responsibility . . ." and "the management of a county school transportation system is for the welfare of the children. . . ." *Ohio County Bd. of Educ. v. Hopkins*, 193 W. Va. 600, 457 S.E.2d 537 (1995).

9. A county board of education has an implicit obligation "to supervise the [transportation] system in a responsible and efficient manner " *Cox v. Bd. of Educ. of the County of Hampshire*, 177 W. Va. 576, 355 S.E.2d 365 (1987)(*per curiam*). *See Hopkins, supra*.

10. 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).

11. A county superintendent's duties include "powers of independent judgment and discretion." *Hall v. Pizzino*, 363 S.E.2d 886, 888 (W. Va. 1980).

12. "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)).

13. Superintendent Guy's decision to refuse to allow Grievant any further testing and training was not arbitrary and capricious.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. *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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

Date: August 28, 2009

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Janis I. Reynolds
Administrative Law Judge