THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

WILLIAM KING, et al.,
Grievants,

v. **DOCKET NO. 2009-1404-CONS**

HANCOCK COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievants, William King, Michael Watkins, Ron Powell, and Richard Gibson, filed a grievance against their employer, the Hancock County Board of Education, on March 11, 2009. The statement of grievance reads:

> Grievants contend that Respondent is not complying with the requirements of W. Va. Code 18A-4-15 regarding call outs for substitute bus operators. The automated calling machine skips people, drops calls, and otherwise deprives Grievants of opportunities to substitute for absent bus operators.

As relief Grievants sought, "correction of the problems of the automated call out machine and compensation for any missed opportunities to substitute beginning July 1, 2009."

A hearing was held at level one on May 11, 2009, and a level one decision denying the grievance was issued June 17, 2009. Grievants appealed to level two on June 26, 2009, and a mediation session was held on August 31, 2009. Grievants appealed to level three on September 15, 2009. A level three hearing was held before the undersigned Administrative Law Judge on December 10, 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 William T. Fahey, Esquire. This matter became mature for decision on January 22, 2010, on receipt of the last of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievants complained that the automated calling system used by Respondent to call out substitutes has failed to respond when they answered the telephone, and has disconnected without providing them with the opportunity to accept or decline an assignment. Grievants did not identify how often or when this has occurred, nor did they identify any particular assignment they should have received. Respondent has tried to correct problems reported by employees, and its information is that the system is functioning properly. In fact, Respondent had only received three complaints about the system from August 26, 2009, through December 9, 2009. Grievants also complained about the hours they must be available to receive calls about available assignments. Grievants did not demonstrate that the automated calling system is not functioning properly, that they were improperly denied any identified assignment, or that Respondent's actions were arbitrary and capricious.

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 Hancock County Board of Education ("HBOE") as substitute bus operators.

2. HBOE entered into an agreement with RESA VI[1] to provide an automated calling service, referred to as TSSI, which is used by regular bus operators to report that they will not be coming to work, and to call substitutes to fill these assignments. HBOE began using this service on July 1, 2008. There are 25 telephone lines dedicated to this service, 12 coming in, and 13 going out. HBOE began using this service because of complaints from substitutes about favoritism, discrimination, and nepotism when an individual employed by HBOE was responsible for filling these assignments. All employees who would be utilizing this system were trained in how to use it. Eighteen other counties statewide use TSSI.

3. When an employee calls in to report off work, TSSI records the information and within a minute begins going down the substitute rotation list trying to fill the assignment.

4. When TSSI calls a substitute employee, the system prompts the employee to enter his identification number, followed by the pound key; then the employee is asked to enter his PIN, followed by the pound key. If the employee enters an incorrect number he is given three chances to correct the error before the system hangs up. The employee must press one to listen to a description of the assignment, and the employee then presses the appropriate number to either accept or decline the assignment.

5. TSSI begins calling for substitutes at 6:00 p.m., and continues to call until 10:00 p.m. It begins calling again in the morning at 5:00 a.m., and continues to place calls until noon, or until all assignments are filled. Substitute employees must be available to

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[1] Regional Education Service Agency

receive telephone calls during these hours, and can call in and change the telephone number the system is to call.

6. Grievants have had problems using TSSI. The system has not responded when they answered the telephone, and the system has hung up on them before it provided them with a description of the assignment. Grievants did not state how many times this has occurred, during what time period it occurred, or whether they reported it to HBOE personnel each time it occurred. Grievants use cellular phones, trac phones, and land lines to receive call-outs, and these problems have occurred with all three types of service.

7. The record does not reflect any specific assignment which any of the Grievants should have received had the system not cut them off.

8. After receiving complaints from substitutes about TSSI, HBOE personnel met with Grievants and their union representatives in December 2008 and February 2009. HBOE personnel monitored the system from December 4, 2008, until February 2009, to make sure it was placing calls according to the rotation schedule. When HBOE first began using TSSI, many calls placed to cellular phones resulted in the call being dropped. This problem still occurs, but not often. HBOE acknowledges that there were some problems in the beginning, but it has tried to correct these problems and believes it has done so. Employees are to call HBOE employee Sandy Parkins immediately if they experience a problem. Since August 26, 2009, HBOE personnel have received three telephone calls reporting a problem with TSSI. Sometime in November 2009, RESA VI had a system wide problem which has been corrected.

9. Ronda Kouski, the RESA VI TSSI operator and WVIIS Coordinator, researches all complaints about TSSI. She has run test jobs on the system to make sure it is working correctly. Her research has led her to believe that the system is working, and it is doing what it is supposed to do, and that if calls are being dropped it is because of human error or poor cellular service. She has not received any complaints from any county other than Hancock.

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).

Grievants argued they are entitled to an opportunity to accept an assignment if they are next in rotation order, and apparently, that they are missing out on opportunities because TSSI has not functioned properly.[2] Respondent counters that the system is

[2] Grievants pointed to the number of "recorded 'no answer' incidents" shown in the TSSI data on Grievant's Exhibit 2, stating this information "is important because that would indicate, in addition to nobody answered the phone, a skip of an employee." The undersigned has no idea how this has any bearing on this grievance. There is nothing in the record from which the undersigned can draw any conclusions from the "no answer" information on this exhibit other than that the employee simply did not answer the

functioning properly, that it has corrected problems which have occurred, and that if Grievants experience a problem, they are to call Sandy Parkins and report it immediately. The undersigned cannot cause Respondent to do more than this. Further,

> a reasonable, good faith attempt to contact employees, in rotation list order, is all that is required by statute. Attempts to make contact by telephone are generally acceptable. Whether the attempt made is sufficient must be determined on a case-by-case basis.

Jennings v. Wyoming County Bd. of Educ., Docket No. 96-55-322 (Nov. 18, 1997). Grievants have not identified any specific attempt to contact them for an assignment which was insufficient, nor have they identified any specific assignment they missed because the call out system did not work properly.

Grievants also complained about having to be available to answer the telephone from 6 to 10 p.m., and 5 a.m. to noon. These are the hours substitutes are to be available because of the design of TSSI. "'Personnel actions of a county board of education which are not encompassed by statute are reviewed against the 'arbitrary and capricious' standard . . . .' *Cornell v. Putnam County Bd. of Educ.*, Docket No. 03-40-111 (June 26, 2003); *Wellman v. Mercer County Bd. of Educ.*, Docket No. 95-27-327 (Nov. 30, 1995)." *Carr v. Tucker County Bd. of Educ.*, Docket No. 06-47-376 (May 7, 2007). "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,*

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telephone when it rang.

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)).

It is the nature of substitute employment that the employee is subject to the inconvenience of waiting by the telephone for a call that may or may not come. While it would be easier for Grievants if a person called for them and someone else could take a message and let Grievants call back, this simply is not possible with TSSI. The undersigned cannot conclude that it is unreasonable for HBOE to utilize TSSI to call out substitutes, nor that it is unreasonable to have the system place telephone calls during the stated hours.

Further, the undersigned has no authority to mandate changes to Respondent's policies.

> [I]t is not the role of this Grievance Board to change agency policies, and that is what Grievants are seeking. 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 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).

Frame v. Dep't of Health and Human Res., Docket No. 00-HHR-240/330 (April 20, 2001).

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. "The evidence does not establish that the automated calling system was not functioning properly, nor does it establish that [Grievants were] not called for any particular job for which [any of them] should have been called, or that [any Grievant] otherwise was harmed in any way." *Anderson v. Raleigh County Bd. of Educ,* Docket No. 01-41-378 (Jan. 28, 2002).

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: May 3, 2010