WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MARVIN RAY WOODS,
Grievant,

v. **Docket No. 2010-0277-NicED**

NICHOLAS COUNTY
BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Marvin Ray Woods, filed a grievance on September 1, 2009,[1] against his employer, Nicholas County Board of Education. The statement of grievance reads, "Posted Position Filled by Less Senior Person No Inservice [sic] offered No interview offered." For relief, Grievant is seeking "Position - back pay when job began 8-21-09."

A level one conference was conducted on October 28, 2009, with the decision denying the grievance dated November 10, 2009. Grievant appealed to level two, and a mediation session was held on January 26, 2010. Grievant timely appealed to level three, and a hearing was held on May 13, 2010, in the Grievance Board's Charleston office. Grievant was represented by John Roush, West Virginia School Service Personnel Association, and Respondent was represented by Howard E. Seufer, Jr., Bowles Rice McDavid Graff & Love LLP. This case became mature on June 10, 2010, upon the parties' submissions of findings of fact and conclusions of law.

Synopsis

Grievant asserts he applied for the position of Coordinator of Transportation.

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[1]Because the grievance form was filed with the Grievance Board but not the Chief Administrator, timeliness is a contested issue. For purposes of introduction, the undersigned has listed the date placed on the grievance form as the filing date and intends to address the parties' arguments in the body of the decision.

Grievant argues he is more senior than the successful applicant and should have received the position, as Grievant met all the qualifications listed in the posting. Grievant further asserts Respondent's failure to specify the requirement of certification for bus operator trainer renders the decision based on that factor arbitrary and capricious.

Respondent argues first that this grievance is untimely, as Grievant filed the grievance form with the Grievance Board, but did not send a copy to the Chief Administrator. Respondent also avers that the position of Coordinator of Transportation is responsible for staff training, including bus driver training. In order to conduct bus driver training, the successful candidate must hold a training certification from the West Virginia Department of Education, and Grievant did not. Respondent asserts that while the requirement of the certificate was not explicit in the posting, it was implied based on the list of major tasks of the position.

With respect to timeliness, Grievant argues he substantially complied with the procedure, and the grievance should not be dismissed.

Respondent has not met its burden on the motion to dismiss. With respect to the merits, this grievance is GRANTED in that the position must be posted again with the training certification specifically stated in the posting.

Findings of Fact

1. Grievant is employed by Respondent as a Mechanic/Foreman.

2. For the period of August 6 through 12, 2009, Respondent posted a notice of vacancy in the position of Coordinator of Transportation. The posting listed the following Certifications/Qualifications: "1. Per West Virginia School Transportation Regulations. 2. West Virginia Transportation Certification or willing to obtain Certification. 3. CDL License

or ability to obtain." Under the heading of "Job Summary," the posting stated in pertinent part, "The major tasks shall include, but not be limited to, setting goals and priorities in all assigned duties, conducting staff training and evaluation..." Under "Qualifications" in the job description, the posting stated:

> 1. Has knowledge and understanding of business administration and practice to include, but not limited to, budgeting, scheduling, inventory control, purchasing, bidding, and oral and written communication.
> 2. Has successful experience in planning, assigning, and supervising the work activities of employees.
> 3. Has successful experience in record keeping and inventory control to include computer literacy skills.
> 4. Possesses recognizable leadership skills.
> 5. Has broad knowledge of computer skills.
> 6. Has broad knowledge of school bus transportation.
> 7. Has broad knowledge of safety rules, traffic regulations, laws and ordinances governing use and operation of motor vehicles in WV and with school bus transportation.
> 15.[sic] Has knowledge of county road system.
> 16.[sic] Holds or is willing to obtain all transportation certification and CDL license.

3. Fourteen individuals, including Grievant, applied for the position. All applicants had satisfactory evaluations.

4. Only one of the fourteen individuals, Peggy Whitacre, had held the title of Director of Coordinator. She also had the West Virginia Transportation Certification and her CDL, as required by posting. Ms. Whitacre also held a training certification from the West Virginia Department of Education which is necessary to have to train bus operators to transport students.

5. Ms. Whitacre declined the position. There were no other classified applicants.

6. Only one of the remaining applicants possessed the requirements listed in the posting, as well as the training certification from the West Virginia Department of Education, and that individual was Jack Keough.

7. Mr. Keough was interviewed on August 18, 2009, and the Nicholas County Board of Education voted to accept the Superintendent's recommendation and hire Mr. Keough as the Coordinator of Transportation on August 20, 2009.

8. Grievant became aware of Mr. Keough's appointment to the position on August 21, 2009. Excluding weekends, holidays, and school closings, the fifteenth day following August 21 was September 14.

9. When filing his grievance, Grievant had the assistance of a representative who was not an attorney and was unfamiliar with the grievance process. Grievant filed this grievance with the Grievance Board on September 1, 2009. Grievant did not provide a copy to Respondent at the time of the initial filing.

10. On September 28, 2009, the Grievance Board forwarded a copy of the grievance to the Superintendent. A copy was filed with the Superintendent on October 1, 2009.

Discussion

Timeliness

Respondent asserts this case was untimely. When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner.

Higginbotham v. W. Va. Dep't of Pub. Safety, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

W. VA. CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." W. VA. CODE § 6C-2-4(a)(1) identifies the time lines for filing a grievance and states:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing. . . .

The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998).

It is undisputed that Grievant was aware of the decision to hire Mr. Keough on August 21, 2009, giving him until September 14, excluding weekends, holidays, and school closings, to file the grievance. Grievant dated his grievance form September 1, 2009, and filed it with the Grievance Board. Grievant did not file the grievance with the Chief Administrator, believing that filing with the Grievance Board was sufficient. It is Respondent's contention that this Grievance Board has held that "timely filing with the

Superintendent is required, and that filing with the Grievance Board will not suffice." (Respondent's Proposed Findings of Fact and Conclusions of Law). For support, Respondent cites *Swick v. South Branch Career and Technical Center*, Docket No. 2008-1351-CONS (Dec. 8, 2008).

In *Swick*, the grievants filed the grievance form with the Grievance Board and served a copy on the attorney for South Branch Career and Technical Center, but not the Chief Administrator. As a result, the level one hearing was not held within the statutory time frames, and the grievants claimed default. The case holds that, while W. VA. CODE § 6C-2-4(a)(1) states that an "employee may" file with the chief administrator, he/she is required so as to place the employer on notice of the grievance, and the Grievance Board will not allow the grievants to prevail on default when they did not conform to the requirements of the statute.

That is distinguishable from the facts here. In this current grievance, Grievant filed his grievance form with the assistance of a representative who was unfamiliar with the grievance process. Grievant is not seeking to obtain an advantage for the inadvertent error. Respondent is not harmed in any way by the delay in notification that a grievance had been filed.

Grievant argues substantial compliance. The West Virginia Supreme Court of Appeals has consistently held that "where there is substantial compliance on the part of the party in regard to a procedure, a mere technical error will not invalidate the entire procedure." *West Virginia Alcohol Beverage Control Admin. v. Scott*, 205 W. Va. 398, 402, 518 S.E.2d 639, 643 (1999) (per curiam). *See also State ex rel. Catron v. Raleigh County Bd. of Educ.,* 201 W. Va. 302, 496 S.E.2d 444 (1997) (per curiam) (finding substantial

compliance in filing grievance); *Mahmoodian v. United Hosp. Ctr., Inc.*, 185 W. Va. 59, 404 S.E.2d 750 (1991) (finding substantial compliance with rules for revoking physician's medical staff appointment privileges); *Hare v. Randolph County Bd. of Educ.*, 183 W. Va. 436, 396 S.E.2d 203 (1990) (per curiam) (finding substantial compliance with termination procedure); *Duruttya v. Board of Educ. of County of Mingo*, 181 W. Va. 203, 382 S.E.2d 40 (1989) (finding substantial compliance in seeking grievance hearing); *Vosberg v. Civil Serv. Comm'n of West Virginia*, 166 W. Va. 488, 275 S.E.2d 640 (1981) (holding that violation of grievance procedure by employer was merely technical and that there was substantial compliance with the procedure).

The Grievance Board has directed in the past that "the grievance process is intended to be a fair, expeditious, and simple procedure, and not a 'procedural quagmire.'" *Harmon v. Fayette County Bd. of Educ.*, Docket No. 98-10-111 (July 9, 1998), citing *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 393 S.E.2d 739 (1990), and *Duruttya v. Bd. of Educ.*, 181 W. Va. 203, 382 S.E.2d 40 (1989). *See Watts v. Lincoln County Bd. of Educ.*, Docket No. 98-22-375 (Jan. 22, 1999).

Because this grievance was filed with the Grievance Board within the statutory time frame, Grievant has substantially complied with the statutory requirements. Respondent's argument on the timeliness issue must fail.

Merits

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

It is well-settled that "[c]ounty 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." Syl. pt. 3, *Dillon v. Wyoming County Bd. of Educ.*, 177 W. Va. 145, 351, S.E. 2d 58 (1986).

Grievant asserts that Respondent's failure to specify the requirement of certification for bus operator trainer renders Respondent's decision to hire Mr. Keough arbitrary and capricious. Respondent asserts that the certification was clear in the job description, as it stated this position "provides staff development for transportation personnel" and "supervises driver education program." (Joint Exhibit 1).

"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." *Trimboli v. Dep't of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997)(citations omitted). "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)).

W. VA. CODE § 18A-4-7A(o)(1)(c) requires that special criteria or skills required to perform the job be specifically stated in the posting and that those special duties or skills be directly related to the position. When Ms. Whitacre declined the position, Respondent placed the rest of the applicants in a matrix. The matrix looked at whether the applicant was in classification, and none of the applicants were. The matrix then looked at seniority, and whether the applicants had certified driver training, the competency test for the position, and a CDL. Mr. Keough was hired because the Superintendent believed him to be the most qualified candidate because Mr. Keough had the certified driver training, as well as the requirements listed on the posting.

It is troubling that the certified driver training was a factor that was considered and was the basis for the hiring, yet was not listed in the posting. Respondent argues that the posting made it clear that one major task of the position was "conducting staff training." The job descriptions list of "performance responsibilities" include "provides staff development for transportation personnel" and "supervises driver education program." While this may provide an applicant with an indication that the certification for driver training was needed, the posting did not specifically state that it was required.

Training that is important enough to be considered in the matrix must be listed on the posting, and making a hiring decision based on the applicant who held the certified

training from the West Virginia Department of Education when it was not specifically listed on the posting is arbitrary and capricious. The Superintendent testified that she was in contact with Ben Shew, the Executive Director of Transportation at the State Department of Education, while drafting the posting. It would have been a very simple addition to put the requirement of the training certification on the posting.

Training that is included in the matrix, must be specifically included in the posting. Because it was not, this grievance is granted, and the position must be posted to specifically include the training certification from the West Virginia Department of Education.

Conclusions of Law

1. When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

2. W. VA. CODE § 6C-2-4(a)(1) states grievances are to be filed within fifteen days from the grievable event.

3. The time period for filing a grievance ordinarily begins to run when the employee is “unequivocally notified of the decision being challenged.” *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998).

4. The West Virginia Supreme Court of Appeals has consistently held that "where there is substantial compliance on the part of the party in regard to a procedure, a mere technical error will not invalidate the entire procedure." *West Virginia Alcohol Beverage Control Admin. v. Scott*, 205 W. Va. 398, 402, 518 S.E.2d 639, 643 (1999) (per curiam). *See also State ex rel. Catron v. Raleigh County Bd. of Educ.,* 201 W. Va. 302, 496 S.E.2d 444 (1997) (per curiam) (finding substantial compliance in filing grievance); *Mahmoodian v. United Hosp. Ctr., Inc.*, 185 W. Va. 59, 404 S.E.2d 750 (1991) (finding substantial compliance with rules for revoking physician's medical staff appointment privileges); *Hare v. Randolph County Bd. of Educ.*, 183 W. Va. 436, 396 S.E.2d 203 (1990) (per curiam) (finding substantial compliance with termination procedure); *Duruttya v. Board of Educ. of County of Mingo*, 181 W. Va. 203, 382 S.E.2d 40 (1989) (finding substantial compliance in seeking grievance hearing); *Vosberg v. Civil Serv. Comm'n of West Virginia*, 166 W. Va. 488, 275 S.E.2d 640 (1981) (holding that violation of grievance procedure by employer was merely technical and that there was substantial compliance with the procedure).

5. "The grievance process is intended to be a fair, expeditious, and simple procedure, and not a 'procedural quagmire.’" *Harmon v. Fayette County Bd. of Educ.*, Docket No. 98-10-111 (July 9, 1998), citing *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 393 S.E.2d 739 (1990), and *Duruttya v. Bd. of Educ.*, 181 W. Va. 203, 382 S.E.2d

40 (1989). *See Watts v. Lincoln County Bd. of Educ.*, Docket No. 98-22-375 (Jan. 22, 1999).

6. Grievant substantially complied with the statutory time frame for filing the grievance when he filed it with the Grievance Board timely.

7. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

8. "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." *Trimboli v. Dep't of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997)(citations omitted). "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)).

9. W. VA. CODE § 18A-4-7A(o)(1)(c) requires that special criteria or skills required to perform the job be specifically stated in the posting and that those special duties or skills be directly related to the position.

10. Grievant met his burden of proving Respondent was arbitrary and capricious when it hired based on a required training certification not specially listed in the posting.

Accordingly, this grievance is **GRANTED**. The position must be posted again and must include the certification for training bus operators.

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 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 (2008).

DATE: November 10, 2010

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Wendy A. Elswick
Administrative Law Judge