WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BRUCE BOWE,
Grievant,

v. **Docket No. 2010-0760-BooED**

BOONE COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Bruce Bowe, is employed by the Boone County Board of Education as a custodian at Madison Middle School in Madison, West Virginia. Mr. Bowe filed the original grievance on December 2, 2009, alleging in a one-page handwritten statement (in addition to the Grievance Statement Form) that Respondent has violated W. Va. Code §18A-4-86(o) [sic] in transferring him back to Madison Middle School to work.[1] Grievant seeks the following as relief: "[r]emoved from present job site into a safer working environment. Medical bills paid and reimbursed (deductions, travel expenses, etc...)" Grievant clarified his grievance at the level three hearing stating that he is seeking to be removed from all Boone County Schools [as a custodian] and placed in a full-time position in Maintenance due to his health condition.[2]

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[1] See Grievance Form Attachments. As Grievant's statement of grievance is a full one-page, single-spaced document, the same is being summarized in this Decision, but is hereby incorporated by reference, as if stated in its entirety.

[2] Wendy A. Elswick, the Administrative Law Judge ("ALJ") presiding over the level three hearing in this matter, conferred with Grievant and Respondent prior to starting the hearing to clarify the grievance (as it was lengthy) so that it could be summarized on the record.

ALJ Elswick resigned from her position at the West Virginia Public Employees

A level one conference was held on October 14, 2009, between Grievant and Respondent. By letter dated October 15, 2009, Respondent, by John G. Hudson, issued the level one decision denying the grievance. On October 28, 2009, Grievant timely appealed to level two of the grievance process. A level two mediation was conducted on September 20, 2010. Grievant appealed to level three of the grievance process on October 1, 2010. On December 6, 2010, a level three grievance hearing was held at the West Virginia Public Employees Grievance Board office in Charleston, West Virginia. Grievant appeared in person, *pro se*. Respondent appeared by counsel, Timothy R. Conaway, Esq.

This matter became mature for decision on January 11, 2011, upon receipt of Respondent's proposed Findings of Fact and Conclusions of Law. Grievant submitted no written proposals.

Synopsis

Grievant is employed as a custodian at Madison Middle School. Grievant has a medical condition relating to his sinuses that is believed to be aggravated by exposure to chemicals, such as cleaning chemicals. Grievant's physician wrote two letters that were provided to Respondent in which the physician asked that Respondent move Grievant to another work site to prevent his exposure to chemicals. Grievant's physician indicated in these letters that the exposure to chemicals was affecting Grievant's health and would lead to additional surgical interventions to treat his condition. Thereafter, Grievant was placed in two non-custodial temporary assignments. After these temporary assignments ended,

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Grievance Board in February 2011. Thereafter, the undersigned was assigned this case.

Grievant was returned to his custodian position, but with modified duties.

Grievant asserts that W. VA. CODE §18A-4-8(o) grants him the right to a transfer from his custodian position to a position in maintenance. Grievant is seeking a transfer to a maintenance position due to his medical condition. Grievant has misinterpreted the meaning and the purpose of W. VA. CODE §18A-4-8(o). Grievant has failed to meet his burden in this matter. Therefore, this grievance is DENIED.

Findings of Fact

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

1. Grievant, Bruce Bowe, is employed as a full-time custodian at Madison Middle School in Madison, West Virginia.

2. Grievant has been employed by Boone County Schools for eight years.

3. In or about 2005, Grievant was diagnosed with a medical condition affecting his sinuses. As stated in a letter from Grievant's physician, Hassan Ramadan, M.D., dated March 29, 2005, in January 2005, Grievant underwent sinus surgery, as well as an osteoplastic flap with fat graft obliteration. The surgery revealed that Grievant had significant nasal polyposis, which was remarkable in nature, filling up his frontal sinuses. The polyposis caused Grievant to have erosion of bone posteriorly as well as anteriorly and inferiorly, and specially also eroding into his orbit, right worse than left.[3]

4. In that same letter, Grievant's treating physician stated that Grievant's condition was "probably due to allergy and maybe some environmental exposure at work."

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[3] See Respondent's Exhibit 1.

As such, Grievant's physician recommended that Grievant stay away from chemical exposure to avoid recurrence. The physician also asked that [Grievant's employer] "consider this and try to get him at a different job site where he will not be exposed to chemicals."[4]

5. In a letter dated December 19, 2007, Dr. Ramadan again detailed Grievant's medical condition and explained that Grievant has had to have additional surgical procedures to treat his condition. In this letter, Dr. Ramadan again stressed that Grievant's work environment appears to worsen Grievant's medical condition, and again asked that [Grievant's employer] change Grievant's working environment to improve Grievant's health, and to cut down on the number of surgical interventions that Grievant would require.[5]

6. Also, in the December 19, 2007 letter from Dr. Ramadan, Ramadan states that "[w]e did recommend in previous letters that this be taken into consideration, because it seems when he is around his work environment, it is affecting his health, and his quality of life, and it is requiring him to have multiple surgical procedures."[6]

7. Thereafter, Respondent assigned Grievant to a "pony driver" position as a result of his medical condition. This "pony driver" position was not posted and this position did not exist at the time Grievant was asked to do this job.[7]

8. As stated in the letter dated October 15, 2009, from John G. Hudson,

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[4] See Respondent's Exhibit 1.

[5] See Respondent's Exhibit 2.

[6] See Respondent's Exhibit 2.

[7] See Respondent's Exhibit 4.

Superintendent of Boone County Schools, to Grievant, Hudson admits that Respondent's placement of Grievant in the "pony driver" position violated W. VA. CODE § 18A-4-8b(g) because the "pony driver" position did not exist at the time Grievant was placed therein. Hudson further acknowledges that Grievant was in no way at fault for said violation.[8]

9. Thereafter, on or about December 19, 2008, during the 2008-2009 school year, Grievant signed a contract with Respondent for a temporary assignment taking the place of a regular employee until he/she returned to work. Under the terms of this contract, Grievant was employed as General Maintenance/Mason, Truck Driver at the Operations Complex to be effective December 22, 2008, and to continue until the regular employee returned to work. This was a 261-day contract.[9]

10. While Grievant was in the pony driver and General Maintenance/Mason, Truck Driver positions, he was not exposed to cleaning chemicals. During that time, Grievant's health improved.

11. In 2009, Superintendent Hudson moved Grievant back to his custodian position at Madison Middle School to honor his original contract because the employee whose position Grievant was temporarily filling returned to work. In the process of returning Grievant to his custodial position, Superintendent Hudson notified Principal Bacchus by email of Grievant's possible need for "reasonable changes in his duties to avoid chemicals during his custodian shift." Superintendent Hudson also indicated in this email that school personnel and Grievant would meet prior to Grievant returning to work

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[8] See Respondent's Exhibit 4.

[9] See Respondent's Exhibit 3.

to develop a plan for the needed changes based upon information from Grievant's physician.[10]

12. In this custodial position Grievant would again be required to work around some cleaning chemicals. However, knowing of Grievant's medical condition and letters from Grievant's physician, Principal Josh Bacchus took Grievant off duties such as mopping, stripping, and buffing floors. Bacchus gave those assignments to other custodians in an attempt to reduce Grievant's exposure to cleaning chemicals.

13. Also, Principal Bacchus rearranged the custodians' schedules to minimize Grievant's exposure to chemicals. Grievant was assigned to the evening shift at Madison Middle School for this reason.

14. Following Principal Bacchus taking such actions to reduce Grievant's exposure to cleaning chemicals, Grievant did not have further hospitalizations for his medical condition. However, Grievant still experienced some sinus infections.

15. Thereafter, a day shift custodial position became available. Grievant had the opportunity to accept the day shift custodian position because he was the most senior custodian. Grievant accepted the day shift position, even though he could have chosen to remain on the evening shift.

16. As the day shift custodian, Grievant is the only custodian at the school during his shift. Therefore, Grievant is required to perform any custodial duties that may arise during his shift, including working with chemicals.

17. As the only custodian working during the day shift, it is more likely that

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[10] See Respondent's Exhibit 5.

Grievant would have to work around chemicals in the course of his normal workday than while working on the evening shift pursuant to the plan developed by Principal Bacchus.

18. When there is only one custodian working at the school, there is less opportunity for the administration to divide the custodial work so that Grievant's exposure to chemicals is minimized.

19. It was Grievant's decision to accept the day shift custodian position.

20. However, because of Grievant's medical condition, Principal Bacchus did not assign Grievant the duty of cleaning, stripping, or buffing the floors after Grievant accepted the day shift position in an effort to minimize Grievant's exposure to chemicals. Principal Bacchus assigned the floor cleaning duties to another custodian, even though it had previously been a day-shift custodian duty.

21. Grievant has mowed grass for Boone County Schools during the summers working a maintenance position(s) on which he has bid and received. This summer maintenance job is not mandatory, and is not part of Grievant's custodial position.

22. Mowing grass while working in the summer position has caused Grievant to have "flare-ups" with his sinus condition, and the same has contributed to his continued medical problems.

23. Based upon his doctor's suggestion, Grievant has worn surgical-type masks when mowing, but these masks have not prevented Grievant from having sinus problems as a result of the grass and dust. Respondent has provided these masks to Grievant.

Discussion

As this is not a disciplinary matter, Grievant bears the burden of proving his

grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R.1 § 3 (2008); *Howell v. W. Va. Dep't of Health 7 Human Res.*, Docket No. 89 DHS-72 (Nov. 29, 1990). "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). "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 and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence supports both sides equally, the Grievant has not met his burden. *Id.*

Grievant alleges that pursuant to W. VA. CODE §18A-4-8(o), Respondent is required to transfer him to a non-custodial position. Specifically, due to his medical condition, Grievant asks to be transferred to a maintenance position, such as a substitute pony driver, or a central office computer repair position performing general maintenance duties. Respondent has denied Grievant's request for a transfer.

It is well-settled that county boards of education have a 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 interest of the schools and in a manner which is not arbitrary and capricious." *Syl. Pt. 3, Dillon v. Wyoming County Board of Education*, 177 W.Va. 145, 351, S.E. 2d 58 (1986). "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 Resources*, 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*, 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 a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education. *See generally, Harrison v. Ginsberg*, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." *Trimboli, supra*.

Further, "[s]chool personnel regulations and laws are to be strictly construed in favor of the employee.' Syl. Pt. 1*, Morgan v. Pizzino*, 163 W. Va. 454, 256 S.E.2d 592 (1979)." Syl. Pt. 1*, Cruciotti v. McNeel,* 183 W. Va. 424, 396 S.E.2d 191 (1990); *State ex rel. Boner v. Kanawha County Bd. of Educ.*, 197 W. Va. 176, 475 S.E.2d 176 (1996). W. VA. CODE § 18A-4-8(o) states as follows: “Notwithstanding any provision of this code to the contrary, a service person who holds a continuing contract in a specific job classification and who is physically unable to perform the job’s duties as confirmed by a physician chosen by the

employee, shall be given priority status over any employee not holding a continuing contract in filling other service personnel job vacancies if the service person is qualified as provided in section eight-e [*§ 18A-4-8e*] of this article." W. VA. CODE § 18A-4-8(o).

However, W. VA. CODE § 18A-4-8b(g) requires county boards to post "all job vacancies of established existing or newly created positions." These jobs must be filled based on seniority, qualifications and evaluation of past service. W. VA. CODE §18A-4-8b(g). The Board is allowed no room to use its own discretion as to how to fill vacancies of existing positions, but must follow the Code requirements of posting and competitively filling the opening. *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001). "Service personnel vacancies are to be filled on the basis of seniority, qualifications and evaluation of past service. W. VA. CODE § 18A-4-8b." *Leishman v. Monongalia County Bd. of Educ.,* Docket No. 04-30-127 (Aug. 31, 2004).

Respondent has admitted that when it originally placed Grievant in the position of pony driver that position did not exist. Therefore, Respondent admittedly violated W. VA. CODE §18A-4-8b(g) when it placed Grievant in the pony driver position.[11] Such was not the fault of Grievant. Based upon the evidence presented, it appears that Superintendent Hudson was taking action to correct this mistake when returning Grievant to his custodial position at Madison Middle School. There had been a temporary Truck Driver/General Maintenance position posted and available. That position was filled by an employee with a continuing contract who had *more* seniority than Grievant. Therefore, Grievant, by the

[11] See Respondent's Exhibit 4, page 2.

terms of W. VA. CODE § 18A-4-8(o), should not have received that position.[12]

After working as a pony driver, but before he was returned to the custodial position, Grievant signed a contract for the 2008-2009 school year to temporarily fill a position of an employee who was off work. The contract was explicit that the term of employment in this position was only until the other employee returned to work.[13] Based upon the record, Grievant worked in this position until the other employee returned to work. At that point, Grievant was returned to his custodial position.

Grievant contends that based upon his medical condition, W. VA. CODE §18A-4-8(o) grants him the right to a transfer from his custodial position, no matter what, to another position, and that his bidding rights are to be given priority over all others. Clearly, the Code does not grant such rights to Grievant. The Code requires there be an existing position to which the employee can transfer; a position cannot be created for the employee with the medical condition. Further, any open position has to be posted properly. Pursuant to W. VA. CODE §18A-4-8(o), priority [bidding] status is only granted to the employee over others who are ***not holding a continuing contract*** (emphasis added). *See,* W. VA. CODE §18A-4-8(o). Therefore, Grievant is not entitled to a transfer pursuant to W. VA. CODE §18A-4-8(o).

Grievant further argued that based upon W. VA. CODE §18A-4-8(o) he should be transferred to one of the jobs in maintenance currently filled by substitutes. This argument also fails. W. VA. CODE § 18A-4-15 controls the procedures for filling temporary vacancies

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[12] See Respondent's Exhibit 4.

[13] See Respondent's Exhibit 3.

with substitute employees. As Grievant is a regular employee holding a continuing contract, he is not eligible to be assigned as a substitute employee.

From the evidence presented, Respondent has made efforts to accommodate Grievant's needs to enable him to perform the functions of his custodial position. Respondent has reorganized the custodians' shifts and assignments to try to minimize Grievant's exposure to chemicals. Even when Grievant accepted the day shift custodian position, knowing that his risk of exposure to chemicals would be increased because there is only custodian on the day shift, Respondent reassigned certain cleaning duties to the evening shift custodians, or other custodians, to reduce Grievant's risk of chemical exposure.

Grievant testified that his health has improved as a result the Respondent's actions to minimize his exposure to chemicals. However, Grievant testified that he still has some flare-ups and infections from time to time. There was no evidence presented that Grievant has had to endure any more surgeries since his job duties were modified. It is also noted that Grievant knowingly and voluntarily bids on and has received summer mowing positions, even though those positions cause Grievant to experience continued sinus problems, or flare-ups. Respondent has even attempted to accommodate Grievant in those positions by supplying him with surgical-type masks, as has been recommended by Grievant's physician. Grievant testified that these masks really do not help his condition.

Respondent's decision to deny Grievant's request for a transfer was not arbitrary or capricious. Respondent cannot transfer Grievant to a position that does not exist. The appropriate laws must be followed in filling service personnel vacancies. Further, Grievant's interpretation of W. VA. CODE § 18A-4-8(o) is flawed. Respondent has taken

numerous actions to try to accommodate Grievant's medical condition in performing his custodial duties, and Grievant has admitted that his health has improved as a result of these actions. Grievant has failed to prove by a preponderance of the evidence that Respondent's actions in denying his request for a transfer were arbitrary or capricious. Accordingly, this Grievance is DENIED.

Conclusions of Law

1. As this is not a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R.1 § 3 (2008); *Howell v. W. Va. Dep't of Health 7 Human Res.*, Docket No. 89 DHS-72 (Nov. 29, 1990). "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). "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 and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence supports both sides equally, the Grievant has not met his burden. *Id.*

2. County boards of education have a 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 interest of the schools and in a manner which is not arbitrary and capricious." *Syl. Pt. 3, Dillon v. Wyoming County Board*

of Education, 177 W.Va. 145, 351, S.E. 2d 58 (1986). "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 Resources*, 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*, 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)).

3. "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education. *See generally, Harrison v. Ginsberg*, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." *Trimboli, supra*.

4. "Notwithstanding any provision of this code to the contrary, a service person who holds a continuing contract in a specific job classification and who is physically unable to perform the job's duties as confirmed by a physician chosen by the employee, shall be given priority status over any employee not holding a continuing contract in filling other

service personnel job vacancies if the service person is qualified as provided in section eight-e [*§ 18A-4-8e*] of this article." W. VA. CODE § 18A-4-8(o).

5. W. VA. CODE § 18A-4-8b(g) requires county boards to post "all job vacancies of established existing or newly created positions." These jobs must be filled based on seniority, qualifications and evaluation of past service.

6. The Board is allowed no room to use its own discretion as to how to fill vacancies of existing positions, but must follow the Code requirements of posting and competitively filling the opening. *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001). "Service personnel vacancies are to be filled on the basis of seniority, qualifications and evaluation of past service. W. VA. CODE § 18A-4-8b." *Leishman v. Monongalia County Bd. of Educ.,* Docket No. 04-30-127 (Aug. 31, 2004).

7. Grievant has failed to meet his burden of proving that Respondent's denial of his request for a transfer was arbitrary or capricious.

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 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: August 1, 2011.

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CARRIE H. LEFEVRE
ADMINISTRATIVE LAW JUDGE