WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

GEORGE HOFFMAN, ET AL.,
Grievant,

v. **Docket No. 2010-0348-CONS**

MASON COUNTY BOARD OF EDUCATION,
Respondent.

D E C I S I O N

Grievants[1] initiated a grievance against Mason County Board of Education ("MCBE"), Respondent on September 14, 2009, protesting Respondent's method of filling a transportation assignment vacated by the retirement of a regular full-time employee. The group grievance filed alleges a violation of W. VA. CODE §§ 18A-4-8b, 18A-5-5b, 18A-4-16 and 6C-2-2. Respondent posted an assignment for a single bus operator. Grievants seek the assignment in question to be rotated among the (Wahama) area bus operators rather than posting the assignment, as is allegedly done with a similar assignment in another area of the county.[2]

A level one conference was held on November 4, 2009, and the grievance was denied at that level on November 30, 2009. Grievants appealed to level two on December

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[1] George Hoffman, Wayne Zirkle, Bruce Hendrickson, Roger Bumgardner, and Carol Smith, Grievants, are employed by Respondent as bus operators in the Wahama area of Mason County.

[2] The Grievance statement appealing to level 3 filed on April 13, 2010, stated:

> Respondent has posted the job of transportation of students from Wahama High School to the vocational school as a regular bus assignment. The job of transportation of students from Hannan High School to the vocational school has been rotated among the Hannan area bus operators for hourly compensation for years. Grievant contends that they are entitled to this same practice and allege a violation of W.Va. Code 18A-4-5b and 6C-2-2(d) & (h).
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> Relief Sought: Grievants seek rotation of the vocation assignment among regular bus operators in the Wahama area and compensation for lost wages from the beginning of the 2009-2010 school year with interest

8, 2009, and a mediation session was held on April 1, 2010. Grievants appealed to level three on April 13, 2010. A level three hearing was held before the undersigned Administrative Law Judge on July 8, 2010, in the Grievance Board's Charleston office. Grievant was represented by counsel, John E. Roush, West Virginia School Service Personnel Association. Respondent MCBE was represented by Gregory W. Bailey, Esquire of Bowles, Rice, McDavid, Graff & Love, LLP. This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on or about August 6, 2010. Both parties submitted fact/law proposals.

Synopsis

Grievants are bus operators employed by the Respondent County Board of Education in the Wahama area of Mason County. The assignment of transporting students from Wahama High School to the vocational school in Point Pleasant (Bus Route 2002) had been treated as a regular position for many years. Upon the resignation of the bus operator performing the duty, the assignment was posted several times and ultimately filled as a regular assignment. Grievants maintain that Respondent should/could rotate the assignment among the area bus operators just as certain 'vocational' assignments are rotated in the Hannan area of Mason County School District. Grievants contend that they are entitled to this same practice and allege a violation of W.Va. Code 18A-4-5b and 6C-2-2(d) & (h).

Grievants contend they are being denied a benefit made available to other bus operators employed by Respondent. Respondent maintains that its actions are lawful, and Grievants' request is unwarranted, unduly burdensome and speculative in nature. Grievants did not establish improper conduct by Respondent. Grievants did not

demonstrate that applicable code, rule, or regulation, in the circumstance(s) of this matter, requires Respondent to provide them the benefit they seek. Grievants have not established, by a preponderance of the evidence, that MCBE acted in a discriminatory or non-uniform manner. Accordingly, this grievance is **DENIED**.

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

Findings of Fact

1. George Hoffman, Wayne Zirkle, Bruce Hendrickson, Roger Bumgardner, and Carol Smith, Grievants, are employed as bus operators in the Wahama area of Mason County by the Mason County Board of Education, Respondent.

2. Respondent divides its transportation department into three geographic areas, roughly corresponding to the three high schools in the county. These three geographic areas are identified as Hannan, Point Pleasant and Wahama.

3. Most if not all bus runs involve transporting students from one location to another, however not all bus runs have the same designation. There are relevant W. VA. CODE definitions. The principle bus assignments involved in this matter have been identified as regular assignment bus runs and extracurricular assignments.[3]

4. There are differences in the Hannan and Wahama vocational bus run assignments. The Wahama assignment involves a distance of 11 miles, as compared to a distance of 26 miles for the Hannan assignment. The travel time from Wahama High

[3] The nomenclature for extracurricular bus runs and extra-duty assignments varies among school districts. In some districts, including Mason County schools, "supplemental" bus runs have the same meaning as extracurricular assignments, as defined by WEST VIRGINIA CODE § 18A-4-16. Extra-duty assignments, as defined by WEST VIRGINIA CODE § 18A-4-8b, are sometimes inappropriately referred to as extracurricular assignments and vice versa. This matter does not address extra-duty assignments.

School to the vocational school is 12 to 13 minutes, as compared to 46 to 48 minutes from Hannan High School to the vocational school. The Wahama High School assignment includes four round trips, as compared to one round trip for the Hannan High School assignment.

5. The assignment of transporting students from Wahama High School to the vocational school in Point Pleasant has been treated as a regular position for many years, and is currently referenced as Bus Route 2002 of the Wahama area of Mason County.

6. In the Hannan area, the assignment of transporting students from Hannan High School to the vocational school in Point Pleasant has been rotated among the bus operators assigned to the Hannan area for many years. The Hannan vocational run is considered to be a supplemental or extracurricular assignment.

7. During a meeting conducted on July 28, 2009, the Mason County Board of Education approved the resignation of Bus Operator Beverly Wilson, Route 2002, effective July 31, 2009.

8. The position of Bus Operator, Route 2002, was posted on July 30, 2009.

9. The vocational bus run assignment for Wahama High School was posted several times; July 30, 2009, August 26, 2009, and September 23, 2009. R. Ex. 2, 3, and 4. Ultimately, Bus Route 2002 was filled as a regular assignment.

10. In the Hannan area of Mason County, the vocational bus run has been rotated among the bus operators assigned to the Hannan area. It is not designated as a regular assignment with a designated bus operator. This generates more money for the bus operators of the Hannan area. Compensation is based upon the hourly rate of the driver while performing the assignment.

11. All of Respondent's identified postings of "Bus Operator, Route 2002" characterized the run as a regular assignment.

12. Motions were made to the Mason County Board to alter the designation of Route 2002. Both motions failed. Respondent specifically chose not to change the designation of Route 2002 to Supplemental Bus Run-AM and Supplemental Bus Run-PM. *See* September 22, 2009 Board Minutes, R. Ex. 5.

13. Grievants do not want Route 2002 awarded as a regular assignment. Grievants want Respondent to rotate the Wahama area vocational assignment (Route 2002) among the (nine) regular bus operators of the Wahama area as is done with an identified vocational bus assignment in the Hannan area of Mason County School district.

14. In order to rotate Bus Route 2002 among the Bus operators of the Wahama area, the dynamics of the assignment would need to be altered. It would be necessary to convert the Wahama regular bus run to one or two supplemental or extracurricular assignments (ie., Supplemental Bus Run-AM and Supplemental Bus Run-PM).

15. The circumstances which predicated the rotation of the Hannan area vocational assignment were not established or clarified by the parties.[4]

16. At the School Board meeting held on October 13, 2009, Stephen M. Patterson was awarded Route 2002, effective October 15, 2009. The vocational bus run

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[4] The Grievance Evaluator, at level one, indicated it was his "understanding that the resulting rotation basis for the Hannan Vocational Run was due to the fact that no single bus operator was willing to take the vocational run." *See* November 23, 2009 Level One Decision. However, it is not established, by any reliable evidence of record, why the identified Hannan area vocational bus assignment is regarded as a supplemental or extracurricular assignment. *See infra*., discussion pages 8-9.

assignment for Wahama High School, Route 2002 was awarded as a regular bus assignment.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Pursuant to the provisions of WEST VIRGINIA CODE § 18A-4-5b, boards of education are required to provide uniform benefits and compensation to similarly situated employees, meaning those who have "like classifications, ranks, assignments, duties and actual working days." *Bd. of Educ. v. Airhart*, 212 W. Va. 175, 569 S.E.2d 422 (2002).

Grievants argued that Respondent is in violation of the uniformity provision of WEST VIRGINIA CODE § 18A-4-5b. Grievants contend that they are being deprived of a benefit Respondent is providing similarly situated employees. Grievants allege discrimination and/or that Respondent's actions are arbitrary and capricious fostering economic damages (lost opportunity wages) to the bus operators of the Wahama area of Mason County.

Respondent maintains that it has not violated or misapplied any rule, statute, regulation or policy in posting and awarding the assignment in discussion. Respondent highlights that Grievants' contentions unduly usurp its authority to control and manage all of the schools and school interests for all school activities.[5] Further, Respondent emphasizes the speculative nature of Grievant's contentions, including: Grievant's failure to establish essential historical factual foundation; the uncertain nature of whether one (as identified in the written grievance) or two (as asserted by Counsel for the Grievants during the level 3 hearing) extracurricular assignments would be created; and if two were created, the identity and number of bus operators who would be involved in the rotation for each.

County boards have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel, but this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. *Dillon v. Bd. of Educ. of County of Wyoming,* 177 W. Va. 145, 351 S.E.2d 58 (1986). A board of education may redefine the duties of a school service personnel position, combine them with the duties of another position, or eliminate a position entirely. *Hambrick v. Mercer County Bd. of Educ.*, Docket No. 94-27-293 (Sept. 20, 1994); *Cox, supra.*

The standard by which to judge these actions is 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

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[5] If bus operators could on their own volition dictate bus assignments or mandate overtime opportunities, despite County School Board determination, such action would circumvent the inherent authority of County School Boards of Education.

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)).

Grievants perform the same general duties of their comparative-workers: they operate buses in Mason County. Grievants referenced the manner in which the vocational bus run assignment in the Hannan High School area is rotated among bus operators assigned to that area and demand the same opportunity. The undersigned is not persuaded of Grievants' alleged entitlement. WEST VIRGINIA CODE § 18A-4-5b provides that the county salary schedule shall be uniform throughout the county, however this provision cannot be applied to make every bus operator schedule uniform, to the degree contended by the instant grievance. Not all bus runs have the same designation nor does every cluster of bus assignments necessarily provide the same configuration of assignments.

The Wahama assignment involves a distance of 11 miles, as compared to a distance of 26 miles for the Hannan assignment. The travel time from Wahama High School to the vocational school is 12 to 13 minutes, as compared to 46 to 48 minutes from

Hannan High School to the vocational school. The Wahama High School assignment includes four round trips, as compared to one round trip for the Hannan High School assignment. Respondent argues that given the material differences in the scope and nature of the assignments, there is discretion with regard to the designation of the various bus assignments within the County. The undersigned ALJ agrees. The nomenclature assigned to a particular bus run is not determined in a vacuum. In addition to applicable code definition, length frequency, duration, destination, time period involved, type and number of students being transported can be essential factors for consideration when determining the designation of a particular bus run.

The Hannan vocational run is considered to be a supplemental or extracurricular assignment while the vocational bus run assignment for Wahama High School, Bus Route 2002, is designated a regular assignment. Grievants offered little evidence concerning how the method of rotating the assignment in the Hannan area came into being. This information, established by verifiable evidence of record, in all likelihood would have been enlightening perhaps even definitive. There are differences in the Hannan and Wahama vocational assignments. The former involves one round trip, whereas the latter apparently involves several round trips. There is also a difference in mileage between the vocational school and Hannan High School and the vocational school and Wahama High Schools.

In reviewing the actions of MCBE, the undersigned Administrative Law Judge does not find Respondent's actions to be arbitrary and capricious or an abuse of discretion. The relief sought by Grievants envisions the conversion of the Wahama regular bus run 2002 to one or two supplemental or extracurricular assignments. Respondent specifically chose not to change the designation of Route 2002 to two Supplemental Bus Runs. Finding of

Fact 12, citing September 22, 2009 Board Minutes, R. Ex. 5. The undersigned cannot find from the evidence presented that Respondent's actions were unreasonable. Rather, the evidence would suggest a difference of opinion on the subject of how best to designate the vocational Bus Route 2002. Considerable deference must be afforded Respondent. Grievants may want the opportunity to make more money during any given pay period, this is understandable. However bus operators are not empowered to dictate bus route assignments to a County School Board to the degree contended by this action. Grievants' actions tend to demonstrate their only motivation for the proposed alteration to Bus Assignment 2002 is self-centered financial gain. A measure of analysis applied to the overall circumstances indicates the implementation of Grievants' proposal is much more problematic than utilitarian.

County boards of education have broad discretion in determining the number and nature of assignments to be performed by service employees. Such discretion extends to determinations as to whether a particular assignment will be designated as a regular or an extracurricular assignment. *Dillon v. Cabell County Board of Education*, Docket No. 97-06-570 (May 28, 1998); *Fry v. Mercer County Board of Education*, Docket No. 07-27-011 (July 31, 2007). Grievants made no showing that Respondent abused its discretion in designating the Wahama High School vocational run as a regular bus operator assignment. Nor is it established that just because there exists an unencumbered bus run opportunity for an identified group of bus operators, that all other bus operators of the County have the right to identify a bus run in their district and dictate that the School Board provide them with opportunity to generate additional income.

Grievants also claimed discrimination and favoritism. For purposes of the grievance procedure, favoritism is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h). 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." W. VA. CODE § 6C-2-2(d). In order to establish a favoritism or discrimination 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 Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievants did not maintain this burden. The difference in treatment here, the difference in opportunity, is most readily identified as related to the responsibilities of the assignment. As set out above, the vocational runs in question are significantly different in length duration and frequency. Therefore, the difference in how they are designated, as regular and extra-curricular, relates to the actual job duties of the employees who perform them and is not discrimination as defined by the statute. See *Pickett v. Monongalia County Bd. of Educ.*, Docket No. 2009-0699-MonED (Dec 8, 2009).

Respondent has successfully defended its actions in the circumstances of this grievance. In summation, it is not established that Respondent has violated its considerable discretion in determining that Route 2002 is and shall remain a regular assignment. Alternative methods for making extracurricular assignments are contemplated by West Virginia Code §18A-4-16. However, it is not established that Respondent is required or should be compelled to reconfigure long standing bus assignment(s) to provide Grievants opportunity to generate additional income.

Grievants highlight that certain co-workers have an opportunity to perform additional duties. Grievants would welcome the same type of opportunity. As previously stated, this is understandable. However, Grievants did not establish that this situation was discrimination and/or favoritism as envisioned for purposes of the grievance procedure, defined by W. VA. CODE § 6C-2-2. WEST VIRGINIA CODE § 18A-4-5b provides that the county salary schedule shall be uniform throughout the county; however this provision cannot be applied to make all bus schedules uniform, to the degree contended by the instant grievance. Bus routes vary and a cluster of bus assignments differs in numerous characteristics. Grievants have not demonstrated sufficient justification to compel Respondent, without its voluntary compliance, to alter the designation of bus assignment 2002. Respondent is not required to make the alterations requested by Grievants in the circumstance(s) of this matter, solely to generate additional financial opportunity for Grievants.

Conclusions of Law

1. In a non-disciplinary matter, Grievants have the burden of proving their case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance

Board, 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 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).

2. Pursuant to the provisions of WEST VIRGINIA CODE § 18A-4-5b, boards of education are required to provide uniform benefits and compensation to similarly situated employees, meaning those who have "like classifications, ranks, assignments, duties and actual working days." *Bd. of Educ. v. Airhart*, 212 W. Va. 175, 569 S.E.2d 422 (2002).

3. WEST VIRGINIA CODE § 18A-4-5b provides that the county salary schedule shall be uniform throughout the county. This provision however cannot be applied to make all bus operator schedules uniform, to the degree contended by the instant grievance. *Also See, Prickett v. Monongalia County Bd. of Educ.*, Docket No. 2009-0699 (Dec. 8, 2009).

4. County boards have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel, but this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. *Dillon v. Bd. of Educ. of County of Wyoming,* 177 W. Va. 145, 351 S.E.2d 58 (1986).

5. County boards of education have broad discretion in determining the number and nature of assignments to be performed by service employees. Such discretion extends to determinations as to whether a particular assignment will be designated as a regular or an extracurricular assignment. *Dillon v. Cabell County Board of Education*,

Docket No. 97-06-570 (May 28, 1998); *Fry v. Mercer County Board of Education*, Docket No. 07-27-011 (July 31, 2007).

6. "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).

7. MCBE did not act in an arbitrary and capricious manner or abuse its discretion when it specifically decided not to reconfigure a regular full-time assignment into two extracurricular assignments.

8. Grievant did not demonstrate that Respondent's actions were arbitrary and capricious or an abuse of discretion.

9. 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." W. VA. CODE § 6C-2-2(d). In order to establish a favoritism or discrimination 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,

(c) that the difference in treatment was not agreed to in writing by the employee.

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

10. Grievants did not demonstrate favoritism or discrimination in the facts of this matter.

11. Grievants failed to establish that Respondent's action was contrary to law, rule or policy and/or was in any other way improper.

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: January 31, 2011

Landon R. Brown
Administrative Law Judge