THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JERRY LEE RUSSELL and
JERROD B. CHRISTIAN,
Grievants,

v. **Docket No. 2010-1032-CONS**

WAYNE COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievants, Jerry Lee Russell and Jerrod B. Christian, filed a grievance against Respondent, Wayne County Board of Education, on February 8, 2010. The statement of grievance reads,

> Grievants contend that Cliff Maynard, another bus operator, has been paid for an extracurricular assignment which was simply assigned to him and never posted. Further, Grievant Christian performs a like assignment without compensation. Grievants allege a violation of W.Va. Code 18A-4-8b, 18A-4-5b, and 6C-2-2(d) & (h).

As relief Grievants seek:

> Grievant Russell seeks posting of the assignment in question. Both Grievants seek back pay with interest to the maximum extent permitted by law.

A level one hearing was held on March 19, 2010. The grievance was denied at that level on March 30, 2010. A level two mediation was conducted on August 2, 2010. A level three hearing was held on December 1, 2010 before the undersigned at the Public Employees Grievance Board in Charleston, WV. Grievants were represented by counsel, John Roush, Esq., of the West Virginia School Service Personnel Association ("WVSSPA"), and Respondent was represented by its counsel, David Lycan, Esq. This

matter became mature for decision on January 14, 2011, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievants are both employed by Respondent as regular bus operators. Respondent filled an extracurricular assignment without posting it. Grievant Christian asserts he previously performed a similar extracurricular assignment and seeks back pay. Grievant Russell asserts he would have been the selected candidate if the assignment had been posted and seeks back pay. Respondent argues that Grievant Christian did not previously perform a duty that qualifies as an extracurricular assignment and that Grievant Russell could not have logistically performed the extracurricular assignment in question.

Grievants proved that Respondent violated W.VA. CODE §§ 18A-4-16 & 18A-4-8b by not posting the assignment. Grievant Christian failed to prove he previously performed an extracurricular assignment. Grievant Russell failed to prove he logistically could have performed the extracurricular assignment. Because the assignment is no longer needed and Grievants failed to prove an entitlement to back pay, Respondent's actions constitute a harmless error.

Findings of Fact

1. Both Grievants and Cliff Maynard are employed by Respondent as regular bus operators.

2. On January 19, 2010, Grievants discovered that regular bus operator Cliff Maynard was receiving extra pay for an extracurricular assignment.

3. The extracurricular assignment performed by Mr. Maynard had never been

posted.

4. Mr. Maynard began receiving payment for the extracurricular bus run on or about September 9, 2008.

5. Mr. Maynard performed the extracurricular bus run in the 2008-2009 and 2009-2010 school years. The need for this extracurricular run ended at the conclusion of the 2009-2010 school year and is no longer in existence.

6. The extracurricular assignment consisted of picking up an aide[1] at East Lynn Elementary ("ELE") at 6:32 a.m. and transporting her to the point where a special needs student boards the bus at 6:42 a.m. Mr. Maynard would then continue with his regular bus route and return the aide, special needs student and other ELE students to ELE. Mr. Maynard would then continue along his regular route to pick up and deliver middle school and high school students to Wayne Middle School and Wayne High School. In the afternoon along his reverse route, Mr. Maynard would pick up Ms. Perry and the special needs student at ELE, as well as his other ELE students, and return all the students to their residences. After completing his regular run, he would begin his extracurricular bus run of transporting Ms. Perry back to ELE.

7. The extracurricular bus run involved approximately twenty (20) minutes of extra drive time for Mr. Maynard outside his regular bus route.

8. The school day at ELE begins at 7:50 a.m.

9. On a former regular bus run, Grievant Christian picked up an aide at a school

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[1]The aide, Linda Perry, was the school secretary at East Lynn Elementary who had agreed to perform the duty of an aide for extra pay as a result of the unavailability of a regular aide to perform the duty. Ms. Perry was qualified as an aide.

along his regular bus route. He did not have to go out of his way or have to start earlier or stay later in transporting the aide along his regular bus route.

10. Grievant Christian changed bus routes on or about February 4, 2010 and no longer performs the duty in question. He had been transporting an aide on his former regular bus run for approximately three years, up until February 4, 2010, without receiving extra pay.

11. Grievant Russell has more regular county bus operator seniority than Mr. Maynard.

12. Grievant Russell begins picking up students on his regular morning bus run at 6:38 a.m. He arrives at ELE to begin delivery of his student passengers at 7:06 a.m. Grievant Russell's regular afternoon bus run begins at 3:35 p.m.

13. After delivering student passengers to ELE, all bus operators are required to make a post trip inspection before leaving school premises.

14. Ms. Perry's regular workday as ELE's school secretary begins at 7:15 a.m. and ends at 3:15 p.m.

Discussion

As this grievance is not about discipline, Grievants must prove their claim by a preponderance of the evidence, which means they must provide enough evidence for the undersigned Administrative Law Judge to decide that their claim is more likely valid than not. *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievants have not met their burden. *Id.*

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*.

Mr. Maynard performs an extracurricular bus run assignment in the morning and afternoon by picking up an aide to ride along with a special needs student. Mr. Maynard

picks up the aide, then performs his regular bus run. Grievant Christian argues that he previously performed the same extracurricular duties that Mr. Maynard performed by picking up a school aide to assist a special needs student. Grievant Christian seeks back pay for his previous transportation of a school aide.

Grievant Christian picked up the assigned school aide at ELE along his regular bus route. He did not stray from his regular bus route nor did he have to start his regular bus route earlier or stay later. W.VA. CODE § 18A-4-16 states:

> Extracurricular duties shall mean, but not be limited to, any activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis: Provided, that all school service personnel assignments shall be considered extracurricular assignments, except such assignments as are considered either regular positions, as provided by section eight of this article, or extra-duty assignments, as provided by section eight-b of this article.

Grievant Christian's transportation of an aide in the morning and evening occurring during his regular workday does not meet the definition of an extracurricular duty. In contrast, Mr. Maynard's transportation of an aide occurring outside his regularly scheduled daily run assignment and outside his regularly scheduled work hours does constitute an extracurricular duty. Grievant Christian failed to demonstrate an entitlement to back pay.

Grievant Russell argues that he holds greater seniority as a regular bus operator than Mr. Maynard and had this particular extracurricular bus run assignment been posted by Respondent, he would have bid upon the assignment. Grievant Russell argues that he would have been the successful applicant for the position due to the seniority of regular bus operators who would have bid upon this assignment. Grievant Russell seeks back pay.

First, Respondent's admitted failure to post the assignment must be addressed. WEST VIRGINIA CODE § 18A-4-16(5) states that extracurricular school service personnel assignments and vacancies shall be filled pursuant to WEST VIRGINIA CODE § 18A-4-8b, unless an alternative procedure has been approved. No alternative procedure was presented by the parties. WEST VIRGINIA CODE § 18A-4-8b requires school service personnel positions to be filled on the basis of seniority, qualifications and evaluation of past service. Respondent admits that the extracurricular school run assignment previously performed by Mr. Maynard had never been posted. Respondent was clearly violating West Virginia Code by not posting the assignment. The undersigned would require the assignment to be posted for the next school year, however the assignment ended at the conclusion of the 2009-2010 school year and is no longer in existence. If Respondent encounters the same situation for a future school year, Respondent must follow WEST VIRGINIA CODE §§ 18A-4-16 and 18A-4-8b and post the extracurricular assignment, unless an approved alternative procedure is in effect.

Normally, "[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977); *Bailey v. W. Va. Dept. of Transp.*, Docket No. 94- DOH-389 (Dec. 20, 1994). However, failure to adhere to established procedures does not always mandate that the action taken must be considered null and void. Whether the grievant suffered significant harm as a result of the procedural error must also be considered. *McFadden v. W. Va. Dept of Health and Human Resources*, Docket No. 94-HHR-428 (Feb. 17, 1995). In addition to demonstrating that the error actually occurred, it must also be shown that the error influenced the outcome. Otherwise, if the same result would have inevitably been

reached, the procedural violation constitutes "harmless error." *Bradley v. Cabell County Bd. of Educ.*, Docket No. 99-06-150 (Sept. 9, 1999); *Dadisman v. W. Va. Div. of Rehabilitation Serv.*, Docket Nos. 98-RS-023/040 (Mar. 25, 1999). *See generally Parker v. Defense Logistics Agency*, 1 M.S.P.B. 489 (1980). *Martin v. Pleasants County Bd. of Educ.*, Docket No. 2008-0197-PLEED (Jan. 31, 2008).

Grievant Russell failed to demonstrate that had the extracurricular assignment been posted he would have been awarded the assignment or that he would have been logistically able to perform the assignment due to his regular bus run schedule. Grievant Russell argues in his proposed findings of fact and conclusions of law at level three that the only regular bus operator with more seniority than Grievant, David Crisel, provided testimony at level one that he already performed an extracurricular assignment. Upon review of the transcript of the level one hearing, the undersigned did not find testimony by Mr. Crisel stating he already performed an extracurricular assignment or alluding that he would not have performed the assignment in question if the opportunity presented itself.

Grievant Russell proposed ways in which he could have performed the extracurricular assignment without interference with his regular bus run schedule but Respondent pointed out logistical difficulties. Grievant Russell argued he could have picked up the aide after completing his regular run, transported the aide to the special needs student's residence, then returned both to ELE. This proposal did not take into consideration that Ms. Perry's work day at ELE as a school secretary began at 7:15 a.m. Grievant Russell's proposal would not have Ms. Perry at the school in time to start her regular workday. Likewise, Grievant Russell's proposal for the afternoon run required Ms. Perry and the special needs student to leave ELE at 3:00 p.m. so that he could deliver the

student to the student's residence and return Ms. Perry to ELE in time to begin picking up student passengers for his regular evening run at 3:35 p.m. Ms. Perry's regular workday as school secretary concludes at 3:15 p.m. The evening proposal would have required Ms. Perry to end her regular workday early. Ms. Perry was the only employee willing and available to perform this particular aide duty during the 2008-2009 and 2009-2010 school years.

Grievant Russell also proposed that he could have picked up Ms. Perry prior to the beginning of his regular morning run which begins at 6:38 a.m. and delivered her to the residence of the special needs student. Ms. Perry would have then waited there to be picked up along with the special needs student by Mr. Maynard as part of his regular morning run. Mr. Maynard arrives at the special needs student's bus stop along his regular morning run at 6:42 a.m. Under this proposal, Ms. Perry would be required to wait in all weather and elements at the special needs student's bus stop for at least 10 minutes between Grievant Russell's drop off time and Mr. Maynard's pick up time.

It is not arbitrary and capricious for a board of education to deny an employee the opportunity to perform an extracurricular run when logistical problems exist. *Russell v. Wayne Co. Bd. of Educ.*, Docket No. 02-50-041 (March 25, 2002); *see Smith v. Putnam Co. Bd. of Educ.*, Docket No. 99-40-058 (April 2, 1999); *Garner v. Monongalia Co. Bd. of Educ.*, Docket No. 05-30-164 (Sept. 16, 2005). Respondent adequately pointed out the logistical problems to Grievant Russell's proposals. The testimony indicates that legitimate questions existed as to Grievant's logistical ability to perform the extracurricular assignment. Grievant Russell failed to demonstrate an entitlement to back pay.

Grievants assert discrimination and favoritism. "Discrimination" is defined by statute

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). "Favoritism" is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee" unless agreed to in writing or related to actual job responsibilities. W. VA. CODE § 6C-2-2(h). In order to establish either a discrimination 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 Education Policy Comm., 655 S.E.2d 52 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

Grievants have failed to establish discrimination and/or favoritism under the facts presented. Grievant Christian previously picking up an aide along his regular bus assignment did not constitute an extracurricular assignment. Respondent proved that Grievant Russell logistically could not have performed the extracurricular assignment.

Conclusions of Law

1. As this grievance is not about discipline, Grievants must prove their claim by a preponderance of the evidence, which means they must provide enough evidence for the undersigned Administrative Law Judge to decide that their claim is more likely valid than

not. *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievants have not met their burden. *Id.*

2. 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).

3. "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).

4. " 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*.

5. W.VA. CODE § 18A-4-16 states:

> Extracurricular duties shall mean, but not be limited to, any activities that occur at times other than regularly scheduled working hours, which include

> the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis: Provided, that all school service personnel assignments shall be considered extracurricular assignments, except such assignments as are considered either regular positions, as provided by section eight of this article, or extra-duty assignments, as provided by section eight-b of this article.

6. WEST VIRGINIA CODE § 18A-4-16(5) states that extracurricular school service personnel assignments and vacancies shall be filled pursuant to WEST VIRGINIA CODE § 18A-4-8b, unless an alternative procedure has been approved.

7. WEST VIRGINIA CODE § 18A-4-8b requires school service personnel positions to be filled on the basis of seniority, qualifications and evaluation of past service.

8. Grievants met their burden of proof in demonstrating that Respondent violated the applicable law and failed to post the extracurricular assignment.

9. Normally, "[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977); *Bailey v. W. Va. Dept. of Transp.*, Docket No. 94-DOH-389 (Dec. 20, 1994). However, failure to adhere to established procedures does not always mandate that the action taken must be considered null and void. Whether the grievant suffered significant harm as a result of the procedural error must also be considered. *McFadden v. W. Va. Dept of Health and Human Resources*, Docket No. 94-HHR-428 (Feb. 17, 1995).

10. In addition to demonstrating that the error actually occurred, it must also be shown that the error influenced the outcome. Otherwise, if the same result would have inevitably been reached, the procedural violation constitutes “harmless error.” *Bradley v. Cabell County Bd. of Educ.*, Docket No. 99-06-150 (Sept. 9, 1999); *Dadisman v. W. Va.*

Div. of Rehabilitation Serv., Docket Nos. 98-RS-023/040 (Mar. 25, 1999). *See generally Parker v. Defense Logistics Agency*, 1 M.S.P.B. 489 (1980). *Martin v. Pleasants County Bd. of Educ.*, Docket No. 2008-0197-PLEED (Jan. 31, 2008).

11. It is not arbitrary and capricious for a board of education to deny an employee the opportunity to perform an extracurricular run when logistical problems exist. *Russell v. Wayne Co. Bd. of Educ.*, Docket No. 02-50-041 (March 25, 2002); *see Smith v. Putnam Co. Bd. of Educ.*, Docket No. 99-40-058 (April 2, 1999); *Garner v. Monongalia Co. Bd. of Educ.*, Docket No. 05-30-164 (Sept. 16, 2005).

12. Grievant Russell failed to demonstrate that had the extracurricular assignment been posted he would have been awarded the assignment and/or that he would have been logistically able to perform the assignment due to his regular bus run schedule.

13. Grievant Christian failed to demonstrate that his previous transportation of an aide in the morning and evening occurring during his regular workday meets the definition of an extracurricular duty.

14. "Discrimination" is defined by statute 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).

15. "Favoritism" is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee" unless agreed to in writing or related to actual job responsibilities. W. VA. CODE § 6C-2-

2(h).

16. In order to establish either a discrimination 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,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

17. Grievants have failed to establish discrimination and/or favoritism under the facts presented.

Accordingly, this grievance is **GRANTED**, in part, and **DENIED**, in part.

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).

Jennifer Lea Stollings-Parr
Administrative Law Judge

Date: May 19, 2011