THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JANET L. EPLING,
Grievant,

v. **Docket No. 2011-0036-BooED**

BOONE COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Janet L. Epling, filed a grievance against Respondent, Boone County Board of Education, on July 9, 2010. Grievant asserts a less senior applicant was awarded an extracurricular assignment for which Grievant had applied. As relief, Grievant seeks an award of the assignment for Secretary II/III Substitute Call Out Person for Summer Custodian Positions, benefits and back pay for Summer 2010, and seniority rights.

A level one conference was held on July 20, 2010. The grievance was denied at that level on July 23, 2010. A level two mediation was conducted on September 16, 2010. A level three hearing was held on May 4, 2011 before the undersigned at the Public Employees Grievance Board in Charleston, West Virginia. Grievant was represented by counsel, John Roush, Esq., of the West Virginia School Service Personnel Association ("WVSSPA"), and Respondent was represented by its counsel, Timothy R. Conaway, Esq. This matter became mature for decision on June 21, 2011, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant argues that she should have been awarded summer substitute call out position, Job No. 4, in addition to Job No. 3. Respondent asserts that because the summer programs have expanded due to a new federal grant, the amount of time necessary to fulfill the assignment's duties of calling out substitutes for a particular classification was unknown. As such, Respondent decided that at least for the first year of the newly expanded summer programs, the call out positions would be posted as four separate jobs to be awarded to four separate applicants.

Grievant has failed to prove by a preponderance of the evidence that Respondent's decision was arbitrary and capricious, therefore, this grievance is denied.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant, Janet L. Epling, is employed by Respondent, Boone County Board of Education, as an Executive Secretary in the Central Office's transportation department.

2. Grievant has a seniority date of August 7, 1978.[1]

3. On June 22, 2010, Respondent posted four positions for summer employment. The positions would call substitutes for particular classifications to fill in for absent service personnel working in the 2010 summer programs offered by Respondent. The four positions posted were as follows:

    1. Secretary II/III Substitute Call Out Person for Summer Cook Positions

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[1] *See* Grievant's Exhibit No. 2.

2. Secretary II/III Substitute Call Out Person for Summer Teaching Aide Positions
3. Secretary II/III Substitute Call Out Person for Summer Bus Operator Positions
4. Secretary II/III Substitute Call Out Person for Summer Custodian Positions

The posting[2] directs applicants to "complete a priority sheet when bidding on more than one position."

5. Grievant filed a bid on the required form sheet.[3]

6. In the blank on the bid form to list positions for which the applicant is applying, Grievant listed "Substitute Call Out Person for Summer."

7. The bid form included space for applicants to list the order of preference "if posting includes more than one position." Grievant listed her preferences as follows:

1. Job No. 3 (Secretary II/III Substitute Call Out Person for Summer Bus Operator Positions)
2. Job No. 2 (Secretary II/III Substitute Call Out Person for Summer Teaching Aide Positions)
3. Job No. 4 (Secretary II/III Substitute Call Out Person for Summer Custodian Positions)
4. Job No. 1 (Secretary II/III Substitute Call Out Person for Summer Cook Positions)

8. Grievant wanted to fill as many of the positions as possible.

9. Grievant was awarded her first preference, Job No. 3, the position for Secretary II/III Substitute Call Out Person for Summer Bus Operator Positions.

10. Helen Baldwin, a Secretary with more seniority than Grievant, was awarded her first preference, Job No. 1, Secretary II/III Substitute Call Out Person for Summer Cook

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[2]Respondent's Exhibit No. 1.

[3]Respondent's Exhibit No. 3.

Positions.

11. Cindy Chandler, a Secretary with less seniority than Grievant, was awarded Job No. 4, Secretary II/III Substitute Call Out Person for Summer Custodian Positions.

12. Barbara Stone, a Secretary with more seniority than Grievant, was awarded Job No. 2, Secretary II/III Substitute Call Out Person for Summer Teaching Aide Positions.

13. The time required for calling substitutes varies.

14. Grievant spent on average one to one and one-half hours per day calling substitute bus operators in the summer of 2010.

15. In previous years when an employee would bid on more than one extracurricular assignment, in addition to the employees regular duties, Respondent's Executive Secretary, Denise Banks, would consult with Administration on whether or not the Administration believes that one employee could handle both jobs. If the duties of both jobs permitted an employee to successfully perform the functions of both jobs, the employee was allowed to fill both jobs.

16. Respondent received federal grant money to expand the summer school program in 2010. Compared to previous summers, more summer programs were held in 2010, and more schools participated. As such, Respondent was uncertain as to how much time would be consumed in calling out substitutes.

17. John Hudson, Superintendent of Schools of Boone County, posted the call out positions as four separate jobs to ensure that the persons selected for the jobs would have ample time to call out substitute employees and ensure adequate staffing at the schools each day. Superintendent Hudson made the decision that it would be in the best interest of the school system to have four different people call out the four different

employee classifications, at least for the first summer of the expanded summer school program.

18. It was Respondent's intent to monitor the newly expanded summer program in 2010 and decide in future years whether or not four separate employees are needed to call out substitutes in more than one classification.

Discussion

As this grievance is not about discipline, Grievant must prove her claim by a preponderance of the evidence, which means she must provide enough evidence for the undersigned Administrative Law Judge to decide that her 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 Grievant has not met her burden. *Id.*

It is well-settled that "county 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 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*.

Grievant asserts that under W.VA. CODE § 18A-4-8h, she is not prohibited from holding more than one extracurricular assignment or summer assignment. Grievant argues that because she has more seniority than Cindy Chandler, Grievant should have been awarded Job No. 4, in addition to Job No. 3. Respondent asserts that because the summer programs have expanded due to a new federal grant, the amount of time necessary to fulfill the assignment's duties of calling out substitutes for a particular classification was unknown. As such, Respondent decided that at least for the first year of the newly expanded summer programs, the call out positions would be posted as four separate jobs to be awarded to four separate applicants.

The positions in question involve calling out substitutes within certain classifications for Respondent's summer program. In regard to summer school programs, W.VA. CODE

§ 18-5-39(f) states in part:

> Notwithstanding any other provision of the code to the contrary, the county board may employ school service personnel to perform any related duties outside the regular school term as defined in section eight, article four, chapter eighteen-a of this code. An employee who was employed in any service personnel job or position during the previous summer shall have the option of retaining the job or position if the job or position exists during any succeeding summer. If the employee is unavailable or if the position is newly created, the position shall be filled pursuant to section eight-b, article four, chapter eighteen-a of this code.

Neither party asserted that the position in question, Job No. 4, should have been retained by an employee who held the position during summer 2009. The undersigned can only infer that the position for Secretary II/III Substitute Call Out Person for Summer Custodian Positions did not exist in the previous summer.

W.VA. CODE § 18A-4-8h provides:

> Upon the effective date of this section, no school service personnel shall be permitted to become employed in more than one regular full-day position, nor more than two one-half day positions at the same time: *Provided,* That nothing herein shall be construed to prohibit a school service personnel from holding an extracurricular assignment or assignments, as provided in section sixteen of this article, or summer positions, as provided in section thirty-nine, article five, chapter eighteen of this code, nor from performing extra-duty assignments, as provided in section eight-b of this article, in addition to his or her regular position.

Denise Banks, Executive Secretary for Respondent for personnel, testified that when an employee bids on more than one position where the positions are in addition to the employee's regular duties, she consults with Administration on whether or not Administration believes that one employee could handle both jobs. If the duties of both jobs permit an employee to successfully perform the functions of both jobs, an employee is allowed to fill both jobs.

This Grievance Board has held that it is not arbitrary and capricious for a board of education to deny a bus operator 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). The same logic can be applied to the summer substitute call out positions in the present matter. Respondent's discretion to limit one summer substitute call out position to one employee because Respondent was unaware during the first year of the summer school expansion how much time would be needed to call out substitutes, was not unreasonable. Because the expanded summer program was unprecedented, Respondent's decision to err on the side of caution in making sure the positions logistically had adequate time to perform the required functions, was not arbitrary or capricious.

Grievant has failed to prove by a preponderance of the evidence that Respondent's decision was arbitrary and capricious. Accordingly, this grievance is DENIED.

Conclusions of Law

1. As this grievance is not about discipline, Grievant must prove her claim by a preponderance of the evidence, which means she must provide enough evidence for the undersigned Administrative Law Judge to decide that her 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 Grievant has not met her 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. 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)).

5. " 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*.

6. W.VA. CODE § 18-5-39(f) states in part:

> Notwithstanding any other provision of the code to the contrary, the county board may employ school service personnel to perform any related duties outside the regular school term as defined in section eight, article four, chapter eighteen-a of this code. An employee who was employed in any service personnel job or position during the previous summer shall have the option of retaining the job or position if the job or position exists during any succeeding summer. If the employee is unavailable or if the position is newly created, the position shall be filled pursuant to section eight-b, article four, chapter eighteen-a of this code.

7. W.VA. CODE § 18A-4-8h provides:

> Upon the effective date of this section, no school service personnel shall be permitted to become employed in more than one regular full-day position, nor more than two one-half day positions at the same time: *Provided,* That nothing herein shall be construed to prohibit a school service personnel from holding an extracurricular assignment or assignments, as provided in section sixteen of this article, or summer positions, as provided in section thirty-nine, article five, chapter eighteen of this code, nor from performing extra-duty assignments, as provided in section eight-b of this article, in addition to his or her regular position.

8. Grievant has failed to prove by a preponderance of the evidence that Respondent's decision to limit one substitute call out position to one employee during the initial year of the expanded summer program was arbitrary and capricious. *See Russell v. Wayne Co. Bd. of Educ.*, Docket No. 02-50-041 (March 25, 2002); *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).

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: July 27, 2011

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Jennifer Lea Stollings-Parr
Administrative Law Judge