THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KRISTY MARIE JARRELL,
Grievant,

v. **Docket No. 2011-1835-CONS**

BOONE COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Kristy Marie Jarrell, filed a grievance against Respondent, Boone County Board of Education, on October 1, 2010. The grievance was Docket No. 2011-0462-BooED and asserted that Respondent was not providing her "established hours for daily work schedule." As relief Grievant sought a "daily work schedule." A level one conference was held on November 9, 2010. The grievance was denied at that level. A level two mediation was held on February 22, 2011. On February 24, 2011, Grievant filed grievance Docket No. 2011-1258-BooED. That grievance asserted that Grievant was not receiving payment for performing a mid-day assignment. The grievance alleged violations of favoritism and discrimination. As relief Grievant sought compensation for performance of her mid-day assignment and back pay with interest. The parties agreed to waive Grievance Docket No. 2011-1258-BooED directly to level three of the grievance procedure.

Prior to the commencement of the level three hearing, the grievances were consolidated as Docket No. 2011-1835-CONS. A level three hearing was held on June 22, 2011, before the undersigned at the Public Employees Grievance Board in Charleston,

WV.[1] Grievant was represented by John E. Roush, Esq., West Virginia School Service Personnel Association. Respondent was represented by Timothy R. Conaway, Esq., Conaway & Conaway Attorneys at Law. This matter became mature for decision on July 25, 2011, upon final receipt of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant asserts that she should either be compensated for performing an extracurricular mid-day bus run or compensated with overtime pay for the time she works past 3:30 p.m. on Monday through Thursday. Respondent argues that Grievant is not performing an extracurricular run and that Grievant does not work over 40 hours a week. Grievant failed to prove that she performs an extracurricular run or that she works in excess of 40 hours in a workweek.

Grievant argues violations of favoritism, discrimination and uniformity. Grievant failed to demonstrate that she is similarly situated to an employee who receives extra compensation for performing like duties and assignments.

Findings of Fact

1. At the time the grievances arose, Grievant was employed as a bus operator/custodian for Respondent.

2. Respondent posted a vacancy[2] on August 11, 2010, for a bus operator/custodian position. The bus operator component constituted 80% of the position

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[1]At the level three hearing, Respondent moved to dismiss grievance Docket No. 2011-0462-BooED, asserting the issue is now moot because a new schedule has been developed. Grievant argued that the issue is not moot because Grievant seeks back pay. The motion to dismiss is denied.

[2]Grievant's Exhibit No. 3.

and required driving the special needs bus in the Scott and Van areas of Boone County. The custodian component constituted 20% of the position and was itinerant countywide. The attachment to the posting set out that the bus operator component would involve driving the bus Monday, Tuesday, Wednesday and Thursday. The custodian component of the position was to be performed on Friday. The attachment's Duties and Responsibilities' section listed, in part, the following:

> The hours of operation will encompass an eight (8) hour work day (7:30 am - 3:30 pm). The operator will be responsible for loading and unloading students and may be required to lift students. The schedule will be subject to change as additional students and needs are identified.
> ....
> The operator will also be responsible for additional duties as assigned by the Director of Exceptional Children.

3. The Terms of Employment section of the job posting's attachment[3] set out the following: "Schedule may vary depending on need."

4. Grievant bid upon the posting and was awarded the bus driver/custodian position.

5. Grievant performed the following bus operator schedule during the 2010-2011 school year:

Beginning at 7:30 a.m. and concluding at 8:50 a.m.

- Pre-trip bus inspection
- Pick up children at their homes and deliver them to Brookview Elementary
- Return bus to the bus shack

Beginning at 11:00 a.m. and concluding at 12:50 p.m.

- Pre-trip bus inspection
- Pick up children at Brookview Elementary and deliver them to their homes
- Pick up children for the afternoon session and deliver them to Brookview Elementary
- Return bus to bus shack

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[3] *See Id.*

Beginning at 2:45 p.m. and concluding at 4:35 p.m.

- Pre-trip bus inspection
- Pick up children at Brookview Elementary and deliver them to their homes
- Return bus to bus shack

6 Grievant works five hours a day as a bus operator on Monday - Thursday.

7. The special needs bus run picks up students who have been identified as having special needs. It is sometimes difficult to load and unload these students because of their special needs. The population of special needs students served varies from year to year, and within the school year.

8. The special needs bus needs to go where the special needs students are located. The special needs bus is different from a bus route that picks up students in a certain area and transports them to school. Special needs students may be spread over a relatively wide area.

Discussion

Since 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 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*.

Grievant asserts that she should either be compensated for performing an extracurricular mid-day run or compensated with overtime pay for the time she works past 3:30 p.m. on Monday - Thursday. Respondent argues that Grievant is not performing an extracurricular run and that Grievant does not work over 40 hours a week.

Grievant argues that her 11:00 a.m.- 12:50 p.m. run is an extracurricular mid-day

run. This run consists of a pre-trip bus inspection, picking up students from the morning session at Brookview Elementary School, dropping off the students from the morning session at their homes, picking up students at their homes for the afternoon session at Brookview Elementary School, dropping off the students at Brookview Elementary School for the afternoon session, then returning the bus to the bus shack. 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.

Further, the statute provides that such assignments "shall be made only by mutual agreement of the employee and the superintendent" and the agreement must be contained in a contract separate from the employee's regular employment contract.

Grievant's bus operator duties performed between 11:00 a.m. - 12:50 p.m. on Monday - Thursday, are part of Grievant's regular curricular run. Grievant's regular curricular run fundamentally consists of transporting special needs students to and from Brookview Elementary School for a morning session and an afternoon session. Grievant has failed to prove that she performs an extracurricular mid-day run. Grievant's request for compensation for a mid-day run is denied.

Grievant argues that if it is determined that she is not performing an extracurricular mid-day run, then she should receive overtime pay for the time she works past 3:30 p.m.

on Monday - Thursday. Grievant is correct in asserting that she should be compensated for overtime work. However, the undersigned does not find the hour and five minutes she works past 3:30 p.m. on Monday - Thursday constitutes overtime. The Federal Fair Labor Standards Act (FLSA) establishes that employees covered by the FLSA must receive overtime pay for hours worked in excess of 40 in a workweek. Grievant works five hours a day each day on Monday - Thursday. On Friday, Grievant works 8 hours as a custodian from 7:00 a.m. - 3:00 p.m. Grievant works a total of twenty-eight hours in a workweek. As such, Grievant does not qualify for overtime pay.

The job posting for Grievant's position clearly stated that the "schedule may vary depending on need." Grievant was put on notice by the posting that the schedule would be subject to change as additional student needs are identified. This is the nature of the position of transporting special needs students. Grievant asserts that because she works past 3:30 p.m. on Monday - Thursday, Respondent has violated W.VA. CODE § 18A-4-8a(i). The statue prohibits a board of education from modifying a service employee's work schedule without the employee's consent. The West Virginia Supreme Court held in *Napier v. The Board of Education of the County of Mingo*, No. 31117 (October 10, 2003), that a special education aide whose duties included riding on a bus to and from school to assist a special needs student was working within her established daily schedule even though Ms. Napier worked thirty-five minutes beyond her original schedule. The Court held that the fluctuation in Ms. Napier's schedule was plausible due to the nature of the work and was not in violation of W.VA. CODE § 18A-4-8a(i). Similarly in the present grievance, Grievant performed duties assisting special needs students which by nature may cause a

fluctuation in schedule. Due to the nature of the work performed by Grievant and the explicit notice in the job posting that the schedule may vary depending on need, the undersigned finds that Grievant failed to demonstrate the variance in her schedule was a violation of W.VA. CODE § 18A-4-8a(i).

Grievant asserts violations of favoritism and discrimination. Grievant argues that another bus operator for Respondent, Scotty Cook, receives extra compensation of $14 a day for performing a mid-day bus run. "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);
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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., 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).

Further, Grievant asserts that not paying her for the mid-day run violates the uniformity provision of WEST VIRGINIA CODE § 18A-4-5b, which requires that uniformity shall apply "to all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county." In order to succeed in any of the claims of favoritism, discrimination or uniformity, Grievant must show that she is similarly situated to another employee who receives extra compensation. Grievant argues that she is similarly situated to bus operator Scotty Cook and that he receives extra compensation for performing a similar mid-day run. Grievant is not similarly situated to Mr. Cook because she does not perform an extracurricular run. Evidence[4] was admitted at the level three hearing that demonstrates that Mr. Cook performs a vocational run and an "Eagles Nest" run[5] in addition to his regular curricular morning, mid-day and afternoon runs. Mr. Cook was not called as a witness at the level three hearing. In addition, Mr. Cook does not transport special needs students. Grievant and Mr. Cook do not have identical duties and responsibilities in performing their bus runs. As such, Grievant has failed to prove that she is similarly situated to Mr. Cook, or that she performs "like assignments and duties" requiring compensation under W.VA. CODE § 18A-4-5b, or that she is the victim of discrimination and/or favoritism.

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[4]*See* Grievant's Exhibits No. 6 & 7, Scotty Cook's Bus Schedules and Vocational Runs.

[5]Eagles Nest is a leadership program for high school students. High school students in the program travel to elementary schools to interact and make a positive impact on elementary students' lives.

Conclusions of Law

1. Since 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). 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)).

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. Grievant did not prove that she performs an extracurricular bus run.

6. Grievant failed to prove that she qualifies for overtime compensation for working in excess of 40 hours in a workweek.

7. Due to the nature of the work performed by Grievant and the explicit notice in the job posting that the schedule may vary depending on need, Grievant failed to demonstrate the variance in her schedule was a violation of W.VA. CODE § 18A-4-8a(i).

8. "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).

9. "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);
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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).

10. WEST VIRGINIA CODE § 18A-4-5b requires that uniformity shall apply "to all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county."

11. By failing to demonstrate that she is similarly situated to another bus operator who receives extra compensation for performing a mid-day run, Grievant failed to demonstrate a violation of favoritism, discrimination or uniformity.

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 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).

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Jennifer Lea Stollings-Parr
Administrative Law Judge

Date: August 17, 2011