THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DENNIS GARNER,
Grievant,

v. **DOCKET NO. 2012-0679-MonED**

MONONGALIA COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Dennis Garner, filed a grievance against his employer, the Monongalia County Board of Education, on or about October 28, 2011. The statement of grievance reads:

> Grievant held an extracurricular assignment (Kaleidoscope Program for Westwood/Skyview) in the 2010-2011 school year. Respondent posted the assignment for the 2011-2012 school year and awarded it to a more senior bus operator. Grievant asserts that he should have been reassigned to the extracurricular assignment and alleges discrimination (W. Va[.] Code 6C-2-2) & a violation of W. Va. Code 18A-4-16.

As relief Grievant sought:

> (a) instatement into the extracurricular assignment (Kaleidoscope Program for Westwood/Skyview), (b) compensation for lost wages with interest, (c) cessation of harassment & (d) introduction of appropriate measures to prevent future acts of harassment.[1]

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[1] Grievant presented no evidence in support of a claim of discrimination or harassment, other than the statement that statements made to him in the presence of other employees by Transportation Supervisor Paul Christopher that Rhonda Owens had gotten his bus run appeared to be offered in a teasing or taunting fashion. Further, nothing in Grievant's written argument addresses either the claims of discrimination or harassment. Accordingly, these arguments are deemed abandoned and will not be addressed.

A hearing was held at level one on December 11, 2011, and a level one decision denying the grievance was issued on January 3, 2012. Grievant appealed to level two on January 10, 2012. A mediation session was held on May 21, 2012. Grievant appealed to level three on May 24, 2012. Two days of hearing were held at level three before the undersigned Administrative Law Judge, on September 26 and October 16, 2012, at the Grievance Board's Westover office. Grievant was represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association, and Respondent was represented by Denise M. Spatafore, Esquire, Dinsmore & Shohl, LLP. This matter became mature for decision on November 27, 2012, on receipt of the last of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant argued he should have been allowed to retain the extracurricular assignment at issue from year to year, because it was the same run. The change in the after school program associated with this assignment, and accordingly the change in the assignment from four days a week to five days a week rendered this a different assignment. Grievant was paid an hourly rate for the actual time worked, not a flat rate, and the addition of one more day each week created a more appealing assignment for the bus operators who would consider bidding on these types of assignments.

The following Findings of Fact are properly made from the record developed at levels one and three.

Findings of Fact

1. Grievant has been employed by the Monongalia County Board of Education ("MBOE") as a bus operator for 24 years.

2. MBOE has in place what is referred to as a "Kaleidoscope" after-school program. Students attending the program are transported home by MBOE bus operators on MBOE school buses after the program ends.

3. On September 13, 2010, MBOE posted two extracurricular Kaleidoscope assignments, Monday through Thursday, as needed, transporting students from Skyview Elementary School and Westwood Middle School to their homes for 26 weeks. Bus operators were paid an hourly rate for the time spent each day performing this assignment.

4. Grievant was awarded one of these assignments for the 2010-2011 school year, and Mary Rogers, a bus operator employed by MBOE, was awarded the other assignment.

5. During the 2010-2011 school year, students would board Grievant's bus at Westwood Middle School at 5:25 p.m., and then Grievant would proceed to Skyview Elementary School to pick up additional students, and transport the students home. The time Grievant returned to the bus garage varied each day, depending on how many students attended the program and the destination of the students attending, but could take as long as two hours.

6. On August 26, 2011, MBOE posted two extracurricular Kaleidoscope assignments, Monday through Friday, as needed, transporting students from Skyview Elementary School and Westwood Middle School to their homes for 26 weeks. Grievant performed one of these Kaleidoscope assignments from the beginning of the 2011-2012

school year until the posting was filled on October 25, 2011. Ms. Rogers performed the other assignment for three days at the beginning of the 2011-2012 school year, until it was determined that only one bus was needed.

7. Grievant applied for one of the posted Kaleidoscope runs, as did Rhonda Owens and Ms. Rogers. Ms. Owens has more seniority than Grievant and was awarded one of the two runs on October 25, 2011. The other run was not filled by MBOE because it was determined that there were not enough students to justify two buses.

8. In January 2012, more students began taking part in the Kaleidoscope program offered at Westwood Middle School and Skyview Elementary School, and a second bus was needed to transport the students home. In January 2012, Transportation Supervisor Paul Christopher told Ms. Rogers that a second bus was now needed to transport students home from the Kaleidoscope program and that she was to make this second run. Ms. Rogers was never placed in this assignment by action of MBOE, and she did not execute a contract for this assignment. Ms. Rogers has less seniority than Grievant, and pointed this out to Mr. Christopher.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 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 also 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). "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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant argued the assignment at issue for the 2011-2012 school year was the same assignment he held during the 2010-2011 school year, and he was entitled to retain the assignment from one year to the next, relying on the provisions of W. VA. CODE § 18A-4-16(6). Respondent argued that the change in the assignment from four days a week to five days a week changed the assignment so that it was not the same assignment. Respondent pointed out that Grievant was paid an hourly rate for the hours worked, and the addition of one day made the assignment more appealing, and that while some bus operators may not have bid on the assignment when it was four days a week, they might be inclined to do so for the additional pay attendant to the extra day. Respondent also pointed out that this was a 20% change in the assignment, which it felt was not a minor change.

W. VA. CODE § 18A-4-16 provides, in pertinent part, as follows:

> (1) The assignment of teachers and service personnel to extracurricular assignments shall be made only by mutual agreement of the employee and the superintendent, or designated representative, subject to board approval. 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 basis: Provided, That all school service personnel assignments shall be considered extracurricular assignments, except such assignments as are considered regular positions, as provided by section eight [§ 18A-4-8] of the article, or extra-duty assignments, as provided by section eight-b [§ 18A-4-8b] of this article.
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> . . .

> (3) The terms and conditions of the agreement between the employee and the board shall be in writing and signed by both parties.
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> (5) The board shall fill extracurricular school service personnel assignments and vacancies in accordance with section eight-b [§ 18A-4-8b] of this article: Provided, That an alternative procedure for making extracurricular school service personnel assignments within a particular classification category of employment may be utilized if the alternative procedure is approved both by the county board and by an affirmative vote of two thirds of the employees within that classification category of employment.
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> (6) An employee who was employed in any service personnel extracurricular assignment during the previous school year shall have the option of retaining the assignment if it continues to exist in any succeeding school year. A county board of education may terminate any school service personnel extracurricular assignment for lack of need pursuant to section seven [§ 18A-2-7], article two of this chapter. If an extracurricular contract has been terminated and is reestablished in any succeeding school year, it shall be offered to the employee who held the assignment at the time of its termination. . . ..

This CODE SECTION does not speak to the issue of how to determine whether an assignment continues to exist, or what types of changes in the assignment would render it a different assignment. Respondent determined that the addition of one day to the assignment changed the assignment, based on the fact that this was a change of 20% to the assignment, and other bus operators that may not have been interested in the pay associated with a four day a week assignment might change their minds and bid on a five day a week assignment.

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). Superintendents have the authority to "[a]ssign, transfer, suspend or promote teachers and all other school personnel," subject to the approval of the board, and boards of education have the authority "[t]o control and manage all of the schools and school interests for all school activities. . . ." W. VA. CODE § 18-4-10(3) & W. VA. CODE § 18-5-13(1). *See Cox v. Bd. of Educ. of Hampshire County*, 355 S.E.2d 365, 369 (W. Va. 1987). 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.*

"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). 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)).

The undersigned cannot conclude that Respondent's actions were arbitrary and capricious, or an abuse of its broad discretion. To the contrary, Respondent's rationale is quite reasonable and fair to all the bus operators. Certainly, other bus operators were entitled to the opportunity to evaluate whether the additional pay available with this addition of one day a week to the assignment was of interest to them, and to bid on the assignment as it had changed.

Finally, Grievant argued that Mr. Christopher's act of asking Ms. Rogers to pick up the second extracurricular assignment in January 2012, amounted to a conclusion by Respondent that the assignment was the same as it had been the preceding school year as it related to Ms. Rogers. The undersigned cannot stretch the facts to reach such a conclusion. It is clear that Mr. Christopher took it upon himself to place Ms. Rogers in the assignment, without consulting anyone in authority about the situation. The record does not reflect Mr. Christopher's thought process. Richard Williams, MBOE's Assistant Manager of Human Resources, testified that, had he known that a second bus was needed in January 2012, the proper action would have been to post the assignment again, since it was not filled in the fall of 2011. Further, as Respondent correctly pointed out, "*[u]ltra vires* acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to repeat such violative acts. *Guthrie v. Dep't of Health and Human Serv.,* Docket No. 95-HHR-297 (Jan. 31, 1996)."

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 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 also 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). "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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. The assignment at issue was an extracurricular assignment. W. VA. CODE § 18A-4-16 provides that extracurricular assignments must be posted and filled pursuant to the provisions of W. VA. CODE § 18A-4-8b.

3. "An employee who was employed in any service personnel extracurricular assignment during the previous school year shall have the option of retaining the assignment if it continues to exist in any succeeding school year." W. VA. CODE § 18A-4-16(6).

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. 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)).

6. Respondent's determination that the addition of one day to the assignment at issue rendered it a new extracurricular assignment was reasonable, and not arbitrary and 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 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).

BRENDA L. GOULD
Administrative Law Judge

Date: December 18, 2012