THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

SHEILA KAY STATLER,
Grievant,

v. **DOCKET NO. 2012-0777-MonED**

MONONGALIA COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Sheila Kay Statler, filed a grievance against her employer, the Monongalia County Board of Education, on or about January 30, 2012. The statement of grievance reads:

> Grievant alleges that Respondent violated W. Va. Code 18A-4-16 by posting an extracurricular assignment (Kaleidoscope) which she had held in the 2010-2011 school year rather than reassigning it to her. (A more senior employee outbid Grievant for the assignment.)

As relief Grievant sought "reinstatement into the Kaleidoscope position and compensation for lost wages and benefits, pecuniary or nonpecuniary, with interest."

A hearing was held at level one on April 30, 2012, and a level one decision denying the grievance was issued on May 11, 2012. Grievant appealed to level two on May 17, 2012. A mediation session was held on January 22, 2013. Grievant appealed to level three on January 31, 2013. A level three hearing was held before the undersigned Administrative Law Judge on July 10, 2013, 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 Jason S. Long, Esquire,

Dinsmore & Shohl, LLP. This matter became mature for decision on August 9, 2013, the deadline for submission of written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant argued she 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 three 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 two more days 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 is employed by the Monongalia County Board of Education ("MBOE") as a bus operator.

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 14, 2009, MBOE posted two extracurricular Kaleidoscope assignments, Tuesday, Wednesday, and Thursday, as needed, transporting students from Mylan Park Elementary School to their homes from October 14, 2009, through May 13, 2010. Bus operators were to be paid a daily rate of $24 per day, but this was changed for

the 2010-2011 school year to an hourly rate for the time spent each day performing this assignment. Grievant was awarded one of these assignments for the 2009-2010 school year, and she continued to perform this assignment during the 2010-2011 school year.

4. During the 2009-2010 and 2010-2011 school years, students would board Grievant's bus at Mylan Park Elementary School at 5:15 p.m., and she would transport the students home on Tuesdays, Wednesdays, and Thursdays. 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 Grievant generally completed the assignment by 6:45 p.m.

5. Due to lack of funding, the Mylan Park Kaleidoscope runs were not needed at the beginning of the 2011-2012 school year. On December 21, 2011, MBOE posted two extracurricular Kaleidoscope assignments, Monday through Friday, as needed, transporting students from Mylan Park Elementary School to their homes, from January 17, 2012, through mid-May 2012.

6. Grievant applied for one of the posted Kaleidoscope runs in December 2011 or January 2012, as did Illa Powroznik-Hess. Ms. Powroznik-Hess has more seniority than Grievant and was awarded one of the two runs in January 2012. Grievant was not awarded either of the two runs, and believes she should have retained the assignment rather than it being awarded to Ms. Powroznik-Hess.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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 she held during the 2010-2011 school year, and she 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 three days a week to five days a week changed the assignment so that it was not the same assignment, and that the Grievance Board has already decided this issue in *Garner v. Monongalia County Board of Education*, Docket No. 2012-0679-MonED (December 18, 2012).

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 scheduled 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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> . . .
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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 . . ..

As was pointed out in *Garner, supra,* 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. However, the undersigned concluded in *Garner, supra.,* that Respondent's conclusion that the change in a Kaleidoscope run from four days a week to five days a week rendered it a different assignment was not unreasonable.

> 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.

Id. The facts here present even a more substantial change in pay as the assignment increased by two days a week, not one, as in the *Garner* case.

> This Grievance Board adheres to the doctrine of *stare decisis*[1] in adjudicating grievances that come before it. *Chafin v. W. Va. Dep't of Health & Human Resources*, Docket No. 92-HHR-132 (July 24, 1992), citing *Dailey v. Bechtel Corp.*, 157 W. Va. 1023, 207 S.E.2d 169 (1974). This adherence is founded upon a determination that the employees and employers whose relationships are regulated by this agency are best guided in their actions by a system that provides for predictability, while retaining the discretion necessary to effectuate the purposes of the statutes applied. Consistent with this approach, this Grievance Board follows precedents established by the Supreme Court of Appeals of West Virginia as the law of this jurisdiction. Likewise, prior decisions of this Grievance Board are followed unless a reasoned determination is made that the prior decision was clearly in error. *Belcher v. W. Va. Dep't of Transp.*, Docket No. 94-DOH-341 (Apr. 27, 1995).

Shaffer v. Kanawha County Bd. of Educ., Docket No. 00-20-085 (June 12, 2000). Grievant has not demonstrated that *Garner, supra*, was clearly in error.

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 her 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

[1] Literally, "to stand by things decided." This is the doctrine that when a court has laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases, where the facts are substantially the same. *Black's Law Dictionary* 1414 (7th ed. 1999). *See W. Va. Dep't of Admin. v. W. Va. Dep't of Health & Human Resources*, 192 W. Va. 202, 451 S.E.2d 768, 771 (1994).

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. This Grievance Board adheres to the doctrine of *stare decisis* in adjudicating grievances that come before it. *Chafin v. W. Va. Dep't of Health & Human Resources*, Docket No. 92-HHR-132 (July 24, 1992), citing *Dailey v. Bechtel Corp.*, 157 W. Va. 1023, 207 S.E.2d 169 (1974). This adherence is founded upon a determination that the employees and employers

> whose relationships are regulated by this agency are best guided in their actions by a system that provides for predictability, while retaining the discretion necessary to effectuate the purposes of the statutes applied. Consistent with this approach, this Grievance Board follows precedents established by the Supreme Court of Appeals of West Virginia as the law of this jurisdiction. Likewise, prior decisions of this Grievance Board are followed unless a reasoned determination is made that the prior decision was clearly in error. *Belcher v. W. Va. Dep't of Transp.*, Docket No. 94-DOH-341 (Apr. 27, 1995).

Shaffer v. Kanawha County Bd. of Educ., Docket No. 00-20-085 (June 12, 2000).

7. Respondent's determination that the addition of two days to the assignment at issue rendered it a new extracurricular assignment was reasonable, and not arbitrary and capricious. *Garner v. Monongalia County Bd. of Educ.*, Docket No. 2012-0679-MonED (Dec. 18, 2012). Grievant has not demonstrated that *Garner* was clearly in error.

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: September 11, 2013