

# **WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**CRYSTAL CANTERBURY,  
Grievant,**

**v.**

**Docket No. 2023-0044-MinED**

**MINGO COUNTY BOARD OF EDUCATION,  
Respondent.**

## **DECISION**

Crystal Canterbury, Grievant, filed this grievance against her employer the Mingo County Board of Education ("MCBOE"), Respondent. Grievant filed the instant grievance challenging her non-selection for an extracurricular job. The original grievance was filed on July 18, 2022, and the grievance statement provides:

Grievant Crystal Canterbury is employed as a Secretary II for Mingo County Board of Education (MCBOE). She has a seniority date under the Secretary listing of April 29, 2014. She bid on a posting for a Substitute Placement Manager – Extracurricular Job (sic) on May 24, 2022, for which the only stated qualification was to currently hold or previously held classification of Secretary, or passage of state competency testing for Secretary. The posting was available for bid from 5.23.22 – 5.27.22. On June 2, 2022, she made a follow up-call about the job to Sandy Criddle, and she was told the position had not yet been filled... .

### **Relief Sought:**

Grievant seeks to be awarded the posting in question, if she was indeed, the most senior secretary to apply during the stated time frame of the posting.

On August 31, 2022, the parties agreed to waive this matter to level three of the grievance process.<sup>1</sup> A level three hearing was held before the undersigned Administrative Law Judge on March 10, 2023, at the Grievance Board's Charleston

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<sup>1</sup> W. VA. CODE § 6C-2-4(a)(4), provides that an employee may proceed directly to level three of the grievance process upon agreement of the parties, or when the grievant has been discharged, suspended without pay, demoted or reclassified resulting in a loss of compensation or benefits.

office. Grievant appeared in person and by counsel Rebecca Roush, Esquire, WV School Service Personnel. Respondent appeared by and by its counsel, Leslie Tyree, Esquire. At the conclusion of the level three hearing, the parties were invited to submit written Proposed Findings of Fact and Conclusions of Law. This matter became mature for decision upon receipt of the parties' fact/law proposal(s) on or about April 17, 2023.

### **Synopsis**

Grievant is employed by Respondent as a Secretary II. Grievant grieved her non-selection for an extracurricular job. Grievant alleges as the most senior applicant, she was improperly denied the extracurricular position of Substitute Placement Manager. Respondent maintains the successful applicant had less seniority but was available during the hours and at a location needed by the position duties. Grievant did not prove by a preponderance of the evidence that Respondent's selection decision was arbitrary and capricious or an abuse of discretion. Accordingly, this Grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

### **Findings of Fact**

1. Grievant is employed by Respondent, Mingo County Board of Education, as a Secretary II.
2. Respondent posted an extra-curricular position for "Substitute Placement Manager-Extra Curricular" on May 23, 2023, posting number EC-2021-274-1. G Ex D

3. Respondents posting EC-2021-274-1 for Substitute Placement Manager-Extra Curricular indicating that the location of the position was MCS-Central Office.

4. Respondent's posting for a Substitute Placement-Manager Extra Curricular did not specify specific work hours, but rather stated that the position would not exceed 10 hours per week and would be on an "as/if needed basis".

5. Grievant, as well as other qualified candidates, applied for the position as Substitute Placement Manager-Extracurricular. Three individuals applied for the extracurricular position.

6. Rocky Hall was the former Mingo County Schools Personnel Director. He had held that position for 5 years including the time period in question for posting EC-2021-274-1. Rocky Hall testified at the instant level three hearing.

7. Former Mingo County Schools Personnel Director Hall established that the former Substitute Placement Manager was housed at the central office and had always been so housed and that Respondent was of the opinion that the new Substitute Placement Manager also needed to be housed at the central office to meet the needs of the county.

8. Grievant was a secretary housed at Lenore Pre-K 8 school and was in fact the only secretary at the large Pre-K 8 school.

9. School secretaries are extremely busy during their 8-hour shift. Signing in and out parents and students, answering the phone, managing lunch and collecting monies, and hundreds of other daily tasks that require their attention.

10. It is debatable whether the beginning or the end of the school day is the

busiest time of day for the school. Nevertheless, it is agreed that school secretaries are extremely busy during their 8-hour shift.

11. Grievant's work hours were 8AM until 4PM. Lenore Pre-K 8 is located a substantial distance from the central office. The exact distance is not reliably established, but it is agreed that the trip would consist of a minimum of 15-20 minute journey.<sup>2</sup>

12. The successful applicant is a secretary housed at the Mingo County Board of Education Central Office with work hours from 7:00AM until 3:00PM.

13. Respondent determined that the Substitute Placement Manager needed to continue to be housed at the central office. This was because of multiple issues that come up every day wherein a central office Director, Personnel Manager, or Superintendent need the assistance of the Substitute Placement Managers to provide information on county needs such as an emergency needed substitute special education aide to ride the bus home with a student, as well as to address any other end of day issues.<sup>3</sup>

14. Central office staff and Directors leave the office at 4:00PM daily. Any discussion/reliable opportunity to speak with the Substitute Placement Manager about county substitute issues prior to their departure needed to transpire prior to 4:00pm.

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<sup>2</sup> Grievant's testimony indicated that she could/ would have worked it out to leave her secretarial job at Lenore Pre K 8 at 3:30 as needed in order to make it to the extra-curricular job by 4:00PM. Respondent maintains the proposed practice was not an acceptable solution.

<sup>3</sup> The level one Conference decision found that "the Substitute Placement Manager position to be effective must be performed at the Mingo County Board of Education central office because that is where the substitute call out system is located, where the call out of substitutes is managed, and where substitute filing of positions occurs and can occur on emergency or needed basis during the day." G Ex B.

15. County School systems are not required to allow staff to leave their regular position early every day for the purpose of accepting another position. West Virginia Code §18A-4-16 states “extra-curricular duties shall mean activities occurring at times other than regularly scheduled work hours.”

16. Former Personnel Director Rocky Hall identified and explained to the Grievant that a condition of employment for this position was to be at the central office before 4:00PM so that contact could be made with central office staff prior to their departure for the day.

17. The posting clearly identifies the hours as needed. Respondent determined that the needs of the county required a central office position and that the successful applicant be there prior to 4:00PM.

18. Former Personnel Director Rocky Hall was of the opinion that the condition of employment was evidenced by the posting which listed the “Division” as MCS central office. There is room for debate regarding this condition.

19. The Respondent has the discretion and authority to place conditions on extra -curricular postings as evidenced by West Virginia Code §18A-4-16 which states that “extra-curricular assignments shall be made only by mutual agreement of the employee and the county.” The county did not agree to move the position from the central office nor did the county agree to change the start time needed.

20. Grievant was not selected for the position.

21. The successful applicant, Tammy Salmons, was approved by the Mingo

County Board of Education as Substitute Placement Manager Extra Curricular on June 21, 2022. R Ex 1. Ms. Salmons is housed in the central office and her regular job ends at 3:00 each day. Ms. Salmon has less seniority than Grievant but is available during the hours and at the location specified by Respondent for the position.

### **Discussion**

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant has the burden of proving her grievance by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "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). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

The position in discussion is an extra-curricular position for "Substitute Placement Manager. Respondent's posting EC-2021-274-1 for Substitute Placement Manager Extra Curricular tends to indicate that the location of the position was Mingo County Schools-Central Office. Grievant alleges and maintains that she was improperly denied the desired position. Grievant contends that she is more senior than the successful applicant and given that arrangements were possible that would enable her to perform the duties, she is entitled to the position.

Extracurricular assignments are addressed at West Virginia Code § 18A-4-16, which provides, in pertinent part:

(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 either regular positions, as provided by section eight [§ 18A-4-8] of this article, or extra-duty assignments, as provided by section eight-b [§ 18A-4-8b] of this article.

Respondent highlights that it has the discretion and authority to place conditions on extra-curricular postings as evidenced by West Virginia Code §18A-4-16 which states that “extra-curricular assignments shall be made only by mutual agreement of the employee and the county.” Respondent maintains it had a legitimate rationale for wanting the position stationed at the central office and did not agree to move the position from the central office nor did the county agree to change the start time.

Respondent maintains the successful applicant had less seniority but is and was available during the hours and at a location needed by the position duties.

County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Syl. Pt. 3, *Dillon v. Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986). County School systems are not required to allow staff to leave their regular position early every day for the purpose of accepting another position.

West Virginia Code §18A-4-16 states extra-curricular duties shall mean activities occurring at times other than regularly scheduled work hours. Allowing the Grievant to leave her position as the only secretary at a large PreK 8 school to accept an extra-curricular job was not acceptable to the county. It would be irresponsible and arguably illegal to allow Grievant to regularly leave her position as the only secretary at a large PreK 8 school to accept an extra- curricular job. Respondent maintains Grievant's proposed practice was not acceptable to the county.

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 is 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). 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)).

“[T]he “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).” Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.*, 210

W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). “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 [the employer].” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff’d* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff’d* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003). Grievant did not prove by a preponderance of the evidence that Respondent’s selection decision was arbitrary and capricious or an abuse of discretion. Grievant did not establish that she was entitled to the extracurricular position in discussion.

### **Conclusions of Law**

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant has the burden of proving her grievance by a preponderance of the evidence. *See* W. VA. CODE R §156-1-3. *Burden of Proof* Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018). “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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

2. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that

discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Syl. Pt. 3, *Dillon v. Bd. of Educ.*, 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 is 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). 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 his judgment for that of the authoritarian agency. See generally *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

4. West Virginia Code § 18A-4-16, which provides, in pertinent part:

(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 either regular positions, as provided by section eight [§ 18A-4-8] of this article, or extra-duty assignments, as provided by section eight-b [§ 18A-4-8b] of this article.

5. In accordance with West Virginia Code § 18A-4-16, Respondent has the discretion and authority to place conditions on extracurricular postings.

6. Grievant did not prove by a preponderance of the evidence that Respondent's selection decision was arbitrary and capricious or an abuse of discretion.

7. Grievant failed to prove by a preponderance of the evidence that Respondent violated any applicable law or policy. Grievant did not establish that she was entitled to the extracurricular position in discussion.

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Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Intermediate Court of Appeals.<sup>4</sup> Any such appeal must be filed within thirty (30) days of receipt of this decision. W. VA. CODE §

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<sup>4</sup> On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over "[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]" W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.

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 named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

**Date: May 25, 2023**

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**Landon R. Brown**  
**Administrative Law Judge**