

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DOUG DAVISSON,

Grievant,

v.

Docket No. 2021-2488-LewED

LEWIS COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Doug Davisson, is employed by Respondent, Lewis County Board of Education, as a bus driver. On June 3, 2021, Grievant filed a grievance, stating:

WV Code § 18A-4-16 (5); WV § 6C-2-2 Grievance. Employees voted and board approved (2010) procedure for employees on long term sub assignment for regular employee in extra curricular is permitted to take an occasional (non regular occurring) extra curricular run without losing the long term assignment. Grievant was assigned Mr. Alderman's extra curricular run on May 18, 2021. On May 19 an extra curricular run to Buchannon/Upshur High occurred and was taken by grievant. Board removed and reassigned grievant from Aldermans run instead of allowing him to return as the policy had been approved by the employees and the BOE. Missing 6 days of assignment at \$30.00 a day. \$180.

As relief Grievant seeks, "Payment for missed assignment plus interest and all related benefits."

A level one hearing occurred on June 21, 2021, and a decision was issued on August 3, 2021. Grievant appealed to level two on August 13, 2021. A level two mediation occurred on April 26, 2022. Grievant appealed to level three on May 6, 2022. A level three hearing occurred before the undersigned at the Westover office of the Public Employees Grievance Board on August 24, 2022, and March 22, 2023. Grievant appeared in person and was represented by Ben Barkey, West Virginia Education

Association. Respondent appeared by Melissa Mace, Director of Personnel, and was represented by Leslie Tyree, Esq. This action matured for decision on May 2, 2023. Each party submitted Proposed Findings of Fact and Conclusions of Law (PFFCL).

Synopsis

Grievant is employed as a full-time bus driver by Respondent, Lewis County Board of Education. Grievant stepped-up to an extracurricular run in the absence of the regular driver. Grievant chose to leave the step-up placement for a more lucrative one-time run and was barred from resuming the step-up run. Lewis County Transportation Department Practices and Procedures states that a step-up driver must remain in the step-up position for the duration of the regular driver's absence. Grievant contends that Respondent allows drivers to take more lucrative runs and still return to their step-up runs. He claims Code gives him the right to return to the step-up run. Grievant did not prove Respondent acted improperly in enforcing its written policy. Accordingly, this grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant, Doug Davisson, is employed by Respondent, Lewis County Board of Education (Board), as a full-time bus driver.
2. On May 18, 2021, Grievant was approved as the step-up driver for the daily extracurricular bus run of Mr. Alderman during Mr. Alderman's absence from work.
3. Grievant was to remain in the extracurricular run position for the duration of Mr. Alderman's absence.

4. Yet, on May 19, 2021, Grievant opted for a one-time extra-duty assignment driving students to Buchannon/Upsur High School instead of driving Mr. Alderman's extracurricular shuttle run.

5. Grievant believes he should have been permitted to return to the step-up run after taking a day off for a more lucrative extra-duty run.

6. Extracurricular assignments occur daily and are scheduled as such.

7. Extra-duty assignments occur sporadically for occasions that are not regularly scheduled, such as field trips.

8. The Lewis County Transportation Department Practices and Procedures was approved on December 13, 2010. (Respondents Exhibit 1).

9. Clause 15 of these Practices and Procedures states:

When a regular bus operator is absent the step-up provision will be initiated immediately. Two (2) step-up lists will be maintained: one for regular runs and one for extracurricular runs. If the absent driver is contracted for more than one extracurricular run, the step-up driver must take all extracurricular runs held by the absent driver. **If accepted, the step-up driver must remain in the step-up absence for the duration of the absence.** [emphasis added]

(Respondent's Exhibit 2).

10. Grievant violated clause 15 of the Practices and Procedures when he stepped into an extracurricular run and then abandoned it for a day for a more lucrative extra-duty run.

11. Beverly Butcher was the executive secretary assigned to the Transportation Department for 14 years prior to leaving on September 14, 2021.

12. Ms. Butcher's duties included managing and filling step-up runs when drivers were absent.

13. If a driver chose to leave their step-up position voluntarily at any time over the last 10 years, the driver would have been precluded from returning to the position. (Ms. Butcher's testimony).

14. Ms. Butcher told Grievant that if he left his step-up assignment, he would not be permitted to resume it. (Testimony of Ms. Butcher and Ms. Melissa Mace, Director of Personnel).

15. As a result of Grievant leaving his step-up position, Ms. Butcher had to find another driver to cover Mr. Alderman's extracurricular run. (Ms. Butcher's testimony).

16. There were, at that time, six days remaining on Mr. Alderman's extracurricular run.

17. When regular drivers leave their run for illness or a personal day, they are allowed to return to their regular run. This is because regular drivers are under contract for their regular runs.

18. When step-up drivers leave their extracurricular runs, they are not allowed to return to them because they are not under contract for these runs. Rather, extracurricular runs are controlled by the Lewis County Transportation Department Practices and Procedures. This practice is in place to ensure student safety through driver continuity. (Ms. Mace's testimony).

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (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. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

Grievant stepped into the extracurricular run of an absent driver then chose to leave the step-up placement for a one-time extra-duty run prior to the end of the regular driver's absence. Grievant was required to remain in the step-up run under written policy.

The Lewis County Transportation Department Practices and Procedures states:

When a regular bus operator is absent the step-up provision will be initiated immediately. Two (2) step-up lists will be maintained: one for regular runs and one for extracurricular runs. If the absent driver is contracted for more than one extracurricular run, the step-up driver must take all extracurricular runs held by the absent driver. **If accepted, the step-up driver must remain in the step-up absence for the duration of the absence.** [emphasis added]

Grievant claims that Respondent's actions in not allowing him to resume the step-up run violated the following provision of West Virginia Code § 18A-4-15:

(a) The county board shall employ and the county superintendent, subject to the approval of the county board, shall assign substitute service personnel on the basis of seniority to perform any of the following duties: ...

(4) To temporarily fill a vacancy in a permanent position caused by severance of employment by the resignation, transfer, retirement, permanent disability, dismissal pursuant to section eight, article two of this chapter, or death of the regular service person who had been assigned to the position. Within twenty working days from the commencement of the vacancy, the county board shall fill the vacancy under the procedures set forth in section eight-b of this article and section five, article two of this chapter. **The person hired to fill the vacancy shall have and be accorded all rights,**

privileges and benefits pertaining to the position; [emphasis added]

This provision is not applicable to Grievant's step-up role because Grievant is a full-time regular bus driver, not a "substitute service personnel." Further, the vacancy Grievant was filling was not "caused by severance of employment by the resignation, transfer, retirement, permanent disability, dismissal pursuant to section eight, article two of this chapter, or death of the regular service person who had been assigned to the position." Nor was Grievant "hired to fill the vacancy," but was a full-time employee who opted to drive Mr. Alderman's extracurricular run during a short absence.

Regardless of the written policy, Grievant contends that Respondent's actual practice is to allow a driver to take a more lucrative run and then return to their original or step-up assignment. There were conflicting witnesses in this regard. Normally, this would lead to credibility determinations. It should be noted that "[i]t is not the role of this Grievance Board to change agency policies.... The [Grievance Board] has no authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or regulation which mandates such a policy be developed or changed." *Jenkins v. West Virginia University*, Docket No. 2008-0158-WVU (June 2, 2009) (citing *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997) (*per curiam*)) (other citations omitted).

In claiming discrimination, Grievant did not compare himself to a particular coworker. "Discrimination' means 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). Grievant did not prove he was similar situated to a particular coworker. Thus, credibility

determinations regarding the existence of a practice contrary to the written policy would simply be an intellectual exercise with no effect on the outcome of this grievance.

Extracurricular assignments, such as the run at issue, 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.

Thus, Respondent has the discretion and authority to place conditions on extracurricular postings. The Board set forth conditions for extracurricular runs in the Lewis County Transportation Department Practices and Procedures. Under these Practices and Procedures, if a driver leaves their step-up position, the driver is precluded from returning to the position. Grievant agreed to these conditions in accepting the assignment, then took a conflicting extra-duty assignment on May 19, 2021. He thus abandoned his step-up extracurricular run. Grievant did not prove that Respondent violated any law or policy in not returning him to his step-up extracurricular run.

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). Respondent has leeway to adopt practices and procedures that are not arbitrary and capricious. An action is recognized as arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (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). Respondent acted to ensure consistency in runs in precluding drivers in step-up extracurricular runs from resuming runs when they leave before finishing the assignment. Respondent does so to ensure student safety. Grievant did not prove this was arbitrary and capricious.

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. W. VA. CODE ST. R. § 156-1-3 (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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

2. An action is recognized as arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

3. Grievant failed to prove by a preponderance of the evidence that Respondent acted in an arbitrary and capricious manner or violated any law or policy.

4. “‘Discrimination’ means 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).

5. Grievant did not prove discrimination by a preponderance of the evidence. Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Intermediate Court of Appeals.¹ Any such appeal must be filed within thirty (30) days of receipt of this decision. W. VA. CODE

¹On 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

§ 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: June 13, 2023.

Joshua S. Fraenkel
Administrative Law Judge#

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.