

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SUSAN FOX,

Grievant,

v.

Docket No. 2023-0808-WetED

WETZEL COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Susan Fox, is employed by Respondent, Wetzel County Board of Education, under the multi-classified title of Director/Coordinator of Transportation, Child Nutrition & Maintenance/Computer Operator/Secretary III/Accountant. On May 3, 2023, Grievant filed a grievance alleging that Respondent made her perform secretarial/clerical duties outside of her classification without additional pay and discriminated against her by having her perform more secretarial/clerical duties than any other director.

As relief, Grievant requests “that her job responsibilities be reviewed and a full-time secretary position be assigned to the WCTEC,” “a review of the hours she has worked as a secretary and that she be awarded back pay plus interest for the work she performed outside her Director/Coordinator contract since being assigned to the WCTEC,” and “[a]ny other relief deemed necessary by the West Virginia Public Employees Grievance Board to make Grievant whole.”

A level one hearing occurred on May 12, 2023, and a decision was issued on June 8, 2023. Grievant appealed to level two on June 14, 2023. A level two mediation occurred on August 22, 2023. Grievant appealed to level three on August 28, 2023. A level three hearing occurred before the undersigned at the Westover office of the Public Employees

Grievance Board on December 5, 2023. Grievant appeared in person and was represented by Anthony Brunicardi, Esq., West Virginia School Service Personnel Association. Respondent appeared by Ben McPherson, Chief Personnel Officer, and was represented by Rick Boothby, Esq., Bowles & Rice LLP. This action matured for decision on December 26, 2023. Each party submitted Proposed Findings of Fact and Conclusions of Law (PFFCL).

Synopsis

Respondent, Wetzel County Board of Education, moved Grievant to its tech school to facilitate her duties as transportation director/coordinator. Unlike Respondent's other schools, the tech school only has a half-time secretary. Grievant occupies a multi-classified position that includes the Secretary III classification. In moving Grievant to the tech school, Respondent increased her secretarial/clerical duties by having her answer the phone and door when the half-time secretary is not working. Grievant claims entitlement to additional compensation and the assignment of a full-time secretary to the tech school. While Grievant is apparently working out of classification since her secretarial/clerical duties are not in the State Code's definition of Secretary III, Grievant failed to prove entitlement to the relief requested. 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, Susan Fox, has been employed by Respondent, Wetzel County Board of Education, for the past 18 years.
2. In 2012, Grievant assumed her current position as Director/Coordinator of

Transportation, Child Nutrition & Maintenance/Computer Operator/Secretary III/Accountant, a multi-classified service personnel position. (Grievant's Exhibit 1).

3. Grievant worked in the Central Office until 2018, whereupon Respondent moved her to the new Wetzel County Technical Educational Center (WCTEC) to be near the bus garage for her transportation duties.

4. WCTEC is a school. In the beginning, WCTEC had no secretary for clerical tasks. Unlike Respondent's other schools which each employ a full-time secretary to perform clerical tasks, WCTEC only has a half-time secretary. This half-time secretary works at WCTEC in the mornings. Another director at WCTEC answers calls in the afternoon. (Testimony of Benjamin McPherson, Chief Personnel Officer).

5. Grievant's secretarial/clerical duties at WCTEC increase when the half-time secretary is not working. These duties include answering calls and opening the front door. Answering the door entails pushing a button. Answering calls entails forwarding them to the intended recipient. (CPO McPherson's testimony).

6. Grievant's job/position description does not include any secretarial/clerical duties. Unlike Secretary I and II, the definition of Secretary III does not include "clerical tasks" and "receiving callers." W. Va. Code § 18A- 4-8(i)(83)-(85).

7. Other directors/coordinators work at Respondent's Central Office. All of them hold multi-classified positions that include the Secretary III classification. The Central Office is not a school and has no dedicated secretary/clerical position. Thus, the directors/coordinators stationed there perform some secretarial/clerical duties, including answering the door. (CPO McPherson's testimony).

8. Respondent's service employees that hold a secretary I, II, III or executive

secretary classification receive a secretary salary supplement pursuant Policy GDBA. (Respondent's Exhibit 4).

9. Since her position includes Secretary III, Grievant receives the secretary salary supplement. (Respondent's Exhibit Nos. 1, 2, 3 and 5).

10. Grievant's salary is set at paygrade H, the highest paygrade for any service personnel classification and the paygrade assigned to Grievant's "Director or Coordinator of Services" classification.

11. None of Respondent's directors/coordinators has a secretary. (CPO McPherson's testimony).

12. Grievant completes her job duties during her regular working hours and takes a one-hour paid lunch period each workday.

13. Grievant has been paid for all work she has performed for Respondent.

14. Under an informal agreement with Respondent's former superintendent, Grievant is credited each week with one hour of comp time, which is paid time off.

15. Grievant is not exclusively assigned to perform the duties of any one classification.

16. No evidence was presented as to how much time Grievant spends performing secretarial/clerical duties or that these duties are more than *de minimis*.

17. Besides receiving the Secretary III salary supplement, no director/coordinator is paid extra for performing secretarial/clerical duties during normal work hours. (CPO McPherson's testimony).

18. When Grievant calls off during periods the half-time secretary is not working, Respondent attempts to get a substitute to perform the secretarial/clerical duties

at WCTEC. If a WCTEC had a full-time secretary, Grievant would not be answering the phone and door. (CPO McPherson's testimony).

19. There is no evidence that Grievant spends more time on secretarial/clerical duties than any other director/coordinator. (CPO McPherson's testimony).

20. Chief Personnel Officer McPherson was the only witness to testify at the level three hearing.

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 claims that Respondent has her perform secretarial/clerical duties outside her classification for a significant portion of her workday with no additional pay. Grievant contends that Respondent discriminates against her by having her perform more secretarial/clerical duties than any of its other directors/coordinators. Grievant asserts that Respondent's policy mandates a supplement be paid for each classification when an employee holds multiple classifications. Grievant claims that Respondent violates the law by assigning her duties for just one of her multiple classifications. Grievant contends that she is overwhelmed with extra work. Grievant implies that moving her to WCTEC and not providing WCTEC a full-time secretary was arbitrary and capricious. As relief, Grievant

requests that a full-time secretary be assigned to WCTEC and that she be awarded back pay for the work she performed outside her contract.

"'Grievance' means a claim by an employee alleging a violation, a misapplication, or a misinterpretation of the statutes, policies, rules, or written agreements applicable to the employee ..." W. VA. CODE 6C-2-2(i)(1). Grievant did not show that Respondent violated any statute, policy, rule, or agreement in only assigning WCTEC a half-time secretary, let alone that any violation would have given her standing to request that the Grievance Board order Respondent to appoint a full-time secretary.

Grievant did not cite any law or submit into evidence any policy that entitles her to additional compensation for being worked out of classification or for performing the duties of a lesser-paid classification within her multi-classified position. Nor did she reveal the compensation figure to which she feels entitled. There may be validity to the allegation that Respondent works Grievant out of classification, since Grievant's clerical duties are not specifically listed in the definition of Secretary III found in State Code. Yet, Grievant did not present any evidence to counter uniform testimony that her clerical duties are *de minimis* or to establish that working her out of classification would have justified additional pay. Additionally, as Secretary II's who serve for eight years in the classification are automatically reclassified as Secretary III's, the Secretary III classification could encompass the duties of a Secretary II.

As for Grievant's claim of discrimination, Grievant did not prove she was treated differently than any other multi-classified director/coordinator. Discrimination for purposes of the grievance process has a very specific definition. "'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 present any evidence that any other multi-classified director/coordinator is given less clerical work than her.

As for the proposition that Respondent was arbitrary and capricious in moving her to WCTEC and in not providing WCTEC a full-time secretary, Grievant did not show that Respondent acted unreasonably. 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 provided a sound basis for moving Grievant to WCTEC, reasoning that it did so to facilitate Grievant's duties as transportation coordinator by placing her close to the bus garage. Grievant provided no evidence to refute this rationale. Grievant failed to prove Respondent's actions were arbitrary and capricious.

Some of the remaining claims could, if proven, entitle Grievant to back pay or other relief. However, Grievant failed to present any evidence to prove how much of her work entails secretarial/clerical duties, the amount of compensation Respondent owes her, the policy mandating payment for each classification of a multi-classified position, her claim that she was exclusively assigned to perform the duties of one classification, or that she was overwhelmed with extra work. Thus, Grievant failed to prove any of her claims and failed to prove she is entitled to the relief requested.

Accordingly, this grievance is DENIED.

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. “A person employed under the class title ‘director or coordinator of services’ may not be exclusively assigned to perform the duties ascribed to any other class title as defined in this subsection: Provided, [t]hat nothing in this paragraph prohibits a person in this position from being multi-classified.” W. VA. CODE § 18A- 4-8(i)(36)(E).

3. Grievant did not prove by a preponderance of the evidence that she was assigned exclusively to perform the duties of any class title.

4. “‘Multiclassification’ means a person employed to perform tasks that involve the combination of two or more class titles in this section. In these instances the minimum salary scale is the higher pay grade of the class titles involved.” W. VA. CODE § 18A-4-8 (i)(69).

5. Paygrade H is the highest paygrade for any service personnel classification and is the paygrade assigned to the “Director or Coordinator of Services” classification. See W. VA. CODE § 18A-4-8a(a)(1)&(2).

6. Grievant failed to prove by a preponderance of the evidence that she was not properly compensated.

7. “‘Secretary III’ means a person assigned to the county board office administrators in charge of various instructional, maintenance, transportation, food services, operations and health departments, federal programs or departments with particular responsibilities in purchasing and financial control or any person who has served for eight years in a position which meets the definition of ‘Secretary II’ or ‘Secretary III.’”¹ W. VA. CODE § 18A- 4-8(i)(85).

¹“‘Secretary I’ means a person employed to transcribe from notes or mechanical equipment, receive callers, perform clerical tasks, prepare reports and operate office machines.” W. VA. CODE § 18A- 4-8(i)(83).

8. 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)).

9. Grievant did not prove by a preponderance of the evidence that Respondent’s actions were arbitrary and capricious.

10. “‘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).

11. Grievant failed to prove by a preponderance of the evidence that Respondent discriminated against her, owed her additional compensation or backpay, or violated any law or policy which would entitle her to the relief requested.

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Intermediate Court of Appeals.² Any such appeal must be filed within thirty (30) days of receipt of this decision. W. VA. CODE

“‘Secretary II’ means a person employed in any elementary, secondary, kindergarten, nursery, special education, vocational, or any other school as a secretary. The duties may include performing general clerical tasks; transcribing from notes; stenotype, mechanical equipment or a sound-producing machine; preparing reports; receiving callers and referring them to proper persons; operating office machines; keeping records and handling routine correspondence. Nothing in this subdivision prevents a service person from holding or being elevated to a higher classification.” W. VA. CODE § 18A- 4-8(i)(84).

²On 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

§ 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: January 17, 2024.

Joshua S. Fraenkel
Administrative Law Judge

appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.