THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KAREN NELSON,
Grievant,

v. **Docket No. 2023-0335-JefED**

JEFFERSON COUNTY BOARD OF EDUCATON,
Respondent.

DECISION

Grievant, Karen Nelson, is employed by Respondent, Jefferson County Board of Education, as a Bus Operator since March 8, 2001. Grievant works the regular school year and during the summer. On July 13, 2022, Grievant filed a lengthy statement of grievance, which is incorporated in full by reference. Grievant alleges Respondent engaged in illegal conduct by failing to post a Summer School Experience program standby bus operator position in 2022. Respondent further alleges Respondent arbitrarily and capriciously awarded the 2022 Summer School Experience program's standby position to a less senior bus operator. As relief, Grievant requested $2,544.08 as pay for the thirteen ("13") days Grievant could have worked had she been awarded the standby bus operator position.

Following the October 7, 2022, level one conference, a level one decision was rendered on November 1, 2022, denying the grievance. Grievant appealed to level two on November 16, 2022. Grievant appealed to level three of the grievance process on March 3, 2023. A level three hearing was held on May 31, 2023, before Administrative Law Judge, Joshua S. Fraenkel[1], at the Grievance Board's Westover, West Virginia

[1] The grievance has since been reassigned to the undersigned Administrative Law Judge for administrative reasons.

office. Grievant appeared in person and was represented by Rebecca A. Roush, General Counsel, West Virginia School Service Personnel Association. Respondent appeared by representative Amy Loring, Chief Human Resources Officer for the Jefferson County Board of Education, and was represented by counsel, Jason S. Long, of Dinsmore & Shohl LLP. This matter became mature for decision on July 25, 2023, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as a bus operator and worked two separate bus routes during the summer in 2021 and 2022. Grievant alleges Respondent illegally failed to post a 2022 Summer School Experience standby bus operator position and arbitrarily and capriciously awarded the standby position to a less senior bus operator. It was undisputed that a local practice prohibited a bus operator from having two separate bus runs that overlap. The Summer School Experience program runs and Grievant's preferred Cedar Ridge run overlapped in 2022. Respondent did not arbitrary and capriciously award a standby position to a bus operator that worked the same Summer School Experience standby position the prior year. Grievant intentionally and knowingly resigned from the 2022 Summer School Experience program in favor of returning to her Cedar Ridge run. Grievant failed to meet her burden and the grievance should be 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 is employed by the Jefferson County Board of Education, hereinafter "Respondent," as a bus operator and has been so employed since March 8,

2001. Grievant drives a bus during the regular school year and applies for summer school assignments from Respondent.

2. Grievant's primary summer bus route was the Cedar Ridge run which began in 2017. The Cedar Ridge run is a contracted run that occurs each year that it is needed when children are enrolled in summer school along the route. The Cedar Ridge run ran each summer year from July 5th through August 4th. The Cedar Ridge run did not run in 2021 due to a lack of students.

3. In 2021, a new Summer School Experience summer program began. The Summer School Experience was a newly created temporary program federally funded through the Elementary and Secondary School Emergency Relief Fund awarded though Covid-19 resources.

4. Respondent posted for summer bus operators for the newly implemented Summer School Experience program. There were approximately 26-28 Summer School Experience bus runs available to bus operators to bid on for assignment.

5. Grievant applied for and was awarded one of the 2021 Summer School Experience bus operator positions. All 2021 Summer School Experience routes were assigned based on seniority.

6. When all the 2021 Summer School Experience routes were selected, including Grievant's route, there remained two additional applicants without any assignments. One of those bus operators was Joeseph Malone. Because there were no available bus routes, Mr. Malone was assigned a standby bus operator position for the 2021 Summer School Experience program.

7. A standby position was substantially different than a regular daily bus run. Standby positions act like a substitute driver and only are to be utilized in emergencies to fill in runs when other bus operators are not available.

8. Mr. Malone was only utilized twice to drive as a standby bus operator in 2021. Mr. Malone's seniority to be a standby bus operator started in September 2021 when the program's run was completed, and the regular school year began.

9. In the summer of 2021, both Grievant and Mr. Malone worked as bus operators in the same Summer School Experience program.

10. It is undisputed that a local practice prohibits a bus operator having two separate bus runs that overlap. The local practice does allow a bus operator to work separate routes so long as those two routes do not overlap.

11. On May 12, 2022, Respondent sent out a letter of intent to see which bus operators from 2021 would elect to continue in their position as a bus operator for the Summer School Experience program. (Resp. Ex. 2).

12. On June 3, 2022, instead of returning the letter of intent, Grievant submitted her resignation to be a bus operator for 2022 Summer School Experience program. (Resp. Ex. 3).

13. Grievant elected to drive her primary summer bus route, the Cedar Ridge run in the summer of 2022.

14. Grievant could have worked from June 3, 2022, to June 30, 2022, for the 2022 Summer School Experience program but "chose not to." (Grievant Ex. I). Grievant instead decided she would give up her seniority for the Summer School Experience run and "stay home until July 5, 2022, when [her] Cedar Ridge run started." (Id.).

15. The Cedar Ridge run is a more secure run due to being a contacted run that reoccurs each year it is needed. The Summer School Experience run is a less secure run due to being a newly created temporary three-year run.

16. Grievant knowingly and intentionally resigned from the 2022 Summer School Experience so as not to give up the more secure 2022 Cedar Ridge run. (*See* Grievant's Ex. I).

17. In 2022, only 21 of the previous 26-28 bus operators elected to return to the Summer School Experience program. As the routes had changed, the returning bus operators were again allowed to select their route based on seniority. Mr. Malone was again left without a route and was assigned as a standby bus operator.

18. Joseph Hollen is the Director of Transportation for the Jefferson County Board of Education. Mr. Hollen's goal in summer of 2022 was to work all drivers who wanted to work. Mr. Hollen was aware of which bus operators responded to the 2022 letter of intent to return to the 2022 Summer School Experience run.

19. Mr. Hollen did not post the 2022 Summer School Experience runs because enough bus operators from 2021 chose to return to their positions for the available positions in 2022.

20. It is more likely than not, Grievant was aware of the 2022 standby Summer School Experience run despite it not being posted.

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*.

"'County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious.' Syl. pt. 3, *Dillon v. Wyoming County Board of Education*, 177 W. Va. 145, 351 S.E.2d 58 (1986)." Syl. Pt. 2, *Baker v. Bd. of Educ.*, 207 W. Va. 513, 534 S.E.2d 378 (2000).

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)). "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), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

"'[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 argues: (1) Respondent illegally failed to post a 2022 standby Summer School Experience bus run position; (2) Because the standby position was not posted, Respondent arbitrary and capriciously awarded the 2022 standby position to a less senior bus operator in violation of West Virginia Code §§ 18-5-39 and 18A-4-8b; (3) Had Grievant been aware of the 2022 Summer School Experience standby position that she would most likely have been awarded the position due to her seniority; and (4) Grievant would have earned $2544.08 for working the thirteen days the Summer School Experience program did not overlap with Grievant's Cedar Ridge run. Respondent counters that it did not arbitrarily and capriciously award the 2022 Summer School Experience standby bus position to Mr. Malone; and that Grievant was aware of the 2022 program and elected not to return in favor of returning to her more secure Cedar Ridge run.

The facts are in dispute whether Respondent offered Grievant a Summer School Experience bus run for the thirteen days it did not overlap with Grievant's chosen Cedar

Ridge run. As the relevant facts are in dispute, credibility determinations are necessary. In situations where "the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required." *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res*., Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981).

In assessing the credibility of witnesses, some factors to be considered ... are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Grievant's demeanor demonstrated signs of attempted misdirection and manipulation. Grievant firmly relied on her argument that she was unaware of the standby position. However, Grievant's own evidence revealed that she was aware she could have worked before her Cedar Ridge run began but resigned instead. (*See* Grievant's Ex. I). Further, Grievant lacks credibility because her resignation letter contradicts her assertion that Hollen didn't offer her the 13 days. Grievant had an absolute financial interest in the outcome as she was motivated to earn an additional $2,544.08. Grievant was inconsistent in her statements. Grievant claims she was unaware of the 2022 summer

standby position because it was not posted. Both Grievant and Mr. Malone worked the temporary three-year Summer School Experience program in 2021. Respondent sent out letters of intent to see which bus operators wanted to return to the Summer School Experience run in 2022. Instead of returning the letter of intent, Grievant sent in her written resignation for the 2022 Summer School Experience program on June 3, 2022. (Resp. Ex. 3). The existence of the letters of intent followed by Grievant's resignation from the program make it more plausible that Grievant either knew or should have known of the 2022 Summer School Experience program runs. Grievant was thus, not credible when she claimed she was unaware of the standby position.

Mr. Hollen was credible when he claimed he offered the 13 non-overlapping days to Grievant to work the program. Mr. Hollen was not biased or motivated to select one bus operator over another. Particularly, at the level three hearing, Mr. Hollen stated his goal in the summer of 2022 was to work all drivers who wanted to work. Mr. Hollen sent out letters of intent to see how many bus operators wanted to elect to return to the Summer School Experience. The letter of intent would have revealed how many bus operators were intending to return to their prior positions. Grievant did not return a signed letter of intent. Instead, Grievant resigned from the Summer School Experience program and chose to stay home until her Cedar Ridge run began. (Grievant's Ex. I). It was undisputed a local practice prohibited a bus operator from having two separate bus runs that overlapped. Grievant intentionally declined to work the 2022 program and instead chose to stay home until her Cedar Ridge run began. Mr. Hollen was credible that he did in fact offer Grievant the 13 non-overlapping days and Grievant declined.

Grievant correctly asserts that West Virginia Code § 18A-4-8b(g) requires county boards to "post and date notices of all job vacancies of existing or newly created positions in conspicuous places for all school service personnel to observe for at least five working days." W. VA. CODE § 18A-4-8b(g) (2023). However, a county board of education is authorized by to establish "a summer school program, which is to be separate and apart from the full school term as established by each county." W. Va. Code § 18-5-39(a) (2023). For summer positions, "[a]n employee who was employed in any service personnel job or position during the previous summer shall have the option of retaining the job or position if the job or position exists during any succeeding summer." W. VA. CODE § 18-5-39(f) (2023). It is only "[i]f the employee is unavailable or if the position is newly created" that the position must be filled pursuant to West Virginia Code § 18-4-8b. *Id.* School year seniority only applies to a newly created or vacated summer position that is posted pursuant to West Virginia Code § 18A-4-8b. Section 18-5-39 discusses when a particular summer program is forced to reduce the number of summer employees from one year to another and states:

> If a county board reduces in force the number of employees to be employed in a particular summer program or classification from the number employed in that position in previous summers, the reductions in force and priority in reemployment to that summer position shall be based upon the length of service time in the particular summer program or classification.

W. VA. CODE § 18-5-39(g)

The grievance board has interpreted this code section to understand it "provides that any employee who accepts a summer assignment is entitled to the same assignment the following year if it exists." *Cowan, et al., v Ritchie County Bd. Of Educ.,* Docket No.

2010-1537-CONS (January 20, 2012) (citing *Lemley v. Wood County Bd. of Educ.,* Docket No. 99-54-198 (Sept. 9, 1999)). Flexibility exists in the definition of "same assignment" in that [i]t is enough that there is consistency in the type of work being performed, even if the location and exact nature of the work is somewhat different." *Id.*

"'Once a board of education employee is properly placed in a particular summer position, seniority rights are established for the employee to return to the position during any succeeding years [. . .]' *Kennedy v. Marion County Bd. of Educ.,* Docket No. 91-24-427 (Dec. 30, 1991)." *Panrell v. Monongalia County Bd. of Educ.,* Docket No. 96-30-408 (April 25, 1997). "The seniority granted to regularly employed workers and the 'seniority" granted to summer employees in their positions is controlled by separate statutes and is not meant to be commingled." *Bowmen [sic] v. Kanawha County Bd. of Educ.,* Docket No. 99-20-039B (Mar. 31, 1999). *Beane v. Kanawha County Bd. of Educ*., Docket No. 03-20-008 (April 30, 2003). *Cowan, et al., v Ritchie County Bd. Of Educ.,* Docket No. 2010-1537 (January 20, 2012).

When the Summer School Experience program was created in 2021, Respondent chose to post and fill the necessary bus operator positions generally without separately posting each route. The position, therefore, was simply bus operator for the program. Grievant failed to cite any authority requiring Respondent to post each run and the standby positions as separate positions. In 2022, Respondent was not required to post any bus operator positions because all the bus operators needed to perform the program elected to return so there were no vacant or newly created positions. *See Costello v. Monongalia County Bd. of Educ*., Docket No. 01-30-016 (June 21, 2001).

Grievant asserts Respondent arbitrarily and capriciously placed a less senior employee in the standby run. However, this argument is based on Grievant's school year seniority. Here, the Summer Experience Program is treated separate and apart from the regular school term. School year seniority only applies to hiring for a newly created or vacated summer position. Grievant failed to prove Respondent was required to post the standby run separately and as such, Grievant's regular school year seniority is not relevant. Grievant was only entitled to return to her previous position as a regular Summer School Experience bus operator but not as a standby bus operator. *Cowan, et al., v Ritchie County Bd. Of Educ*., Docket No. 2010-1537 (January 20, 2012). *See Lemley v. Wood County Bd. of Educ*., Docket No. 99-54-198 (Sept. 9, 1999).

On May 12, 2022, Respondent mailed out letters of intent to the 2021 bus operators, including Grievant, to see which bus operators would elect to return to the Summer School Experience program. On June 3, 2022, instead of returning the letter of intent, Grievant knowingly and voluntarily submitted a written resignation in favor of returning to the more secure Cedar Ridge run. (Resp. Ex. 3). Grievant's own evidence clearly shows that Grievant "*could have worked* 6/3-6/30 on [her] Summer Experience job, and [she] *chose not to*. [She] decided to give up [her] SE run and stay home until 7/5 when [her] Cedar Ridge run started." (Grievant's Ex. I). (Emphasis added).

Grievant argues that had she known about the standby summer experience run she would not have resigned and most likely would have been awarded the run due to her seniority. Grievant argues that, had she been awarded the run, she could have worked the 13 non-overlapping days and earned $2,544.08. Grievant's arguments are speculative because Grievant chose to resign. If Grievant truly wanted to work the 2022

Summer School Experience run for the 13 non-overlapping days, she had the opportunity to return as a bus operator and chose her route based on seniority. Grievant did not do this. Instead, Grievant intentionally declined to work those thirteen days and instead purposely decided to stay home until her Cedar Ridge run began on July 5, 2022. (Grievant's Ex. I), (Resp. Ex. 3). There was no difference in pay from the standby run and any other run so Grievant suffered no loss even if she was unaware that the standby run was available.

Grievant failed to meet her burden to show she was entitled to lost wages for $2,544.08. It is more likely than not, Grievant was aware of the 2022 standby Summer School Experience run despite it not being posted. Grievant knowingly and intentionally resigned from the program and chose to stay home instead of working the 13 non-overlapping days in her prior position. Grievant failed to prove Respondent acted arbitrarily and capriciously by allowing Mr. Malone to return to the same position in 2022. Instead, Respondent followed West Virginia Code § 18-5-39(f) regarding Mr. Malone's 2022 standby position by allowing him to return to his prior position. As such, this grievance should be denied.

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. 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. "'County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious.' Syl. pt. 3, *Dillon v. Wyoming County Board of Education*, 177 W. Va. 145, 351 S.E.2d 58 (1986)." Syl. Pt. 2, *Baker v. Bd. of Educ.*, 207 W. Va. 513, 534 S.E.2d 378 (2000).

3. 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)). "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), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

4. "'[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).

5. There is a difference between a county school service employee's contract for the regular school year and a contract to work during a summer term. *See Patterson v. Bd. of Educ. of Raleigh*, 231 W. Va. 129, 744 S.E.2d 239, (2013).

6. In situations where "the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required." *Jones v. W. Va. Dep't of Health & Human Res.*, Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res*., Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981).

7. "County boards shall post and date notices of all job vacancies of existing or newly created positions in conspicuous places for all school service personnel to observe for at least five working days." W. Va. Code § 18A-4-8b (g) (2023).

8. A county board of education is authorized by to establish "a summer school program, which is to be separate and apart from the full school term as established by each county." W. Va. Code § 18-5-39(a) (2023).

9. West Virginia's statute provides, in part, that "[a]n employee who was employed in any service personnel job or position during the previous summer shall have the option of retaining the job or position if the job or position exists during any succeeding summer." West Virginia Code § 18-5-39(f) (2023). Section 18-5-39 (f) further provides that "[i]f the employee is unavailable or if the position is newly created, the position shall be filled pursuant to [§ 18-4-8b]." (*Id.).*

10. Section 18-5-39 discusses when a particular summer program is forced to reduce the number of summer employees from one year to another. Specifically, W. Va. Code § 18-5-39(g) states:

> If a county board reduces in force the number of employees to be employed in a particular summer program or classification from the number employed in that position in previous summers, the reductions in force and priority in reemployment to that summer position shall be based upon the length of service time in the particular summer program or classification.

W. Va. Code § 18-5-39(g)

11. The grievance board has interpreted this code section to understand it "provides that any employee who accepts a summer assignment is entitled to the same assignment the following year if it exists." *Cowan, et al., v Ritchie County Bd. Of Educ.,* Docket No. 2010-1537 (January 20, 2012). *See Lemley v. Wood County Bd. of Educ.,* Docket No. 99-54-198 (Sept. 9, 1999).

12. "'Once a board of education employee is properly placed in a particular summer position, seniority rights are established for the employee to return to the position during any succeeding years [. . .]' *Kennedy v. Marion County Bd. of Educ.,* Docket No.

91-24-427 (Dec. 30, 1991)." *Panrell v. Monongalia County Bd. of Educ.,* Docket No. 96-30-408 (April 25, 1997).

13. "The seniority granted to regularly employed workers and the "seniority" granted to summer employees in their positions is controlled by separate statutes and is not meant to be commingled. W. Va. Code §§ 18-5-39; 18A-4-8b; & 18A-4-8g. *Bowmen [sic] v. Kanawha County Bd. of Educ.,* Docket No. 99-20-039B (Mar. 31, 1999)." *Beane v. Kanawha County Bd. of Educ*., Docket No. 03-20-008 (April 30, 2003). *Cowan, et al., v Ritchie County Bd. Of Educ.,* Docket No. 2010-1537 (January 20, 2012).

14. Section 18-5-39(g) has been interpreted to say it "provides that any employee who accepts a summer assignment is entitled to the same assignment the following year if it exists." *Cowan, et al., v Ritchie County Bd. Of Educ*., Docket No. 2010-1537 (January 20, 2012). *See Lemley v. Wood County Bd. of Educ*., Docket No. 99-54-198 (Sept. 9, 1999).

15. Grievant failed to prove Respondent was required to separately post the standby run, that the assignment of the run was arbitrary and capricious, or that she was otherwise entitled to wages of $2,544.08.

Accordingly, this 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

[2] 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. 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: September 6,2023

Wes H White
Administrative Law Judge

§ 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.