

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**CHRISTOPHER BIRD,
Grievant,**

v.

Docket No. 2017-1534-KanED

**KANAWHA COUNTY BOARD OF EDUCATION,
Respondent, and**

**EMMETT G. BUSSE,
Intervenor.**

DECISION

Grievant, Christopher Bird, filed this action on January 17, 2016, after he was not awarded a position as an Electrician II. His Statement of Grievance reads as follows:

Grievant asserts that although he was the most qualified applicant for the position of electrician, another applicant with less seniority was awarded the position based on the unlawful additional duties and requirements placed on the job posting, including but not limited to, the requirement of a "clean driving record" and a DUI incident considered a permanent disqualifying incident as opposed to the requirement that Grievant possess a valid driver's license. This is in violation of W.V. Code Section 18A-4-8b.

Relief Sought: Grievant respectfully requests to be made whole including, but not limited to, the immediate instatement into the position, backpay with interests, seniority, and any other relief deemed necessary by the grievance evaluator.

Mary Jo Swartz, the designee of the county superintendent, conducted a conference on February 7, 2017. By decision issued on February 22, 2017, Ms. Swartz denied the grievance at Level One. Grievant appealed to Level Two on March 1, 2017. On April 19, 2017, Emmett G. Busse filed an intervention form. On April 20, 2017, Mr. Busse was

granted intervenor status. A mediation session was conducted on April 24, 2017. Grievant appealed to Level Three on April 24, 2017. Administrative Law Judge Carrie H. LeFevre conducted an evidentiary hearing at Level Three on August 8, 2017, at the Grievance Board's Charleston office. This case was reassigned on October 25, 2017, for administrative reasons. Grievant appeared in person and by his representative, John Everett Roush, American Federation of Teachers - WV, AFL-CIO. Intervenor appeared *pro se*. Respondent appeared by its counsel, James W. Withrow, General Counsel. This case became mature for consideration upon receipt of the last of the parties' fact/law proposals on September 18, 2017.

Synopsis

Grievant is a regularly employed Custodian of the Kanawha County Board of Education. Grievant was the most senior applicant for the posting of an Electrician II with the Kanawha County Board of Education. Grievant was denied the position by Respondent on the basis that he was not qualified. Grievant proved by a preponderance of the evidence that it was arbitrary and capricious for Respondent to consider him not qualified for the Electrician II position. Grievant proved by a preponderance of the evidence that he was qualified to perform the job at the time Respondent made its hiring decision. According to the statutory criteria outlined in WEST VIRGINIA CODE § 18A-4-8b, Grievant should have received the position.

The following Findings of Fact are based on the record of this case.

Findings of Fact

1. Grievant is a regularly employed Custodian of the Kanawha County Board of Education. Grievant's regular employee seniority date is September 17, 2010.

2. Prior to his employment in the position at issue in this grievance, Emmett G. Busse, Intervenor, was a regularly employed Bus Operator of the Kanawha County Board of Education. His regular employee seniority date is April 25, 2016.

3. From September 1, 2016, through September 8, 2016, Respondent posted a vacancy for an Electrician II. The job description for Electrician II does not specifically mention any qualification related to an applicant's driving record, other than the following two duties/responsibilities: Possess and maintains a valid West Virginia driver's license; Ability to perform duties in compliance with the county requirements and Board of Education policies.

4. Respondent's policy G68 provides that an applicant for a position that involves driving a county vehicle will be "disqualified" for "Driving while intoxicated." Joint Exhibit Number 8. The policy gives no time limit for how long such an incident would disqualify an applicant from consideration for a position that involves driving a county vehicle. By the terms of the policy such an incident would ban an applicant from any position that involves driving a county vehicle *ad infinitum*.

5. Grievant had a previous DUI citation at the time he applied for the Electrician II position, although he maintained a valid driver's license. Grievant completed all aspects of his ignition lock program on or about September 10, 2016.

6. Respondent asserts that it limits the time period for disqualifying incidents to five years, but provided no evidence supporting the reasonableness of the application of this limit or why some violations would act to disqualify and others would not.

7. Grievant was convicted for driving under the influence, less than .15, on December 14, 2016. As indicated above, a conviction for driving under the influence is a disqualifying violation according to Respondent's policy G68. Grievant's violation resulted in no points on his license, but Grievant was required to utilize an ignition lock device on his vehicle from July 6, 2015, through September 19, 2016. Grievant declined to bid upon jobs requiring the employee to drive one of Respondent's vehicles during this period.

8. Many of Respondent's employees who drive one of Respondent's vehicles as part of their jobs do not have a "clean" driving record. See Joint Exhibit Number 9.

9. Terry Hollandsworth, the head of Respondent's maintenance department, recommended employment of Grievant even though he was aware of Grievant's DUI.

10. Respondent did not fill the vacancy for the Electrician II position until December 15, 2016, when it employed Mr. Busse.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in

opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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 complains that there is no time frame placed on the review of an applicant/employee's driving record, and a selection process utilizing this policy is arbitrary and capricious. There is no question that Grievant was the most senior applicant who was qualified for the position of Electrician II and that his past evaluations were acceptable. WEST VIRGINIA CODE § 18A-4-8b provides with regard to selection for service personnel positions that:

A county board shall make decisions affecting promotion and filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight of this article, on the basis of seniority, qualifications and evaluation of past service.

Qualifications means the applicant holds a classification title in his or her category of employment as provided in this section and is given first opportunity for promotion and filling vacancies. Other employees then shall be considered and shall qualify by meeting the definition of the job title that relates to the promotion or vacancy, as defined in section eight of this article.

As made clear by the Level One Decision, the crucial question concerns Grievant's DUI conviction and the applicability of Respondent's Policy G68 to the situation. There is no dispute that Grievant was cleared of his DUI at the time Respondent approved the selection of another applicant on December 19, 2016. However, at the time he applied for

the position in September 2016, he had not yet been cleared. It is also undisputed that at all times relevant, Grievant possessed a valid driver's license.

Grievant must prove by a preponderance of the evidence that Respondent's decision was arbitrary and capricious. The "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. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105; 556 S.E.2d 72 (2001)(citing *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). "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); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

It is not unreasonable, or arbitrary and capricious, to require employees who drive vehicles supplied by their employer to maintain a good driving record. Just as Ms. Swartz at the lower level, the undersigned has concerns about the legality of a requirement that an individual have a clean driving history without any time frame for consideration. The lower level record also placed some importance on the fact that Grievant was still required to use the ignition lock device at the time of the posting and his application. Grievant aptly points out that this was a misreading of applicable law. With regard to the ability or qualification to perform a job, the status of the applicant when he or she is to begin the job is the critical time period. *Bowyer v. Fayette County Bd. of Educ.*, Docket No. 2012-1352-

FayED (Aug. 22, 2013). As of December 15, 2016, Grievant could legally operate a vehicle without the use of an ignition lock device.

Turning to Respondent's Policy G68, the record did provide the Board of Education's practice. First, the practice is to limit the ban on consideration for jobs that involve driving one of Respondent's vehicles for any applicant who has a disqualifying violation on his or her record up to five years. As with the lifetime ban, Respondent made no case for the reasonableness of that or any other span of time being set as a limit for disqualification of an applicant. Respondent presented no evidence to support a ban for certain violations and no consequence for others. As is clear by Joint Exhibit Number 9, employees with a variety of violations on their records continue to drive Respondent's vehicles. A ban, lifetime or five years, on DUI and no such impediment for speeding, driving while using a cell phone or other risky behavior in operating a motor vehicle is also unreasonable.

Grievant's counsel also points to WEST VIRGINIA CODE § 18A-2-12a(b)(7) which provides:

All official and enforceable personnel policies of a county board must be written and made available to its employees.

The five year ban is not part of a written policy. Pursuant to the above statute, it is unenforceable.

No applicant for the position in question possessed the classification title of Electrician II nor did any applicant hold preferred recall status with seniority in the electrician classification category. Grievant was the most senior applicant who was qualified for the position of Electrician II. Grievant had acceptable evaluations of his

service with Respondent. According to the statutory criteria outlined in WEST VIRGINIA CODE § 18A-4-8b, Grievant should have received the position.

Finally, Respondent seeks to supplement the requirements of Policy G68 with an unwritten practice which places a time cap on a disqualifying lack of a “clean driving record.” In addition to being unenforceable because it is unwritten, this practice is arbitrary and capricious because Respondent was unable to explain the policy considerations behind a five-year ban and it failed to explain why some violations, such as DUI, were disqualifying violations, while other violations such as speeding or driving while using a mobile phone are not considered disqualifying violations. The record of this case provides no valid reason to deny Grievant employment in the Electrician II position.

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. 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).

2. WEST VIRGINIA CODE § 18A-4-8b provides with regard to selection for service personnel positions that:

A county board of education shall make decisions affecting promotion and filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight, article four of this chapter, on the basis of seniority, qualifications and evaluation of past service.

3. The "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. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105; 556 S.E.2d 72 (2001)(citing *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). "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); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

4. The record established by a preponderance of the evidence that Grievant was the most senior applicant who was qualified for the position of Electrician II. Grievant had acceptable evaluations of his service with Respondent. According to the statutory criteria outlined in WEST VIRGINIA CODE § 18A-4-8b, Grievant should have received the position.

5. Grievant proved by a preponderance of the evidence that it was arbitrary and capricious for Respondent to consider him not qualified for the Electrician II position. Grievant proved by a preponderance of the evidence that he was qualified to perform the job at the time Respondent made its hiring decision.

Accordingly, this grievance is **GRANTED**.

Respondent is **ORDERED** to award the Electrician II position to Grievant. Respondent is **ORDERED** to award Grievant back pay plus interest, benefits, and seniority to the time Mr. Busse was placed in the position.

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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. See *also* 156 C.S.R. 1 § 6.20 (2008).

Date: November 9, 2017

Ronald L. Reece
Administrative Law Judge