

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MARK WALLS,
Grievant,

v.

Docket No. 2017-0955-CabED

CABELL COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Mark Walls, Grievant, filed this grievance against his employer the Cabell County Board of Education ("CCBE"), Respondent, protesting his non-selection for identified bus run(s). The original grievance was filed on September 6, 2016, and the grievance statement provides:¹

I bid on 25 extracurricular bus runs (08/02-08-08) and was offered choice of two jobs, when asked if I could guarantee 4:00 P.M. arrival to H.E.M.S I could not and Mr. Meadows immediately withdrew the offers stating he had to have someone at the school no later than 4. I should have had the choice of several runs not just the two based on my seniority. I believe 18A-4-8b & 18A-4-16 have been violated.

Relief Sought:

I want the opportunity to choose from the extra runs posted based on my seniority and receive the pay I would have received once school began on August 11, 2016. My first choice would have been EX8U17008 TTW-HHS PM #2 (SP. NEEDS)

Subsequent to the request for a level one hearing, a conference was held by mutual agreement at level one on September 19, 2016. A level one decision was issued on about September 30, 2016, granting in part, Grievant's grievance. Grievant was

¹ Variation in the wording of the grievance statement transpired as the grievance proceeded from level one to level three, but the core of the grievance is consistent and clear. Grievant maintains he is entitled to an additional extracurricular bus run, identified as bus run EXBU17008 (Sp. needs) transition assignment.

granted assignment EXBU17017 the “Highlawn Talented and Gifted Run” dating back to August 11, 2016. Grievant appealed to level two on October 17, 2016, contending he was also entitled to EXBU17008 Special Needs Transition to Work bus assignment. A mediation session was held on December 19, 2016. Grievant appealed to level three on December 19, 2016. A level three hearing was held before the undersigned Administrative Law Judge on June 6, 2017, at the Grievance Board’s Charleston office. Grievant appeared in person and was represented by Joe Spradling, Esquire, WV School Service Personnel Association. Respondent was represented by its counsel Leslie Tyree, Esquire. This matter became mature for consideration on or about July 7, 2017, the assigned mailing date for the submission of the parties' proposed findings of fact and conclusions of law documents. No request was received requesting an extension for submission of fact/law proposals.²

Synopsis

Grievant, employed by Respondent as a bus operator, applied for an extracurricular position, but was not the successful applicant. Grievant filed this grievance challenging his non-selection for an extracurricular special needs bus run. Grievant contends that, based on his seniority, he should have been awarded the Huntington High School (Sp. needs) bus run. Grievant is not assigned to a lift bus, which is required to complete the identified bus run. Respondent specified valid cause why Grievant, a service person, with acknowledged seniority was not employed in the position

² Respondent’s submission was received in a timely fashion. Grievant presented its proposed fact/law proposal tardy on or about certificate of service date of August 11, 2017.

for which he applied. Grievant is not available to complete this run. 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. Mark Walls, Grievant, is employed by Cabell County Board of Education, Respondent, as a bus operator, with a seniority date of February 16, 2005.

2. Grievant bid on a number of extracurricular bus runs, several conflicted with his regular schedule. Grievant was awarded the "Highlawn Talented and Gifted bus run" EXBU17017 dating back to August 11, 2016, by the instant September 30, 2016 level one decision.

3. Grievant had also bid on a Huntington High School bus run EXBU17008 (Sp. needs) Transition to Work assignment.

4. To accommodate one or more individuals scheduled for transportation, Bus Run EXBU17008 necessitates a lift bus. See R Ex 1.

5. Grievant does not operate a lift bus.

6. At the time relevant to this matter, Bus Operator Mike Lemley was the most senior applicant assigned to a lift bus. Bus Operator Mike Lemley, with a seniority start date of February 8, 2006, was awarded the Huntington High School EXBU17008 (Sp. needs) bus run.

7. Respondent has a lift bus stationed at the Transportation Complex at Cox Landing.

8. The lift bus stationed at the Transportation Complex is identified by Respondent for use in case of an emergency, or other event, when a regular lift bus is out of service. This bus is not a spare or extra bus, it should be considered the back-up bus.

9. As a general practice, in Cabell County bus operators do not share or switch on and off a set of reserve buses. Bus operators are generally assigned one identifiable bus and is primarily responsible for the care and maintenance of that bus for the duration of contract terms (e.g., semester, special run, school year, etc.).

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Grievant challenges his non-selection for one or more extracurricular bus runs. Grievant contends that he should have been awarded the Huntington High School (Sp. needs) bus run solely on his seniority.³ WEST VIRGINIA CODE § 18A-4-8b requires school service personnel positions to be filled based on seniority, qualifications and evaluation of past service. Further, if requested, a county board shall show valid cause why a service person with the most seniority is not promoted or employed in the position for which he or she applies. Respondent maintains Grievant is not available to complete the Huntington High School EXBU17008 (Sp. needs) bus run because he does not have access to the required equipment (lift bus) to comply with the posted assignment. Grievant is not assigned a lift bus, but is of the opinion (believes) he would be available for the EXBU17008 special needs run if he were allowed to drive to the Transportation Complex, pick up the back-up lift bus, complete the run, then drive the lift bus back to the Transportation Complex to pick up his assigned bus and drive it back to the Milton Garage.

³ WEST VIRGINIA CODE § 18A-4-16 provides:

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.

WEST VIRGINIA CODE § 18A-4-16(5) states that extracurricular school service personnel assignments and vacancies shall be filled pursuant to WEST VIRGINIA CODE § 18A-4-8b, unless an alternative procedure has been approved.

The special needs bus run, identified by Grievant as being unlawfully denied to him, required a lift bus. See job posting, R Ex 1. Bus operators generally are assigned one bus which is his or her responsibility for the length of a designated period e.g., school year and/or contract term. Buses are not generally provided on an ad hoc basis. The back-up lift bus Grievant wants to use for the run, in discussion, is stationed at the Transportation Complex and is used in situations where a regular lift bus has to be taken out of service (emergency & maintenance). Bus Operator Mike Lemley was the most senior applicant assigned to a lift bus. Essentially, Respondent was of the opinion that Grievant was ineligible to fulfill a fundamental condition of the posting. Bus Operator Mike Lemley was awarded the Huntington High School, EXBU17008 (Sp. needs) bus run because he, unlike Grievant, could fulfill the prerequisites of a special needs bus run.

Respondent does not dispute that Grievant has more seniority than Bus Operator Lemley, who was awarded the Special needs bus run; however, Respondent maintains it has valid and recognized rationale for the determination as applied. Respondent does not argue that the proposal presented by Grievant is forbidden, it is also NOT established as an obligation or mandated option that Respondent must make available. At best, it is a discretionary option, the discretion is Respondent's not Grievant's to determine how best to provide the essential services of Cabell County Schools.

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).

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).

It is not arbitrary and capricious for a board of education to deny an employee the opportunity to perform an extracurricular run when logistical problems exist. *Russell v. Wayne Co. Bd. of Educ.*, Docket No. 02-50-041 (March 25, 2002) aff.d, Kan. Co. Cir. Ct., Civil Action No. 02-AA-54 (August 22, 2002); see *Smith v. Putnam Co. Bd. of Educ.*, Docket No. 99-40-058 (April 2, 1999); *Garner v. Monongalia Co. Bd. Of Educ.*, Docket

No. 05-30-164 (Sept. 16, 2005). It is highlighted that Grievant does not operate a lift bus, the scenario that Grievant has envisioned may work theoretically but creates readily foreseeable logistic complications. The unwarranted travel, avoidable duplication, diminishing use of equipment and monopolizing of resources tend to diminish the practical application. The scenario limits Respondent's ability to maximize resources and creates unnecessary chaos. Given the inevitable, it is prudent to be prepared for a potential mechanical breakdown of one or more bus(es) on any given day. Grievant's presented plan inhibits Respondent's ability to efficiently respond to such disruptions. Respondent has a duty to operate in a responsible manner.

Respondent persuasively pointed out the rationale of its analysis and the wisdom of its determination. Grievant is not available to complete the identified run because he does not have reliable access to the required equipment (lift bus) to comply with the assignment as posted. There may always be some optional action or alternative conduct for every decision; nevertheless, just because there is a conceivable alternative scenario does not demonstrate that the conclusion reached is unlawful. Not all options are efficient or optimal use of limited resources. Reasonable men may differ as to the feasibility of Grievant's proposal but Respondent's determination not to avail itself of foreseeable logistic problem(s) is not unreasonable. Grievant did not meet his burden.

It is not established that Respondent is required to recognize every potential scenario before awarding an extracurricular assignment, but it is Respondent's duty to act responsible in the utilization and management of resources. Given the circumstances of the bus run in discussion, acknowledged prerequisites, logistics, limited

availability of resources and the applicability of a less constrictive solution, Respondent's determination was rational and reasonable. Respondent specified valid cause why Grievant, a service person, with acknowledged seniority was not employed in the position for which he applied. Respondent's actions were not arbitrary, capricious or clearly wrong.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. The burden of proof in a non-disciplinary matters rests with the Grievant to prove the elements of his case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). W.VA. CODE ST. R. § 156-1-3 (2008). "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 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 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. Wyoming County Board of Education*, 177 W.Va. 145, 351, S.E. 2d 58 (1986).

3. WEST VIRGINIA CODE § 18A-4-8b requires school service personnel positions to be filled on the basis of seniority, qualifications and evaluation of past service.

4. 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).

5. It is not arbitrary and capricious for a board of education to deny an employee the opportunity to perform an extracurricular run when logistical problems exist. *Russell v. Wayne Co. Bd. of Educ.*, Docket No. 02-50-041 (March 25, 2002) aff.d, Kan. Co. Cir. Ct., Civil Action No. 02-AA-54 (August 22, 2002); see *Smith v. Putnam Co. Bd. of Educ.*, Docket No. 99-40-058 (April 2, 1999); *Garner v. Monongalia Co. Bd. Of Educ.*, Docket No. 05-30-164 (Sept. 16, 2005).

6. Respondent acted in a reasonable manner in awarding a special needs bus run to the most senior bus operator with a bus equipped to meet the prerequisites of the job posting.

7. Grievant failed to establish that Respondent unlawfully failed to award him an identified extracurricular bus run.

Accordingly, this grievance is **DENIED**.

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: August 25, 2017

Landon R. Brown
Administrative Law Judge