

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JAMES DESHAZO,
Grievant,

v.

Docket No. 2017-2174 McDED

McDOWELL COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

James Deshazo, Grievant, filed this grievance against his employer the McDowell County Board of Education ("MCBOE"), Respondent, protesting his non-selection for a summer position. The original statement of grievance was filed on May 16, 2017, providing "I am filing this grievance on this new summer position based on my regular/summer seniority which I believe I am entitled[.]" Grievant seeks to be awarded the position and back pay.

A hearing was held at level one on May 30, 2017, and the grievance was denied at that level on June 21, 2017. Grievant appealed to level two on June 27, 2017, and a mediation session was held on October 6, 2017. Grievant appealed to level three on October 12, 2017. A level three hearing was held before the undersigned Administrative Law Judge on January 5, 2018, at the Grievance Board's Beckley office. Grievant appeared by counsel, Joe Spradling, Esquire, WSSPA. Respondent was represented by Howard Seufer, Jr., Esquire, Bowles Rice, LLP. At the level three hearing, counsel for Grievant verbally requested to submit on the underlying record. Respondent by counsel agreed. This matter became mature for consideration on January 8, 2018.

Synopsis

Grievant is employed by Respondent as a bus operator. Grievant seeks to be placed in one of three new summer general maintenance positions for the Summer of 2017. Of the applicants, Grievant was determined to be fourth in seniority. Grievant did not establish by a preponderance of the evidence entitlement to one of the new summer positions. Accordingly, this grievance DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant, James Deshazo, is employed by Respondent, McDowell County Board of Education as a Bus Operator.
2. Grievant filed this grievance on May 16, 2017, alleging his non-selection for newly created summer positions for general maintenance was in violation W. Va. Code 18A-4-8g.
3. It is uncontested that the three summer general maintenance position vacancies of 2017 were newly created summer service positions.
4. Grievant is alleging, based on his seniority, that he should have been selected for one of the three new summer positions.
5. Steve Johnson, one of the successful applicants for the summer general maintenance job, was the only applicant that qualified for the first priority. He was regularly employed by MCBOE in the general maintenance classification at the time of the posting.

6. No applicant qualified for the second priority.
7. Grievant, Thomas Bell and Jeff Gammon all qualified for the third priority because all were regularly employed service personnel holding jobs in classifications other than the category of the summer general maintenance position.
8. Thomas Bell's regular employment seniority date is September 18, 1989.
9. Jeff Gammon's regular employment seniority date is September 3, 2001.
10. Grievant's regular employment seniority date is September 8, 2003.
11. Both Thomas Bell and Jeff Gammon had more regular employment seniority than Grievant, thus were entitled to fill the remaining two new summer general maintenance positions.

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.*

“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 Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986). Grievant contends that in filling three newly created general maintenance positions for the summer of 2017, he should have been selected over two of the three successful candidates, in that he had 30 days of “summer seniority.” Respondent disagrees and highlights the non-contested fact that the positions in discussion were newly created general maintenance summer positions,

Service personnel summer contracts and seniority are governed by West Virginia Code Section 18-5-39, which reads in relevant part:

(f) Notwithstanding any other provision of this code to the contrary, the board may employ school service personnel to perform any related duties outside the regular school term as defined in section eight [§ 18A-4-8], article four, chapter eighteen-a of this code. An 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. If the employee is unavailable or **if the position is newly created, the position shall be filled pursuant to section eight-b [§ 18A-4-8b]**, article four, chapter eighteen-a of this code. . . .(Emphasis added)

Id.

In the instant situation, the positions in discussion were newly created general maintenance summer positions. West Virginia Code § 18A-4-8b(a), which is to be used in filling newly created summer positions, states that a board of education is required to

“make decisions affecting . . . the filling of any service personnel positions . . . on the basis of seniority, qualifications and evaluation of past service.”

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).

Respondent awarded the summer service person positions pursuant to seniority. However, contrary to Grievant's contentions because the vacancies were newly created summer service positions, Respondent maintains that the positions were to be filled based upon regular seniority, rather than Grievant's contended "summer seniority." citing *Carpenter v. Logan County Board of Education*, Docket No. 2015-0051-LogED

(September 4, 2015). “The seniority granted to regular employed workers and the ‘seniority’ granted to summer employees in their positions is controlled by separate statutes and is not meant to be comingled. W. Va. Code §§ 18-5-39; 18A-4-8b; & 18A-4-8g, *Bowmen 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-CONS (Jan. 20, 2012).” *Carpenter v. Logan County Bd. of Educ. and Terry Turner*, Docket No. 2015-0051-LogED (Sept. 4, 2015) *Carpenter v. Logan County Board of Education*, Docket No. 2016-1807-LogED (April 28, 2017).

The three summer general maintenance jobs at issue were “newly created summer positions,” as such the positions should be filled in a particular order. West Virginia Code § 18A-4-8b is to be followed in filling vacancies for newly created summer service personnel positions, and states, in part, as follows:

(a) A county board shall make decisions affecting promotions and the 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.

(b) 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. If requested by the employee, the 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. Qualified applicants shall be considered in the following order:

(1) Regularly employed service personnel who hold a classification title within the classification category of the vacancy;

(2) Service personnel who have held a classification title within the classification category of the vacancy whose employment has been discontinued in accordance with this section;

(3) Regularly employed service personnel who do not hold a classification title within the classification category of vacancy;

(4) Service personnel who have not held a classification title within the classification category of the vacancy and whose employment has been discontinued in accordance with this section;

W. Va. Code § 18A-4-8b.

Pursuant to evidence of record, only one of the successful applicants for the Summer of 2017 general maintenance job, Steve Johnson, qualified for the first priority. No applicant qualified for the second priority. While Thomas Bell, Jeff Gammon and Grievant all qualified for the third priority, in that all three were regularly employed service personnel holding jobs in classification categories other than the category of the summer posting. West Virginia Code §18A-4-8g(k) provides that:

[i]f a school service employee applies for a position outside of the classification category he or she currently holds, and if the vacancy is not filled by an applicant within the classification category of the vacancy, the applicant shall combine all regular employment seniority acquired for the purpose of bidding on the position.

Accordingly, pursuant to the evidence of record, Thomas Bell and Jeff Gammon each had more acquired regular employment seniority than Grievant thus, were entitled to fill the remaining two summer general maintenance positions. See Fof 7-9 *infra*.

The West Virginia Supreme Court of Appeals has routinely held that, "Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous." Syl. Pt. 4, *Security National Bank & Trust Co. v. First W. Va. Bancorp, Inc.*, 166W. Va. 775, 277 S.E.2d 613 (1981); Syl. Pt.1, *Dillon v. Bd. of County of Mingo*, 171 W. Va. 631, 301 S.E.2d 588 (1983). 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 his 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).

Respondent filled the positions in discussion pursuant to applicable West Virginia Code relevant to newly created summer positions. Grievant has not demonstrated by a preponderance of the evidence that Respondent erred in filling the three summer of 2017 general maintenance positions. Absent some unidentified error in calculation the three most senior candidates were selected.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. Because the subject of 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 Board, 156 C.S.R. 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 employer has not met its burden. *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 Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986).

3. West Virginia Code § 18A-4-8b states, in part,

(a) A county board shall make decisions affecting promotions and the 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 [§ 18A-4-8] of this article, on the basis of seniority, qualifications and evaluation of past service.

(b) 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. If requested by the employee, the 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. Qualified applicants shall be considered in the following order:

(1) Regularly employed service personnel who hold a classification title within the classification category of the vacancy;

(2) Service personnel who have held a classification title within the classification category of the vacancy whose employment has been discontinued in accordance with this section;

(3) Regularly employed service personnel who do not hold a classification title within the classification category of vacancy;

(4) Service personnel who have not held a classification title within the classification category of the vacancy and whose employment has been discontinued in accordance with this section;

W. Va. Code § 18A-4-8b.

4. “The seniority granted to regular employed workers and the ‘seniority’ granted to summer employees in their positions is controlled by separate statutes and is not meant to be comingled. 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-CONS (Jan. 20, 2012).” *Carpenter v. Logan County Bd. of Educ. and Terry Turner*, Docket No. 2015-0051-LogED (Sept. 4, 2015).

5. The successful applicants for the new summer general maintenance positions all had more employment seniority than Grievant.

6. Grievant did not demonstrate that Respondent erred in applying the seniority priority application of West Virginia Code § 18A-4-8b(b) for the three newly created general maintenance positions for the Summer of 2017.

7. Grievant has not established by a preponderance of the evidence that he was unreasonably denied one of the newly created 2017 summer general maintenance positions.

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: February 27, 2018

Landon R. Brown
Administrative Law Judge