THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

GARY WROBLEWSKI,
Grievant,

v. **Docket No. 2018-0464-WayED**

WAYNE COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Gary Wroblewski, Grievant, is employed as a classroom teacher by Respondent, Wayne County, Board of Education ("Board"). He has been employed by the Board for twenty-one years and is presently assigned to Spring Valley High School ("Spring Valley"). Mr. Wroblewski filed a Level One grievance form dated September 27, 2017, alleging:

> Grievant applied for two posted assignments: (1) Alternative Education Lead Teacher, and (2) Alternative Education Special Education Teacher at Wayne High School. These positions are 3.5 hours each afternoon from Monday through Thursday. The successful candidate will receive $25.00 per hour (Lead) and $20.00 per hour (special ed.). Grievant did not receive either of the positions. Grievant alleges a violation of West Virginia Code § 18A-4-16, SBE Policy 4373, and that Respondent has abused its discretion in filling these positions.

As relief, Grievant seeks "instatement into one of these assignments; retroactive wages, benefits, and seniority, and an award of interest on all monetary sums."

A Level One hearing was held and a decision denying the grievance was entered on January 4, 2018. Grievance appealed to Level Two on January 16, 2018, and a mediation was conducted on February 9, 2018. Grievant appealed to Level Three by form dated February 20, 2018. A Level Three hearing was held in the Charleston office of the

West Virginia Public Employees Grievance Board on June 25, 2018. Mr. Wroblewski was present and represented by John E. Roush, Esquire, AFT-WV and the Wayne County Board of Education was represented by Leslie Tyree, Esquire. This matter became mature for decision August 2, 2018, upon receipt of the last Proposed Finding of Facts and Conclusions of Law from the parties.

Synopsis

Grievant applied for two extra-curricular teaching positions at the Wayne County Alternative Learning Center. The classes start at 3:30 p.m. and run through 7:00 p.m. and are located at Wayne Middle School. Grievant demonstrated that he was qualified for the two positions. Grievant's regular full-time teaching position is at Spring Valley High School. Due to the end time of his regular teaching schedule and the distance from Spring Valley High School to Wayne Middle School, it is not possible for Grievant to be at the Alternative Learning Center until 3:45 p.m. at best. Respondent did not consider Grievant for the posted position because he was not available to be present at the start of classes. Grievant argued unsuccessfully that it was arbitrary and capricious for Respondent to start the alternative program at a time when he and other potential applicants were not available to be considered for the positions.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Gary Wroblewski, Grievant, is employed as a classroom teacher by Respondent, Wayne County Board of Education ("Board"). He has been employed by the Board for twenty-one years and is presently assigned to Spring Valley High School

("Spring Valley"). He holds teaching certifications in Social Studies, Special Education and Alternative Education.

2. In addition to his regular full-time teaching position, Grievant has worked extra-curricular assignments in the Alternative Learning Center for Wayne County Schools at Ceredo Kenova High School for three years, and at Buffalo High School for five years. For two of the five years at Buffalo High School, Grievant was assigned as the lead teacher for the Alternative Learning Center ("ALC"). During this period, the ALC classes started at 4:00 p.m. and ended at 7:30 p.m. and were held three days per week. Grievant quit bidding on these extracurricular assignments around 2006 when he began receiving summer school assignments.

3. The ALC provides a learning structure for students who are not succeeding in the regular classroom structure.[1] The goal of the ALC is to keep the students current on their instruction while addressing the issues which impede their ability to cope in the regular setting. It is anticipated that every ALC student will be returned to the regular classroom.

4. On August 15, 2017, the Board posted two extra-curricular assignments for the ALC: one for a lead teacher and one for a special education teacher. Both positions were located at Wayne Middle School. The positions were for four days per week, Monday through Thursday. The time was 3:30 p.m. to 7:00 p.m. Respondent Exhibits 1 & 2.

5. Grievant, as well as other classroom teachers, applied for the extra-curricular positions.

[1] Students are often assigned to the ALC because they are extremely disruptive in the regular classroom or have been expelled for a violation of the W. Va. Safe Schools Act. *See*, W. VA. CODE § 18A-5-1a.

6. Grievant was not considered for the ALC positions because he could not reach Wayne Middle School after the end of his duties at Spring Valley until 3:45 p.m. at best. Grievant requested that he be able to leave his last class early or that his schedule be changed to give him a planning period for the last period of the day.[2] Both requests were denied by his building principal.

7. Classroom teachers in alternative education programs must be selected upon their demonstrated competence in the following standards:

> 1. Any West Virginia professional teaching certificate;
> 2. Ability to effect positive behavior in disruptive students;
> 3. Effective leadership and/or mentoring skills working with youth;
> 4. Successful experience in providing education to troubled or disruptive youth;
> 5. Specialized training or experience in non-traditional programs; and,
> 6. Specialized training behavior management skills.[3]

8. Respondent used the provisions of *State Board Policy 5000*[4] to compare the candidates for the posted positions at the ALC rather than the criteria set out in the *West Virginia Procedure Manual for Expected Behavior in Safe Supportive Schools.* There is no evidence that the results would have been different with the use of the different criteria.

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[2] Changing Grievant's schedule would require rescheduling the classes for all students in his last period class or changing the schedule of at least one other teacher. Allowing Grievant to leave his last class early would reduce the instructional time for those students.

[3] *West Virginia Procedure Manual for Expected Behavior in Safe Supportive Schools.* Page 60. *See also*, Grievant Exhibit 1 p. 48.

[4] *State Board Policy 5000* was adopted to implement the hiring criteria set out in W. VA. CODE § 18A-4-7a.

9. The Wayne County teachers selected for the positions were Aaron Staley and Kristi Robertson. Mr. Staley had approximately seven years of experience in an alternative school setting and Ms. Robertson had less than a year. The overall qualifications of the successful applicants were not compared with Grievant's qualifications because Grievant was disqualified from holding the position due to his schedule conflict.

10. The 3:30 p.m. start time made it difficult for high school teachers in some other Wayne County high schools to arrive at Wayne Middle School in time for the start of classes.

Discussion

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. VA. CODE R §156-1-3. *Burden of Proof.* "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 party bearing the burden has not met its burden. *Id.*

There is no dispute that the ALC teaching positions are extra-curricular pursuant to W.VA. CODE § 18A-4-16 which states:

> The assignment of teachers and service personnel to extracurricular assignments shall be made only by mutual agreement of the employee and the superintendent, or designated representative, subject to board approval. 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.

Grievant believes he should have been considered and selected to fill one of the two posted alternative education teaching jobs for which he applied. "County boards of education have substantial discretion in matters relating to hiring, assignment, transfer, and promotion of school personnel, as well as matters involving curricular programs and qualification and placement of personnel implementing those programs. However, that discretion must be tempered in a manner that is reasonably exercised, in the best interest of the schools, and in a manner, which is not arbitrary and capricious." *Cowen v. Harrison County Bd. of Educ.*, 195 W. Va. 377, 378, 465 S.E.2d 648, 649, (1995). *See* also, Syl. Pt. 3, *Dillon v. Wyoming County Bd. of Educ.,*177 W. Va. 145, 351 S.E.2d 58 (1986).

Grievant opines that the Respondent's decision to start the ALC classes at 3:30 p.m. was arbitrary and capricious because it disqualified him, and many other high school teachers in Wayne county, from consideration. The disqualification resulted from the regular schedules of those teachers ending at a time that made it impossible to reach the Wayne Middle School before ALC classes started. Grievant points out that the early start time significantly reduces the pool of applicants for the extra-curricular positions. He cites W. VA. CODE § 18A-4-7a (o) (1) (D) which states, "Postings for vacancies made pursuant to this section shall be written so as to ensure that the largest possible pool of qualified applicants may apply…" Grievant argues that Respondent's decision to start the ALC classes is in direct conflict with this statutory directive.

Grievant's position is fatally flawed. First, the statute regulates how professional positions must be posted. The problem with Grievant being disqualified does not relate to the posting for the positions but rather the ALC start time. More importantly, there is no dispute that these positions are extra-curricular as defined in W.VA. CODE § 18A-4-16. The statutory provision cited by Grievant simply does not apply to filling extra-curricular positions.

The Grievance Board has previously determined that the provisions of W.VA. CODE § 18A-4-7a are not applicable in the selection of professional personnel for extracurricular assignments*. Hall v. Mingo County Board of Education*, Docket No. 95-29-529 (March 28, 1996); *Foley v. Mineral County Board of Education*, Docket No. 93-28-255 (Oct. 29, 1993); *Smith v. Logan County Board of Education*, Docket No. 91-23-040 (July 31, 1991). Additionally, as Grievant has pointed out, the criteria for filling these alternative teaching positions is set out in *West Virginia Procedure Manual for Expected Behavior in Safe Supportive Schools,* not in W.VA. CODE § 18A-4-7a. Yet the provision Grievant relies upon specifically applies to, "[p]ostings for vacancies made pursuant to this section," which is W.VA. CODE § 18A-4-7a.

Faced with this obstacle, Grievant points out that for interpreting the provisions of Chapter 18 and 18A of the West Virginia Code, the West Virginia Supreme Court has held that, "[t]he two chapters of the Code, though not enacted at the same time, should be considered in *pari materia* and, therefore, they should be read and considered together. *State* v. *Reel*, 152 W.Va. 646, pt. 1 syl., 165 S.E.2d 813; *State ex rel. Campbell* v. *Wood*, 151 W.Va. 807, pt. 1 syl., 155 S.E.2d 893; *Owens-Illinois Glass Company* v. *Battle*, 151 W.Va. 655, pt. 1 syl., 154 S.E.2d 854. "*Smith v. Siders*, 155 W. Va. 193, 201,

183 S.E.2d 433, 437, (1971). Grievant reasons that this job posting statute should be read in *pari materia* with the positing provision for other positions set out in Chapter 18A of the Code to require that all position postings for education employees must "be written so as to ensure that the largest possible pool of qualified applicants may apply" W. VA. CODE § 18A-4-7a (o)(1)(D).

The ruling in *Smith v. Siders* does not apply in this matter. In that case, the Court was face with two statutory provisions related to the termination of a county superintendent's contract. One in Chapter 18 and one in Chapter 18A. The Court utilized the "in *pari materia*" rule to arrive at a statutory interpretation which allowed the two provisions to be applied in such a way as to harmonize the meaning and application of both statutes. Such an interpretation is not necessary here. The statute clearly and unambiguously applies to positions filled under W. VA. CODE § 18A-4-7a. There is no conflict with another Code provision which requires the two to be interpreted. The West Virginia Supreme Court of Appeals has consistently held:

> "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." *Syl. pt. 2, State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968); *Syl. pt. 1, Peyton v. City Council of Lewisburg*, 182 W.Va. 297, 387 S.E.2d 532 (1989); *Syl. pt. 3, Hose v. Berkeley County Planning Commission*, 194 W.Va. 515, 460 S.E.2d 761 (1995); *Syl. pt 2, Mallamo v. Town of Rivesville*, 197 W.Va. 616, 477 S.E.2d 525 (1996), *Maikotter v. University of W. Va. Bd. of Trustees/West Va. Univ*., 206 W. Va. 691; 527 S.E.2d 802 (1999).

The plain and clear meaning of W. VA. CODE § 18A-4-7a(o)(1)(D) is that it applies exclusively to positions to be filed pursuant to W. VA. CODE § 18A-4-7a, and not to the alternative teaching extra-curricular positions which are the subject of this grievance.

Grievant also argues that there is not good reason for Respondent to move the starting time of the ALC classes from 4:00 p.m. to 3:30 p.m. making the action arbitrary and capricious. Grievant notes that Respondent's testimony was that the time was changed to provide more instructional time. However, the end time was moved up a half hour as well, so the instructional time remained the same. There was no evidence that the time was changed to eliminate specific applicants or for any other nefarious reason.

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)).

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 her judgment for that of [the employer]." *Blake v. Kanawha County Bd. of Educ.,* Docket No. 01-20-470 (Oct. 29, 2001); *Butler v. Dep't of Health & Human Res.*, Docket No. 2014-0539-DHHR (Mar. 16, 2015).

Once again, "County boards of education have substantial discretion in matters. . . involving curricular programs and qualification and placement of personnel implementing those programs." Grievant did not prove by a preponderance of the evidence that

Respondent's decision to start the ALC classes at 3:30 p.m. was unreasonable, arbitrary and capricious, or an abuse of its discretion. Accordingly, the grievance is **DENIED**.

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. VA. CODE R §156-1-3. *Burden of Proof.* "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 party bearing the burden has not met its burden. *Id.*

2. "County boards of education have substantial discretion in matters relating to hiring, assignment, transfer, and promotion of school personnel, as well as matters involving curricular programs and qualification and placement of personnel implementing those programs. However, that discretion must be tempered in a manner that is reasonably exercised, in the best interest of the schools, and in a manner, which is not arbitrary and capricious." *Cowen v. Harrison County Bd. of Educ.*, 195 W. Va. 377, 378, 465 S.E.2d 648, 649, (1995). *See* also, Syl. Pt. 3, *Dillon v. Wyoming County Bd. of Educ.,*177 W. Va. 145, 351 S.E.2d 58 (1986).

3. The Grievance Board has previously determined that the provisions of W.VA. CODE § 18A-4-7a are not applicable in the selection of professional personnel for extracurricular assignments*. Hall v. Mingo County Board of Education*, Docket No. 95-29-529 (March 28, 1996); *Foley v. Mineral County Board of Education*, Docket No. 93-28-

255 (Oct. 29, 1993); *Smith v. Logan County Board of Education*, Docket No. 91-23-040 (July 31, 1991).

4. The criteria for filling these alternative teaching positions is set out in *West Virginia Procedure Manual for Expected Behavior in Safe Supportive Schools,* not in W.VA. CODE § 18A-4-7a.

5. Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." *Syl. pt. 2, State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968); *Syl. pt. 1, Peyton v. City Council of Lewisburg*, 182 W.Va. 297, 387 S.E.2d 532 (1989); *Syl. pt. 3, Hose v. Berkeley County Planning Commission*, 194 W.Va. 515, 460 S.E.2d 761 (1995); *Syl. pt 2, Mallamo v. Town of Rivesville*, 197 W.Va. 616, 477 S.E.2d 525 (1996), *Maikotter v. University of W. Va. Bd. of Trustees/West Va. Univ*., 206 W. Va. 691; 527 S.E.2d 802 (1999).

6. 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)).

7. 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).

8. Grievant did not prove by a preponderance of the evidence that Respondent's decision to start the ALC classes at 3:30 p.m. was unreasonable, arbitrary and capricious, or an abuse of its discretion.

Accordingly, the 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: September 13, 2018.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE