THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DJUANA KENNEDY,

Grievant,

v. **Docket No. 2018-1209-WetED**

WETZEL COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Djuana Kennedy, is employed by Respondent, Wetzel County Board of Education. On May 17, 2018, Grievant filed this grievance against Respondent stating, "I was denied the Paden City Summer School bus run for 2018. I had driven this run for the last three summers. I was the last person to drive the Paden City Summer School bus run. This is a violation of West Virginia Code 18a-5-39[sic][1]." For relief, Grievant seeks "[t]o be awarded the Paden City Summer School bus run for 2018 and any back pay for time I did not drive this run."

A level one conference was held on June 14, 2018. A level one decision was rendered on July 3, 2018, denying the grievance. Grievant appealed to level two on July 13, 2018, and a mediation session was held on October 16, 2018. Grievant appealed to level three of the grievance process on October 22, 2018. A level three hearing was held on January 15, 2019, before the undersigned at the Grievance Board's Westover, West Virginia office. Grievant appeared in person and by counsel George B. "Trey" Morrone III, West Virginia School Service Personnel Association. Respondent appeared by its Superintendent, Abram S. Highley, and by counsel, Denise M. Spatafore, Dinsmore

[1]Corrected to West Virginia Code §18-5-39 upon appeal to level two.

Shohl, LLP. This matter became mature for decision on February 27, 2019, after final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Respondent has employed Grievant as a summer bus run operator since 2014. Each year, Respondent reduces in force all summer bus driver positions, reposts the positions by run, and chooses from applicants based on summer seniority, which usually results in drivers retaining their runs from the previous summer. Grievant drove the New Martinsville/Paden City summer run in 2017. In 2018, Respondent eliminated the run driven by the most senior summer bus driver, Ms. Norris, and reduced in force the least senior summer bus driver, Mr. West, before assigning Grievant's 2017 summer run to Ms. Norris. Respondent assigned to Grievant the summer Extended Year Run, resulting in her working 14 fewer days in the summer of 2018. Grievant contends that she was entitled to retain her 2017 summer run under W. Va. Code § 18-5-39(f). Respondent contends that W. Va. Code § 18-5-39(g) obligated it to provide Ms. Norris her choice of summer runs once it eliminated Ms. Norris' 2017 summer bus run. The cited code sections mandate that reemployment in summer positions be based on summer seniority, but permit drivers who drove the previous summer to retain their summer employment over more senior summer drivers who did not drive the previous summer. While neither party's interpretation of the code is accurate, Respondent's interpretation led it to the proper outcome. Accordingly, the grievance is 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 as a full-time and summer bus operator by Respondent, Wetzel County Board of Education.

2. Grievant has been a summer bus driver with Respondent since 2014.

3. Each year, Respondent reduces in force all summer bus driver positions, reposts the positions by run, and chooses from applicants based on summer seniority, which usually results in each driver being awarded the run held the previous summer.

4. Grievant's summer bus run assignments have been as follows:

   a. 2014 - Short Line School
   b. 2015 - New Martinsville School and Paden City Elementary School
   c. 2016 - New Martinsville School and Paden City Elementary School
   d. 2017 - New Martinsville School and Paden City Elementary School
   e. 2018 - Extended School Year

5. There existed four summer bus runs during 2014 and 2015.

6. There existed five summer bus runs during 2016 and 2017.

7. Respondent posted four summer bus runs for 2014 and 2015, including one for Long Drain School, one for Short Line School, and two for New Martinsville School/Paden City Elementary School.

8. Respondent posted a fifth summer bus run for 2016 and 2017, which it identified as Extended School Year run.

9. Marie Norris was the most senior summer bus operator going into 2018.

10. Grievant was the fourth most senior summer bus operator going into 2018.

11. Jason West was the fifth most senior summer bus operator going into 2018, and was thus the least senior summer bus driver.

12. Only four of the previous summer's five bus driver positions were needed in 2018.

13. The Short Line bus run, driven by Ms. Norris in the summer of 2017, was eliminated in 2018.

14. Jason West was reduced in force for summer employment in 2018.

15. When the summer runs were posted, Ms. Norris, as the most senior summer driver, was given her choice of the remaining summer runs in 2018, and assumed the New Martinsville/Paden City run that Grievant had driven the previous summer.

16. In 2018, Grievant was not offered her New Martinsville/Paden City run from the summer of 2017, but was able to take the Extended School Year run previously held by Mr. West.

17. The Extended School Year bus run entailed 14 fewer working days than the other three summer runs.

18. Grievant's pay rate for the summer of 2018, was $133.80 per day.

19. In receiving the Extended School Year bus run for the summer of 2018, Grievant's work days were reduced by 14 days from what they would have been if she had kept her New Martinsville/Paden City run, resulting in a loss of $1,873.20.

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*.

Grievant contends that Respondent acted appropriately when, for the summer of 2018, it reduced the least senior summer bus operator, Mr. West, after eliminating the 2017 summer bus run held by the most senior summer bus operator, Ms. Norris. Grievant contends that Respondent acted improperly when it then gave Ms. Norris the New Martinsville/Paden City run Grievant had driven in 2017, and assigned Grievant the Extended School Year run driven by Mr. West in 2017. Grievant contends that she is entitled to retain her 2017 summer bus run and that Ms. Norris should have received the Extended School Year run held by Mr. West. Grievant asserts that West Virginia Code §§ 18-5-39(f) and 18-5-39(g) are to be read in conjunction with each other and that, under the reduction in force provision of 39(g), Mr. West was properly reduced as the least senior bus driver, but that there was no further authority under either section to then assign Ms. Norris a run belonging to any of the remaining drivers. None of the 2017 summer runs held by any of the remaining drivers were eliminated. Therefore, Grievant asserts that, as 39(g) fails to address the assignment of these runs and as 39(f) does address their assignment, 39(f) would govern and allow each of the remaining drivers to keep their 2017 summer runs. This is accomplished by assigning to Ms. Norris the run driven by Mr. West, and by allowing Grievant and the remaining drivers to retain their 2017 summer runs.

Respondent counters that only the later of West Virginia Code §§ 18-5-39(f) and 18-5-39(g) applies to a reduction in summer positions. Respondent contends that these sections are mutually exclusive because 39(g) mandates that the driver of an eliminated

run choose from the runs of the less senior drivers whereas 39(f) allows a driver to retain her run from the previous summer. Respondent asserts that it was required by 39(g) to provide Ms. Norris her choice of summer runs, since she was the most senior driver, and that she was therefore properly allowed to select Grievant's run.

West Virginia Code § 18-5-39(g) provides that "[i]f 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." West Virginia Code § 18-5-39(f) provides, in pertinent 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."

Grievant contends that every effort should be made to give effect to both sections and that this can be done by assigning Grievant the New Martinsville/Paden City run and Ms. Norris the Extended School Year run. While asserting that these sections conflict, Respondent also contends that there is simply one summer school program for associated service personnel and that personnel are not entitled to exactly the same location or run so long as summer personnel are employed under their classification. It further asserts that it has substantial discretion in matters relating to the summer assignment of school personnel, as long as it does so in a manner which is not arbitrary and capricious.

Unfortunately, neither party's interpretation of the code is correct. Respondent correctly relies on prior Board decisions which hold there is only one summer bus operator

position, even when there are various summer bus runs, in contending that it complied with these decisions in assigning Grievant any one of its summer bus runs. "The Grievance Board has also determined that some flexibility exists in the definition of 'same assignment.' It 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. By way of example, bus operators' positions remain the same even though the routes change from summer to summer, school lunch programs at different schools are part of one overall summer lunch program, and a summer transportation program employing aides remain the same program even though the routes change from summer to summer. *Lilly v. Fayette County Bd. of Educ*., Docket No. 96-10-481 (Sept. 15, 1997); *Lilly v. Fayette County Bd. of Educ*., Docket No. 99-10-43[3] (Mar. 17, 2000); *Williams v. Kanawha County Bd. of Educ*., Docket No. 0[1]-20-058 (May 10, 2001); *Costello v. Monongalia County Bd. of Educ*., Docket No. 01-30-016 (June 21, 2001)." *Eisentrout v. Preston County Bd. of Educ*., Docket No. 2010-0022-PreED (April 16, 2010); *Cowan, et al. v. Ritchie County Bd. of Educ*., Docket No. 2010-1537-CONS (Jan. 20, 2012). In these actions, the Board determined that some flexibility existed in the definition of “same assignment” or “position”.

While there are inconsistencies in Respondent’s overall interpretation of the code sections at issue, the strength of its position rests in its reposting of the summer driver positions each year. The practical result of its so doing is that Respondent in effect reduces in force these positions each and every year and then reemploys the drivers from the previous summer if they apply, thus enabling Respondent to utilize section (g), since it applies to reduction and reemployment of summer employees. However, in identifying

each run through its postings of the summer driver positions, Respondent gives the misleading impression that it is filling individual runs rather than summer bus driver positions. While Respondent aptly allocates priority on the basis of summer bus driver seniority when hiring summer bus drivers, its practice of then giving drivers their choice of run on the basis of summer seniority gives the misleading impression that (g) mandates that it do so. Section (g) simply mandates that Respondent reemploy reduced drivers on the basis of summer seniority to the one summer bus driver "position" or "assignment".

The distinction between (g) and (f) is that (f) is not a seniority provision like (g), but (f) simply trumps (g)'s seniority provision if a more senior summer employee does not work the summer prior to the one in question when a less senior one does. The less senior employee then prevails over the more senior one if there are not enough summer driver slots for both of them the following summer. Section 39(g) does not specifically mandate that Respondent provide summer drivers their choice of specific run based on summer seniority. Neither does section 39(f) mandate priority in the assignment of runs, but simply prioritizes the hiring of bus drivers from the previous summer over more senior summer drivers who did not work the previous summer. Neither (g) nor (f) even mentions assignment of summer runs. Section 39(g) dictates reemployment of summer bus operators based on summer seniority, should the number of drivers be reduced. Each driver is entitled to be rehired into a summer bus position if their seniority allows, but not a particular summer position. *Cowan, et al. v. Ritchie County Bod of Educ., supra*. As discussed in *Cowan, supra*, an employee may be entitled to a summer position due to his or her summer seniority, but not necessarily at the exact same location, so long as summer employment is retained. In reemploying drivers, section 39(f) allows drivers from

the previous summer to trump the summer seniority of drivers who did not drive the previous summer.

Respondent argues that it must apply section 39(g) at the expense of section 39(f). Grievant contends that Respondent does not have the discretion to interpret one statutory provision at the expense of another when it can avoid doing so. If Respondent has a path to compliance with both (f) and (g), it must take that path. "A statute must be construed to give effect to all of its provisions, and not to diminish any of them." *West Virginia Human Rights Comm'n v. Garretson*, 468 S.E.2d 733, 738, 196 W. Va. 118, 123,(1996). In spite of Respondent's argument to the contrary, Respondent did abide by both (f) and (g) by assigning to Ms. Norris Grievant's New Martinsville/Paden City run. Section (f) was not applicable, because all summer drivers in 2018, had also driven in the summer of 2017. Because they all returned from the previous summer, Respondent did not have to recategorize seniority under section (f). Respondent complied with (g) by giving Ms. Norris priority in reemployment, in essence reemploying her before any of the other drivers. Ironically, Respondent clearly complied section 39(f), section 39(g), and the "same assignment" provision of *Eisentrout* and *Cowan*. Section (g) and section (f) do not conflict. Section 39(f) simply clarifies (g) by allowing a less senior summer driver to retain summer employment over a more senior summer driver when the more senior driver takes the previous summer off and the less senior one does not.

Even if (f) and (g) were in conflict, the undersigned does not need to determine which section takes precedent in the instant case, because all drivers returned from the previous summer and Respondent did not reconfigure driver seniority. Therefore, (f) does not apply. The bottom line is that Grievant did retain a summer position for 2018, even

after a reduction in the number of positions, due to her summer seniority, which is what she was entitled to under (f), (g), and the "same assignment" provision of *Eisentrout* and *Cowan*.

While Respondent has great discretion in conducting its affairs in a manner not specifically addressed by code, it cannot do so in a manner that is arbitrary and capricious. "'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). "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). Because it appears that Respondent applied its flexible interpretation of "summer assignment or position" in the limited situation of the elimination of a run, and not to the reassignment of runs between the same drivers from one summer to the next, its interpretation could be seen as arbitrary.

While Respondent clearly allows more senior summer drivers to have their pick of run when their run is eliminated, the undersigned cannot determine how Respondent assigns runs when the drivers and runs are the same from one summer to the next. Although the record does not reflect whether or not Respondent consistently allows every summer driver to choose their run based on seniority, the silence of evidence works against Grievant because she has the burden of proof. The undersigned reads this silence in Respondent's favor to presume a consistent application of Respondent's policy allowing selection of summer runs each year based on summer seniority. The undersigned concludes that Grievant did not prove that Respondent's methodology in assigning runs was arbitrary and capricious.

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. "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." W. VA. CODE § 18-5-39(f)

3. “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)

4. “W. Va. Code 18-5-39, which addresses the employment of service personnel for summer school programs, provides that any employee who accepts a summer assignment is entitled to the same assignment the following year if it exists. *Tuttle v. Marion County Bd. of Educ.*, Docket No. 96-24-412 (Feb. 28, 1997). *See Chaffins v. Wayne County Bd. of Educ.*, Docket No. 97-50-092 (Sept. 3, 1997). *See generally Mooney v. Mercer County Bd. of Educ*., Docket No. 94-27-582 (July 31, 1995); *Panrell v. Monongalia County Bd. of Educ.*, Docket No. 94-30-586 (Mar. 24, 1995); *Cooke v. Logan County Bd. of Educ.*, Docket No. 92-23-031 (Oct. 9, 1992).” *Lemley v. Wood County Bd. of Educ*., Docket No. 99-54-198 (Sept. 9, 1999); *See also Gump v. Marshall County Bd. of Educ*., Docket No. 2017-2138-MarED (May 22, 2018).

5. "The Grievance Board has also determined that some flexibility exists in the definition of 'same assignment.' It 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. By way of example, bus operators' positions remain the same even though the routes change from summer to summer, school lunch programs at different schools are part of one overall summer lunch program, and a summer transportation program employing aides remain the same program even though the routes change from summer to summer. *Lilly v. Fayette County Bd. of Educ*., Docket No. 96-10-481 (Sept. 15, 1997); *Lilly v.*

Fayette County Bd. of Educ., Docket No. 99-10-43[3] (Mar. 17, 2000); *Williams v. Kanawha County Bd. of Educ*., Docket No. 0[1]-20-058 (May 10, 2001); *Costello v. Monongalia County Bd. of Educ*., Docket No. 01-30-016 (June 21, 2001)." *Eisentrout v. Preston County Bd. of Educ*., Docket No. 2010-0022-PreED (April 16, 2010); *Cowan, et al. v. Ritchie County Bd. of Educ*., Docket No. 2010-1537-CONS (Jan. 20, 2012).

6. "A statute must be construed to give effect to all of its provisions, and not to diminish any of them." *West Virginia Human Rights Comm'n v. Garretson*, 468 S.E.2d 733, 738, 196 W. Va. 118, 123,(1996).

7. "As we noted in Syllabus Point 7, in part, of *Lincoln County Board of Education v. Adkins*, 188 W. Va. 430, 424 S.E.2d 775 (1992): 'Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.' (Citations omitted). *See also* Syl. pt. 2, *West Va. Dept. of Health and Human Resources/Welch Emergency Hosp. v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993); Boley v. Miller, 187 W. Va. 242, 418 S.E.2d 352 (1992); *Blennerhassett Historical Park Comm'n v. Public Serv. Comm'n of W. Va*., 179 W. Va. 250, 366 S.E.2d 758 (1988). . . .*Martin v. Randolph Cnty Bd. of Educ*., 195 W. Va. 297, 313, 465 S.E.2d 399, 415 (1995)." *Lewis Cty Bd. of Educ. v. Bohan*, 2015 W. Va. LEXIS 263.

8. "'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).

9. Grievant did not prove by a preponderance of evidence that Respondent failed to comply with the law when it assigned Grievant's 2017 summer run to Ms. Norris in the summer of 2018, and assigned to Grievant the Extended School Year run, or that the manner in which Respondent assigned these runs was arbitrary and capricious.

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 W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: April 9, 2019

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Joshua S. Fraenkel
Administrative Law Judge