

# **WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**THOMAS MESSER**  
**Grievant,**

**v.**

**Docket No. 2019-1282-CONS**

**WAYNE COUNTY BOARD OF EDUCATION,**  
**Respondent.**

## **DECISION**

Thomas Messer, Grievant, filed grievances against his employer Wayne County Board of Education ("WCBE"), Respondent, protesting non-selection and alleging several allegations of wrong doing: Improper RIF Transfer, demotion, discrimination, favoritism, reprisal and failure to properly employ. The original grievances 2019-0173-WayED (filed July 31, 2018), 2019-0384-WayED (filed Sept 19, 2018) and 2019-0610-WayED (filed November 20, 2018) were merged into this consolidated grievance pursuant to a verbal request of the parties and the subsequent *Order of Consolidation* dated March 27, 2019. The universal relief Grievant sought by the claims was to be placed in an equivalent position, backpay, interest and related benefits.

A level one conference was held on or about October 2, 2018 for grievances 2019-0173-WayED and 2019-0384-WayED, where Grievant claimed he was improperly Reduced in Force/Transferred during the spring of 2017. A separate level one conference was held for grievance 2019-0610-WayED, wherein Grievant alleged he was improperly denied a position for which he had applied. The grievances were denied at level one by written decisions dated October 30, 2018 and February 8, 2019, respectfully. Grievant appealed to level two and a mediation session was held on March 26, 2019. Further, on March 26, 2019, the parties verbally requested the grievances be

consolidated. A consolidation order was issued by the Public Employees Grievance Board dated March 27, 2019. Grievant appealed to level three on or about April 2, 2019. A level three hearing was held before the undersigned Administrative Law Judge on November 6, 2019, at the Grievance Board's Charleston office. Grievant was present in person and with his representative, Ben Barkey, West Virginia Education Association (WVEA). Respondent was represented by counsel, Leslie Tyree, Esquire. At the conclusion of the level three hearing, the parties were invited to submit written fact/law proposals. Both parties submitted proposed Findings of Fact and Conclusions of Law, and this matter became mature for decision on December 18, 2019, on receipt of the last of these fact/law proposals.

### **Synopsis**

Grievant is employed by Respondent as a classroom teacher. Grievant filed the instant grievance(s) challenging his non-selection for two positions and his reduction in force during the 2016/2017 school year. Grievant did not prove Respondent's selection decision was arbitrary and capricious or an abuse of discretion with respect to the selection challenges. Grievant did not raise the issue of his 2016/2017 transfer until the 2018/2019 school year, 14 months post transfer and clearly out of compliance with the timeline requirements set forth in West Virginia Code § 6C-2-3(1). This is a consolidated grievance; Grievant withdrew a portion of his protest, an identifiable selection of the grievance is untimely and lastly Grievant did not establish Respondent's selection decision was arbitrary and capricious or an abuse of discretion. Grievant has not met the applicable burden of proof thus 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. Grievant has been an employee of Respondent for approximately seven years originally hired as a classroom teacher. Grievant left Wayne County Board employment for a period of time and later returned in 2013 as a Culinary Arts teacher.
2. Grievant was hired into a position as School Improvement Coordinator/Administrative Teacher Integration Specialist/Central Office around 2015 by then Superintendent Sandra Pertee.
3. Prior to Grievant's employment into the School Improvement Coordinator/Administrative Teacher Integration Specialist/Central Office there had never existed such a position in Wayne County Schools.
4. Upon the retirement of Sandra Pertee, Dr. Steve Paine accepted a position as the Superintendent of Schools in Wayne County.
5. Wayne County Schools was facing a severe and debilitating financial deficit and Dr. Paine reduced in force and/or transferred approximately 90 employees during the 2016/2017 school year, including Grievant.
6. Superintendent Paine chose to eliminate the position of School Improvement Coordinator/Administrative Teacher Integration Specialist/Central Office, the position held by Grievant.<sup>1</sup>

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<sup>1</sup> Whenever there is a reduction in the number of professional positions in the county, West Virginia Code § 18A-4-7a(k)(3) provides:

7. In the spring of 2017, Grievant received notice that his job was being eliminated and as a result of his seniority and certification he would be transferred into a position for which he was qualified to hold. R Ex 1

8. Grievant, while reduced from his position as School Improvement Coordinator/Administrative Teacher Integration Specialist/Central Office, remained employed by the Wayne County Board of Education, who ultimately transferred him into the position of Health/PE Teacher Buffalo Middle School. G Ex 1 and R Ex 2 and 3

9. The elimination of the School Improvement Coordinator/Administrative Teacher Integration Specialist/Central Office and the subsequent transfer of Grievant were both approved by the Wayne County Board of Education.

10. On March 24, 2017, Grievant was notified he was being considered for transfer for the 2017/2018 school year. On May 4, 2017, Grievant was notified that he had been approved for transfer (Boards action May 1, 2017). Grievant filed a grievance

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Whenever a county board is required to reduce the number of professional personnel in its employment, the employee with the least amount of seniority shall be properly notified and released from employment pursuant to the provisions of section two, article two of this chapter . . .

An employee subject to release shall be employed in any other professional position where the employee is certified and was previously employed or to any lateral area for which the employee is certified, licensed or both, if the employees seniority is greater than the seniority of any other employee in that area of certification, licensure or both.

WEST VIRGINIA CODE § 18A-2-2 requires that an employee's continuing contract can be terminated only after written notice and the opportunity for a hearing before the board of education, prior to May 1. However, the Grievance Board has held that this provision does not apply to the lateral transfer of administrators who retain employment after the elimination of their positions. *Roncella v. McDowell County Bd. of Educ.*, Docket No. 01- 33-395 (Dec. 27, 2001). The facts of this case establish that Grievant was placed on transfer for subsequent assignment to a different position.

regarding the subsequent transfer on or about July 31, 2018, in excess of 12 months after the transfer had been complete. (G Ex 1, R Ex 1 through 3 and applicable grievance form)

11. At the beginning of the 2017/2018 school term, Grievant applied for the Crum Prek-8 Assistant Principal's position. Grievant was interviewed by the hiring committee but was not chosen as the successful applicant by Respondent.

12. Respondent is mandated to select the most qualified applicant for posted professional positions. Respondent must make the selection based on the hiring criteria in West Virginia Code §18A-4-7a.

13. Grievant applied for and was interviewed for the Vice Principal position at Fort Gay Elementary and was not selected for the job.

14. Pursuant to the hiring matrix for the Fort Gay Vice Principal position, Grievant was tied for last place among five applicants. R Ex 6

15. On September 19, 2018, Grievant filed a grievance regarding his non selection for the Vice Principal position at Fort Gay Elementary School.

16. Respondent posted a position from October 30, 2018 until November 5, 2018 seeking a business education teacher for Tolsia High School. The position was a 200-day teaching position.

17. Grievant applied for the position at Tolsia High School but was not selected for the position.

18. Grievant holds a certificate in PE, Health and Culinary Administration and does not hold a certification in business education.

19. On November 26, 2018, Grievant filed a grievance regarding his non selection for a Business Education Teacher, position PT19-238 at Tolsia High School.<sup>2</sup>

20. Grievant was considered for the position but was not the successful applicant. Evidenced by Respondent's Exhibit 7, Grievant was not the highest scoring applicant.

21. There were no fully certified applicants for the business education position at Tolsia High School. The successful applicant was not fully certified to hold the position.

### **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 (2018). "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.*

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<sup>2</sup> Grievant withdrew his claim for non-selection for the business education position (formerly Docket Number 2019-0610-WayED). See Grievant's submission of fact/law proposals. The issue need not be addressed further in this decision.

Grievant's allegations against Respondent in the instant grievance from time to time is less than direct, tending to encompass several alternative theories of unlawful actions. Grievant needs to demonstrate his allegation by a preponderance of the evidence. In an attempt to clarify the issues in dispute the undersigned will present the issues in an organized manner but not necessarily in the sequence alleged by Grievant.

West Virginia Code § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." W. VA. CODE § 6C-2-3(a)(1). Further, West Virginia Code § 6C-2-4(a)(1) sets forth the time limits for filing a grievance, stating as follows:

Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing . . . .

W. VA. CODE § 6C-2-4(a)(1). The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998). See *Rose v. Raleigh County Bd. of Educ.*, 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989).

Grievant did not raise the issue of his 2017/2018 school year transfer until the 2018/2019 school year. Grievant did not file a grievance on this issue until July 31, 2018,

based upon a transfer that was approved in May 2017.<sup>3</sup> Grievant filed his grievance 14 months after his transfer was approved, clearly outside the time frame required. As such his grievance regarding the 2017/2018 school year transfer must be denied. Grievant's complaint regarding his transfer is out of compliance with the time line requirements set forth in West Virginia Code § 6C-2-3(1).

Further, regardless of the timeliness aspect of the complaint, it is recognized that *Transfer decisions* "are based on the needs of the school system, as decided in good faith by the superintendent and the board. *Hawkins v. Tyler County Bd. of Educ.*, 166 W.Va. 363, 275 S.E. 2d 592 (1979) and *Post v. Harrison County Bd. of Educ.*, Docket No. 89-17-355 (Feb. 20, 1990). See *Jochum v. Ohio County Bd. of Educ.*, Docket No. 91-35-396 (Jan. 31, 1992)." *Stewart, et al., v. Kanawha County Bd. of Educ.*, Docket No. 96-20-370 (Jan. 31, 1997). W. Va. Code § 18A-2-7 grants broad discretion to a superintendent, and gives him or her the authority to transfer school personnel subject only to the approval of the board. *Post v. Harrison County Bd. of Educ.*, Docket No. 89-17-355 (Feb. 20, 1990). Grievant has not demonstrated his transfer was not based on the needs and best interest of the school system.

Grievant testified that he had been assured by multiple sources including former county superintendent's Steve Paine and David Roach that an equivalent position would be created for him. Grievant indicated responsible agents of Respondent told him prior to his transfer hearing that they "would find a position for him." (Grievant L-3 testimony)

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<sup>3</sup> In general terms, on May 4, 2017, Grievant was notified that he had been approved for transfer (Board action on May 1, 2017). Grievant's true grievance is the difference in compensation between the two positions.



Grievant alleges he is entitled to better position than the one he is currently being employed. It is readily possible that Grievant misunderstood some or part of Respondent's reassurances at the time of Grievant's transfer/reassignment. Grievant's perception of an equivalent position and Respondent's obligation to transfer Grievant into a position for which he was qualified to hold are not synonymous. Respondent persuasively argued that as a result of Grievant's seniority and certification Grievant was transferred into a position for which he was qualified to hold. Grievant has not established malfeasance by any of Respondent's agents. The elimination of the School Improvement Coordinator/Administrative Teacher Integration Specialist/Central Office position and the subsequent transfer of Grievant were both duly approved by the Wayne County Board of Education. Respondent has not demonstrated abuse of discretion.

It is well-recognized that county boards of education have substantial discretion in matters related to hiring, assignment, transfer, and promotion of school personnel. 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. *Syl. Pt. 3, Dillon v. Bd. of Educ.*, 177 W.Va. 145, 351 S.E. 2d 58 (1986).

The selection of candidates for educational positions is not simply a "mechanical or mathematical process." *Tenney v. Bd. of Educ.*, 183 W. Va. 632, 398 S.E.2d 114 (1990). Moreover, county boards of education have substantial discretion in matters relating to the hiring of school personnel so long as the decisions are made in the best interests of the schools, and are not arbitrary and capricious. *Dillon v. Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986); *Christian v. Logan County Bd. of Educ.*, Docket No. 94-23-173 (Mar. 31, 1995). Consistent with these standards of review, the grievance

procedure is not intended as a "super interview," but merely an analysis of the legal sufficiency of the selection process at the time it occurred. *Stover v. Kanawha County Bd. of Educ.*, Docket No. 89- 20-75 (June 26, 1989). See *Sparks v. Mingo County Bd. of Educ.*, Docket No. 96-29-447 (Feb. 18, 1997).

It is established that the decision/matrix used by Respondent was based upon a consideration of the 11 required hiring criteria set forth in West Virginia Code §18A-4-7a. It is further evident from the applicable hiring matrices, Respondents Exhibit 6 and 7, presented for the Fort Gay Vice Principal position as well as the Business Education position at Tolsia High School, that Grievant was not the highest ranked (best) candidate for the positions.

In order to obtain relief, Grievant must establish a significant flaw in the selection process sufficient to suggest that the outcome might reasonably have been different. *Hopkins v. Monroe County Bd. of Educ.*, Docket No. 95-31-477 (Feb. 21, 1996); *Stover, supra*. The standard to use in this review is the arbitrary and capricious standard.

"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). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 198 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)). The arbitrary and capricious standard of review does not permit an administrative law judge to simply substitute her judgment for that of the school board. *Bradley v. Bd. of Directors*, Docket No. 96-BOD-030 (Jan. 28, 1997). See *Harper v. Mingo County Bd. of Educ.*, Docket No. 93-29-064 (Sept. 27, 1993).

Grievant did not demonstrate a flaw in the selection process, nor did he demonstrate that he was more qualified than the successful candidate(s) for which he applied. Grievant is frustrated. Grievant has not shown the selection process, as a whole, to be arbitrary and capricious. Respondent has a reasonable degree of discretion. The decision reached was not so implausible that it could not be ascribed to a difference of opinion. Grievant did not demonstrate the decision-making process in the fact pattern of this matter to be fatally flawed.

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 (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. 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. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. See *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See also *Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

4. A grievance must be filed by the employee within fifteen days of the event upon which it is based. W. VA. CODE § 6C-2-4(a)(1).

5. Grievant did not file a grievance regarding his 2017/2018 school year transfer until July 31, 2018 based upon a transfer that was approved in May, 2017, this issue of the instant grievance is untimely.

6. An administrative transfer is within the discretionary authority of the superintendent, subject to the approval of the Board, in compliance with the notice and hearing requirements. That power must be exercised in a reasonable manner and in the

best interests of the school, rather than arbitrarily and capriciously. *Roncella v. McDowell County Bd. of Educ.*, Docket No. 01-33-395 (Dec. 27, 2001).

7. The selection of candidates for educational positions is not simply a "mechanical or mathematical process." *Tenney v. Bd. of Educ.*, 183 W. Va. 632, 398 S.E.2d 114 (1990). Moreover, county boards of education have substantial discretion in matters relating to the hiring of school personnel so long as the decisions are made in the best interests of the schools, and are not arbitrary and capricious. *Dillon v. Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986); *Christian v. Logan County Bd. of Educ.*, Docket No. 94-23-173 (Mar. 31, 1995). Consistent with these standards of review, the grievance procedure is not intended as a "super interview," but merely an analysis of the legal sufficiency of the selection process at the time it occurred. *Stover v. Kanawha County Bd. of Educ.*, Docket No. 89-20-75 (June 26, 1989). See *Sparks v. Mingo County Bd. of Educ.*, Docket No. 96-29-447 (Feb. 18, 1997).

8. In order to obtain relief, a grievant must establish a significant flaw in the selection process sufficient to suggest that the outcome might reasonably have been different. *Hopkins v. Monroe County Bd. of Educ.*, Docket No. 95-31-477 (Feb. 21, 1996); *Stover, supra*. The standard to use in this review is the arbitrary and capricious standard.

9. "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." *Trimboli v. Dep't of Health & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997) (citations omitted). "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.” *Id.* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

10. Grievant has failed to prove by a preponderance of the evidence that the decision-making process was fatally flawed, that Respondent acted in an arbitrary and capricious manner, or that it otherwise overstepped its broad discretion as described in W. VA. CODE § 18A-4-7a.

11. Grievant did not demonstrate a substantial flaw in the selection process, or that he was the best qualified candidate for the identified 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 (2018).

**Date: February 3, 2020**

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**Landon R. Brown**  
**Administrative Law Judge**