

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**ROBERT FRANCIS, et al.,
Grievants,**

v.

Docket No. 2021-0074-CONS

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

DECISION

Grievants¹ are employed as bus drivers by Respondent, Lewis County Board of Education. On July 30, 2020, Grievants filed grievances against Respondent stating:

WV § 18A-4-8(m)(2) relegation; WV § 18A-4-16; § 18A-5-2; WV § 6C-2-2 discrimination.² Grievants were not paid their contract extracurricular runs during the COVID pandemic government ordered closure of schools between May and June 2020. Grievants initially told “no” by the superintendent then appeared before the board and were not given a definite answer by the board. Board president questioned fairness. Asked the superintendent again and were referred back to the initial answer.

As relief, Grievants seek, “Payment for missed extracurricular runs during the COVID ordered government shutdown.”

A level one conference occurred and a level one decision was rendered on September 8, 2020. Grievants appealed to level two on September 16, 2020. A mediation session was held on April 29, 2021. Grievants appealed to level three on May

¹Grievants include Robert Francis, Tommy Gettings, Rex Helmick, Gerry Paugh, and Terry Sprouse.

²As Grievants did not address discrimination in their Proposed Findings of Fact and Conclusions of Law, this claim is deemed abandoned.

18, 2021. On November 8, 2021, a level three hearing was held before the undersigned at the Grievance Board's Westover office. Grievants appeared in person and were represented by Ben Barkey. Respondent was represented by attorney Leslie Tyree. This matter became mature for decision on January 21, 2022.³ The parties submitted written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievants are employed by Respondent as full-time school bus drivers and have extracurricular run contracts for extra pay. The COVID pandemic resulted in school closings and the cancellation of all bus runs, during which Grievants received their regular pay but not their extracurricular pay. The West Virginia Department of Education's COVID guidance suggests that drivers be paid for their extracurricular runs if their contracts are ambiguous. Grievants' contracts unambiguously indicate that extracurricular runs operate and are paid on an "as needed" basis. 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. Grievants are employed as full-time bus drivers for the Respondent, Lewis County Board of Education.
2. Grievants also have extracurricular bus runs with Respondent to supplement their income.

³The original mature date of January 14, 2022 was extended upon joint request.

3. The extracurricular runs have always operated on an “as needed” basis and drivers are paid only for time expended on them.

4. Respondent posted the extracurricular runs and Grievants signed extracurricular run contracts for the runs. (Grievants’ Exhibit 1)

5. Posting 579, covering Grievant Francis’ extracurricular run, states that it operates “as needed.” The contract also indicates the run is need based. It states that “[t]he Board reserves the right to modify such duties and responsibilities from time to time as circumstances warrant” and that “[i]n the event the Employee is unable, for any reason, to perform the duties and responsibilities of the extracurricular assignment for any period, the aforesaid level of compensation shall be reduced on a pro-rata basis.” (Grievants’ Exhibit 1)

6. Posting 424, covering Grievant Gettings’ extracurricular run, does not state that it is “as needed,” only that “[w]ork days of the week vary based on need” However, the associated contract indicates that the run is need based. It states that “[t]he Board reserves the right to modify such duties and responsibilities from time to time as circumstances warrant” and that “[i]n the event the Employee is unable, for any reason, to perform the duties and responsibilities of the extracurricular assignment for any period, the aforesaid level of compensation shall be reduced on a pro-rata basis.” (Grievants’ Exhibit 1)

7. Run postings 389, 430, & 1101 and the associated contracts for Grievant Sprouse state that his extracurricular runs are on an “as needed” basis. (Grievants’ Exhibits 1 & 7)

8. Postings 388 & 362, covering Grievant Paugh's runs, state that they operate on an "as needed" basis. The contract for the first run states it is "as needed." The contract for the second indicates it is need based. It states that "[t]he Board reserves the right to modify such duties and responsibilities from time to time as circumstances warrant" and that "[i]n the event the Employee is unable, for any reason, to perform the duties and responsibilities of the extracurricular assignment for any period, the aforesaid level of compensation shall be reduced on a pro-rata basis." (Grievants' Exhibit 1)

9. Postings 368 & 359, covering Grievant Helmick's extracurricular runs, state they operate on an "as needed" basis. The associated contracts also indicate the runs are need based. The contracts state that "[t]he Board reserves the right to modify such duties and responsibilities from time to time as circumstances warrant" and that "[i]n the event the Employee is unable, for any reason, to perform the duties and responsibilities of the extracurricular assignment for any period, the aforesaid level of compensation shall be reduced on a pro-rata basis." (Grievant's Exhibit 1)

10. Due to the COVID-19 pandemic, schools across the state were closed to in-person learning during the 2020-2021 school term.

11. All regular and extracurricular runs were cancelled during this time due to the lack of need.

12. Grievants did not drive and were not paid for their extracurricular runs during the COVID closure but continued to receive their regular salary.

13. The West Virginia Department of Education (WVDE) issued guidance on compensation during the COVID closure in the form of frequently asked questions.

14. WVDE issued *COVID-19 School Closure Finance FAQ 3.24.2020*, stating:

Q13. How should county boards of education handle extra-curricular contracts during the school closures? Should employees continue to be paid as though those extra-curricular duties were fulfilled (e.g.: bus driver with a contract to make certain mid-day runs)?

A13. At this time, county boards should continue paying these employees under their extracurricular contract obligations since the inability to actually perform the extracurricular duties is outside of the control of the employee.

Extra duty bus runs generally will not occur during the school closures. Drivers are not due additional compensation if extra duty runs do not occur.

(Grievants' Exhibit 4)

15. WVDE followed this up with *COVID-19 School Closure Finance FAQ*

4.6.2020, which states:

Extracurricular Contracts – The WVDE 3.24.2020 FAQ discussed extracurricular contracts. Many county boards have asked how that guidance intersects with extracurricular assignments in specific and nuanced situations. The WVDE has determined that extracurricular postings and contracts are not uniform across the counties. Therefore, it is impractical to offer general guidance that can be applicable to all county boards of education. County boards should review extracurricular employment contracts and postings to make consistent determinations within individual counties. The WVDE recommends that in cases where ambiguity remains after reviewing the applicable documentation, county boards should pay the employees during the school closures.

Q9. The 3.24.2020 FAQ indicated that county boards of education should still pay employees for extracurricular contracts during the school closures. Does this

guidance apply in situations where an employee had not yet performed work related to their extracurricular contract (e.g. prom or graduation coordinator)?

A9. During these extraordinary times, the WVDE recommends that, to the extent financially possible, all employees be paid for extra-curricular contracts in accordance with their normal payment schedule. Likely, planning work related to such lump-sum extracurricular contracts has already occurred even though the events/activities ultimately may be cancelled or delayed.

Q10. The 3.24.2020 FAQ indicated that county boards of education should still pay employees for extra-curricular contracts during the school closures. If an extra-curricular assignment is posted to reflect that the payments are made only when the actual duties are performed (e.g. when the driver makes the run or the employee assists with lunch duty), does that change the guidance?

A10. Look to the contractual agreement with the employee. If there is no contractual agreement, then there is no obligation to the (sic) pay the employee for extracurricular work not actually performed. If, on review, ambiguity remains, the WVDE urges the county to pay the employee.

(Grievants' Exhibit 5)

16. Ongoing funding for extracurricular runs has been provided through a county levee approved by Lewis County voters in 2020. (Grievants' Exhibit 6)

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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.*

Grievants are employed by Respondent as full-time school bus drivers but also had extracurricular run contracts for the 2020-2021 school year. The COVID pandemic resulted in schools being closed to in-person learning and the cancellation of all regular and extracurricular bus runs, during which Grievants received their regular but not their extracurricular pay. Grievants contend they should be paid for these undriven extracurricular runs because guidance from the West Virginia Department of Education (WVDE) indicates that, to the extent funds are available, extracurricular runs that went undriven during the COVID closure should be paid. Grievants assert that funds were available through a county levee. Grievants also claim that Respondent violated State Code by relegating them to a condition of employment that reduced their pay. Grievants contend that some of their extracurricular runs were not on an “as needed” basis. Respondent counters that it has always compensated for extracurricular runs on an “as needed” basis, that Grievants’ runs were unambiguously posted and awarded as “as needed” runs, and that it did not terminate or change the conditions of the run contracts.

In its COVID-19 School Closure Finance FAQ 4.6.2020, WVDE provides guidance on payment of extracurricular contracts during COVID closure. This states in part:

...County boards should review extracurricular employment contracts and postings to make consistent determinations within individual counties. The WVDE recommends that in cases where ambiguity remains after reviewing the applicable documentation, county boards should pay the employees during the school closures. ...

...During these extraordinary times, the WVDE recommends that, to the extent financially possible, all employees be paid for extra-curricular contracts in accordance with their normal payment schedule. ...

...If, on review, ambiguity remains, the WVDE urges the county to pay the employee.

Grievants' extracurricular run contracts unambiguously indicate they are on an "as needed" basis. For one run, the posting did not indicate it was on an "as needed" basis, but the associated contract unambiguously indicates it is "as needed." Respondent's extracurricular runs have always operated on an "as needed" basis and Respondent has consistently treated these runs as such by only paying drivers for the time they expend on these runs. During the COVID closure, Respondent ensured consistency by compensating all extracurricular runs on an "as needed" basis, in uniformity with its ongoing practice and Grievants' extracurricular run contracts, meaning it did not pay for undriven runs. This action was also in accordance with WVDE guidance.

Even if Respondent had not complied with WVDE guidance, Grievants did not show that the WVDE guidance was obligatory. In its most recent FAQ on the matter (School Closure Finance FAQ 4.6.2020), WVDE consistently uses terms of suggestion, such as "recommends" and "urges." Thus, WVDE guidance on this issue was simply a recommendation.

As for the non-relegation clause, it states:

Without his or her written consent a service person may not be: ... (2) Relegated to any condition of employment which would result in a reduction of his or her salary, rate of pay, compensation or benefits earned during the current fiscal year; or for which he or she would qualify by continuing in the same job position and classification held during the fiscal year and subsequent years.

W. VA. CODE § 18A-4-8(M)(2).

Grievants clearly consented and assumed their extracurricular runs on an “as needed” basis when they signed their contracts. Grievants did not cite any authority for the proposition that Respondent’s failure to provide the full potential of work and pay under their “as needed” extracurricular run contracts violated the non-relegation clause when this failure emanated from a lack of need. Grievants did not drive their “as needed” extracurricular runs during the COVID closure because the runs were not needed. Thus, the non-relegation clause is inapplicable.

Grievants imply that Respondent’s refusal to pay undriven extracurricular runs was arbitrary and capricious because WVDE permitted payment if funds were available. An action is recognized as arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). “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).

WVDE guidance opened the door for Respondent, “to the extent financially possible,” to pay Grievants for their undriven extracurricular runs but also gave Respondent an alternative course of action if the extracurricular run contracts unambiguously allowed for non-payment. Respondent had leeway to abide by the extracurricular run contracts, which indicated use and payment of runs on an “as needed” basis, despite the availability of funds. Grievants did not prove that Respondent was under any obligation to use available funds to pay them for extracurricular runs they had not driven. Therefore, this grievance is DENIED.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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.” *Lechliter 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. “Without his or her written consent a service person may not be: ... (2) Relegated to any condition of employment which would result in a reduction of his or her salary, rate of pay, compensation or benefits earned during the current fiscal year; or for which he or she would qualify by continuing in the same job position and classification held during the fiscal year and subsequent years.” W. VA. CODE § 18A-4-8(M)(2).

3. Grievants did not prove by a preponderance of the evidence that Respondent violated the non-relegation clause.

4. An action is recognized as arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

5. Grievants did not prove by a preponderance of the evidence that their extracurricular runs were anything other than “as needed,” that Respondent was obligated to pay them for unneeded and untaken extracurricular runs, or that Respondent was arbitrary and capricious in not paying them for these untaken runs.

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: February 18, 2022

Joshua S. Fraenkel
Administrative Law Judge