

# **WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**JIMMY LOVEJOY, et al.,  
Grievants,**

**v.**

**Docket No. 2021-0905-CONS**

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

## **DECISION**

This matter was filed separately at level one of the grievance process in October 2020 by Grievants Jimmy Lovejoy, Chris Toppings, Joseph Wade and Billy Fulks, maintenance employees of the Lincoln County Board of Education, Respondent, and was later consolidated. This grievance challenges Respondent's administration of extracurricular grounds keeping assignments and compensation as arbitrary and capricious and contrary to statute. The statements of the various Grievants set forth with minor grammatic variation provide that:

We are the mowing - weed eating - crew we do all mowing for county we [were] not offered the many extra job of mowing & weed eating that was done at Hamlin Lions Club last couple of years.

The relief requested,

Paid for all mowing & extra work that has been done at Lions Club paid by county funds.

A level one conference was held, and the consolidated grievance was denied at that level by a written Level One Conference Decision dated November 18, 2020. Grievants appealed to level two on December 2, 2020, and a mediation session was held on January 28, 2021. Grievants appealed to level three on February 16, 2021. A level three hearing was held before the undersigned Administrative Law Judge on November

18, 2021, at the Grievance Board's Charleston office. Grievants appeared in person and by representative,<sup>1</sup> Gordon Simmons, West Virginia School Service Personnel Association. Respondent appeared by and through counsel, Leslie Tyree, Attorney at Law. At the conclusion of the level three hearing, the parties were invited to submit written proposed Findings of Fact and Conclusions of Law. Not all parties submitted fact/law proposals and this matter became mature for decision on or about January 13, 2022, on receipt of the last of the submitted proposals.

### **Synopsis**

Grievants, at the time of relevant incidents, were maintenance service employees, performing various assignments which including mowing and other grounds keeping duties for Respondent. Grievants contend that they were improperly denied extra mowing work and proper compensation.

Until the 2020-2021 school year, certain maintenance assignments had not been posted by Respondent, and employees were compensated pursuant to their regular pay rates for duties. Once identified, duties were posted as extracurricular. The pay for the assignment(s) were established pursuant to the assignment. Grievant alleges this is a violation of the non-relegation clause in the statutory provisions for public school service employees. Grievants contend Respondent is obligated to pay the wages they were receiving prior to the grass cutting duties being recognized as extracurricular mowing

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<sup>1</sup>Grievants Jimmy Lovejoy, and Joseph Wade were represented by Gordon Simmons, West Virginia School Service Personnel Association while Grievants Chris Toppings, and Billy Fulks, were *pro se* (represented themselves).

positions, this wage being 1½ time normal pay (not the dollar amount an hour established by the extracurricular assignment). Further, Grievants contend not being offered mowing and weed-eating duties for an athletic field the school district leased was improper. Grievants allege entitlement to the Lions Club Field assignment and the compensation associated with performing the duties.

Grievants failed to establish by a preponderance of the evidence a mandatory higher rate of compensation for their current extracurricular mowing positions. Further, Grievants did not establish that Respondent violated any rule or statute in not offering duties Respondent was not required to perform, nor is it established Grievants are entitled to compensation for work they did not perform. 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. Grievants,<sup>2</sup> work in the maintenance department for the Lincoln County Board of Education, Respondent. The various job classifications for the individual Grievants vary and were not necessarily clarified with much specificity at the level three hearing. As maintenance employees, Grievants can be consigned mowing, weed eating and other general grounds maintenance assignments in addition to their various other duties.

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<sup>2</sup> There are four distinct Grievants in association with this grievance matter, Jimmy Lovejoy, Chris Toppings, Joseph Wade and Billy Fulks.

2. During the course of Grievants' employment as maintenance workers, they often mowed grass after their regular work hours and were paid for any extra hours in accordance with the Fair Labor Standards Act. Grievants are not recognized as the "mowing and weed eating crew" for Lincoln County Schools. Grievants were compensated to perform mowing and weed eating tasks based upon their regular rates of pay (time and half for work performed above and beyond regular work hours). Grievants were paid overtime to perform mowing services.

3. The current Superintendent Jeffrey Kelley began his employment with the Lincoln County Board of Education on July 1, 2020.

4. Assistant Superintendent Josh Brumfield began his service with the Lincoln County Board of Education on July 13, 2020. Mr. Brumfield testified at the level three hearing of this grievance.

5. A dispute arose in August 2020, regarding who was responsible for mowing of a creek bed between the school bus parking lot, mowed by Grievants, and the central office location, mowed by a central office custodian.

6. Josh Brumfield, Assistant Superintendent since July 13, 2020, requested central office staff to provide him with job descriptions to determine who was responsible for mowing the creek bed. At that time, Mr. Brumfield discovered that Grievants had no written job descriptions for their extracurricular activities regarding mowing grass.

7. It was determined/learned at that time that extracurricular mowing assignments were never posted. The new school board administration was of the opinion this was problematic.

8. Extracurricular contracts are those contracts for services that are performed on a regular basis outside the employees regular contracted work hours. Extracurricular assignments are addressed at West Virginia Code § 18A-4-16, which provides, in pertinent part:

(1) 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.

9. Upon discovering that grass mowing and weed-eating tasks had never been posted, Assistant Superintendent Josh Brumfield undertook steps to correct the error by assuring that after hour grass mowing positions were posted as extracurricular contracts during the 2020/2021 school year pursuant to West Virginia Code § 18A-4-16.

10. At no time during previous administrations were Grievants employed in extracurricular grass mowing positions as the county's prior administrations had never posted such positions.

11. On February 26, 2021, Respondent posted extracurricular grounds keeping duties, which included the mowing assignments Grievants had been performing.

Respondent posted and paid according to the counties supplemental extracurricular pay scale. Among other detail the posting (R Ex 1) specified that:

**Job Summary:** This position as defined by WV Code 18A-4-8(51), Groundsman means a person employed to perform duties that relate to the appearance, repair, and general care of school grounds in a county school system. Additional assignments may include routine cleaning duties in buildings.

\* \* \*

**Terms of Employment:**

1. Employment of begins July 1 each year and continues through June 30.
2. Duties are to be completed outside of the regular work day, Schedule determined by the Director of Maintenance.
3. Maximum of 20 hours a week person per person, unless prior approval is given by the immediate supervisor
4. LCBOE Schedule #17 Level XIV-Service "Posted" Supplemental or Extra Curricular rate of pay shall be \$15.00 per hour, See LCSD Policy 6700 "overtime", for compensation of overtime pay in excess of the 40 hour work week: FLSA Status: Non-Exempt

See R EX 1.

12. Grievants bid upon and were selected to perform the four posted extracurricular service position, "County-wide Groundsman."

13. Prior to February 26, 2021, Grievants had been performing the now recognized as Groundsman (extracurricular service position) duties, after their regular 8-hour day. For the duties Grievants had been compensated at time-and-one-half of their individual regular rate of pay. Respondent posted the extracurricular grounds keeping position and duties at a pay rate of \$15.00 per hour. This rate is less than the amount Grievants had been receiving prior to the duties being recognized as a posted extracurricular duty.<sup>3</sup>

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<sup>3</sup> There is some confusion, whether Grievants are getting \$15 an hour or \$22.50, (time and half) for the work performed as Groundman. Issue is relevant but not a fact either side

14. Further, Respondent leased from the Hamlin Lions Club what is referred to as the “Lions Club Field” for a plethora of school sporting events, practices and student activities. The Lions Club Field is not located near a school building.

15. The Lions Club Field is used all year long on a daily basis including weekends for sports practices and games. This usage is not clarified to be exclusive to Respondent activities. Historically, pursuant to the contract, the responsibility for mowing the field was with the Lessor, the Hamlin Lions Club. L3 testimony

16. The field fell into disrepair when the Lessor stopped mowing the field. The failure of the Hamlin Lions Club to mow the field would result in the students being unable to participate in sporting events or practices on the field.

17. Superintendent Jeff Midkiff took steps to have the Lions Club Field mowed so that student activities could continue.

18. Tina Black, executive secretary, was tasked with finding personnel to mow the Lions Club Field. Ms. Black testified at the Level three hearing.

19. Ms. Black contacted what she understood to be the most senior substitutes available to perform the mowing tasks for the Lions Club Field.

20. Ms. Black was of the understanding and belief that school maintenance employees, were not available to pick up the mowing at the Hamlin Lions Field because it was preferable to mow during the daytime hours when the students were in school.

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established with much certainty. Respondent indicates Grievants are compensated at \$22.50 an hour for Groundsman activities post their normal 40hr work week. See Assistant Superintendent Brumfield L3 Testimony.

Grievants were otherwise engaged in the performance of their regular jobs as maintenance workers during that time frame.

21. Grievants contest Respondent's decision to assign mowing for the Hamlin Lion's Club athletic field to a substitute custodian and a bus driver.<sup>4</sup> Pursuant to evidence of record, Steve Jeffers and Chris Abel performed mowing duties at the Lion's Club field at Respondent's direction.

22. The majority of the mowing and weeding done on the leased Lions field by Respondent agents was accomplished during the daytime hours. However, it is recognized a limited amount was occasionally done outside of the normal business day. e.g., rain delay, catchup and/or minimum amounts. Primarily the mowing done by Respondent employees on the Lions field was accomplished while Grievants were otherwise engaged in the performance of their regular jobs as maintenance workers.

23. Grievants never held extracurricular mowing contracts for the Lincoln County Board of Education prior to the Groundsman positions being posted and filled by the new administration during the 2020/2021 school year. While there was overtime activity which included grass cutting, on school board property, extracurricular mowing positions did not exist until the 2020/2021 school year under the new administration.

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<sup>4</sup> Grievants request to be paid for "all mowing and extra work that has been done at Lions Club Field" "for the last couple of years." The blanket request fails to provide much detail, e.g., years of recognized obligation (performance) and which of them, if any, were available on the days in question to perform the mowing at the Lions Club Field. Grievants allege entitlement to 628.25 hours of lost wages paid to alternative individuals.

## **Discussion**

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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, the party bearing the burden has not met its burden. *Id.*

There are four distinct Grievants in association with this grievance matter. While this matter is a consolidated grievance, it is recognized that not all Grievants are identical regarding eligibility and/or ability to perform an identified assignment. Further, Grievants were compensated to perform mowing and weed eating task based upon their individual regular rates of pay. (Time and half for work performed above and beyond regular work hours). Previously, Grievants were paid overtime, not a set fee for mowing services. What was and is problematic throughout this grievance is the overuse of generalities and non-specific statements of information.

Grievants were routinely authorized to perform mowing and other various grounds keeping duties by Respondent. The duration and consistency of these duties throughout

the years are of debate. See Grievants L3 testimony. Nevertheless, after a dispute in August 2020, Respondent's new administration became aware and determined that extracurricular mowing assignments were never posted. Grievants mowed grass and weeded on school grounds periodically for years, the duties were not posted positions but extracurricular supplemental duties non the less. The new school board administration undertook steps to correct the error by assuring that after hour grass mowing activities were posted as extracurricular contracts during the 2020/2021 school year pursuant to West Virginia Code § 8A-4-16. The Grievance Board has long recognized that boards of education should be encouraged to correct their errors as early as possible. *Toney v. Lincoln County Bd. of Educ.*, Docket No. 2008-0533-LinEd (Oct. 31, 2008); *Conners v. Hardy County Bd. of Educ.*, Docket No. 99-16- 459 (Jan. 14, 2000); *Barrett v. Hancock County Bd. of Educ.*, Docket No. 96-15-512 (Dec. 31, 1997).

Prior to February 26, 2021, Grievants were compensated to perform the extracurricular mowing duties based upon their regular rates of pay at one and a half (1½) normal pay for performing the duties at a time other than regular scheduled working hours.<sup>5</sup> Respondent posted extracurricular grounds keeping duties for four positions. The position as defined by WV Code § 18A-4-8(51), Groundsman means a person employed to perform duties that relate to the appearance, repair, and general care of school grounds in a county school system. Respondent posted the extracurricular grounds keeping position and duties at a pay rate of \$15.00 per hour. Grievants were free

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<sup>5</sup> In addition to the reduction in compensation for the extracurricular mowing assignments, Grievants also contest Respondent's decision to assign mowing for the Hamlin Lion's Club Field to a substitute custodian and a bus driver for a total of 628.25 hours to be lost wages.

to apply or not apply for the posted “County-Wide Groundman” positions. R Ex 1

Grievants, as maintenance employees of Respondent’s, want the mowing assignments recognized as within their purview as extracurricular duties but are of the opinion and belief the duties “must” be compensated at the rate previously compensated prior to being recognized as a posted Groundsman’s assignment. Respondent acquiesces and recognizes the services are performed on a regular basis outside the employees regular contracted work hours, thus should be designated pursuant to WV Code § 18A-4-16, extracurricular assignments, but holds fast to the belief that it is empowered to establish a fair and equitable rate for the contracts regardless of the amount of compensation Grievants may have individually received for overtime activities.

“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). “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.3d 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 & 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.” *Id.* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

Grievants cite the concept referred as the non-relegation clause of WV Code § 18A-4-8(m)<sup>6</sup> to bar Respondent from establishing any amount of compensation less than that which Grievants had received for mowing assignment prior to the activity being recognize as a “County-wide Groundsman” (Extracurricular Service Position) assignment.<sup>7</sup> Grievant’s argument is problematic for several reasons. Grievants neglect to recognize there was no prior contract, but independent work assignment compensation determined by the compensation rate of the individual performing the task (not consistent or uniformed compensation). Grievants were paid overtime, not an established fee for mowing services. While there was overtime activity which included grass cutting, on school board property, extracurricular mowing positions did not exist until the 2020/2021 school year under the new administration. Respondent became aware of error in that

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<sup>6</sup> “Without his or her written consent, a service person may not be: (1) Reclassified by class title; or (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 school year; or for which he or she would qualify by continuing in the same job position and classification held during that fiscal year and subsequent years.” West Virginia Code §18A-4-8(m). Grievants independently sought and accepted the Groundsman positions as posted.

<sup>7</sup> The non-relegation clause has been found by the West Virginia Supreme Court of Appeals to prohibit a board of education from issuing a new contract that reduces the compensation of a service employee. *Crock v. Harrison County of Board of Education*, 211 W.Va. 40, 560 S.E.2d 515 (2002). In *Crock*, the Supreme Court held that the non-relegation clause prohibits a board of education from terminating an employee's contract and reissuing it with altered compensation. The undersigned ALJ is not persuaded the instant matter is an example of terminating a prior extracurricular contract.

extracurricular work was being performed without the benefit of extracurricular postings. Respondent appropriately corrected its error and posted extracurricular mowing positions. The amount of compensation Respondent established and intended to pay a Groundsman is specified on the posting, however, the exact amount is not as clear as the undersigned would prefer. Grievants are to get \$15 an hour or \$22.50 (time and half) for the work performed as Groundman post their normal 40-hour work week. Respondent maintains it established the salary for Groundsman position as authorized pursuant to Lincoln County Board Education pay schedule. R Ex 2.<sup>8</sup> Grievants independently sought and accepted the Groundsman positions as posted. Grievants did not demonstrate by a preponderance of the evidence that Respondent established an unlawful rate of pay for an extracurricular service position.

In addition to the rate of compensation established for the Groundsman positions, Grievants also challenged the awarding of some mowing assignments — specifically, those of the Lion's Club field. Grievants request to be paid for "all mowing and extra work that has been done at lions club field" "for the last couple of years." However, generally they failed to establish how many years this work has taken place, how much money they believe they are owed, or which of them, if any, were available on the days in question to perform the mowing at the Lions Club Field. Respondent among other objections and opposition to the request of the various Grievants, highlights the timeliness of the grievance.<sup>9</sup> Specifically, Grievants contest Respondent's decision to assign

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<sup>8</sup> Lincoln County Board Education pay schedule: Service "Posted" Supplemental or Extra Curricular rate of pay shall be \$15.00 per hour. (added 3-15-10 effective 7-1-2010) R Ex 2

<sup>9</sup> It is noted that despite the undersigned verbal prompting at the level three hearing, both

mowing for the Hamlin Lion's Club field to Steve Jeffers and Chris Abel, a substitute custodian, and a bus driver for a total of 628.25 hours.

Grievant's allegation tends to presuppose the existence of duty, whereas for a long time (yrs.) there were no "jobs" at the Lions Club Field. The property is not owned by Respondent and the grass mowing pursuant to the lease agreement was not the responsibility of Respondent. When Respondent did assume "some" responsibility for maintaining the property, it is not established the administrative decision to mow and weed eat during the tradition day is outside the purview of Respondent's authority.

Notwithstanding the untimely issue, Grievants failed to establish that they individually, or as a group, would have been entitled to any grass mowing assignments at the Lions Club Field had those positions existed. Grievants failed to establish Respondent was required to exclusively have them perform any mowing on the Lions athletic field before or after February 2020.<sup>10</sup> Grievants failed to prove that they are in any way entitled to compensation for mowing they did not perform, or they would have been able to perform those mowing functions outside their regular hours of employment to the exclusion of all others performing the duties. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Trustees/W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998) (citing *Harrison v. W. Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995)).

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Respondent and Grievants neglected to discuss/establish the timeliness issue, at the level three hearing or in their respective submitted fact/law proposals. While relevant, this issue is considered abandon and will not be addressed further.

<sup>10</sup> February 26, 2020, is the date of the Groundsman position posting. The mowing of the Lions Club Field was not posted. Respondent wanted the field mowed during the daytime hours.

Grievants failed to demonstrate by a preponderance of the evidence that Respondent's decision to deny them the mowing the Hamlin Lion's Club field was arbitrary and capricious. Respondent's decision to offer the duties of mowing the Lion's Club field to individuals who could do it during the daytime hours is not established to be unreasonable. It is interesting that during mowing season, Respondent didn't just instruct Grievants or some other employee(s) to periodically mow grass during the normal course of business. Respondent's failure to offer the duties of mowing the Hamlin Lion's Club field to Grievants is not established by a preponderous of the evidence to be unlawful.

In summary, Respondent became aware of error in that recurring work assignments were being performed without the benefit of extracurricular postings. Respondent's new administration sought to appropriately correct past error and posted county-wide Groundsman (extracurricular service) positions. In recognition of the duties as extracurricular assignments the agency duly established a rate for the position. Respondent established the salary for a Groundsman position as authorized pursuant to Lincoln County Board Education pay schedule. The set rate was less than the amount individuals were receiving in relation to their regular individual rate of pay. The Groundsman position pays \$15 an hour with time and half being \$22.50 an hour time for duties beyond Grievant's forty-hour work week. Grievants independently sought and accepted the Groundsman positions as posted. Grievants failed to establish by a preponderance of the evidence that the compensation established was unlawful. The undersigned trier of fact is persuaded that Respondent, in the circumstance of this matter,

is empowered to establish a fair and equitable rate for extracurricular contracts. Lastly, Grievants failed to establish by a preponderance of the evidence entitled to compensation for work they did not perform. Respondent's failure to offer the duties of mowing the Hamlin Lion's Club field to Grievants is not established to be unlawful.

The following conclusions of law are appropriate in this matter:

### **Conclusions of Law**

1. This grievance does not involve a disciplinary matter. Consequently, Grievants bear the burden of proving their 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 party bearing the burden 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. The Grievance Board has long recognized that boards of education should be encouraged to correct their errors as early as possible. *Toney v. Lincoln County Bd. of Educ.*, Docket No. 2008-0533-LinEd (Oct. 31, 2008); *Conners v. Hardy County Bd. of*

*Educ.*, Docket No. 99-16- 459 (Jan. 14, 2000); *Barrett v. Hancock County Bd. of Educ.*, Docket No. 96-15-512 (Dec. 31, 1997).

4. Extracurricular assignments are addressed at West Virginia Code § 18A-4-16, which provides, in pertinent part:

(1) 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.

5. Grievants independently sought and accepted Groundsman positions as posted. Grievants did not establish by a preponderance of the evidence that Respondent established an unlawful rate of pay for an extracurricular service position.

6. Grievants did not prove that that they were entitled to a superior rate of compensation for their current extracurricular mowing positions.

7. 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).

8. Grievants failed to demonstrate by a preponderance of the evidence that Respondent's action of not providing them the opportunity to mow the Hamlin Lion's Club field was arbitrary and capricious.

9. Grievants did not establish that Respondent violated any rule or statute in not offering duties Respondent was not required to perform, nor is it established by a preponderance of the evidence that Grievants are entitled to compensation for work they did not perform. Grievants failed to prove entitlement to lose wages.

10. Respondent's failure to offer the duties of mowing the Hamlin Lion's Club field to Grievants is not established by a preponderous of the evidence to be unlawful.

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 25, 2022

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