MICHAEL WEAVER,

Grievant,

v. DOCKET NO. 98-32-008

MORGAN COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Michael Weaver, Grievant, filed a grievance against his employer, the Morgan County Board of Education, Respondent, on October 3, 1997, stating:

> He was required to have a physical examination as a condition of his employment as a school bus operator. He was examined by his regular physician. The cost of this examination was $35.00. The respondent declined to pay more than $28.00 for this examination as it had contracted with another physician to provide physical examinations at a cost of $28.00 per examination. He alleges a violation of West Virginia Code §18A-2-10 and requests additional reimbursement in the amount of $7.00.

Grievant was denied relief at Level I on October 8, 1997. After the Grievance was denied at Level II on January 7, 1998, the Grievant elected to bypass consideration at Level III, as is permitted by W.Va. Code §18A-29-4(d), and advanced his claim to Level IV. Grievant is represented by counsel, John E. Roush, and Respondent is represented by counsel, Kimberly Croyle.

On January 19, 1998, the Grievance Board received Respondent's appeal of the Level II decision. A hearing of the matter was then scheduled for March 10, 1998. On March 9, 1998, the parties, through counsel, agreed to submit the grievance on the record as developed at Levels I and II of the grievance procedure and waivethe Level IV hearing. The case became mature for decision on April 16, 1998, with receipt of the Grievant's proposed findings of fact and conclusions of law. For administrative reasons, the case was transferred to this Administrative Law Judge for decision on April 22, 1998.

The following findings of fact are derived from the record.

FINDINGS OF FACT

1. Grievant is employed by Respondent as a regular bus operator and has been so employed for

seven years.

2. Pursuant to current state law, bus operators must undergo annual physical examinations as a requirement for employment and certification as a bus operator.

3. Each year, for at least the past five years, Respondent has solicited bids from area physicians to perform the required annual bus operators' examinations.

4. It is the practice of the Respondent to pay the cost of the physical performed by the successful bidder.

5. Any employee who does not wish to have the Board-employed physician perform his or her physical may choose another physician to perform the examination and, as has been the practice for several years, the Respondent will reimburse that employee the same dollar amount which would have been paid to the successful bidder physician had he/she performed the examination.

6. At the Respondent's meeting of June 24, 1997, bids from four physicians were received and reviewed. The bids were:

Dr. Rick Graves: $28.00 Berkeley Springs Medical Associates: $34.00

Tri-State Community Health Center: $50.00

Dr. Andrew Berens: $35.00

Respondent voted to accept Superintendent Charles Montgomery's recommendation that the physical examination contract be awarded to Dr. Graves at the rate of twenty-eight dollars($28.00) per exam. Respondent also accepted the superintendent's recommendation that, although the bus operators would be allowed to go to the doctor of their choice, Respondent would only reimburse up to twenty-eight dollars ($28.00) for the physical, and would not be responsible for any additional medical tests arising out of the findings of the physical.

7. The bus operators were notified on or about June 25, 1997, by letter, that Dr. Graves was selected to perform the annual physical examinations and that the Board would pay only twenty-eight dollars ($28.00) toward any physical examination performed by another doctor.

8. Grievant was familiar with Respondent's procedure of procuring an independent contractor to perform the annual physicals and had submitted to physicals by Respondent's independent contractors in previous years.

9. Grievant scheduled an appointment with Dr. Graves to complete the required examination.

Prior to performing the exam, Dr. Graves asked Grievant to complete a medical history. Grievant refused to complete the requested paperwork, although he indicated he would answer any relevant questions asked by Dr. Graves. Dr.Graves refused to perform the physical examination under those conditions.

10. Grievant then went to his personal physician, Dr. Berens, and had his physical performed. Dr. Berens charged Grievant thirty- five dollars ($35.00) for this service.

11. Grievant submitted Dr. Berens' bill of thirty-five dollars ($35.00) to Respondent for reimbursement. Respondent refused to pay more than twenty-eight dollars ($28.00) for the exam leaving a shortfall of seven dollars ($7.00).

DISCUSSION

In a non-disciplinary matter, the burden of proof is upon the grievant to prove the elements of his grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar. 28, 1996).

Grievant relies almost solely upon W.Va. Code § 18A-2-10, which provides:

> In case a medical or physical examination of any school board employee or qualified applicant who becomes an employee of the board for any school position is required by a board of education or by any administrator, department or agency of government which has authority to require such examination, the cost shall be paid in full by the employer. It shall be unlawful for any board of education to require any employee or applicant who becomes an employee of the board to pay the cost of any medical or physical examination as a condition of employment.

Grievant contends that the “plain meaning” of the statute should control and is not open to interpretation. He states that the denial of the grievance would require a “complete rejection ofsimple statutory language.” (See footnote 1)

Respondent agrees that it is required to pay for physical examinations required of its employees, but relies on prior opinions from both the State Superintendent of Schools and this Grievance Board which approved the practice of placing reasonable limits upon reimbursement for fees charged by an employee's chosen physician. State Superintendent Opinions, April 19, 1983, & March 4, 1987. Melba v. Cabell County Bd. of Educ., Docket No. 06-87-137 (Dec. 31, 1987).

Respondent also contends that acceptance of Grievant's position would open a Pandora's Box that could conceivably bankrupt school systems by requiring school boards to pay the full amount

charged by the doctor for every physical, including diagnostic tests, regardless of cost. While Grievant insists that the granting of his grievance would not require a board of education to pay forexaminations that were “unreasonably expensive,” the undersigned is not convinced. Should the question of “reasonableness” become the standard, this Grievance Board and the courts would be inundated with cases asking for a determination of reasonableness. In any case, while Grievant believes the statute requires payment for the examination, without limitation and regardless of the cost, this Grievance Board has established precedent that is contrary to this position.

In a direct response to the same question at issue here, the State Superintendent has opined that a board of education has the discretion to reasonably limit the amount it reimburses employees for fees charged by a physician chosen by the employee and may even limit the reimbursements to that amount contracted for by the board of education with the selected doctor(s). West Virginia State Superintendent of Schools Opinions dated April 19, 1983, and March 4, 1987. It has long been the rule of law that opinions made by the State Superintendent of Schools should be accorded great weight unless clearly erroneous. Smith v. Bd. of Educ. of County of Greenbrier, 192 W.Va. 321, 452 S.E.2d 412 (1994).

This Grievance Board also previously examined the issue, looking in particular at the language of W.Va.Code § 18A-2-10, and found that a county board of education may limit the amount it reimburses its employees for physicals performed by their chosen private physician to the amount charged by the independent contractor physician as long as said amount is not arbitrary. Melba, supra. Precedent on this issue is clearly established and the undersigned Administrative Law Judge does not believe the prior decisions of either this Grievance Board or the State School Superintendent to be erroneous, nor have there been any subsequent rulings or changes in the law which would distinguish these opinions from this case.

There is no evidence the Respondent's actions were arbitrary or capricious. Respondent took much time in soliciting bids for the examinations and based its reimbursement to Grievant on the contractual amount they paid to the chosen physician. This amount was only seven dollars ($7.00) less than the amount charged by Grievant's doctor. It is difficult to see how the amount of the reimbursement could be determined to be arbitrary, and there is no evidence in the record which indicates the Respondent's actions in this matter were arbitrary or capricious in any other way.

In addition to the foregoing narration, it is appropriate to make the following conclusions of law.

CONCLUSIONS OF LAW

1. In a non-disciplinary matter, the burden of proof is upon the grievant to prove the elements of his grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar. 28, 1996).

2. "County boards of education have broad discretion in personnel matters . . . but must exercise that discretion in a manner which is not arbitrary or capricious." Dodson v. McDowellCounty Bd. of Educ., Docket No. 93-33-243 (Feb. 15, 1994). See Dillon v. Bd. of Educ. of County of Wyoming, 351 S.E.2d 58 (W.Va. 1986).

3. The arbitrary and capricious standard of review of county board of education decisions requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute his judgment for that of a board of education. See generally, Harrison v. Ginsberg, 286 S.E.2d 276 (W. Va. 1982).

4. School bus operators are required as a condition of their employment to have annual physical examinations. W.Va. Code § 18A- 2-10.

5. A county board of education may retain the services of a physician as an independent contractor to perform physical examinations. 126 C.S.R. §92.

6. A county board of education may limit the amount it reimburses its employees for physicals performed by private physicians to the amount charged by the independent contractor physician. State School Superintendent Opinions, April 19, 1983, and March 4, 1987. Melba v. Cabell County Bd. of Educ., Docket No. 06-87-137 (Dec. 31, 1997).

7. Grievant failed to prove by a preponderance of the evidence that the Board of Education's actions in reimbursing its bus operators for physical examinations performed by doctors of its choice was either contrary to law, or arbitrary and capricious.

Accordingly, this grievance is **DENIED**.

Any party may appeal this DECISION to the Circuit of Kanawha County or to the Circuit Court of Morgan County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

DATED:May 6,1998 RANDY K. MILLER

ADMINISTRATIVE LAW JUDGE

Footnote: 1

Grievant also cites a 1953 Attorney General's Opinion which states that a board of education has no authority to require school bus drivers to submit to physical examinations by doctors designated by the board. 45 Op. Atty. Gen. 485 (1953). This argument is without merit. Legislative rules dealing with physical qualifications and examinations for county bus drivers have been promulgated which abrogate the Attorney General's 25-year-old opinion. More specifically:

A county board of education can, on the nomination and recommendation of the county superintendent of schools, employ a physician or retain the services of a physician as an independent contractor, or can establish a clinic for the purpose of having its personnel and prospective personnel medically/physically examined. If an employee has some objection, however, to being examined by the physician chosen by the board, then the employee can be examined by a physician of his/her choice.

126 C.S.R. §92. It is clear this rule provides a board of education with the option to select and contract with a physician to perform the physical examinations.