

TERESA GROSE,

Grievant,

v.

DOCKET NO. 00-41-231

RALEIGH COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Teresa Grose (Grievant) alleges that Raleigh County Board of Education (RCBE) improperly assigned another employee for a summer Transportation Aide position. This grievance was denied at Level I by Ronald L. Cobb on June 6, 2000. A Level II hearing was held on June 26, 2000. Grievant was represented at this hearing by Kimberly Levy, Esq. of the West Virginia School Service Personnel Association and Arnold W. Ryan. This grievance was denied at Level II by RCBE Superintendent Dwight D. Dials on July 6, 2000. Proceedings at Level III were apparently bypassed pursuant to W. Va. Code § 18-29-4(c). The parties agreed that this grievance could be submitted for decision at Level IV based upon the record developed at the lower levels. The parties were given until October 23, 2000, to submit proposed findings of fact and conclusions of law, both parties did so, and this grievance became mature for decision on that date. The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievant is employed by RCBE as a Transportation Aide.
2. In the spring of 2000, RCBE posted a vacancy for a sufficient number of Transportation Aides (Aides) to serve its Special Education Extended Year Program during the summer. The posting did not specify assignments to particular buses. Four Aides were eventually required.
3. Three applicants were Aides who had served in the program the previous summer, and were selected pursuant to W. Va. Code § 18-5-39.

4. An Aide who had served in the program the previous summer retired, which created the vacancy for which Grievant applied.
5. Grievant had no summer substitute seniority, but had more regular year seniority than any other applicant for the vacant Aide position, and was selected for the position on that basis.
6. One incumbent Aide, Nancy Fain (Fain), asked to be assigned to Bus #104, the Beckley area bus run vacated by the retiring Aide, as it was close to her home.
7. Grievant also wanted the assignment to Bus #104.
8. RCBE has traditionally assigned positions in its Special Education Extended Year Program by considering summer seniority.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6. A preponderance of the evidence is defined as “evidence which is 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.” Black's Law Dictionary (6th ed. 1991); Leichter v. W. Va. Dep't of Health & Human Resources, 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.

Grievant alleges that she should have been assigned to Bus #104 in RCBE's Special Education Extended Year Program because she had more regular year seniority than Fain, and argues that her non-selection violated W. Va. Code §§ 18-5-39 and 18A-4- 8b. RCBE responds that it has traditionally assigned those positions by considering summer seniority, of which Grievant had none. W. Va. Code § 18-5-39 states, in pertinent part: “[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. If the employee is unavailable or if the position is newly created, the position shall be filled pursuant to section eight-b [§ 18A-4-8b], article four, chapter eighteen-a of this code.”

There is little disagreement about the facts in this grievance, and a preponderance of the evidence demonstrates that RCBE was acting within its discretion when it assigned Fain to Bus #104.

As Grievant had not been employed in the Special Education Extended Year Program the previous summer, she was not entitled to any position during the summer of 2000 pursuant to W. Va. Code § 18-5-39.

“County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as the discretion is exercised reasonably, in the best interests of 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).

In applying the “arbitrary and capricious” standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that decision, and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W.Va. 162, 286 S.E.2d 276 (1982). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, *supra* at 286, Hill and Cyrus v. Kanawha County Bd. of Educ., Docket No. 96- 20-362 (Jan. 30, 1997).

The credible evidence of record in this grievance shows that RCBE has traditionally assigned its Special Education Extended Year Program positions by considering summer seniority. This practice has been accepted by this Grievance Board. Shorts v. Raleigh County Bd. of Educ., Docket No. 00-41-228 (Nov. 13, 2000); Panrell v. Monongalia County Bd. of Educ., Docket No. 96-30-408 (Apr. 25, 1997). While Fain had such seniority, Grievant did not, and so Fain was assigned Bus #104 by RCBE.

Under these circumstances, the undersigned concludes that relevant factors were considered by RCBE in reaching its decision, and cannot conclude that there has been a clear error of judgment. Bowman, *supra*. Respondent's policy of assigning its Special Education Extended Year Program positions by considering summer seniority was not arbitrary and capricious.

Accordingly, Grievant failed to prove, by a preponderance of the evidence, that she should have been assigned to Bus #104 in RCBE's Special Education Extended Year Program. Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6. A preponderance of the evidence is defined as “evidence which is 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.” Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993).

2. “County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as the discretion is exercised reasonably, in the best interests of 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).

3. In applying the “arbitrary and capricious” standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that decision, and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W.Va. 162, 286 S.E.2d 276 (1982). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, *supra* at 286, Hill and Cyrus v. Kanawha County Bd. of Educ., Docket No. 96- 20-362 (Jan. 30, 1997).

4. Respondent's policy of filling its Special Education Extended Year Program assignments by considering summer seniority was not arbitrary and capricious.

5. Grievant failed to prove, by a preponderance of the evidence, that she was improperly denied assignment to Bus #104 in RCBE's Special Education Extended Year Program.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Raleigh 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.

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 appealing party must also provide the Board with the civil

action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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ANDREW MAIER

ADMINISTRATIVE LAW JUDGEDated November 22, 2000