THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

ROBERT FRY et al.,

Grievants,

v. Docket No. 07-27-011

Janis I. Reynolds

Chief Administrative Law Judge

MERCER COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants, Robert Fry, Donna Marshall, Fred Scott, Joyce Smith (See footnote 1), and Carolyn Ellis, are employed as bus operators by the Mercer County Board of Education ("MCBOE" or "Board"). They filed this grievance against MCBOE on October 10, 2006. The Statement of Grievance says, "WV CODE 18A-4-16 & 18A-2-7. (See footnote 2) Termination of extracurricular assignement [sic] & re assignment[.]" The relief sought was, "Board replaced extra curricular assignments with 'flex positions.' Assignments continue to exist but have been assigned to new positions. Placement in extracurricular positions position [sic], backpay and benefits."

This grievance was denied at all lower levels. Grievants appealed to Level IV on January 17, 2007. Although a Level IV hearing was originally scheduled, the parties decided to submit this case on the record developed below, with the addition of depositionstaken on March 22, 2007. Grievants were represented by Ben Barkey of WEST VIRGINIA EDUCATION ASSOCIATION, and MCBOE was represented by John Shott, Esq. This case became mature

for decision on April 26, 2007, after receipt of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievants assert that since their extracurricular assignments continue to exist, albeit in a different format, MCBOE cannot combine a variety of assignments into two full-time positions. Grievants assert once they obtain extracurricular assignments, MCBOE cannot reorganize these assignments and must continue to assign these bus runs to them as long as they exist.

Respondent asserts it followed past practice, and at the end of the school year all the extracurricular assignments and contracts terminated, with the exception of regular, early Voc-Tech runs, it assessed the transportation needs of the MCBOE, reviewed the costs of the extracurricular assignments, including the overtime, and decided it would be cost effective and more efficient to take the majority of the extracurricular assignments and roll them into two, full-time, flex positions.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievants are bus operators employed by MCBOE. During the 2005 - 2006 school year, they all had several extracurricular bus runs. Grievants received additionalcompensation for these runs, and often these extracurricular assignments resulted in Grievants receiving overtime.

2. Extracurricular assignments are for one year only, and at the end of each school year, MCBOE assesses the need for and the cost of each assignment. The early morning Voc-Tech runs are long-standing and are not reviewed.

3. In January 2006, the Superintendent asked the then Director of Transportation and Safety to review the extracurricular assignments and see if they could be combined into full-time positions. After a review of the costs and needs of the transportation system, MCBOE decided to combine many of the extracurricular assignments, and an additional new run, into two, full-time, "flex" positions.

4. The flex run known as the Pineville High School run was originally composed of eight extracurricular runs from six different bus operators. The flex run known as the Bluefield High School run was originally composed of eleven extracurricular runs from eight different bus operators. Because these flex runs are made up of so many extracurricular runs, while they may contain the extracurricular run of a Grievant, they overall do not match Grievants' extracurricular runs.

5. These positions were posted, and Grievants did not apply.

6. Some of the planned additions to the flex runs did not work, and these runs were reposted. The employee who had the run before received the position, if the employee wanted it.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of theW. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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. "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.

W. Va. Code § 18-4-16 (6) states: (See footnote 3)

> **(6) An employee who was employed in any service personnel extracurricular assignment during the previous school year shall have the option of retaining the assignment if it continues to exist in any succeeding school year. A county board of education may terminate any school service personnel extracurricular assignment for lack of need pursuant to section seven, article two of this chapter. If an extracurricular contract has been terminated and is reestablished in any succeeding school year, it shall be offered to the employee who held the assignment at the time of its termination. If the employee declines the assignment, the extracurricular assignment shall be posted and filled pursuant to section eight-b of this article. (Emphasis added).**

The first issue to address is the plain language of the statute. It says "[a]n employee who

was employed in any service personnel extracurricular assignment during the previous school year shall have the option of retaining the assignment if it continues to exist in any succeeding school year." (Emphasis added). The assignments Grievants had are nolonger extracurricular assignments, but are now part of a regular, full-time position, thus this Code Section does not apply.

Additionally, Grievants assert MCBOE does not have the authority to make the changes involved in this grievance. County boards have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel, but this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986). Superintendents have the authority to "[a]ssign, transfer, suspend or promote teachers and all other school personnel," subject to the approval of the board, and boards of education have the authority "[t]o control and manage all of the schools and school interests for all school activities. . . ." W. Va. Code §18-4-10(3) & W. Va. Code §18-5-13(1). See Cox v. Bd. of Educ. of Hampshire County, 355 S.E.2d 365, 369 (W. Va. 1987). Additionally, a county superintendent's duties include "powers of independent judgment and discretion." Hall v. Pizzino, 363 S.E.2d 886, 888 (W. Va. 1980). A board may redefine the duties of a school service personnel position, combine them with the duties of another position, or eliminate a position entirely. Hambrick v. Mercer County Bd. of Educ., Docket No. 94-27-293 (Sept. 20, 1994); Cox, supra.

The standard by which to judge these actions 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 theDeaf 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)).

In reviewing the actions of MCBOE, the undersigned Administrative Law Judge does not find them to be arbitrary and capricious or an abuse of discretion. MCBOE studied the extracurricular transportation situation, properly notified employees of the termination of their extracurricular contracts, decided employing two, full-time, bus operators would be more efficient and effective, and made the change. "A board of education has the discretion to determine the number of jobs for and the employment terms of service personnel. When a board of education seeks to reduce employment costs, the board may decide that the schools' best interest requires the elimination of some service personnel jobs." Richardson v. Putnam Bd. of Educ., Docket No. 97-40-189 (Oct. 15, 1997) citing Lucion v. McDowell County Bd. of Educ., 195 W. Va. 297, 446 S.E.2d 487 (1994). This same reasoning applies to creating and combining positions.

Additionally, to accept Grievants' argument that a board of education does not have the authority, with proper notice, to adjust or change extracurricular assignments in any way, would severely limit the ability of a superintendent to reorganize and manage a county school system in a cost-efficient manner. See Napier v. Logan County Bd. of Educ., Docket No. 94-23-541 (Apr. 25, 1995). The above-discussion will be supplemented by the following Conclusions of Law.

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. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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. "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. W. Va. Code § 18A-4-16(6) does not apply if multiple, former extracurricular assignments have been combined into a full-time position, as the assignments are no longer extracurricular in nature.

3. County boards 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. Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986).

4. "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 implausiblethat 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 Resources, 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)).

5. "A board of education has the discretion to determine the number of jobs for and the employment terms of service personnel. When a board of education seeks to reduce employment costs, the board may decide that the schools' best interest requires the elimination of some service personnel jobs." Richardson v. Putnam Bd. of Educ., Docket No. 97-40-189 (Oct. 15, 1997) citing Lucion v. McDowell County Bd. of Educ., 195 W. Va. 199, 446 S.E.2d 487 (1994). This same reasoning applies to creating and combining positions.

6. MCBOE did not act in an arbitrary and capricious manner or abuse its discretion when it decided combine nineteen extracurricular assignments into two full-time 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 § 18-

29-7 (repealed) (but see Executive Order No. 2-07, May 8, 2007). Neither theWest 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 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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Janis I. Reynolds

Chief Administrative Law Judge

Date: July 31, 2007

Footnote: 1

Ms. Smith is no longer a party to this grievance as testimony at the lower level revealed her extracurricular assignment was discontinued and was not incorporated into the flex runs.

Footnote: 2

Grievants did not identify what actions of MCBOE were a violation of this Code Section. Accordingly, it will not be addressed.

Footnote: 3

W. Va. Code § 18A-4-16 (4) states "[a]n employee's contract of employment shall be separate from the extracurricular assignment agreement provided for in this section and shall not be conditioned upon the employee's acceptance or continuance of any extracurricular assignment proposed by the superintendent, a designated representative, or the board."