THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

DONNA HOWELL,

Grievant,

v. **Docket No. 07-27-130**

MERCER COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Donna Howell ("Grievant") initiated this grievance on January 5, 2007, alleging a bus assignment was posted in violation of W. Va. Code § 18A-4-8b, because it did not accurately describe the run that was vacant. Grievant did not bid on the run because of the alleged error, and seeks to have the assignment correctly posted. The grievance was denied at all lower levels, with hearings being held at both levels two and three. Grievant appealed to level four on April 23, 2007. Because of legislative action affecting the grievance procedure and the Grievance Board, no action on this grievance was taken for some time, and a level four hearing was ultimately scheduled for February 11, 2008. However, by letter dated February 1, 2008, the parties (See footnote 1) notified the Grievance Board that they wished to submit this matter for a decision based upon the record developed below. The parties' submitted fact/law proposals on March 3, 2008, and this grievance was reassigned to the undersigned administrative law judge on July 11, 2008, in order to expedite the decision.

Synopsis

Grievant challenges the posting of a bus operator position, which only described the position by a

general area which included at least six bus runs. After calling the transportation office to attempt to ascertain which bus run was posted, Grievant was given information which misled her into believing that the assignment was one that she did not desire. Therefore, she did not apply for the vacancy. The position, which was awarded to a substitute, was, indeed, a position which Grievant would have bid upon if she had known which position it was. Pursuant to the requirements of W. Va. Code § 18A-4- 8b(g)(2), when posting positions, a board of education is required to give particulars of the job and sufficient information to draw the largest possible pool of applicants. The posting in this case did not accomplish that purpose, so the grievance is granted.

Findings of Fact

1. Grievant has been employed by Respondent as a bus operator for approximately 30 years.
2. At all times pertinent to this grievance, Grievant was assigned to a bus run in the Princeton/Glenwood area. There are six bus runs assigned to that particular area of Mercer County.
3. On November 30, 2006, Respondent posted a vacancy for “Bus Operator _ Princeton/Glenwood Area.” The particular run was not otherwise identified or described in the posting.
4. In an attempt to determine which run within the Princeton/Glenwood area was vacant, Grievant called the transportation office and spoke with a secretary. Thesecretary's comments led Grievant to believe that the vacant run was not the one being served by bus #560.
5. The only run Grievant was interested in was the one being served by bus #560, which she had heard might become vacant due to a retirement. Since she believed this was not the assignment that had been posted, she did not bid on the vacancy.
6. The vacancy posted on November 30 was for the run served by bus #560. It was awarded to a substitute driver, Mary Taylor.

Discussion

Because this is not a disciplinary case, the Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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).

Grievant contends that, if the posting had more specifically described which run was vacant, or if she had received correct information when she inquired about the vacancy, she would have bid on the assignment. Respondent counters that, if Grievant had spoken to the correct person, i.e. Michael Weeks, Supervisor of Transportation and Safety, she would have known exactly which bus run was vacant. In addition, Respondent argues that it has no obligation to list a bus number when posting a vacancy. As Grievant has noted, W. Va. Code § 18A-4-8b(g) addresses the requirements by which a county board of education must abide when posting service personnel positions. In particular, it states in subsection (2), as follows:

> Notice of a job vacancy shall include the job description, the period of employment, the amount of pay and any benefits and **other information that is helpful to prospective applicants to understand the particulars of the job**. Job postings for vacancies made pursuant to this section shall be written **so as to ensure that the largest possible pool of qualified applicants may apply**. Job postings may not require criteria which are not necessary for the successful performance of the job and may not be written with the intent to favor a specific applicant.

(Emphasis added.) Grievant believes that the posting of a bus assignment, which does not give any specific information by which the particular run may be identified, runs afoul of this statute. The undersigned agrees.

"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." *Hancock County Bd. of Educ. v. Hawken,* 209 W. Va. 259; 546 S.E.2d 258 (1999), *citing 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." *Trimboli v. Dep't of Health and Human Resources*, Docket No. 93-HHR-322 (June 27, 1997). 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 exrel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). "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 her judgment for that of a board of education." *Trimboli*, *supra*; *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

While Respondent contends that it has no specific obligation to provide a bus number when posting such vacancies, it *is* obligated to describe the position so that applicants may make an intelligent decision as to whether they are interested in the job. Employees should not be required to know whom to contact in order to find out what position has been posted, and then hope that they received correct information upon which to base their decision regarding the desirability of the position. Respondent also has protested any requirement of placing the bus number in a job posting, because the actual bus may change from year to year, while the run itself will remain unchanged. However, the undersigned will take administrative notice that, in most counties in this state, bus runs are posted as serving a particular area, neighborhood, or street. Obviously, in the instant case, stating the area was insufficient to particularly describe the assignment, but Respondent could have provided the particular street or streets or a neighborhood within that area. Moreover, the posting could also have contained the current bus number, stating clearly that it was the run *currently* served by bus number such-and-such, which would also have given more descriptive information as to the exact run being posted.

As recognized in *Sanders v. Pocahontas County Board of Education*, Docket No. 06-38-430 (May 10, 2007), a job posting is legally sufficient if it is “clear as to job duties,qualifications and work location.” The posting at issue here was not clear as to the specific location, and the undersigned concludes that it did not comport with the requirements of W. Va. Code § 18A-4-8b(g). Therefore, under the circumstances, it was an abuse of Respondent's discretion in personnel matters to post the bus assignment in the manner that it did.

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. In a non-disciplinary case, the Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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).

2. Job postings for service personnel positions “shall include the job description, the period of employment, the amount of pay and any benefits and other information that is helpful to prospective applicants to understand the particulars of the job” and must “be written so as to ensure that the largest possible pool of qualified applicants may apply.” W. Va. Code § 18A-4-8b(g)(2).

3. "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." *Hancock County Bd. of Educ. v. Hawken,*209 W. Va. 259; 546 S.E.2d 258 (1999), *citing Syl. pt. 3*, *Dillon v. Wyoming County Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986).

4. The job posting at issue did not comport with the requirements of W. Va. Code § 18A-4-8b(g)(2).

Accordingly, this grievance is **GRANTED**, and Respondent is **ORDERED** to repost the bus operator position at issue, providing a more specific description of the exact assignment, so that all qualified applicants may apply.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mercer County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7 (repealed*)*. (See footnote 2) 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 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.

Date: August 4, 2008

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DENISE M. SPATAFORE

Acting Chief Administrative Law Judge

Footnote: 1

Grievant was represented by counsel, John E. Roush of the School Service Personnel Association, and Respondent was represented by counsel, John H. Shott.

Footnote: 2

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.