THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

MICHELLE MARSHALL,
Grievant,

v. **DOCKET NO. 2010-0704-MonED**

MONONGALIA COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

This grievance was filed on November 19, 2009, by Grievant, Michelle Marshall, against her employer, the Monongalia County Board of Education. The statement of grievance reads:

> Grievant contends that Respondent employed a less senior bus operator for a mid-day/supplemental assignment in violation of W. Va. Code [§§] 18A-4-8b & 18A-4-16.

The relief sought by Grievant is "instatement into the assignment if it continues to exist and compensation for lost wages with interest."[1]

A conference was held at level one on April 22, 2010, and a decision denying the grievance at that level was issued on May 6, 2010. Grievant appealed to level two on May 20, 2010, and a mediation session was held on August 4, 2010. Grievant appealed to level three on August 14, 2010. A level three hearing was held before the undersigned on

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[1] Grievant testified at the level three hearing that she was no longer seeking compensation because she had received an extracurricular painting assignment during the 2009-2010 school year, which had paid her the same amount she would have earned in the bus operator assignment at issue.

October 26, 2010, in the Grievance Board's Westover office. Grievant was represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association, and Respondent was represented by Jennifer S. Carradine, Esquire, Dinsmore & Shohl. This matter became mature for decision on November 23, 2010, upon receipt of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was the most senior applicant for a posted extracurricular bus run. Because she was unable to begin the run at the starting time set forth on the posting, due to a conflict with her morning run, she was not awarded the position. Grievant argued that it was arbitrary and capricious to place the early starting time on the posting, asserting that the starting time was flexible, as evidenced by the fact that it was later the prior school year.[2] The start time for this run was determined based upon the needs of the students, and Grievant was not able to perform the duties as required because of a schedule conflict. Respondent did not abuse its discretion, act in an arbitrary and capricious manner, or violate any statutory provision when it determined that Grievant could not be placed in this assignment.

The following Findings of Fact are made based upon a preponderance of the evidence presented at the level three hearing.

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[2] Grievant also asserted it would be later in the 2010-2011 school year, but this misrepresents the testimony. The witnesses testified the schedule was still being worked out, and they were not sure what was being discussed would actually work. It will also be noted that Grievant did not file a grievance challenging the starting time on the posting when the assignment was first posted.

Findings of Fact

1. Grievant has been employed by the Monongalia County Board of Education ("MBOE") as a bus operator for 17 years.

2. Respondent posted an extracurricular bus run on September 16, 2009, which stated "must be available to depart MTEC[3] at 8:25 a.m. and return to MTEC at 10:00 a.m." This bus run was needed to transport students in the nursing assistant program to a nursing home for clinical experience. Grievant applied for the assignment, as did John Carpenter.

3. Belinda Baker is a teacher at MTEC who teaches the nursing assistant students in the morning session. The State Board of Nursing requires the nursing assistant students to have 55 hours of clinical experience. Ms. Baker must submit a calendar to the State Board of Nursing which states the times the students will arrive and depart the nursing home each day. The exact amount of clinical experience time must be on the calendar, and MTEC is inspected every other year to assure compliance with the state requirements. Inspectors will arrive at the nursing home before the students to make sure they arrive on time. Ms. Baker makes every effort to schedule the students to be at a nursing home for at least an hour and a half, because the students have to get into the assigned nursing home, get their assignment, meet the resident, and if the resident is going to be bathed, the student must gather the resident's clothes, and sometimes wait for a shower. All of this takes time. Some of the students must be back at MTEC by 10:30 a.m. for their next bus. Travel to and from MTEC takes about 20 minutes each way. For

[3] MTEC is the acronym for the Monongalia Technical Education Center.

these reasons, Ms. Baker asked that the bus transporting the students to the assigned nursing home be available to depart from MTEC at 8:25 a.m. for the 2009-2010 school year.

4. The subject extracurricular run was awarded to Mr. Carpenter. Mr. Carpenter is a bus operator employed by MBOE, and has less seniority than Grievant. Mr. Carpenter was able to depart MTEC at 8:25 a.m., as was required by the posting.

5. During the 2009-2010 school year, Grievant had a morning run transporting students from their homes to school. Her last stop of the morning was to drop students off at Brookhaven School. She departed Brookhaven School at 8:30 a.m., and it would take her about 10 minutes to travel to MTEC from Brookhaven School. She could not perform the subject extracurricular run as posted as it was impossible for her to depart MTEC at 8:25 a.m.

6. Grievant did not hold the assignment at issue during any prior school year. During the 2008-2009 school year various bus operators, including Grievant, transported the nursing students from MTEC to various nursing homes on a rotating basis, and there were times that the students arrived at the assigned nursing home later than the scheduled arrival time.

Discussion

Grievant has the burden of proving her grievance by a preponderance of the evidence. *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). "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 employee has not met her burden. *Id*.

This grievance is about which of two employees should have received a posted extracurricular bus run.[4] Grievant readily admits that she could not have performed the run in a timely manner, as posted, because she could not be at MTEC until 8:40 a.m. at the earliest. Grievant's argument is that Respondent's decision to post the run with the requirement that it had to depart MTEC at 8:25 a.m. was arbitrary and capricious. Respondent disputes this contention and stands by its decision. Respondent points out that Grievant could not perform this duty as required, and it properly awarded the run to someone who could meet the time requirements.

W. VA. CODE § 18A-4-16(5) provides as follows:

> The board shall fill extracurricular school service personnel assignments and vacancies in accordance with section eight-b [§ 18A-4-8b] of this article: Provided, That an alternative procedure for making extracurricular school service personnel assignments within a particular classification category of employment may be utilized if the alternative procedure is approved both by the county board and by an affirmative vote of two thirds of the employees within that classification category of employment.

W. VA. CODE§ 18A-4-8b provides that school service personnel positions are to be filled "on the basis of seniority, qualifications and evaluation of past service."[5]

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[4] W. VA. CODE §18A-4-16 defines extracurricular duties to "mean, but not be limited to, activities that occur at times other than regularly scheduled working hours. . . and which occur on a regularly scheduled basis."

[5] The qualifications and evaluations of Grievant and Mr. Carpenter are not at issue in this grievance.

County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the 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). Generally, an action is arbitrary and capricious if factors intended to be considered were not relied upon, important aspects of the problem were entirely ignored, the decision was explained in a manner contrary to the evidence before the decision maker, or the decision reached was so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). 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)).

This Grievance Board has previously found that “it is not an abuse of discretion for a board of education to refuse to award an assignment to a driver when ‘legitimate questions existed as to Grievant’s logistical ability to perform the run[.]’” *Garner v. Monongalia County Bd. of Educ.*, Docket No. 05-30-164 (Sept. 16, 2005); *Russell v. Wayne County Bd. of Educ.*, Docket No. 02-50-041 (March 25, 2002); *See Smith v. Putnam County Bd. of Educ.,* Docket No. 99-40-058 (Apr. 2, 1999).

It is quite clear that the nursing assistant program schedule was developed by Ms. Baker in order to accommodate the needs of her students, and that is what was required.

Respondent then posted the extracurricular run as Ms. Baker requested. Grievant quite simply was unable to perform the run as required, because her morning run did not end until five minutes after this extracurricular run departed. She would have been 15 to 20 minutes late every day, and either the nursing assistant students would not have been able to get their required clinical hours, or else those students who had to be back at MTEC by 10:30 a.m. would have missed their next bus. Respondent was not required to jump through hoops to accommodate Grievant's schedule. Respondent properly awarded the run to the most senior bus operator who was able to perform the required services.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. Grievant has the burden of proving her grievance by a preponderance of the evidence. *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.

2. Extracurricular school service personnel positions are to be filled "on the basis of seniority, qualifications and evaluation of past service." W. VA. CODE §§ 18A-4-8b and 18A-4-16(5).

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

4. Generally, an action is arbitrary and capricious if factors intended to be considered were not relied upon, important aspects of the problem were entirely ignored, the decision was explained in a manner contrary to the evidence before the decision maker, or the decision reached was so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). 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. This Grievance Board has previously found that "it is not an abuse of discretion for a board of education to refuse to award an assignment to a driver when 'legitimate questions existed as to Grievant's logistical ability to perform the run[.]'" *Garner v. Monongalia County Bd. of Educ.*, Docket No. 05-30-164 (Sept. 16, 2005); *Russell v. Wayne County Bd. of Educ.*, Docket No. 02-50-041 (March 25, 2002); *See Smith v. Putnam County Bd. of Educ.,* Docket No. 99-40-058 (Apr. 2, 1999).

6. Grievant did not demonstrate that Respondent acted in an arbitrary and capricious manner, abused its discretion, or acted in violation of any statutory provision when it awarded the extracurricular run at issue to a less senior bus operator because Grievant was unable to perform the required services due to a schedule conflict.

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: April 18, 2011