WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LISA S. NESTOR,
Grievant,

v. **Docket No. 2013-0622-KanED**

KANAWHA COUNTY BOARD OF EDUCATION,
Respondent.

D E C I S I O N

Lisa S. Nestor, Grievant, filed this grievance against her employer, Kanawha County Board of Education ("KCBE" or "Board"), Respondent, on October 8, 2012, protesting that her work schedule had been altered to avoid the payment of overtime wages. Grievant sought to have her work schedule hours changed to 6:45 a.m. to 3:15 p.m. with overtime and backpay. Grievant contends Respondent is in violation of W. VA. CODE § 18A-4-8a(i). Grievant seeks retroactive wage and benefits with interest.

A hearing was held at level one on November 8, 2012. The grievance was granted in-part and denied in-part at that level pursuant to a December 4, 2012 decision. Grievant appealed to level two on December 7, 2012, and a mediation session was held on February 25, 2013. Grievant appealed to level three on March 6, 2013. A level three hearing was held before the undersigned Administrative Law Judge on September 5, 2013, in the Grievance Board's Charleston office. Grievant appeared in person and was represented by John E. Roush, Esq., West Virginia School Service Personnel Association. Respondent was represented by its General Counsel, James W. Withrow, Esq. Both parties submitted Proposed Findings of Fact and Conclusions of Law, and this matter became mature for decision on October 7, 2013, on receipt of the last of these proposals.

Synopsis

Respondent altered the work schedule of Grievant, a special education aide, to be more in sync with the arrival and departure time of her assigned special needs student. Grievant contends this was a violation of WEST VIRGINIA CODE § 18A-4-8a(i), in that her work schedule was altered during the school year without her written consent to avoid payment of overtime wages. Respondent maintains its action was a prudent and permissible exercise of its authority. Respondent notes the alteration in Grievant's daily work schedule was minimal and reflective of the arrival and departure of the special education student she assisted. Respondent further notes Grievant's actions were in violation of applicable agency overtime rules and regulations.

Notwithstanding the language in W. VA. CODE § 18A-4-8a, restricting changes in a service employee's daily work schedule, a county board of education must have freedom to make reasonable changes to a service employee's daily work schedule within the parameters of the employee's contract. A service employee is not empowered with the ability to *sua sponte* enlarge his or her work day schedule to include overtime on a regular and continuous basis. In the circumstance of this matter, Respondent acted within recognized authority when it made modifications to Grievant's schedule as an Aide assigned to assist a special education student. Accordingly this grievance is DENIED.

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

Findings of Fact

1. Grievant is regularly employed by Respondent as a special education aide assigned to work at Capital High School.

2. The 2012-2013 school year was Grievant's fifth year at Capital High School. Grievant is assigned to work with one particular student who has significant physical needs that require attention throughout the day.

3. The student's transportation arrangements have changed over his years at Capital High School. Initially he was transported by bus, then his mother and eventually by his brother, who is now a student at Capital High School.

4. In 2011-2012 school year, the student was transported by his mother and arrived at school generally at 6:55 a.m. but prior to 7:00 a.m.

5. During the 2012-2013 school year, the student began to be transported by his brother who drove to school and arrived at approximately 7:05 a.m.

6. In the 2011-2012 and the 2012-2013 school year, the student left school at approximately 3:15 p.m. each day (estimated departure time ranges between 3:05 p.m. and 3:15 p.m.).

7. At the beginning of the 2012-2013 school year, Clinton Giles, Principal at Capital High School, developed a schedule for the aides at the school. The document was disseminated to employees. The schedule provided that autism mentors and one-on-one aides would generally work from 6:45 a.m.–2:45 p.m., but would be adjusted to coincide with the arrival times of the students. Resp. Ex. 1.

8. Grievant did not adjust her schedule to meet the later arrival time of the student. Grievant continued to report to work at 6:45 a.m. and work until the student went

home. This schedule resulted in Grievant's receipt of approximately thirty minutes of extra pay or overtime for each work day, i.e., 6:45 a.m. to 3:15 p.m.

9. Kanawha County Schools have established and duly promulgated policy governing and regulating overtime for employees. Such policy, among other provisions, provides that an employee who anticipates the need for overtime to complete his or her weeks work is to obtain prior approval and failure to obtain such approval to work beyond their normal 40-hour workweek is grounds for disciplinary action.[1] See Kanawha County Schools Administrative Regulation, Overtime, Series G78A, Resp. Ex 4.

10. On or about September 21, 2012, the school administration learned that Grievant was working a 6:45 a.m. to 3:15 p.m. schedule because Grievant was accumulating significant overtime.

11. Assistant Principal Angela Cruikshank met with Grievant and advised her that she would work from 7:00 a.m. until 3:00 p.m., which more closely matched the student's arrival and departure time.

12. On or about September 21, 2012, Grievant's schedule was shifted to 7:15 a.m. to 3:15 p.m. Among other rationale one of the explanations given to Grievant for the change in her schedule was to limit the amount of overtime being worked. This was not the only rationale provided.

13. Grievant protested and Respondent conducted a hearing regarding the issue(s) in contention.

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[1] Kanawha County Schools Administrative Regulation, Overtime, Series G78A, also states that "[o]vertime for service personnel is considered an 'extra duty assignment,'" and "employee with the greatest length of service time in a particular category of employment shall be given priority in accepting extra duty assignments." Resp. Ex 4.

14. WEST VIRGINIA CODE § 18A-4-8a(i) states in pertinent part:

> No service employee may have his or her daily work schedule changed during the school year without the employee's written consent and the employee's required daily work hours may not be changed to prevent the payment of time and one-half wages or the employment of another employee.

15. Respondent's December 3, 2012, level one decision authored by Deputy Superintendent Joseph T. Godish, and approved by Superintendent Duerring, determined that:

> Based on the above statute, your grievance is granted as to the changes in hours and you will return to the 6:45 a.m. - 2:45 p.m. schedule as the change to 7:00 a.m. - 3:00 p.m. was made during the school year without your written consent. However, it is not required that you work beyond 2:45 p.m. as the teacher and another aide are available to supervise your student until his brother picks him up. It is noted that the earlier schedule is consistent with the hours shared with the aide staff at the beginning of the school year. It is also noted that Ms. Cruikshank did not authorize you to work in excess of forty hours per week as she did not have the authority to do so. The county job description for aids also provides permission must be obtained from the building principal before working overtime. The grievance is denied as to the request for overtime back pay.

16. As a result of the level one decision, Grievant's schedule was changed to 6:45 a.m. to 2:45 p.m. Grievant's authorized work schedule was altered barring the work day she had regularly performed before the September 21, 2012 schedule, i.e., 6:45 a.m. to 3:15 p.m. Grievant was specifically not authorized to work to 3:15 p.m., eliminating approximately thirty minutes of overtime she had been accruing daily prior to September 21, 2012. Thus, this grievance was granted in-part and denied in-part at level one pursuant to the December 3, 2012 decision.

Discussion

As this grievance does not involve a disciplinary matter, 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 § 3 (2008). "A preponderance of the evidence is evidence 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." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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, a party has not met its burden of proof. *Id.*

Grievant's schedule was changed by approximately 15-20 minutes which, in the circumstance of this matter, more readily aligned her scheduled day with that of her assigned student's arrival and departure times and allowed Grievant to complete her duties within a regular work day. This, on its face, seems prudent and reasonable; however, the query posed is whether it is legal pursuant to West Virginia school law and applicable case law. This issue has been addressed by the Grievance Board a number of times; however, because there are differing facts and circumstances surrounding each change of this nature, these claims are decided on a case-by-case, fact-specific basis. *Seal v. Marshall County Bd. of Educ.*, Docket No. 06-25-094 (Sept. 7, 2006); *Stover v. Mason County Bd. of Educ.*, Docket No. 96-26-048 (Nov. 27, 1996); *Sipple v. Mingo County Bd. of Educ.*, Docket No. 95-23-541 (Mar. 27, 1996); *McClain v. Hancock County*

Bd. of Educ., Docket No.96-15-114 (June 27, 1996); *Tolliver v. Mingo County Bd. of Educ.,* Docket No. 95-29-475 (May 31, 1996); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995).

Grievant maintains Respondent's actions are in violation of WEST VIRGINIA CODE § 18A-4-8a(i), in that her work schedule was altered during the school year without her written consent to avoid payment of overtime wage. WEST VIRGINIA CODE § 18A-4-8a(i) states in pertinent part:[2]

> No service employee may have his or her daily work schedule changed during the school year without the employee's written consent and the employee's required daily work hours may not be change to prevent the payment of time and one-half wages or the employment of another employee.

Respondent notes that Grievant's conscious decision to not adjust her schedule, at the beginning of the 2012-2013 school year, to coincide with the arrival time of her student, as instructed by the principal,[3] does not validate or authorize entitlement to continuously overtime. Respondent highlights that a service employee is not empowered with the ability to *sua sponte* enlarge his or her work schedule to include overtime on a regular and continuous basis. Respondent argues that it legitimately has the ability to alter/limit Grievant's self-imposed schedule of 6:45 a.m. to 3:15 p.m.

Both the West Virginia Supreme Court of Appeals and the Grievance Board have addressed the issue of changing the working hours of service personnel.[4]

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[2] The statutory language in question has had a slightly different citation, i.e.,WEST VIRGINIA CODE §18A-4-8a(7) at the time of some of the prior cases.

[3] Citing Resp. Ex 1, *see* Finding of Fact 7, *supra.*

[4] The leading case decided on this issue is *Napier v. Board of Education of the County of Mingo*, 214 W.Va. 548, 591 S.E.2d 106 (2003).

Napier v. Mingo County Board of Education, Docket No. 00-29-086 (July 13, 2000), and *Sipple v. Mingo County Board of Education*, Docket No. 95-29-487 (Mar. 27, 1996) involved changes to the schedule of special education aides required to assist special education students on school-provided transportation. The Administrative Law Judge in *Napier* cited *Sipple* and held:

> Notwithstanding the language in W. VA. CODE § 18A-4-8a, restricting changes in a service employee's daily work schedule, a county board of education must have the freedom to make reasonable changes to a service employee's daily work schedule within the parameters of her contract, some of which cannot reasonably be effected until shortly after school starts.

Id. (citations omitted). The Grievance Board concluded the school board's modifications to the aide's transportation duties and schedule were not arbitrary or capricious or schedule "changes" contemplated by the West Virginia Legislature under W. VA. CODE § 18A-4-8a, as they were made in response to the changing needs of the student population and within the parameters of an aide's contract. These grievances were denied. *Napier, supra; Sipple, supra*.

Napier was ultimately appealed to the West Virginia Supreme Court of Appeals, and after a lengthy discussion about statutory construction, the West Virginia Supreme Court, *Napier v. Board of Education of the County of Mingo*, 214 W.Va. 548, 591 S.E.2d 106 (2003) held:

> Insofar as Ms. Napier's position requires her to be assigned to a specific bus to assist the special needs students riding said bus, it may be said that her daily schedule corresponds to, or is commensurate with, the daily route of the bus to which she is assigned. As such, the duration of Ms. Napier's workday is defined by the daily schedule of Bus Number 9607. Thus, the Board acted within its authority when it required Ms. Napier to meet the bus at Musick, in order to attend to a student's needs, instead of at Busch High School, as it earlier had instructed her do so. Moreover, to the extent that Ms. Napier's job is solely to care for the special needs students

> to whom she is assigned, it is entirely plausible that her daily schedule would not be static throughout the school year[,] but might be adjusted, within the confines of Bus Number 9607's daily route, in order to permit her to accommodate fewer or greater numbers of students as their needs dictate. Therefore, the Board did not change Ms. Napier's work schedule in violation of W. VA. CODE § 18a-4-8a(7) [.]

Id.

Further, county boards of education have broad discretion in personnel matters but must exercise that discretion in a manner which is not arbitrary or capricious. (citations omitted). It is noted that Courts may venture beyond the plain meaning of a statute in those instances where a literal application would produce an absurd result. *State ex rel. Frazier v. Meadows*, 193 W. Va. 20, 454 S.E.2d 65 (1994). In the fact pattern of the instant matter, a strict, literal interpretation of W. VA. CODE § 18A-4-8a(i) would preclude a school board from even slightly altering a service employee's schedule. This we know is nonsensical. *Napier, supra; Sipple, supra; Froats v. Hancock County Bd. of Educ.*, Docket No. 89-15-414 (Dec. 18, 1989). Such a literal interpretation would produce a result inconsistent with the apparent legislative intent of protecting school service employees from involuntary changes in their shift assignments. Additionally, the undersigned concurs with Respondent's position that Grievant's actions of self-awarded regular and continuous overtime is beyond Grievant's authority and in violation of applicable Kanawha County Schools Administrative Regulation pertaining to overtime. *See* Series G78A, Resp. Ex. 4. Grievant was not authorized nor approved to receive thirty minutes of overtime a day on a continuous basis.

This Grievance Board has recognized that county boards of education must have freedom to make reasonable changes in a service employee's schedule, so long as the alterations do not extend the employee's workday beyond the parameters of his or her

current contract. *Seals v. Marshall County BOE*, Docket No. 06-25-094 (Sept 7, 2006); *Vidrine v. Jackson County Bd. of Educ.*, Docket No. 03-18-173 (Oct. 31, 1996); *Sipple v. Mingo County Bd. of Educ.*, Docket No. 95-23-541 (Mar. 27, 1996); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995); *Froats v. Hancock County Bd. of Educ.*, Docket No. 89-15-414 (Dec. 18, 1989).

Grievant's job duties were to provide the appropriate support for a specific student and changes in her schedule commensurate with the needs of the student were within the confines of her job description. In this instance, Grievant's schedule was changed by approximately 15-20 minutes to enable her to match her student's arrival and departure times and allowing her to complete her assigned duties within the confines of a regular work day. This is prudent administrative conduct and not arbitrary or capricious. Grievant testified and begrudgingly admits that her schedule does, in fact, change from time to time, depending on whether or not the student is at school. Given the direction by the West Virginia Supreme Court of Appeals, in *Napier v. Board of Education of the County of Mingo*, 214 W.Va. 548, 591 S.E.2d 106 (2003), the undersigned Administrative Law Judge finds Grievant's schedule is largely "defined by the daily schedule of [her student]" and there has been no violation of W. VA. CODE § 18A-4-8a(i).

Grievant failed to prove by a preponderance of the evidence that the Board abused its discretion, acted in an arbitrary and capricious manner, or impermissibly violated W. VA. CODE § 18A-4-8a(i) when it made reasonable modifications to Grievant's schedule as an aide assigned to assist a special education student.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. 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 Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008). "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).

2. County boards of education have broad discretion in personnel matters, including making job assignments, 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).

3. Grievances contending an employee's schedule has been changed in violation of W. VA. CODE § 18A-4-8a, which limits changes in a school service employees' daily work schedule during the school year to those which are consented to in writing by the employee, must be decided on a case-by-case, fact-specific basis. *Seal v. Marshall County Bd. of Educ.*, Docket No. 06-25-094 (Sept. 7, 2006); *Napier v. Mingo County Board of Education*, Docket No. 00-29-086 (July 13, 2000); *Stover v. Mason County Bd. of Educ.*, Docket No. 96-26-048 (Nov. 27, 1996); *Sipple v. Mingo County Bd. of Educ.*, Docket No. 95-23-541 (Mar. 27, 1996); *McClain v. Hancock County Bd. of Educ.*, Docket No.96-15-114 (June 27, 1996); *Tolliver v. Mingo County Bd. of Educ.,* Docket No. 95-29-475 (May 31, 1996); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995).

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 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 the Deaf 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).

5. 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 ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker,* 547 F. Supp. 670 (E.D. Va. 1982)). "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 his judgment for that of a board of education. *See generally, Harrison v. Ginsberg,* [169 W. Va. 162], 286 S.E.2d 276, 283 (1982)." *Trimboli*, *supra*, *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

6. Courts may venture beyond the plain meaning of a statute in those instances where a literal application would produce an absurd result. *State ex rel. Frazier v. Meadows,* 193 W. Va. 20, 454 S.E.2d 65 (1994).

7. Notwithstanding the language in W. VA. CODE § 18A-4-8a(i), restricting changes in a service employee's daily work schedule, a county board of education must have freedom to make reasonable changes to a service employee's daily work schedule, within the parameters of her contract. *Seals v. Marshall County BOE*, Docket No. 06-25-

094 (Sept 7, 2006); Vidrine v. Jackson County Bd. of Educ., Docket No. 03-18-173 (Oct. 31, 2003); *Sipple v. Mingo County Bd. of Educ.*, Docket No. 95-29-487 (Mar. 27, 1996). Also *see Conner v. Barbour County Bd. of Educ.,* Docket Nos. 93-01-543/544 (Jan. 31, 1995); *Froats v. Hancock County Bd. of Educ.,* Docket No. 89-15-414 (Dec. 18, 1989); *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-1100 (Aug. 2, 1995).

8. Grievant failed to prove by a preponderance of the evidence that the Board abused its discretion, acted in an arbitrary and capricious manner, or impermissibly violated W. VA. CODE § 18A-4-8a(i) when it made reasonable modifications to Grievant's schedule as an Aide assigned to assist a special education student. *See Napier v. Board of Education of the County of Mingo*, 214 W.Va. 548, 591 S.E.2d 106 (2003).

9. Respondent established prudent legitimate rationale for making minimal changes to Grievant's work day schedule.

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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: November 15, 2013

Landon R. Brown
Administrative Law Judge