DAVID BAYS,

Grievant,

v. **Docket No. 98-10-193**

FAYETTE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, David Bays, alleges the Fayette County Board of Education ("FCBOE") violated W. Va. Code § 18A-4-8b when it refused to allow him to switch a portion of his vocational bus run with a portion of another vocational run. Grievant also alleges FCBOE acted in an arbitrary and capricious manner when it did not allow this switch. This grievance was denied at Levels I and II, and Level III was by-passed. After the matter was scheduled and continued several times, for good cause shown, the parties agreed to submit the case on the record developed below. This case became mature for decision on August 20, 1998, the deadline for the parties' proposed findings of fact and conclusions of law. (See footnote 1)

After a detailed review of the record in its entirety the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been a regular bus operator for FCBOE since January 23, 1979.

2. Grievant has a regular a.m. and p.m. run and works out of the Midland Trail High School bus center. 3. For ten years, Grievant has also completed the Midland Trail vocational run which consisted of taking vocational students from the Midland Trail area to the Vocational Center. He then changed to a spare bus, picked up the carpentry and masonry students, and transported them to their work site. (See footnote

2) Later he returned to the work site, picked up the students, transported them to the Vocational Center, and returned the Midland Trail vocational students to Midland Trail.

4. In January 1998, Mr. Kenny Young retired. He had completed the Mt. Hope vocational run which consisted of taking vocational students from the Mt. Hope area to the Vocational Center. He would then pick up the health occupations students, and transport them to their work site. Later he returned to the work site, picked up the health occupations students, transported them to the Vocational Center, and returned the Mt. Hope vocational students to Mt. Hope.

5. When Grievant learned of Mr. Young's retirement, he asked to switch a portion of his vocational run with a portion of Mr. Young's vocational run.

6. Grievant asked to drive the health occupations students instead of the carpentry and masonry students. Grievant saw transporting the health occupations students as preferable because the carpentry and masonry students tracked a lot of mud into the bus, which required him to take additional time and clean two buses.

7. Grievant did not want the Mt. Hope vocational run, as it would interfere with his other assignments. 8. Both Mr. Young's regular run,S79, and his vocational run, S80, were posted on January 21, 1998, and February 3, 1998.

9. Grievant did not apply at either time.

10. Dianne Muncy, as the most senior, qualified applicant, was selected for both positions. She has less seniority than Grievant.

11. The Midland Trail vocational run has always transported the carpentry and masonry students, and the Mt. Hope vocational run has always transported the health occupations students.

12. Grievant's contract, signed on January 12, 1998, details his schedule, including the carpentry and masonry students vocational run.

13. The switching of portions of vocational runs has never been allowed in the past by FCBOE.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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.

Grievant alleges a violation of W. Va. Code § 18A-4-8b, and avers his seniority rights were violated when FCBOE would not allow him to modify his schedule in the requested manner. Grievant notes that a county board of education "shall make decisions affecting promotions and the filling of any service personnel position of employment of jobs occurring throughout the school year . . . on the basis of seniority, qualifications andevaluation of past service." Id. That Code Section defines promotion "as any change in his employment that the employee deems to improve his working circumstances within his classification category of employment[,] and shall include transfer to another classification category or place of employment if the position is not filled by an employee who holds a title within that classification category of employment." Id. Grievant argues that because he viewed changing these portions of the two runs as a promotion, FCBOE is required to grant his request pursuant to W. Va. Code § 18A-4-8b.

There was no allegation that the job vacancy of the vocational run was not posted and filled correctly. Grievant agrees he did not apply for the position. It is clear that as Grievant was more senior than the successful applicant, Ms. Muncy, he would have received both or either of the posted positions if he had applied. Since this service personnel position consisted of the entire Mt. Hope vocational run, and it was posted and filled properly, there was no violation of W. Va. Code § 18A-4-8b.

As for the charge that FCBOE acted in an arbitrary and capricious manner when it did not agree to allow Grievant to switch portions of the two vocational runs, this charge is without merit. Although it is true that an employee's schedule may be changed, his employment contract may be modified with his written consent, and a county board of education may alter a vacant position before it is posted, these changes are not required. See W. Va. Code §§ 18A-2-5, 18A-2-6, &18A-4-8a.

Whether FCBOE should have granted Grievant's request is judged by the arbitrary and capricious standard. The arbitrary and capricious standard of review requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the decision-maker. Seegenerally, Harrison v. Ginsberg, 286 S.E.2d 276 (W. Va. 1982). Generally, an action by a board of education is considered arbitrary and capricious if the decision-maker did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem or situation, explained its decision in a manner contrary to the evidence before it, or reached a decision that is 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). See Snodgrass v. Kanawha County Bd. of Educ., Docket No. 97-20-255 (Mar. 19, 1998).

Given the above-stated standard of review, the undersigned Administrative Law Judge cannot find that FCBOE's failure to allow Grievant to switch portions of the two vocational runs to be arbitrary and capricious, especially since Mr. Galen Horricks, Director of Transportation, testified that to allow this type of switching, without reposting the positions, could generate multiple grievances.

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 each element of their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (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.

2. Grievant has failed to demonstrate a violation of W. Va. Code § 18A-48b. 3. Grievant has filed to demonstrate that FCBOE acted in an arbitrary and capricious manner when it would not allow him to switch portions of two vocational runs.

Accordingly, this grievance is **DENIED**. Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Fayette 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: August 31, 1998

Footnote: 1

Grievant was represented by Attorney John Roush from the West Virginia School Service Personnel Association, and Respondent was represented by Attorney Erwin Conrad.

Footnote: 2

Grievant utilizes a spare bus for the carpentry and masonry students because of the amount of dirt and mud they track onto the bus.