VINCE YARBER,

Grievant,

v. **DOCKET NO. 01-10-343**

FAYETTE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Vince Yarber, filed this grievance against his employer, the Fayette County Board of Education ("Board") on February 28, 2001, alleging he was "improperly passed over for a vocational run in violation of West Virginia Code § 18A-4-16[1] and/or Fayette County Board of Education Policy F.5" (Jt. Ex. 1). Grievant requested payment for the run, plus pre-judgment interest. The grievance was denied at level one by Charles Garrison, Principal at Fayetteville High School. A level two hearing was held on April 30, 2001, and the grievance was denied on May 10, 2001, by Ray Carson, Grievance Evaluator. The Board waived participation at level three, and Grievant appealed to level four on May 18, 2001. The parties agreed to submit the grievance based on the record developed at the lower levels, and this matter became mature for decision on June 15, 2001, the deadline for the parties' proposed findings of fact and conclusions of law. Grievant was represented

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[1]The evidence establishes that Grievant meant to claim a violation of W. Va. Code § 18A-4-15.

by Perry Bryant, West Virginia Education Association, and the Board was represented by Douglas L. Kincaid, Director of Personnel.

SUMMARY OF EVIDENCE

Joint Exhibits

Ex. 1 - Grievance forms.
Ex. 2 - Fayette County Public Schools Extracurricular Assignment Contract for Normal Lilly, dated January 8, 2001.[2]

Grievant's Exhibits

Ex. 1 - Fayette County Board of Education Policy F-5: Extra-duty/Extracurricular bus Transportation, revised April 1, 1996.

Board Exhibits

Ex. 1 - W. Va. Code § 18A-4-15.
Ex. 2 - February 16, 1994 Attorney General's Opinion.
Ex. 3 - March 1, 2001 narrative description of grievance written by Mark D. Skaggs, Assistant Principal of Fayetteville High School.

Testimony

Grievant testified in his own behalf, and presented the testimony of Betty Harler, David Bays, and Stuard Galen Horrocks. The Board presented the testimony of Mark Skaggs.

FINDINGS OF FACT

The facts in this matter are not in dispute, and are set forth in the following findings.

1. Grievant is employed as a bus operator for the Board. Grievant also has an extracurricular assignment one hour per day Tuesday, Thursday and Friday, to transport students from Fayetteville Middle to Fayetteville High School.

[2]The parties agreed to the submission of this document into evidence subsequent to the level two hearing.

2. Norman Lilly is employed as a bus operator for the Board, and also has an extracurricular assignment with the Board, transporting students to the Fayette Plateau Vo-Tech School from 9:00 a.m. to 2:00 p.m. Monday through Friday. Jt. Ex. 2.

3. On February 2, 2001, a Friday, Mr. Lilly was making his Vo-Tech run when he was injured attempting to break up a fight between two students. Mr. Lilly informed Galen Horrocks, Supervisor of Transportation, at approximately 1:00 p.m., that he had been injured and would need a substitute to complete the remainder of his extracurricular assignment that day.

4. Mr. Horrocks determined this to be an emergency situation. The most senior bus operator on the rotation list was Grievant. Although Grievant's extracurricular run did not actually begin until approximately 1:30 p.m. on Fridays, Mr. Horrocks considered Grievant already committed to his own extracurricular run, and so he called the next most senior bus operator, Charles Parrish, to complete Mr. Lilly's extracurricular run.

5. Later that Friday evening, Mr. Lilly called Mr. Horrocks and informed him he would be off work the entire next week due to his injuries.

6. Mr. Horrocks offered Mr. Parrish Mr. Lilly's extracurricular run for the next week, and he accepted.

7. Grievant, Betty Harler, and David Bays, all bus operators for the Board, have in the past been allowed to find substitutes for their own runs when a more lucrative driving assignment became available.

DISCUSSION

Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (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. Grievant alleges the Board violated W. Va. Code § 18A-4-15, and its own past practice, when he was passed over for Mr. Lilly's extracurricular assignment. The Board denies it violated any statute, policy, rule, or procedure with respect to the assignment of Mr. Lilly's extracurricular run.

W. Va. Code § 18A-4-15 provides, in pertinent part:

> (b) Substitutes shall be assigned in the following manner: A substitute with the greatest length of service time, that is, from the date he or she began his or her assigned duties as a substitute in that particular category of employment, shall be given priority in accepting the assignment throughout the period of the regular employee's absence or until the vacancy is filled on a regular basis under the procedures set out in section eight-b [§ 18A-4-8b] of this article. All substitutes shall be employed on a rotating basis according to the length of their service time until each substitute has had an opportunity to perform similar assignments: Provided, That if there are regular service employees employed in the same building or working station as the absent employee and who are employed in the same classification category of employment, the regular employees shall be first offered the opportunity to fill the position of the absent employee on a rotating and seniority basis with the substitute then filling the regular employee's position. A regular employee assigned to fill the position of an absent employee shall be given the opportunity to hold that position throughout the absence.

In addition, Board Policy F-5 governs the practice of the Board in assignment of bus operators for extra-duty and extracurricular trips, including substituting for regular extracurricular Vo-Tech runs. The relevant section of Policy F-5 states:

> Scheduling of Drivers: The Superintendent's designee is responsible for assigning ALL drivers on a rotating basis according to seniority within their

> bus center. Should there be more than one driver needed for a trip or trips on the same day, the Superintendent's designee shall assign drivers in sequence of seniority within their bus center. Seniority provides the drivers the priority in accepting such assignments, followed by other fellow employees within their bus center on a rotating basis according to the length of their service time as a school bus operator until all such employees have had an opportunity to perform similar assignments. (Emphasis in original).

G. Ex. 1.

Grievant argues first that he was improperly passed over for Mr. Lilly's extracurricular run because he was available between 1:00 and 1:30 p.m. on Friday, February 2, 2001, before his own extracurricular run began. Second, assuming it was improper for Mr. Parrish to have been offered the emergency run, it was likewise improper to allow him to continue in that assignment until Mr. Lilly returned. Finally, and in the alternative, Grievant contends there were actually two (2) separate assignments requiring substitute coverage with respect to Mr. Lilly's extracurricular run: The first was the emergency coverage needed on Friday, February 2, 2001, when Mr. Lilly was injured; the second was the coverage needed the next week during Mr. Lilly's absence.

The Board contends it was not improper for Mr. Horrocks to skip Grievant on the rotation list as he was committed to make an extracurricular run at the same time that Mr. Lilly informed him he had been injured. Further, the Board argues that the substitute coverage of Mr. Lilly's assignment was a continuous absence, and as such, once Mr. Parrish was assigned the run, he was entitled to continue in that position throughout Mr. Lilly's absence.

County boards of education have broad discretion in personnel matters, including making job assignments and transfers, but must exercise that discretion in a manner which is not arbitrary or capricious. Dillon v. Wyoming County Bd. of Educ., 351 S.E.2d 58 (W.

Va. 1986); Conrad v. Nicholas County Bd. of Educ., Docket No. 97-34-388 (Jan. 12, 1998); Mullins v. Logan County Bd. of Educ., Docket No. 94-23-283 (Sept. 25, 1995); Dodson v. McDowell County Bd. of Educ., Docket No. 93-33-243 (Feb. 15, 1994).

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.2d1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16., 1996). While a searching inquiry into the facts is required to determine if an action is arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of the board of education. See generally Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

With respect to Grievant's argument that he should have been called to substitute for Mr. Lilly on Friday, February 2, 2001, the evidence established that Mr. Horrocks had perhaps a half-hour between the time he was informed a substitute was needed for Mr. Lilly's run on Friday, February 2, 2001, and the time Grievant's own extracurricular run began. If the situation had been as simple as just offering the run to Grievant, perhaps Grievant could prevail on the argument that he should be have been offered the "emergency" run. However, offering Grievant the "emergency" run would necessarily have entailed finding yet another substitute to make Grievant's run, and there was no guarantee that could have been accomplished within that half-hour. Under the circumstances, the undersigned does not find that it was improper, unreasonable, or arbitrary and capricious

for Mr. Horrocks to determine the situation an "emergency" which allowed him to pass over Grievant, who already had a run scheduled within the half-hour, and move on to Mr. Parrish, who was available without restriction to make the run.

Grievant's next argument is that W. Va. Code § 18A-4-15 only provides that "a substitute with the greater length of service time" is entitled to remain in a substitute assignment until the regular employee returns, and since Mr. Parrish was not the substitute with the greater length of service time, he was not permitted to remain in that position past the emergency situation on Friday, February 2, 2001. In support of this theory, Grievant cites a line of Grievance Board cases which have held that employees who are illegally or improperly selected for a position have no right to maintain that position. Those cases relate to long-term substitutes who have been selected to fill positions for regular employees who will be on a leave of absence for more than thirty (30) days pursuant to W. Va. Code § 18A-4-15(2), without going through the competitive bidding process. While those cases do not control the instant situation, Grievant argues that the same principle should be applied, i.e, if the selection of Mr. Parrish for the substitute assignment was improper at the outset, he should not be entitled to receive the benefit of that improper selection.

Grievant's reliance on the cited portion of Code § 18A-4-15 and previous Grievance Board cases is misplaced, however, because neither Grievant nor Mr. Horrocks are substitute employees. The more relevant portion of Section 18A-4-15 is the latter half, which provides the manner in which regular employees may fill an absent regular employee's absence. Code § 18A-4-15 states that "[a] regular employee assigned to fill the position of an absent employee shall be given the opportunity to hold that position

throughout the absence." In the instant case, Mr. Horrocks was correctly assigned to fill the position, and was then given the opportunity to hold the position throughout Mr. Lilly's absence. That practice complies with the statute and Grievant has failed to show any violation.

CONCLUSIONS OF LAW

1. Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (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.

2. W. Va. Code § 18A-4-15 provides, in pertinent part:

> (b) Substitutes shall be assigned in the following manner: A substitute with the greatest length of service time, that is, from the date he or she began his or her assigned duties as a substitute in that particular category of employment, shall be given priority in accepting the assignment throughout the period of the regular employee's absence or until the vacancy is filled on a regular basis under the procedures set out in section eight-b [§ 18A-4-8b] of this article. All substitutes shall be employed on a rotating basis according to the length of their service time until each substitute has had an opportunity to perform similar assignments: Provided, That if there are regular service employees employed in the same building or working station as the absent employee and who are employed in the same classification category of employment, the regular employees shall be first offered the opportunity to fill the position of the absent employee on a rotating and seniority basis with the substitute then filling the regular employee's position. A regular employee assigned to fill the position of an absent employee shall be given the opportunity to hold that position throughout the absence.

3. County boards of education have broad discretion in personnel matters, including making job assignments and transfers, but must exercise that discretion in a manner which is not arbitrary or capricious. Dillon v. Wyoming County Bd. of Educ., 351

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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.2d1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16., 1996). While a searching inquiry into the facts is required to determine if an action is arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of the board of education. See generally Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

5. Grievant has failed to prove Mr. Horrocks' decision to call Mr. Parrish to substitute for Mr. Lilly on Friday, February 2, 2001, in what was clearly an "emergency" situation, was improper, unreasonable, arbitrary or capricious.

6. W. Va. Code § 18A-4-15 provides that "[a] regular employee assigned to fill the position of an absent employee shall be given the opportunity to hold that position throughout the absence." Mr. Horrocks was correctly assigned to fill Mr. Lilly's position, and was then given the opportunity to hold that position throughout the absence, in compliance with the statute.

7. Grievant has failed to prove the Board violated W. Va. Code § 18A-4-15 in assigning Mr. Horrocks the remainder of Mr. Lilly's run, following Mr. Lilly's injury.

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. Any 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. 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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MARY JO SWARTZ
Administrative Law Judge

Dated: July 13, 2001