CONNIE LAWSON and TINA BAISDEN,

Grievants,

v. **Docket No. 01-23-355**

LOGAN COUNTY BOARD OF EDUCATION,

Respondent,

D E C I S I O N

Grievants, Connie Lawson and Tina Baisden, filed the following Statement of Grievance against their employer the Logan County Board of Education ("LCBOE"):

> Grievants, regularly employed as a bus operator and teacher's aide, are currently assigned to work transporting special needs children. They were placed on the transfer list and will be assigned to duties other than the transportation of special needs children even though the need for their services will continue to exist. Grievant[s] allege that special needs children are transported to school by another agency under contract with the board of education. In addition Grievant Baisden contends that she was not the least senior aide involved in the transportation of special needs students and that she should not have been transferred from those duties. Grievants allege a violation of West Virginia Code §§18A-4-8b, 18A-2-7; 18A-4-8, and Respondent's policies regarding transfer.
>
> Relief Sought: Grievants seeks (sic) reinstatement to their assignments serving the transportation needs of special needs children. They also seeks (sic) compensation for additional expenses incurred as a result of alternate assignment. (Since they have not received alternate assignments for the 2001 - 2002 school year yet it is impossible to determine the existence of such damages at the present.)

This grievance was denied at Level I and Level II, Grievants elected to bypass Level III, and they appealed to Level IV on May 23, 2001. A Level IV hearing was held on July 11, 2001. This case became mature for decision on July 24, 2001. (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 Lawson is employed as a bus operator, and Grievant Baisden is employed as an aide.

2. Both Grievants have worked with special needs children for many years.

3. During the 2000-2001 school year, LCBOE had four special education runs in the Logan bus area.

4. After completing a survey and looking at the needs and expectations for the 2001-2002 school year, and recognizing the need to cut positions, LCBOE decided the Special Education transportation needs in the Logan area could be met with three runs.

5. The need to cut a Special Education run in the Logan area was communicated to the involved employees.

6. Several of the Logan area bus operators and aides got together informally and formulated a workable schedule to decrease the number of Special Education runs in the Logan area to three. Grievant Baisden participated in this planning; Grievant Lawson did not.

7. After reviewing this schedule, LCBOE believed it to be a workable change and adopted it.

8. As the least senior bus operator and aide in the Logan area involved in the transportation of special needs children, Grievants were notified they would be placed on the transfer list. 9. Approximately ten to twelve years ago, LCBOE moved all the mechanics to one location. This action did not change the placement and posting of bus operators and aides involved in transportation. All postings list the location of the positions by the three bus areas: Logan, Chapmanville, and Mann.

10. During the 2000 - 2001 school year, the bus operator of one of the Special

Education runs complained because several of the special needs children were on the bus too long. She asked Pat Joe White, the Transportation Director, to ride on the bus and observe the problem first hand. Mr. White did this and was concerned about the effect the lengthy bus ride had on these children.

11. After discussion with his supervisor, then Superintendent Ray Woolsey, Mr. White called Wayne Cutter at the State Department of Education to ask his advice on the possibility of contracting out a portion of the run. Mr. Cutter noted that contracting out had been done in other counties, and even parents were, at times, reimbursed for bringing their own children to school, when the county had difficulty transporting a student.

12. Mr. White contacted PRIDE, a community-based organization, that used bus operators to transport children. These bus operators receive the same training as school bus operators.

13. LCBOE arranged for PRIDE to pick up these two or three special needs children and take them directly to school without having to change buses. This change significantly decreased the amount of time these special needs children were on the bus.

14. This change occurred during the second semester, and no grievances were filed as a result of this accommodation for these children. 15. The contract with PRIDE ended of at the close of the school year, and LCBOE did not know at the time of the Level IV hearing, July 21, 2001, whether it would again need to contract with PRIDE for its services.

16. Transfers in LCBOE are done on the basis of seniority within the classification and the area/bus garage location.

17. LCBOE does not treat aides as having separate categories. An aide can serve within the transportation area or in the school setting. Grievant Baisden could be transferred to a school setting.

Issues and Arguments

Grievants make several arguments. First, Grievants argue the LCBOE Transportation Department has one work station, and since neither Grievant is the least senior in the Special Education Transportation Department, (See footnote 2) they should be allowed to take the positions of less senior Special Education transportation employees in the Chapmanville or Mann areas. Second, Grievants argue the fourth run is still needed in the Logan area. Third, they were told that when the run in the Logan area was cut another run would open up in the Chapmanville area. Finally, Grievants argue Respondent cannot provide transportation to students through the use of an independent contractor. (See footnote 3) Respondent argues there are and always have been three transportation work stations in LCBOE, and all job postings are location specific. Accordingly, Grievants, as the least senior in their classifications at their work station, were properly placed on the transfer list. This has been LCBOE's practice for many years. Respondent did not recognize that Grievants could only be placed in Special Education, and asserted they can be transferred to any bus operator or aide position. Additionally, Respondent argues it contracted with PRIDE, a community organization, for this year only, after consultation with the State Board of Education. This action was taken to provide transportation to a few Special Education students and to terminate the long bus rides some of these special needs children were enduring. They note this change was in the best interest of the children. LCBOE also notes this change occurred during the second semester, and there were no grievances filed over this action at that time. Respondent also pointed out that the surveys it conducted indicated that with a decreased student population there was a decreased need for Special Education transportation in the Logan area, and with many unfunded service personnel positions, it chose to cut one aide and one bus operator position in the Logan bus area. Respondent strongly asserts it never told Grievants a run was being cut in the Logan area to provide

a Special Education run in the Chapmanville area, and the goal was always to decease service personnel positions.

Discussion

___As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of theW. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6. "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 and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

Grievants did not prove by a preponderence of the evidence that LCBOE has only one bus garage. It is clear from the evidence that although the mechanics were moved to one location, LCBOE has continued to maintain three bus garages, and the transportation assignments and postings come from these three locations. It is also clear LCBOE handles transfers within these locations. (See footnote 4) Thus, Grievants are not entitled to "bump" less senior bus operators or aides who are working with special needs children in the Chapmanville or Mann locations. Additionally, this Grievance Board has previously ruled that service personnel do not have bumping rights. Miller v. Hancock County Bd. of Educ., Docket No. 97-15-334 (Nov. 17, 1997). As frequently noted by this Grievance Board, transfers of school service personnel are governed W. Va. Code § 18A-2-7, relating to service personnel transfers, and subsequent placement. This Code Section, states, in pertinent part:

> The superintendent, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter. . . .

This power to transfer employees must be exercised reasonably and in the best interests of school systems and may not be exercised arbitrarily or capriciously. State ex rel. Hawkins v. Tyler County Bd. of Educ., 166 W. Va. 363, 275 S.E.2d 908 (1980).

As previously stated, W. Va. Code § 18A-2-7 grants broad discretion to a superintendent, and gives him the authority to transfer school personnel subject only to the approval of the board. Post v. Harrison County Bd. of Educ., Docket No. 89-17-355 (Feb. 20, 1990). Further, employees have no right to be assigned to a particular position, and transfers are not based on seniority, but are based on the needs of the school system, as decided in good faith by the superintendent and the board. Hawkins, supra; Post, supra. See Jochum v. Ohio County Bd. of Educ., Docket No. 91-35-396 (Jan. 31, 1992). The standard of review in a transfer is stated in Dillon v. Board of Education of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (W. Va. 1986). It is well-settled that "[c]ounty boards of education have substantial discretion in matters relating to hiring, assignments, transferring and promotion of school personnel," as long as they exercise this discretion "reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Id. The West Virginia Supreme Court has stated that boards of education have "great discretion . . . to transfer and assign [personnel] to designatedschools and [the West Virginia Supreme] Court will not interfere with the exercise of that discretion where such action is taken in good faith for the benefit of the school system and is not arbitrary." Hawkins supra. Thus, whether a transfer was properly conducted is judged by the arbitrary and capricious standard, in the absence of a county policy requiring seniority be considered. Lester v. McDowell County Bd. of Educ., Docket No. 93-33-256 (Jan. 31, 1994); See also Hawkins, supra; LeMastus v. Wyoming County Bd. of Educ., Docket No. 55-87-290-4 (Mar. 23, 1988);

Tenny v. Barbour County Bd. of Educ., Docket No. 01-87-166-2 (Nov. 13, 1987).

"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 Resources, Docket No. 93-HHR-322 (June 27, 1997). 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)). "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 ofeducation. See generally, Harrison v. Ginsberg, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

The undersigned Administrative Law Judge cannot find LCBOE's transfer determination was arbitrary and capricious, and the undersigned Administrative Law Judge's decision is based on the following factors. LCBOE conducted a survey which indicated the need for fewer Special Education runs in the Logan area. LCBOE was over the state funding formula for service personnel positions. No cuts had been made within the Transportation Department in the past several years. Additionally, the Logan Special Education bus operators were able to develop a plan which reduced the number of runs from four to three, without harm to the special needs children they serve. Grievants have sufficient seniority at this time to maintain their positions when LCBOE makes the necessary RIF's to reduce employees within their classifications, but they are not

allowed to specify which position they will fill upon transfer.

Grievants' argument that their positions are still needed is also assessed under the arbitrary and capricious standard. Given the facts listed above, LCBOE's decision to reduce runs in the Logan area cannot be seen as "unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra.

As for the issue of contracting with PRIDE, two things must be noted. One, no grievances were filed during the pendency of this contract. Two, the contract has now ended, and LCBOE has not made another contract for the 2001 - 2002 school year. Since the question of whether Respondent could contract with PRIDE only arose after the contract ended, this question is now moot. Additionally, Grievants were not contendingthis contract was an issue for the 2000 - 2001 school year; they were only raising the issue for the 2001 - 2002 school year when they are to be transferred. There is no contract at this time. If indeed Grievants are asking for a ruling on whether such a contract would be proper in the future, this would be a request for an advisory opinion, and "this Grievance Board does not issue advisory opinions." Prickett v. Monogalia County Bd. of Educ., Docket No. 00-30-280 (Nov. 16, 2000). See Priest v. Kanawha County Bd. of Educ., Docket No. 00-20-144 (Aug. 15, 2000); Dooley v. Dep't of Transp., Docket No. 94-DOH- 255 (Nov. 30, 1994); Pascoli & Kriner v. Ohio County Bd. of Educ., Docket No. 91-35- 229/239 (Nov. 27, 1991).

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 their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan

County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6. "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 and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id. 2. Grievants did not meet their burden of proof and demonstrate LCBOE has only one bus garage from which assignments are made and positions are located.

3. Grievants' argument that LCBOE's decision to decrease Special Education runs in the Logan area was incorrect must be assessed under the arbitrary and capricious standard.

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 Resources, Docket No. 93-HHR-322 (June 27, 1997). 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)). " 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. See generally, Harrison v. Ginsberg, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli,

supra. 5. Grievants have not met their burden of proof and demonstrated LCBOE's decision to decrease the number of Special Education runs in the Logan bus area was arbitrary and capricious.

6. W. Va. Code § 18A-2-7 grants broad discretion to a superintendent, and gives him the authority to transfer school personnel subject only to the approval of the board. Post v. Harrison County Bd. of Educ., Docket No. 89-17-355 (Feb. 20, 1990). Further, employees have no right to be assigned to a particular position, and transfers are not based on seniority, but are based on the needs of the school system, as decided in good faith by the superintendent and the board. Hawkins, supra; Post, supra. See Jochum v. Ohio County Bd. of Educ., Docket No. 91-35-396 (Jan. 31, 1992). A decision on transfers is also assessed using the above stated arbitrary and capricious standard.

7. Grievants have not demonstrated the decision to transfer Grievants within the Logan area was arbitrary and capricious.

8. To answer the question of whether a possible contract with an outside agency would violate statutes would require the Grievance Board to issue an advisory opinion, as there is currently no contract in place.

9. "[T]his Grievance Board does not issue advisory opinions." Prickett v. Monogalia County Bd. of Educ., Docket No. 00-30-280 (Nov. 16, 2000). See Priest v. Kanawha County Bd. of Educ., Docket No. 00-20-144 (Aug. 15, 2000); Dooley v. Dep't of Transp., Docket No. 94-DOH-255 (Nov. 30, 1994); Pascoli & Kriner v. Ohio County Bd. of Educ., Docket No. 91-35-229/239 (Nov. 27, 1991).

Accordingly, this grievance is **DENIED**. Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of the Logan 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.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: September 13, 2001

Footnote: 1

Grievants were represented by Attorney John Roush from the West Virginia School Service Personnel Association, and Respondent was represented by Logan County Prosecuting Attorney Brian Abraham.

Footnote: 2

No evidence was presented to support the idea that there was a separate Special Education Transportation Department. LCBOE has one Transportation Department.

Footnote: 3

Since it was not argued in the post-hearing briefs, it is assumed Grievants no longer wished to pursue the issue of Grievant Lawson changing her run to pick up the students transported by PRIDE. The evidence demonstrated this change would require Grievant to work in two bus areas, and this has not been permitted before. It would also require another bus operator to change her run, students would be on the bus for an excessive amount of time, and it was uncertain Grievant Lawson could actually performthe run in the required time.

Footnote: 4

Although Grievants argued their transfers were against LCBOE's Policy, no policy was placed into evidence to rebut the testimony of Superintendent Brenda Skibo.