JERRY RUSSELL,

Grievant,

v. **Docket No. 02-50-041**

WAYNE COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Jerry Russell ("Grievant") initiated this proceeding on November 14, 2001, challenging his non-selection for two posted extracurricular bus runs. He seeks instatement to one of the runs, plus back pay. Level one consideration was waived, and a level two hearing was held on January 3, 2002. The grievance was denied in a written level two decision dated January 31, 2002. Level three consideration was also waived, and Grievant appealed to level four on February 8, 2002. The parties elected to have a decision rendered based upon the lower level record, supplemented by fact/law proposals, which were submitted by March 8, 2002. (See footnote 1) A conference call was held between the parties and the undersigned on March 18, 2002, during which it was agreed that additional documentary evidence would be submitted. That evidence was received by the undersigned on March 18, 2002, at which time this grievance became mature for consideration.

The following findings of fact are made from a preponderance of the credible evidence of record.

Findings of Fact

1. Grievant is employed by Respondent Wayne County Board of Education ("WCBOE") as a bus operator with approximately twenty-six years of seniority.

2. On September 28, 2001, WCBOE posted two extracurricular bus runs, both of which required students to be picked up at Dunlow Elementary School at 5:00 p.m. on Tuesdays and Thursdays and transported to their homes.

3. Grievant was the most senior driver to bid on the extracurricular runs.

4. Grievant's regular afternoon bus run ends at approximately 4:00 p.m..

5. It is twenty-one miles from the last dropoff on Grievant's regular afternoon run to Dunlow Elementary School.

6. Grievant performed one of the posted extracurricular runs for approximately one month prior to its being filled through posting. He arrived at Dunlow Elementary at 4:45 each day after completing his regular afternoon run, and performed his pre- and post- trip inspections prior to loading the bus at 5:00.

7. Both of the posted runs were awarded to drivers with less seniority than Grievant whose afternoon runs were closer to Dunlow Elementary School. One bus operator drives five miles to Dunlow, and the other operator drives three miles, after completing their regular runs.

8. In order to perform one of the extracurricular runs, Grievant would have to perform his pre- and post-trip inspections in approximately five minutes and encounter no delays or traffic problems while traveling from the last stop on his regular run to Dunlow Elementary School. 9. A "Memorandum of Agreement" between WCBOE and the county's bus operators was adopted on June 23, 1997. It provides, in pertinent part, that:

> All new runs and permanent vacancies . . . must be posted and bid by seniority in the county. . . . This is to include all extra work not included in the drivers regular contract, including special education runs, kindergarten runs, gas pump attendant, etc.
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> NO BUS OPERATOR shall have more than one (1) extra curricular bus run, between his/her a.m. and p.m. regular runs on any school day, either bid or assigned in any said area. A bus operator may have one (1) established extra curricular bus run after his/her p.m. regular run.

Level IV, Joint Exhibit 1 (Emphasis in original).

Discussion

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

West Virginia Code § 18A-4-16(5) provides as follows regarding the filling of extracurricular assignments:

> The board shall fill extracurricular school service personnel assignments and vacancies in accordance with section eight-b 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.**

(Emphasis added.) The parties agree that the “Memorandum of Agreement” adopted in1997 is an “alternative procedure” pursuant to the provisions of the statute. Grievant contends that, pursuant to the adopted procedure, he should have received one of the runs, as the most senior driver. Respondent agrees, but contends that it was not feasible to place Grievant in either run due to logistical and financial concerns.

First, Respondent argued that it was not possible for Grievant to safely complete his afternoon run, drive to Dunlow Elementary, and complete the necessary inspections of his bus by 5:00. King Queen, Director of Transportation, testified that he had driven Grievant's bus route by car, and it had taken 39 minutes to get to Dunlow Elementary from Grievant's last stop. Although Grievant testified that he could complete his pre- and post-trip inspections within five minutes, Mr. Queen believed that, if the inspections were performed properly, it would take Grievant 10 to 12 minutes to complete them. Mr. Queen stated that all conditions would have to be “perfect”, meaning no traffic problems, bad weather, etc., for Grievant to be able to pick up students at Dunlow Elementary at 5:00.

Second, Respondent contends that it would simply be a waste of resources for Grievant to drive an extra 21 miles to Dunlow Elementary when the drivers selected for these runs drove only short distances to Dunlow after the completion of their regular runs. It would obviously be more expensive for WCBOE to cover the expenses of having Grievant pick up students at Dunlow Elementary.

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). However, the Supreme Court has ruled that an administrative body, includingschool boards, must abide by the remedies and procedures it properly establishes to conduct its affairs. Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). Respondent does not dispute that the Memorandum of Agreement entitles Grievant to placement in one of the runs, due to his superior seniority. While there is no provision in the Memorandum Agreement which would allow Respondent to deny the appropriate candidate an extracurricular run only to save money, Respondent's concerns regarding Grievant's ability to promptly and safely arrive at Dunlow Elementary are legitimate.

It has been previously held by this Grievance Board that it is not arbitrary and capricious for a board of education to deny an employee the opportunity to perform an extracurricular run when logistical problems exist. See Smith v. Putnam County Bd. of Educ., Docket No. 99-40-058 (Apr. 2, 1999). 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). Clearly, Grievant would have to perform his pre- and post-trip inspections very quickly in order to return to Dunlow Elementary by 5:00. In addition, he would have to encounter no traffic or weather problems. It was not arbitrary and capricious for Respondent to award these runs to other drivers who would have more time between their afternoon runs and their arrival at Dunlow Elementary School. Although Grievant established that he could perform his regular run and the Dunlow run on a “perfect” day, the safety of students should not be put at risk when such assignments are made. The evidence indicates that legitimate questions existed as to Grievant's logisticalability to perform the runs, justifying Respondent's decision.

Consistent with the foregoing, the following conclusions of law are appropriate.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving his claims 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. Extracurricular assignments must be filled pursuant to the provisions of W. Va. Code § 18A-4-8b, unless an alternative procedure is adopted by a two-thirds vote of the employees in the particular employment classification. W. Va. Code § 18A-4-16(5).

3. 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).

4. It was not arbitrary and capricious for Respondent to deny Grievant placement in the runs at issue, due to legitimate concerns as to his ability to promptly and safely arrive at Dunlow Elementary School in time to pick up students after completing his regular afternoon run.

5. Respondent violated no law, policy, regulation or written agreement by refusing to place Grievant in one of the extracurricular bus runs to Dunlow ElementarySchool.

Accordingly, this grievance is **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Wayne 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. 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.

Date: March 25, 2002 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant was represented at all levels by Susan Hubbard of WVEA; Respondent was represented at level two by Michael E. Ferguson, Director of Federal Programs, and at level four by David Lycan, Esquire.