THOMAS KUHN,

Grievant,

v v.

Docket No. 02-20-336

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Thomas Kuhn, is employed as an Electronics Technician II by the Kanawha County Board of Education ("KCBOE" or "Board"). He filed the following grievance on July 3, 2002:

> Statement of Grievance: Grievant contends that the board of education improperly denied him the use of a county van for transportation to and from work. Grievant alleges a violation of West Virginia Code §§ 18A-4-5b and 18-29-2. (See footnote 1)
>
> Relief Sought: Grievant seeks: (a) compensation for all lost wages, benefits, and expenses; pecuniary and nonpecuniary; incurred as a result of the loss of use of the company van; (b) interest for any sums to which he is entitled; and (c) immediate restoration of the use of the company van to him.

This grievance was denied at Levels I and II, and Level III was waived. Grievant appealed this decision to the Grievance Board on October 17, 2002, and this case was submitted on the record. This case became mature for decision on January 7, 2003, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 2)

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 employed as an Electronics Technician II, and is a 261-day employee. He is

assigned to the Crede warehouse, but he travels to other locations in the county to perform his work. Employees in Grievant's classification are rarely called out for emergencies or overtime.

2. One reason employees are assigned a vehicle is the need for them to respond to emergencies. Test. Allred, Level II Hearing.

3. Grievant has been employed by KCBOE for approximately 26 years and receives 19.5 sick/personal leave days per school year and 21 vacation days per school year. Three of the 19.5 sick/personal leave days are for family illness. Test. Grievant, Level II Hearing.

4. Grievant routinely has few or no leave days of any kind at the end of the year, which means he is absent approximately forty days each year.

5. Grievant has not been disciplined for any leave abuse, nor has KCBOE stated Grievant has engaged in any leave abuse.

6. In recent years Grievant has used his leave to take his mother and father to the doctor. (See footnote 3) He also took some personal sick leave as well. 7. Other KCBOE employees who have a high rate of absenteeism no longer drive Respondent's vehicles to and from work. Test. Grievant and Mr. Allred, Level II Hearing.

8. Approximately five years ago, Grievant was assigned a vehicle and allowed to drive this van to and from work.

9. Approximately one year ago or a little less, Grievant was told he was to park his van at Crede and to drive his own car to work. He was no longer allowed to drive it to and from work because he was absent so frequently.

10. After about a month, Grievant told his supervisor, Charlie Rucker, he was taking the vehicle back. He told Mr. Rucker if the Board wanted the vehicle back they would end up down at the board office, meaning he would file a grievance. Grievant did not ask permission to start driving the vehicle to and from work again. Test. Grievant, Level II Hearing.

11. Mr. Rucker did not give Grievant permission to retake the vehicle, but Mr. Rucker also did not stop Grievant from retaking the vehicle.

12. Mr. Rucker retired, and the new supervisor told Grievant he could no longer drive the vehicle to and from work.

13. Grievant went to Jeff Allred, Director of Maintenance and Energy, and asked why he could no longer drive the van home and was informed he was absent too much.

14. There is no written policy on assignment of vehicles to employees, but it has been the past practice for several years to only assign vehicles to employees with a high rate of attendance. There have been no exceptions to this practice. 15. It is an advantage for Grievant to drive KCBOE's van to and from work, and it is a benefit for Respondent, at times, for Grievant to have the van, because he does not have to stop at Crede first, and he can go directly to the work site.

Issues and Arguments

Grievant asserts it was inappropriate and a form of punishment to take his assigned van away because of his frequent failure to come to work, because he has not taken more leave days than the amount he receives each year. Additionally, Grievant maintains that he is being treated differently from other similarly situated employees. Further, Grievant notes the practice of removing vehicles from employees with a high rate of absenteeism is not in writing; thus, it is not enforceable pursuant to West Virginia Board of Education Policy 5300.

Respondent notes the removal of an assigned vehicle is not a punishment, the assignment of vehicles is at Respondent's discretion, employees have no right to drive a Board owned vehicle, and a vehicle that is not at the Respondent's disposal for each work day is of no benefit to the employer. Respondent also avers Grievant has not been treated differently than other employees with a high rate of absenteeism.

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 § 4.21 (2000); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha CountyBd. 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.

Grievant has made multiple arguments to support his grievance. They will be addressed one at a time, even though there is some overlap of rationale for the Decision reached.

I. Prior case law

First, it should be noted that the issue in this grievance was recently addressed in Nottingham v. Kanawha County Board of Education, Docket Nos. 02-20-062/077 (Sept. 11, 2002). The attorneys in that case were the same as in this case. The grievant in Nottingham was a plumber, and he wanted to be assigned a vehicle, especially for overtime call-outs. This grievant noted other less senior employees had vehicles. The administrative law judge noted Grievant did not have a vehicle because he was "absent from work too often." The administrative law judge also noted that other employees with absentee problems did not have vehicles; thus, the grievant had not been harmed. No discrimination or favoritism was established.

II. Board's authority

W. Va. Code § 18-5-13(o) was not addressed in the Nottingham Decision. This Code Subsection states boards of education have the authority:

> (o) To allow or disallow their designated employees to use publicly provided carriage to travel from their residences to their workplace and return: Provided, That the usage is subject to the supervision of the board and is directly connected with and required by the nature and in the performance of the employee's duties and responsibilities;

(Emphasis Added.)

Since the designation as to which employee is to receive a vehicle is within the discretion of a board of education, the standard of review for this decision is the arbitrary and capricious standard. "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, 196 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. The undersigned Administrative Law Judge does not find Respondent's decision to be arbitrary and capricious. Grievant frequently misses work for whatever reason, and the justifications for his absenteeism are not the subject of this grievance. The fact is, Grievant is repeatedly not there, and if he is not there, neither is KCBOE's vehicle. (See footnote 4) Additionally, Grievant does not need the vehicle for call-outs or overtime assignments. It is not arbitrary and capricious for Respondent to want to keep its vehicles at its facility for its own use.

III. Removal of the use of the van is punishment

Grievant also suggested the removal of the vehicle was a punishment. This argument has not been proven. Grievant has received no written reprimand or any other type of punishment for his taking of leave.

IV. Use of the van is a benefit and is controlled by W. Va. Code § 18A-4-5b.

Grievant asserts the driving of the van is a benefit, and as such is subject to W. Va. Code § 18A-4-5b which states:

> The county board of education may establish salary schedules which shall be in excess of the state minimums fixed by this article. These county schedules shall be uniform throughout the county with regard to any training classification, experience, years of employment, responsibility, duties, pupil participation, pupil enrollment, size of buildings, operation of equipment or other requirements. Further, uniformity shall apply to all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county:
>
> . . .
>
> Counties may provide, in a uniform manner, benefits for service personnel which require an appropriation from local funds including, but not limited to,dental, optical, health and income protection insurance, vacation time and retirement plans excluding the state teachers' retirement system. . . .

The advantage of driving Respondent's vehicle to and from work is similar to a boon and, but it is not a benefit within the meaning of W. Va. Code § 18A-4-5b. A benefit, pursuant to the above-cited

Code Section, must be uniformly provided to all employees without discretion. That is not the case here. W. Va. Code § 18-5-13(o) places the authority to designate the employees who will receive vehicles with boards of education. While it is certainly pleasant for an employee to have KCBOE provide transportation to and from work, KCBOE is not required to provide this advantage to all employees.

V. Policy issue

Grievant's next argument is that this "policy" is not enforceable because it is not in writing pursuant to Policy 5300. Section 2.8 of Policy 5300 (126-141-2) states: "All official and enforceable personnel policies must be written and made available to every employee of each county board of education." The answer to this argument is simple. There is no need for a written policy about the assignment of vehicles to maintenance employees, because KCBOE's determinations on who is to drive work vehicles is a management decision and/or operating procedure, not a personnel policy. Again, W. Va. Code § 18-5- 13(o) has given KCBOE the authority to designate drivers, and Respondent has chosen to do so in this manner. Further, as previously stated this decision is not seen as arbitrary and capricious.

VI. Discrimination

Next, Grievant asserts he has been discriminated against and treated differently than other similarly situated employees. Discrimination is defined in W. Va. Code § 18-29-2(m), as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

This Grievance Board has determined that a grievant, seeking to establish a prima facie case (See footnote 5) of discrimination under W. Va. Code § 18-29-2(m), must demonstrate the fol lowing:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

Once a grievant establishes a prima facie case of discrimination, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hickman, supra. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94- DOH-376 & 377 (Feb. 23, 1995). Through his own testimony, Grievant established that other employees who have the same pattern of absenteeism are treated the same the same way he has been treated. Mr. Allred testified that this was a practice without exception. Clearly, Grievant is not being treated differently from other similarly situated employees.

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, 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 § 4.21 (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. W. Va. Code § 18-5-13(o) states boards of education have the authority:

> (o) To allow or disallow their designated employees to use publicly provided carriage to travel from their residences to their workplace and return: Provided, That the usage is subject to the supervision of the board and is directly connected with and required by the nature and in the performance of the employee's duties and responsibilities;

(Emphasis Added.)

3. When a board of education has the discretion to act pursuant to statute, the standard of review of these actions is whether these decisions were arbitrary and capricious.

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, 196 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. KCBOE did not abuse its discretion or act in an arbitrary and capricious manner when it made the management decision only to assign vehicles to employees who do not have problems with absenteeism. 6. KCBOE's designation of an employee to drive a vehicle to and from home is not a benefit.

7. The designation of which employees may drive board of education vehicles is controlled by W. Va. Code § 18-5-13(o), not W. Va. Code § 18A-4-5b, and need not be controlled by a written personnel policy.

8. Discrimination is defined in W. Va. Code § 18-29-2(m), as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

9. This Grievance Board has determined that a grievant, seeking to establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m), must demonstrate the following:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

10. Once a grievant establishes a prima facie case of discrimination, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hickman, supra. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. HumanRights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

11. Grievant has not met his burden of proof and established a prima facie case of discrimination, as Grievant is treated the same as similarly situated employees. See Nottingham v. Kanawha County Bd. of Educ., Docket Nos. 02-20-062/077 (Sept. 11, 2002).

12. Grievant has not established a violation of any policy or statute.

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. 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 sonamed. 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: January 31, 2003

Footnote: 1

The subsection was not identified, but Grievant raised the issue of discrimination.

Footnote: 2

Grievant was represented by Attorney John Roush from the West Virginia School Service Personnel Association, and the Board was represented by Attorney James Withrow.

Footnote: 3

It is unclear how Grievant took this much sick leave for family members. KCBOE's sick leave policy, G28, states at 28.03, "[a]n employee may take up to three (3) days of accumulated sick leave per school year for the purpose of attending to the injury or illness of such employee's immediate family."

Footnote: 4

Grievant's attorney suggested perhaps Grievant could take his own vehicle on days he knew he would be absent due to a doctor's appointment. Grievant was not agreeable to this suggestion.

Footnote: 5

A prima facie case generally refers to a set of facts which, if not rebutted or contradicted by other evidence, would be sufficient to support a ruling in favor of the party establishing such facts. See Black's Law Dictionary 1353 (4th ed. 1968).