WILLIAM LARUE,

Grievant,

v. **Docket No. 05-39-012**

PRESTON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

William Larue ("Grievant") initiated this grievance on November 19, 2004, challenging the docking of his pay on an "enhancement support" day. The grievance was denied at level one on November 29, 2004, and, following a hearing held on December 6, 2004, it was denied at level two on December 10, 2004. Level three consideration was waived, and Grievant appealed to level four on January 13, 2005. A hearing was conducted in Westover, West Virginia, on April 4, 2005. Grievant was represented by counsel, John E. Roush, and Respondent was represented by counsel, William C. Means. This matter became mature for consideration upon receipt of the parties' fact/law proposals on May 4, 2005.

The following pertinent facts have been proven by a preponderance of the evidence of record.

Findings of Fact

1. Grievant has been employed by Respondent as a bus operator for 13 years. 2. October 29, 2004, was an Instructional Support Enhancement ("ISE") day, during which teachers have meetings, and students do not attend school. All employees are paid for ISE days as a regular workday.

3. ISE days are different from staff development days, during which staff attend seminars and other educational classes to obtain continuing education credit. Respondent allows employees to stay home on staff development days, if they choose to "make up" the continuing education hours by attending sessions on their own time. When an employee chooses not to attend a Board-sponsored

staff development session, he/she is not required to use personal leave.

4. A mandatory meeting for all bus drivers was scheduled for the October 29, 2004, ISE day. A memorandum was sent to all drivers stating this, and it was also announced to drivers over the radio on more than one occasion that attendance was mandatory.

5. In the past, service employees were not required to report to work on ISE days, and they were not required to use leave if they chose not to work.

6. Despite being advised that the October 29 meeting was mandatory, Grievant did not attend. After he was informed that he would have to use a personal leave day, Grievant refused, and his pay was docked.

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 (2004); 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.

County boards of education are expected to abide by the policies and regulations they promulgate, even if those rules bestow rights upon employees which are not provided by statute. Hall v. Mingo County Bd. of Educ., Docket No. 95-29-529 (Mar. 28, 1996). See Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977); Wright v. McDowell County Bd. of Educ., Docket No. 93-33-115 (Nov. 30, 1993). Nevertheless, in the absence of a legal requirement to do so, a board of education is not required to follow the same informal personnel practices year after year. Conner v. Barbour County Bd. of Educ., Docket No. 93-01-246 (Apr. 28, 1994). See e.g., Taylor v. Monongalia County Bd. of Educ., Docket No. 92-30-314 (Nov. 30, 1992); Biller v. Upshur County Bd. of Educ., Docket No. 90-49-533 (Sept. 27, 1991); Napier v. Lincoln County Bd. of Educ., Docket No. 89-23-635 (May 25, 1990); Isaacs v. Lincoln County Bd. of Educ., Docket No. 89-22-555 (Jan. 12, 1990); Terek v. Ohio County Bd. of Educ., Docket No. 35-87-294-3 (July 20, 1988). “Informal practices” which have been discontinued and upheld by this Grievance Board have included such issues as flex time (Smith v. Department of Health and Human Resources, Docket No. 00-HHR-271 (Feb. 22, 2001)), the employment of unneeded coaches (Reed v. Kanawha County Board of Education, Docket No. 99-20-111 (May 27, 1999)), and methods of assigning extra bus runs (Conner, supra). A deviation from

past practice simply represents one of a number of factors to be considered when determining if a discretionary decision by the county board or a school administrator is arbitrary and capricious. See Cromley v. Mason County Bd. of Educ., Docket No. 94-26-573 (Apr. 27, 1995). Generally, a board of education's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, 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).

In the instant case, there was conflicting testimony regarding Respondent's past practice regarding ISE days. At level two, Superintendent John Lofink testified that mandatory attendance on the ISE day in question was a deviation or change from the county's practice over the past couple of years. However, at level four, Transportation supervisor James Cale, who also worked for Respondent for several years as a driver, testified that there have always been mandatory meetings, sometimes on ISE days, that all drivers are required to attend.

Under the circumstances presented, the undersigned cannot find Respondent's requirement for mandatory attendance at this particular meeting to be an arbitrary and capricious decision. It was communicated to all bus operators on several occasions that attendance at this meeting was mandatory. Knowing that it was not a staff development session, Grievant had some responsibility to ascertain whether or not attendance was truly “mandatory,” and what the consequences for non-attendance would be. Although Superintendent Lofink's testimony at level two was seemingly contradictory on this point,it would appear that Mr. Cale, who has worked for Respondent both as a driver and now as Transportation Supervisor, would be knowledgeable and reliable regarding past practice for bus driver meetings. Indeed, Grievant's own level four testimony indicated that he may have confused ISE days with staff development days, because he provided a detailed explanation of the other educational and training sessions he had attended during the current school year, in order to explain why he did not feel compelled to attend the October 29 meeting. Therefore, it is plausible that Grievant has confused mandatory attendance on ISE days with the voluntary attendance, with pay, which has been allowed on staff development days in the past.

Accordingly, because Grievant refused to use a personal leave day when he was required to attend the meeting in question, Respondent acted appropriately in docking his pay. Therefore, he is

not entitled to restoration of his pay for that day, upon which he did not work and did not use applicable leave. The following conclusions of law support this decision.

Conclusions of Law

1. In a non-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 (2004); 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. In the absence of a legal requirement to do so, a board of education is not required to follow the same informal personnel practices year after year. Conner v. Barbour County Bd. of Educ., Docket No. 93-01-246 (Apr. 28, 1994). See e.g., Taylor v.Monongalia County Bd. of Educ., Docket No. 92-30-314 (Nov. 30, 1992); Biller v. Upshur County Bd. of Educ., Docket No. 90-49-533 (Sept. 27, 1991); Napier v. Lincoln County Bd. of Educ., Docket No. 89-23-635 (May 25, 1990); Isaacs v. Lincoln County Bd. of Educ., Docket No. 89-22-555 (Jan. 12, 1990); Terek v. Ohio County Bd. of Educ., Docket No. 35-87-294-3 (July 20, 1988).

3. Generally, a board of education's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, 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).

4. Grievant has failed to prove by a preponderance of the evidence that it was arbitrary and capricious for Respondent to dock his pay when he failed to attend a mandatory bus operator's meeting on an ISE day.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Preston 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.

Date: May 18, 2005

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DENISE M. SPATAFORE

Administrative Law Judge