THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

NINA BOARMAN, et al.,

Grievants,

v. **Docket No. 06-02-286**

Denise M. Spatafore

Administrative Law Judge

BERKELEY COUNTY BOARD OF EDUCATION

Respondent.

DECISION

Grievants (See footnote 1) are employed as transportation aides by the Respondent Berkeley County Board of Education ("the Board"). Grievants contend that their transfers for the 2006-2007 school year should be rescinded and that they should receive extra compensation for mid-day bus runs. They initiated this grievance on May 10, 2006, at level four, and it was remanded to level two for a hearing, which was held on June 29, 2006. The grievance was denied at that level on July 28, 2006, and level three was waived. Grievants again appealed to level four on August 17, 2006. In lieu of a level four hearing, the parties agreed to submit this matter for a decision based upon the record developed below, accompanied by fact/law proposals received on October 24, 2006. Grievants wererepresented by counsel, Jessica M. Baker, and Respondent was represented by its general counsel, Laura L. Sutton.

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

Findings of Fact

1. Grievants are employed by the Board as transportation aides, and have traditionally performed duties associated with morning and afternoon bus runs, transporting special needs students to and from school. They have been paid for a 35-hour work week, despite the fact the none of them worked a full 7-hour workday.

2. In February of 2006, Ron Cartee, Director of Transportation, recommended that additional duties be assigned to the special education transportation aides, due to the fact that they were "under-utilized" and worked an average of four hours per day.

3. On March 24, 2006, all 23 transportation aides were notified that they were being recommended for transfer for the upcoming school year, with the stated reason being: "The need to realign the duties of transportation aides to include school based responsibilities in order to make full use of available personnel to better meet the needs of students."

4. After transfer hearings conducted on April 13, 2006, the Board approved placement of all the aides on the transfer list. This approval was based upon testimony from the administration to the effect that the school system could make better use of the time during the school day when the aides were being paid, but were not actually working. However, during the hearing, testimony focused on placing bus aides in schools where help was needed. 5. During the summer of 2006, discussions occurred between administration officials, Grievants, and WVEA representatives. The first proposed plans, which would have placed the aides in schools in the middle of the day, was abandoned, and others were proposed. None of the proposals could be agreed upon by the parties involved.

6. In June of 2006, the 23 transportation aide positions were posted, with each including a midday bus run.

7. All of the transportation aides, including Grievants, have returned to the duties they performed during the prior school year. However, they now are assigned to work four mid-day preschool bus runs on a rotating basis. (See footnote 2) This results in each aide being assigned a mid-day run for five weeks of the school year, for four days per week. The aides are required to perform these duties without additional compensation.

8. During previous school years, as recently as 2005-2006, aides assigned to the four

preschool runs staffed by Respondent received additional compensation for performing those assignments, over and above their regular salaries.

9. When Mr. Cartee first became Transportation Director in 2004, he proposed that the aides wear uniform shirts. The aides opposed this idea, and the uniforms were not approved by the Board.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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 (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. Grievants contend that their transfer was improper, because it was not “based upon known or expected circumstances”, as required by W. Va. Code § 18A-2-7. They also believe that Mr. Cartee's initial recommendation that they take on more responsibilities was based upon retaliatory motives, as a result of the uniforms dispute. In addition, they contend that they are entitled to additional compensation for performing mid-day runs.

“County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel; nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious.” *Cahill v. Mercer County Bd. of Educ.*, 195 W. Va. 453, 465 S.E.2d 910 (1995); *Bd. of Educ. v. Enoch*, 186 W. Va. 712, 414 S.E.2d 630 (1992); *Egan v Bd. of Educ.*, 185 W. Va. 302, 406 S.E.2d 733 (1991). Even when, as in this case, the county board is given the authority to make a determination in “its sole and exclusive judgment,” that broad grant of discretion must still be exercised reasonably, rather than arbitrarily.

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." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). An action is recognized as arbitrary andcapricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). "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." *Trimboli, supra*, *Blake, supra*.

Under the circumstances presented, the undersigned cannot find Respondent's action in placing Grievants on transfer to have been arbitrary and capricious or an abuse of discretion. While it is true that the initial plan was not carried out and was, in fact, modified several times, the stated purpose remained the same: to require the transportation aides to perform duties for the Board during their mid-day “free time” between bus runs. In this case, the “known or expected circumstances” was Grievants' lack of duties during this time period each day, not the proposal for filling that time. Therefore, Grievants have failed to establish that it was improper for the Board to approve their transfers.

As to Grievants' claim of retaliation by Mr. Cartee, “reprisal” is defined by *W. Va. Code* §18-29-2(p) as "retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." A grievant claiming retaliation may establish a *prima facie* case of reprisal by presenting evidence as follows:

> (1) that he/she engaged in protected activity, e.g., filing a grievance;
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> (2) that he/she was subsequently treated in an adverse manner by the employer or an agent;
>
> (3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and,
>
> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Conner v. Barbour County Bd. of Educ., *supra*. *See Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); *Fasce v. Bd. of Directors*, Docket No. 94-BOD-1072 (Sept. 13, 1995); *Fareydoon- Nezhad v. W. Va. Bd. of Trustees at Marshall Univ.,* Docket No. 94-BOT-088 (Sept. 19, 1994). There being no evidence that any grievance was filed over the uniform proposal, Grievants have failed to establish a *prima facie* case of reprisal.

This Grievance Board held in *McBride v. Summers County Board of Education*, Docket No. 01-

45-614 (Aug. 20, 2002), that infrequent assignments which are not part of an employee's daily duties are extra-duty assignments, which are defined by W. Va. Code § 18A-4-8b(f) as “irregular jobs that occur periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips. It was also determined than an employee performing such an assignment is entitled to additional compensation, as provided for by W. Va. Code §18A-4-8a(8).

However, *McBride*, *supra*, is distinguishable from the instant case. In *McBride*, the mid-day assignments were not posted, and the bus operators were merely told at the beginning of the school year that they would be required to perform these duties withoutextra pay. (See footnote 3) In this case, all of the transportation aide positions were properly posted and included mid-day bus runs as part of their normal duties. As noted in *McBride*, *supra*:

> 'W. Va. Code §§ 18A-4-8a and 18A-4-8b do not prohibit a county board of education from requiring [employees] to be assigned on a rotational basis for in-county bus trips during regular school hours without additional compensation.' *Broughman v. Tyler County Bd. of Educ*., Docket No. 94-48- 068 (Jan. 20, 1995); *Blankenship v. Mingo County Bd. of Educ.*, Docket No. 96-29-334 (Apr. 22, 1997). (See footnote 4) These cases were decided on the proposition that extracurricular and extra-duty assignments necessarily were not part of the employee's regular work day, but if an employer made what would normally be an extracurricular assignment part of an employee's regular duties, even on an irregular basis, then it was not required to pay additional compensation for that work.

The mid-day assignments at issue here were posted as part of Grievants' regular assignments, and they are not legally entitled to additional compensation for them. Moreover, Grievants are already paid for this time and only have to perform these duties on an infrequent basis, so their claim is without merit.

The following conclusions of law support this decision.

Conclusions of Law

1. In a non-disciplinary matter, Grievants have the burden of proving their 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 (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. “County boards of education have substantial discretion in matters relating to the hiring,

assignment, transfer, and promotion of school personnel; nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." *Cahill v. Mercer County Bd. of Educ.*, 195 W. Va. 453, 465 S.E.2d 910 (1995), *Bd. of Educ. v. Enoch*, 186 W. Va. 712, 414 S.E.2d 630 (1992), *Egan v Bd. of Educ.*, 185 W. Va. 302, 406 S.E.2d 733 (1991). 3. "Only those employees whose consideration for transfer or intended transfer is based upon known or expected circumstances . . . shall be considered for transfer." W. Va. Code § 18A-2-7.

4. Grievants' transfer was based upon known or expected circumstances, and it was not arbitrary and capricious or an abuse of discretion.

5. "Reprisal" is defined as "retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." W. Va. Code §18-29-2(p).

6. Grievants have failed to establish that their transfers were the result of reprisal.

7. "Extra-duty" jobs are "irregular jobs that occur periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips," and employees performing such jobs are entitled to compensation as provided forby W. Va. Code §18A-4-8a(8). *See* W. Va. Code § 18A-4-8b(f); *McBride v. Summers County Bd. of Educ.*, Docket No. 01-45-614 (Aug. 20, 2002).

8. "W. Va. Code §§ 18A-4-8a and 18A-4-8b do not prohibit a county board of education from requiring [employees] to be assigned on a rotational basis for in-county bus trips during regular school hours without additional compensation." *Broughman v. Tyler County Bd. of Educ*., Docket No. 94-48-068 (Jan. 20, 1995); *Blankenship v. Mingo County Bd. of Educ.*, Docket No. 96-29-334 (Apr. 22, 1997).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Berkeley 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: December 1, 2006

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievants are Nina F. Boarman, Margaret Myers, Patsy Fowler, Linda K. Grubb, Brenda C. Brode, Brenda T. Bolyard, Rosalie M. Schaeffer, Betty L. Rodgers, Marlene Bishop, Teresa D. Montgomery, Kim Dillow, Beverly J. Cramer, Brenda K. Gochenour, Luz Dolly Benevides, Bonnie Burkhart, and Joyce A. Englebright.

Footnote: 2

The remaining mid-day bus runs are performed by aides who are provided through RESA. Because the RESA aides would have lost these assignments, the plan to include a mid-day run in every transportation aide's assignment was abandoned.

Footnote: 3

In addition, the evidence in McBride was that other bus operators were currently receiving extra compensation for making similar mid-day runs, and the evidence in this case does not establish a similar situation.

Footnote: 4

West Virginia Code § 18A-4-8a was entirely re-written in 1998, but the revisions are mostly format changes and do not add or subtract any provisions which would affect the reasoning upon which Broughman was based.