THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

ELAINE PRICKETT,
Grievant,

v. **DOCKET NO. 2009-0699-MonED**

MONONGALIA COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Elaine Prickett, filed a grievance against her employer, the Monongalia County Board of Education, on October 15, 2008. The statement of grievance reads:

> Grievant contends that the board of education rearranged her schedule in order to reduce the number of hours she worked on her regular job. This also resulted in a loss of pay as she exceeds forty ho[u]rs worked during a week much less frequently. Grievant explained to her supervisors a way that her schedule could have been restored to last year's time length, which would also have made the transportation system more efficient. (It would have allowed the board of education to avoid creation of an additional bus operator position.) The response was that this plan of Grievant would not help. (The plan would have helped both Grievant and the transportation system.) Grievant alleges a violation of West Virginia Code §§6C-2-2(d), (h) & (l); 18A-4-5b; 18A-4-8(m); and 18A-4-8b.

As relief Grievant sought, "reinstatement of her bus to the starting time and number of hours worked in the 2007-2008 school year and compensation for wages lost to the maximum extent permissible by law and interest on all sums to which she is entitled."

Two days of hearing were held at level one on November 16, 2008, and February 10, 2009, and a level one decision denying the grievance was issued on March 9, 2009. Grievant appealed to level two on March 16, 2009, and a mediation session was held on May 4, 2009. Grievant appealed to level three on May 15, 2009. A level three hearing was

held before the undersigned Administrative Law Judge on August 26, 2009, at the Grievance Board's Westover office. Grievant was represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association, and Respondent was represented by Jason S. Long, Esquire, Dinsmore & Shohl, LLP. This matter became mature for decision on October 5, 2009, the deadline for the parties to submit reply briefs.

Synopsis

Grievant complained that less senior bus operators were assigned bus routes that resulted in them working more hours than she. Grievant was placed on transfer and did not contest her transfer. Many bus operators had their routes changed for the 2008-2009 school year due to the closure of University High School, and its reopening in a new location. Transfers are not based on seniority, but on the needs of the school system. Further, Grievant did not demonstrate the Respondent acted in an arbitrary and capricious manner. Grievant also argued that the uniformity provisions should be applied to the hours worked by bus operators. Grievant did not demonstrate that bus routes can be made uniform. Finally, Grievant did not prove her claims of favoritism, discrimination or harassment.

The following Findings of Fact are properly made from the record developed at levels one and three.

Findings of Fact

1. Grievant has been employed by the Monongalia County Board of Education ("MBOE") as a bus operator for 19 years.

2. MBOE bus operators are paid for a six hour day. If they work more than six hours a day, they are paid at an hourly rate for all time actually worked over six hours. If their schedules are such that they work less than six hours, they are still paid for six hours.

3. During the 2007-2008 school year Grievant began work at 5:30 a.m. each week day, and returned to her base at approximately 9:00 a.m. In the afternoon, she began her bus run at approximately 1:15 p.m. and finished that run at 4:30 p.m. Grievant's bus route included transportation of students to and from University High School ("UHS"), and transportation to and from Westwood Middle School.

4. Grievant was placed on transfer in the Spring of 2008. Grievant did not contest the transfer.

5. Around December 1, 2008, the building which had housed UHS, near downtown Morgantown, was closed, construction of a new building to house UHS was completed in a different location on Point Marion Road, close to the border with Pennsylvania and further from the population centers, and the new school was opened. In addition, the start time for classes at UHS was changed to an earlier time than it had been, and the start time for Westwood Middle School was changed to a later time than it had been the previous year. These changes resulted in substantial changes in bus routes in Monongalia County, both at the beginning of the school year, and when UHS finally opened. Around 30 bus routes were changed, and changes were still being made to routes in February 2009.

6. Grievant's bus route was changed for the 2008-2009 school year, so that she began work at 6:30 a.m. each week day, and returned to her base at 8:45 to 9:00 a.m. She no longer transported students to UHS in the morning. In the afternoon she began her

bus run at 1:00 p.m., drove to the new UHS, and completed her bus run at approximately 4:30 p.m., or later, depending on traffic.[1] This reduction in the number of hours worked resulted in a decrease in Grievant's pay from the preceding year. Grievant's rate of pay did not change.

7. For the 2008-2009 school year, MBOE bus operator Scott McElroy was assigned a portion of what had been Grievant's route the previous year. He began work at 5:30 a.m. Mr. McElroy is less senior than Grievant. Mr. McElroy worked more hours than Grievant nearly every week during the 2008-2009 school year.

8. During the 2008-2009 school year, MBOE bus operator John Dolog worked more hours than Grievant during some weeks, and fewer hours than Grievant during some weeks. Mr. Dolog is less senior than Grievant.

9. Mr. Dolog obtained his assignment by bidding on a posted position. Grievant chose not to bid on this position because she preferred to stay where she was familiar with the children on the route.

10. Grievant presented a plan to MBOE's Transportation Department which would have changed several bus routes, and added more time to her daily schedule. This plan was not adopted by MBOE. Sometime after this, five changes were made to Mary Rogers' bus route.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the Public

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[1] Prior to the opening of the new UHS, Grievant began her afternoon bus run at 1:15 p.m., and finished work at about 4:15 p.m.

Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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). "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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant argued that Respondent violated the uniformity provisions of WEST VIRGINIA CODE § 18A-4-5b, that Grievant was the victim of discrimination, favoritism, and harassment, and that Respondent acted in an arbitrary and capricious manner. Respondent argued that Grievant did not demonstrate that it had violated or misapplied any statute, rule, regulation or policy, and that it did not act in an arbitrary and capricious manner. Respondent pointed out that transfers are not based on seniority, and denied the charges of discrimination, favoritism, and harassment. Finally, Respondent noted that Grievant is not entitled to overtime, and that Grievant did not mitigate her damages inasmuch as she failed to bid on the route which was awarded to Mr. Dolog.

The first issue is whether the uniformity provisions apply to this case. Grievant argued that inasmuch as the uniformity provisions have "been held to extend to the number of days in the employment term of similarly situated employees, . . . [i]t is natural that the concept would be applied to the number of hours worked by similarly situated employees." Grievant did not indicate how this would be possible with bus operators schedules and hours. WEST VIRGINIA CODE § 18A-4-5b states as follows:

> The county board of education may establish salary schedules which shall be in excess of the state minimums fixed by this article.
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> 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. . ..

There is no question that the bus operators in Monongalia County all have different routes and schedules, and work a varying number of hours. It is unlikely that any two bus operators work the same number of hours. Indeed, the table prepared by Grievant, and included in her Proposed Findings of Fact and Conclusions of Law, shows that Grievant did not work the same number of hours any two weeks during the 2008-2009 school year. It would be impossible to create bus routes which would all take the same amount of time each day to perform. The uniformity provisions do not apply to this situation.

As to Grievant's complaint about less senior drivers being assigned routes which resulted in them getting more hours than she, Grievant's real complaint is that she was placed on transfer, which she did not contest when it occurred. Transfers are not based on seniority.

> Pivotal to the instant case is the fact that Grievant did not challenge his transfer when he was notified of the potential schedule changes in May of 2005. If Grievant wished to obtain or avoid a particular shift, it would have been prudent for him to voice his concerns at that time. Moreover, it is well-settled that 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. *State ex rel. Hawkins v. Tyler County Bd. of Educ.*, 166 W. Va. 363, 275 S.E.2d 908 (1980); *Post v. Harrison County Bd. of Educ.*, Docket No. 89-17-355 (Feb. 20, 1990). *See Jochum v. Ohio County Bd. of Educ.*, Docket No. 91-35-396 (Jan. 31, 1992).

Riddle v. Ritchie County Bd. of Educ., Docket No. 05-43-450 (Apr. 26, 2006).

County boards have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel, but this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. *Dillon v. Bd. of Educ. of County of Wyoming,* 177 W. Va. 145, 351 S.E.2d 58 (1986). Superintendents have the authority to "[a]ssign, transfer, suspend or promote teachers and all other school personnel," subject to the approval of the board, and boards of education have the authority "[t]o control and manage all of the schools and school interests for all school activities. . . ." W. VA. CODE § 18-4-10(3) & W. VA. CODE § 18-5-13(1). *See Cox v. Bd. of Educ. of Hampshire County*, 355 S.E.2d 365, 369 (W. Va. 1987). A board of education may redefine the duties of a school service personnel position, combine them with the duties of another position, or eliminate a position entirely. *Hambrick v. Mercer County Bd. of Educ.*, Docket No. 94-27-293 (Sept. 20, 1994); *Cox, supra.*

"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 Res.*, 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)).

Grievant did not demonstrate that Respondent's actions were arbitrary and capricious, or an abuse of its broad discretion. Grievant's claim begins with the fact that she suggested a different bus schedule which changed the routes of six drivers, and which would have added more time to Grievant's bus route, and her suggestion was rejected. She opined that her plan would possibly have eliminated the need for one bus operator position, and suggested that Respondent's goal was to punish her, although she did not explain what she was allegedly being punished for, or why anyone would desire to see her punished. Paul Christopher, MBOE's Supervisor of Transportation testified that when he was assigning routes, he made a chart with every route on it, and tried to make each bus operator's daily schedule as close to six hours as possible. He further testified that he and the Director of Transportation, Irv Schuetzner, considered and discussed the changes suggested by Grievant, and felt that the changes were not feasible, and that it would not be of any benefit to change all the bus routes around as Grievant suggested. Respondent was not required to accept the changes suggested by Grievant. The undersigned cannot find from the evidence presented that Respondent's actions were unreasonable. Rather, the evidence would suggest a difference of opinion on the subject of how best to assign bus routes.

Grievant also claimed discrimination and favoritism. For purposes of the grievance procedure, favoritism is defined as "unfair treatment of an employee as demonstrated by

preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h). Discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a favoritism or discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant's claim of favoritism is twofold. First, she is complaining that other less senior bus operators have bus routes which result in them working more hours than she does. Again, this is a complaint about Grievant's transfer, which she did not contest, and transfers are not based on seniority. Further, despite MBOE's efforts to try to arrange routes so that all the drivers work around six hours a day, no two bus routes are the same. The different treatment here, that is, the difference in the number of hours worked, is a direct result of the difference in each route assigned to each bus operator. The difference in treatment is related to actual job responsibilities.

The undersigned would also point out that while Grievant was complaining about Mr. Dolog being assigned a route which resulted in him working more hours than she most weeks, Mr. Dolog obtained his assignment by bidding on it. Grievant had the same opportunity to bid on this route and obtain more hours, but did not want this route. She made her choice, and cannot now claim favoritism or discrimination by comparing her assignment to Mr. Dolog's.

Second, Grievant is complaining that after refusing to change Grievant's route, Respondent then made five changes to Mary Rogers' route, another bus operator in Monongalia County. Respondent readily admitted that even as of February 2009, changes were still being made to bus routes. Grievant did not present any evidence describing the changes made to Ms. Rogers' route, nor did she state whether these changes ultimately resulted in Ms. Rogers working more hours or fewer hours each day, or whether Ms. Rogers works more hours each day than Grievant. She did not indicate that the changes were not necessary to provide proper transportation services. Did Ms. Rogers benefit in any way from these changes? The only evidence before the undersigned is that changes were made to Ms. Rogers' bus route. This is the nature of bus routes, and this fact alone does not constitute discrimination or favoritism.

WEST VIRGINIA CODE § 6C-2-2(l) defines "harassment" as "repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." What constitutes harassment varies based upon the factual situation in each individual grievance. *Sellers v. Wetzel County Bd. of Educ.*, Docket No. 97-52-183 (Sept. 30, 1997). "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable

performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. *See Moreland v. Bd. of Trustees*, Docket No. 96-BOT-462 (Aug. 29, 1997)." *Pauley v. Lincoln County Bd. of Educ.*, Docket No. 98-22-495 (Jan. 29, 1999).

Grievant argued that Respondent's action in removing approximately one hour from her schedule to punish Grievant constituted harassment, and suggested that Respondent somehow gained some satisfaction from hurting Grievant. The undersigned finds nothing in the evidence to support such a claim, and specifically the record does not reflect why any employee of Respondent would derive satisfaction from Grievant's punishment. Moreover, a single incident does not constitute harassment. *Johnson v. Dep't of Health and Human Res.*, Docket No. 98-HHR-302 (Mar. 18, 1999); *Metz v. Wood County Bd. of Educ.*, Docket No. 97-54-463 (July 6, 1998).

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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). "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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. WEST VIRGINIA CODE § 18A-4-5b provides that the county salary schedule shall be uniform throughout the county. This provision cannot be applied to make all bus operator schedules uniform, as every bus route is different.

3. "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. *State ex rel. Hawkins v. Tyler County Bd. of Educ.*, 166 W. Va. 363, 275 S.E.2d 908 (1980); *Post v. Harrison County Bd. of Educ.*, Docket No. 89-17-355 (Feb. 20, 1990). *See Jochum v. Ohio County Bd. of Educ.*, Docket No. 91-35-396 (Jan. 31, 1992)." *Riddle v. Ritchie County Bd. of Educ.*, Docket No. 05-43-450 (Apr. 26, 2006).

4. County boards have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel, but this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. *Dillon v. Bd. of Educ. of County of Wyoming,* 177 W. Va. 145, 351 S.E.2d 58 (1986). Superintendents have the authority to "[a]ssign, transfer, suspend or promote teachers and all other school personnel," subject to the approval of the board, and boards of education have the authority "[t]o control and manage all of the schools and school interests for all school activities. . . ." W. VA. CODE § 18-4-10(3) & W. VA. CODE § 18-5-13(1). *See Cox v. Bd. of Educ. of Hampshire County*, 355 S.E.2d 365, 369 (W. Va. 1987). A board of education may redefine the duties of a school service personnel

position, combine them with the duties of another position, or eliminate a position entirely. *Hambrick v. Mercer County Bd. of Educ.*, Docket No. 94-27-293 (Sept. 20, 1994); *Cox, supra.*

5. "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 Res.*, 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)).

6. Grievant did not demonstrate that Respondent's actions were arbitrary and capricious or an abuse of discretion.

7. In order to establish a favoritism or discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

8. Grievant did not demonstrate favoritism or discrimination in the assignment of bus routes.

9. WEST VIRGINIA CODE § 6C-2-2(l) defines "harassment" as "repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession." What constitutes harassment varies based upon the factual situation in each individual grievance. *Sellers v. Wetzel County Bd. of Educ.*, Docket No. 97-52-183 (Sept. 30, 1997). "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. *See Moreland v. Bd. of Trustees*, Docket No. 96-BOT-462 (Aug. 29, 1997)." *Pauley v. Lincoln County Bd. of Educ.*, Docket No. 98-22-495 (Jan. 29, 1999). A single incident does not constitute harassment. *Johnson v. Dep't of Health and Human Res.*, Docket No. 98-HHR- 302 (Mar. 18, 1999); *Metz v. Wood County Bd. of Educ.*, Docket No. 97-54-463 (July 6, 1998).

10. Grievant did not establish that she had suffered any harassment by any employee of Respondent.

11. Grievant established no legal entitlement to a specific assignment after her transfer for the 2008-2009 school year.

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. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: December 8, 2009