WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BILL ROSE,
Grievant,

v. **Docket No. 2011-1442-BraED**

BRAXTON COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Bill Rose, filed a grievance against the Braxton County Board of Education ("BCBE"), Respondent, protesting his placement on a transfer list. The original grievance was filed on April 7, 2011 and the grievance statement provides:

> Grievant contends that Respondent violated W. Va. Code 18A-2-7 in placing him on the transfer list. (Grievant received notice of this placement by letter on March 22, 2011.) Grievant contends that his assignment was still available and he should have retained it. He also contends that there were less senior bus operators in the Little Birch area who were not placed on the transfer list and that the failure to place these employees on the transfer list constituted discrimination as defined in W. Va. Code § 6C-2-2. Grievant also [contends] that he should have been given the option of agreement to the negligible changes in his assignment and to have retained the assignment thereby without being placed on the transfer list or posting of the assignment. Other bus operators were given this opportunity and Grievant contends the failure to offer this option to him constituted discrimination as defined in W. Va. Code § 6C-2-2.
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> Relief Sought: Grievant seeks reassignment to the route he held in 2010-2011. (Grievant is willing to accept the negligible changes.) Grievant also seeks compensation for the time involved in driving to the start of his new assignment and mileage expenses for the commute to the starting point of his new assignment.

A hearing was held at level one on April 18, 2011, and the grievance was denied at that level on May 3, 2011. Grievant appealed to level two on May 11, 2011, and a mediation session was held on August 18, 2011. Grievant appealed to level three on

August 30, 2011. A level three hearing was held before the undersigned Administrative Law Judge on December 9, 2011, in the Grievance Board's Charleston office. Grievant appeared in person and was represented by John Roush, Esquire, of the West Virginia School Service Personnel Association. Respondent BCBE was represented by Rebecca M. Tinder, Bowles Rice McDavid Graff & Love LLP.

This case became mature for decision on January 9, 2012, the deadline for the submission of the parties' proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals.

Synopsis

Grievant, a regular bus operator, contends Respondent's action in not awarding him a newly formulated, merged county bus route which was substantially similar to the assignment Grievant had been performing during the prior school year, was unlawful. Grievant contends violation of W. VA. CODE § 18A-2-7 and discrimination/favoritism per W. VA. CODE § 6C-2-2.

Respondent implemented a coherent process for assignment of bus operators to reconfigured/modified routes.[1] The merged bus route assignment of discussion for the 2011-2012 school year is substantially the same as the run driven by Grievant the prior year but assigned to another bus operator, a more senior driver than Grievant. Respondent's decision to eliminate the assignment of Grievant, making modifications to

[1] Braxton County Administrative Operating Procedure with regard to reconfigured bus routes provided, in part, that when two substantially identical routes were combined into one route, resulting in minor modifications to the existing route, the more senior driver would be assigned the route, with acceptance of the minor modifications, and the less senior driver would be placed on transfer.

the overlapping run of a more senior bus operator, was neither arbitrary nor capricious. Some of Respondent's actions could and perhaps should have been more prudently implemented, however, Respondent's ultimate actions are consistent with the articulated plan for reconfigured/modified bus routes. The implemented plan of action has not been shown to be an unreasonable exercise of Respondent's recognized discretionary authority. In the final analysis, it is not established that Respondent's paramount action(s) were unlawful; nor did Grievant prove his allegations of favoritism and/or discrimination. Grievance is **DENIED.**

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 by Respondent as a regular bus operator. Grievant has been employed as a regular bus operator for approximately 15 years, driving in the Little Birch area of Braxton County for approximately the last 12 years.

2. The seniority order of the bus operators driving in the Little Birch area, from the highest to lowest is as follows:

   a. Geary White,
   b. Bill Rose (Grievant)
   c. Darla Shaver
   d. Mark Rose
   e. Mary Rose

3. On or about November 15, 2010, Grievant, and other effected bus operators were notified, by a writing left on the seat of the assigned buses, of a change in their respective assignments (bus routes).

4. The affected bus operators began running the new assignments (routes) shortly after November 15, 2010, and continued to do so for the rest of the 2010-2011 school year.[2]

5. Prior to the new route assignments, at the beginning of the 2010-2011 school year, Grievant and bus operator Geary White were assigned to substantially identical overlapping runs in the Little Birch area.

6. Grievant's new assignment, which Respondent did not consider a substantial assignment change, was as depicted in Gr. Ex. 3.

7. Bus operator White's new route was markedly shorter than the pre-November 15, 2010 assignment. Geary White's new route, which was a substantial change in his assignment, was depicted in Gr. Ex. 4.

8. No employee grieved the new assignments.

9. Administrative personnel of Respondent did not have the effected bus operators execute a Mutual Agreement relating to the new assignment(s), nor was the new assignments brought before the Board for approval in accordance with W. VA. CODE § 18A-4-8A(i).

10. W. VA. CODE § 18A-4-8A(i) provides

> (i) No service employee may have his or her daily work schedule changed during the school year without the employee's written consent and the employee's required daily work hours may not be changed to prevent the payment of time and one-half wages or the employment of another employee.

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[2] Respondent contends these routes were temporary assignments. In fact, the new assignments were not properly approved in accordance with W. VA. CODE § 18A-4-8a(i).

11. Respondent determined that a new, combined route was needed for the 2011-2012 school year and not the two routes that Grievant and Geary White were driving, either prior to or post November 15, 2010. Gr. Ex. 5.

12. Grievant's assignment-route after November 15, 2010, (Gr Ex 3) was substantially similar to the new combined route depicted by Grievant's Exhibit 5.

13. By letter dated January 19, 2011, Respondent notified Grievant that he was being considered for transfer for the 2011-2012 school year. Gr. Ex. 1.

14. Grievant requested a hearing before Respondent on the recommendation that he be placed on the transfer unassigned list.

15. Both Grievant and Geary White are bus operator assigned to the Little Birch area. Respondent conducted a hearing for Grievant and Geary White on February 28, 2010, on the proposed transfer(s).

16. Bus operator Geary White was originally also notified that he was to be considered for transfer by the Board for the 2011-2012 school year, but that action was later rescinded, and Geary White accepted modifications to his pre-November 15, 2010 run as his 2011-2012 assignment.[3] The grievance of *Dennis Cottrill v. Braxton County Bd. of Educ.*, Docket No. 2011-1495-BraED, highlighted a potential disparate treatment of bus operators and was instrumental in Respondent's determination as to who ultimately would be awarded the 2011-2012 combined run assignment. Resp. Ex. 1.

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[3] *Dennis Cottrill v. Braxton County Bd. of Educ.*, Docket No. 2011-1495-BraED. Grievant Cottrill compared his situation to that of bus operators Bill Rose and Geary White, who were, at the time, both placed on transfer and the slightly modified route posted (White-Rose). However, as a result of calling the White-Rose inconsistency to the attention of the Board, the Board on May 26, 2011, voted to rescind the transfer of White, reinstating him into the run, as modified, for the 2011-2012 school year. The run for the 2011-2012 school year is substantially the same as the run assigned to operator White, a more senior driver than Bill Rose, whose route was reconfigured/modified by less than 50%. Referenced in Resp. Ex. 1.

17. Respondent, via Superintendent Albright, determined that the bus operators who had previously driven the majority of any reconfigured/modified routes would be again assigned those routes for the 2011-2012 school year with their agreement to accept the minor modifications to the routes. The superintendent considered those routes that changed less than 50% to be minor modifications, rather than new routes.

18. Superintendent Albright determined that, when two substantially identical routes were combined into one route, resulting in minor modifications to the existing route, the more senior driver would be assigned the route, with acceptance of the minor modifications, and the less senior driver would be placed on transfer.

19. Geary White was more senior than Grievant and was assigned the reconfigured 2011-2012 school year route.

20. On March 14, 2011, the Board approved the placement of Grievant on the transfer list. Gr. Ex. 6.

21. The new combined run awarded to Geary White in the 2011-2012 school year is substantially the same as the run both bus operators White and Grievant drove in the 2010-2011 school year, prior to November 15, 2010.[4]

22. Respondent did not place Mark Rose and Darla Shaver on the transfer list. Both of these employees are assigned to the Little Birch area. Mark Rose was permitted to agree to the changes in his assignment, i.e., the absorption of Mary Rose's bus route, and to retain the same without posting.

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[4] Grievant contends that his route (post November 15, 2010) closely resembled the new 2011-2012 route and, as a result, he should have been given the right to accept modifications to his route, similar to other bus operators, rather than be placed on the transfer list.

23. The following bus operators in areas other than the Little Birch area are less senior than Grievant and were permitted to agree to a change in their assignments for the 2011-2012 school year and to retain the same without posting;

a. Gary Brown, Bus #86
b. Jim Holcom, Bus #94
c. Allan Shaver, Bus #91
d. Chris Stewart, Bus #23

24. Grievant's 2011-2012 assignment is farther from his home. Grievant's new route requires him to drive nine miles (one way) to the parking site of the bus to begin his route and the same mileage to return home at the end of his work day. No other bus operator is compensated for travel to and from work.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Respondent eliminated a number of bus operator positions after the 2010-2011 school year, and reconfigured many routes driven by various operators. The newly formulated, merged county bus route at issue in this grievance for the 2011-2012 school year is almost identical to the route performed by Grievant in the 2010-2011 school year. Grievant contends that Respondent violated W. VA. CODE § 18A-2-7 in placing him on the transfer list. WEST VIRGINIA CODE § 18A-2-7(a) provides in pertinent part the following:

> Only those employees whose consideration for transfer or intended transfer is based upon known or expected circumstances which will require the transfer of employees shall be considered for transfer or intended for transfer and the notification shall be limited to only those employees.

Grievant maintains that he should have been given the option of agreeing to the negligible changes in his assignment and to have retained the assignment thereby, without being placed on the transfer list or posting of the assignment. Grievant contends other bus operators were given this opportunity and the failure to offer this option to him constituted discrimination and/or favoritism as defined in W. VA. CODE § 6C-2-2.

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). WEST VIRGINIA CODE § 18A-2-7 grants broad discretion to a superintendent, and gives him the authority to transfer school personnel subject only to the approval of the board. *Post v. Harrison County Bd. of Educ.,* Docket No. 89-17-355 (Feb. 20, 1990). In this case, the operating procedure that the Braxton County Administrative personnel used to assign bus operators to reconfigured bus routes designated as modified

routes was presented by testimony of Respondent's administrative agents. *See* testimony of Superintendent Dennis Albright and Assistant Superintendent Shawn Dilly.

This grievance is complicated by the ramifications of the November 15, 2010 directives.[5] The directives altered the bus routes driven by Grievant, Geary White, and a finite number of other bus operators. Respondent became aware and now highlights that the altered assignments were not properly approved. Respondent contends this oversight effects the entitlement positions of Grievant and the more senior bus operator White to the combined altered assignment of 2011-2012.

The assignment change of November 15 was a substantial change in bus operator Geary White's assignment. Operator White did not execute a "mutual agreement" relating to the assignment, nor was the new assignment brought before the Board for approval in accordance with W. VA. CODE § 18A-4-8a(i). This information was brought to light during Geary White's requested transfer hearing before the Board. Respondent contended that given this procedural development, the routes of Grievant and Geary White return to their original state (that which existed prior to the November 15, 2010 notice of change) beginning with the 2011-2012 school year.[6] While this argument tends to seem self-

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[5] On or about November 15, 2010, Grievant, Geary White and other bus operators were notified, by a writing left on the seat of the assigned buses, of a change in their assignment. The changes began shortly after the drivers were informed and lasted until the end of the school year 2010-2011. Respondent is fond of characterizing the November 15, 2010 directives as temporary assignments.

[6] Generally, a county board of education is not bound by an employee's mistake. *Samples v. Raleigh County Bd. of Educ.*, Docket No. 98-41-391 (Jan. 13, 1999); *Carr v. Monroe County Bd. of Educ.,* Docket No. 98-31-342 (Dec. 15, 1998). Additionally, there exists an affirmative duty to correct an error in classification when such error is discovered. *See Dillon v. Mingo County Bd. of Educ.*, Docket No. 05-29-413 (Apr. 28, 2006); *Samples v. Raleigh County Bd. of Educ.*, Docket No. 98-41-391 (Jan. 13, 1999).

indulgent, nevertheless, it has a credible basis in law. Thus, Respondent's analysis is not found to unreasonable.

The procedure that Respondent used to assign bus operators to routes designated as "modified routes," was identified and explained by uncontroverted testimony of Superintendent Dennis Albright and Assistant Superintendent Shawn Dilly. As a general rule, it was determined that bus operators who had previously driven the majority of any reconfigured/modified routes would be again assigned those routes for the 2011-2012 school year with their agreement to accept the minor modifications to the routes. Respondent considered those routes that changed less than 50% to be minor modifications. Further, it was determined that, when two substantially identical routes were combined into one route, resulting in minor modifications to the existing route, the more senior driver would be assigned the route, with acceptance of the minor modifications, and the less senior driver would be placed on transfer. The newly combined run awarded to Geary White in the 2011-2012 school year is substantially the same as the run both bus operators White and Grievant drove in the 2010-2011 school year, prior to November 15, 2010. In accordance with the articulated plan of action, Respondent ultimately concluded that Geary White was more senior than Grievant and thus was assigned the reconfigured 2011-2012 school year route.

Grievant alleges placing him on the transfer list constitutes discrimination and/or 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);
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> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
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> (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).

In support of his claim of favoritism and/or discrimination, Grievant attempts to compare himself and his situation with other identified bus operators. The undersigned is not persuaded.

The manner of assigning the run to Geary White and transferring Grievant was the same as bus operators Mark and Mary Rose, wherein their two routes were combined into one and the more senior driver, Mark Rose, was assigned the slightly modified route, with his agreement, and Mary Rose was placed on transfer. The manner of assigning the run to Geary White and transferring Grievant was the same as bus operators Sally Hart and Ernie Bennett, wherein their two routes were combined into one and the more senior driver, Sally Hart, was assigned the slightly modified route,[7] with her agreement, and Ernie

[7] This slightly modified route included the absorption of students from the eliminated run of Dennis Cottrill, another bus operator.

Bennett was terminated, as he lacked sufficient seniority to retain a position in the county. The process seems relatively clear and consistent, now. However, it was not such at all times thoughout the span of the process.[8] This is regrettable. It is understandable why Grievant perceived inequitable treatment and was of the opinion that he was treated less favorably than some other bus operator in the county. Nevertheless, Grievant's perception is not supported in fact.

Grievant also compares himself with the following employees: Gary Brown, Bus 86, and Jim Holcomb, Bus 94, who were permitted to retain their assignments with acceptance of minor modifications as a result of an employee who retired; Allen Shaver, Bus 91, who was permitted to retain his assignment with his acceptance of minor modifications to his run as a result of moving a student's bus stop closer to the remaining existing route; and Chris Stewart, Bus 23, who was permitted to retain his assignment with his acceptance of minor modifications to his run (1/3 shorter) as a result of having to start at the other end of a bridge for safety reasons resulting in his running the same route, but in a different order. None of these routes involved the elimination and combination of routes for the 2011-2012 school year. The employee(s) to whom Grievant compares himself are not similarly situated to Grievant with regard to the circumstances of their respective bus route assignments. Favoritism and/or discrimination is not found to be evident in the facts of this case.

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[8] Subsequent to *Dennis Cottrill v. Braxton County Bd. of Educ.*, Docket No. 2011-1495-BraED which highlighted potential disparate treatment of bus operators, operator White was allowed to accepted minor modifications to his pre-November 15, 2010 run as his 2011-2012 assignment and was removed from the transfer list. *See* Finding of Fact 16.

Respondent maintains its actions should be upheld in that awarding the 2011-2012 assignment to bus operator White is correct in its totality. Respondent argues that there had been an error made (affecting the lawful effect of a November 15, directive), and in acknowledging its procedural oversight, bus operator White's entitlement to his prior route must be recognized. Respondent rationalizes that the reconfigured 2011-2012 school year route is substantially the same as the run both bus operators White and Grievant drove in the 2010-2011 school year, prior to November 15, 2010, and given that Geary White was more senior than Grievant, it is proper to award operator White the newly reconfigured assignment. It is noted that the November 15, 2010 changes in their bus routes were improperly implemented through no fault of either employee. Respondent maintains their actions are within the purview of the law and their discretionary authority thus their actions should not be overturned on review.

"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)).

Respondent was confronted with a unique set of facts in the circumstance of this case. Respondent has attempted to implement a consistent and rational process. The ultimate determination of Respondent did, in fact, take into consideration relevant facts pertinent to the circumstances of the case. Respondent's ultimate determination was not to Grievant's liking but Grievant has not established that Respondent's actions were unreasonable.

Transfer decisions are to be based on the needs of the school, as decided in good faith by the county superintendent and the county board. *Eckenrode v. Kanawha County Bd. of Educ.*, Docket No. 96-20-302 (Jan. 22, 1997); *Howard v. Mingo County Bd. of Educ.*, Docket No. 99-29-241 (Sept. 16, 1999); *Ellis v. Wayne County Bd. of Educ.*, Docket No. 99-50-353 (Oct. 29, 1999*); Brewer v. Mercer County Bd. of Educ.*, Docket No. 05-27-310R (Aug. 30, 2006); *Prickett v. Monongalia County Bd. of Educ.*, Docket No. 2009-0699-MonED (Dec. 8, 2009); *Stover v. Logan County Bd. of Educ.*, Docket No. 2010-1051-LogED (Dec. 13, 2010).

Some of Respondent's actions could and perhaps should have been more prudently implemented; however, Respondent's actions are consistent with the articulated plan for reconfigured/modified bus routes. Grievant has not established that Respondent's actions in the circumstances of this grievance were implausible and cannot be ascribed to as a difference of opinion. Grievant has not demonstrated that Respondent exceeded its authority in implementing the route assignment process as described. It is well-recognized

that county boards of education have substantial discretion in matters related to hiring, assignment, transfer, and promotion of school personnel. *See Dillon v. Bd. of Educ.,* 177 W.Va. 145, 351 S.E.2d 58 (1986). It is not established that Respondent's plan for assignment of reconfigured bus routes was unreasonable, unlawfully designed or implemented. Respondent implemented a coherent process for assignment of bus operators to reconfigured/modified routes. The best interest of Braxton County Schools students is the paramount concern of Respondent.

Respondent's decision to place Grievant on the transfer list and, subsequently, make minor modifications to the bus routes of another bus operator, was neither arbitrary or capricious. Nor has Grievant established such action was an inappropriate use of Respondent's discretion or authority in attempting to meet the needs of the students of Braxton County. Grievant has failed to demonstrate that Respondent's actions violated any statute, rule, policy, or that the actions were arbitrary or capricious.

The following conclusions of law are appropriate in this matter:

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 Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008). "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. 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) and W. VA. CODE § 18-5-13. *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.*

3. "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).

4. An action is recognized as arbitrary and capricious 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) (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 his judgment for that of a board of education. *See generally, Harrison v. Ginsberg,* [169 W. Va. 162], 286 S.E.2d 276, 283 (1982)." *Trimboli*, *supra*, *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

5. Transfer decisions are to be based on the needs of the school, as decided in good faith by the county superintendent and the county board. *Eckenrode v. Kanawha County Bd. of Educ.*, Docket No. 96-20-302 (Jan. 22, 1997); *Howard v. Mingo County Bd. of Educ.*, Docket No. 99-29-241 (Sept. 16, 1999); *Ellis v. Wayne County Bd. of Educ.*, Docket No. 99-50-353 (Oct. 29, 1999*); Brewer v. Mercer County Bd. of Educ.*, Docket No. 05-27-310R (Aug. 30, 2006); *Prickett v. Monongalia County Bd. of Educ.*, Docket No. 2009-0699-MonED (Dec. 8, 2009); *Stover v. Logan County Bd. of Educ.*, Docket No. 2010-1051-LogED (Dec. 13, 2010).

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 reconfigured/modified bus routes.

9. Respondent's decision to eliminate the assignment of Grievant, making minor modifications to the overlapping run of a more senior bus operator, was neither arbitrary nor capricious and was within the sound discretion of the agency.

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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: June 12, 2012

Landon R. Brown
Administrative Law Judge