THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ROBYN WOLFORD,

Grievant,

v. **Docket No. 2018-0549-HamED(R)**

HAMPSHIRE COUNTY BOARD OF EDUCATION,

Respondent.

DECISION ON REMAND

Grievant, Robyn Wolford, is employed by Respondent, Hampshire County Board of Education. On October 10, 2017, Grievant filed this grievance against Respondent stating, "I ran an extra curricular bus run from August 2017 [sic][1] my extra curricular bus run was awarded to another driver without giving me the option to take the run." For relief, Grievant seeks "[t]o be awarded my previously held extra curricular bus run and all back pay."

A level one conference was held on January 3, 2018. A level one decision was rendered on January 22, 2018, which determined the grievance to be untimely. Grievant appealed to level two of the grievance process on February 6, 2018, and a mediation session was held on August 27, 2018. Grievant appealed to level three of the grievance process on September 5, 2018. On December 8, 2018, a level three hearing was held before the undersigned at the Grievance Board's Westover, West Virginia office. Grievant appeared in person and by counsel, George B. "Trey" Morrone III, West Virginia School Service Personnel Association. Respondent appeared by its Superintendent, Jeffrey

[1]Grievant moved without objection to correct the date to August 2014, which the undersigned granted.

Pancione, and by counsel, Kimberly Croyle, Bowles Rice, LLP. Also present was Respondent's Director of Human Resources, Terrie Saville. On January 25, 2019, each party submitted written Proposed Findings of Fact and Conclusions of Law. On March 1, 2019, the undersigned issued a Dismissal Order for untimely filing.

Grievant appealed the Dismissal Order to the Circuit Court of Kanawha County. On October 11, 2019, Circuit Court Judge Tera L. Salango issued a Final Order (under Civil Action No. 19-AA-35) reversing the Dismissal Order and remanding the grievance to the West Virginia Public Employees Grievance Board for a decision on the merits. This Final Order included a finding of fact stating that "[t]he 2017-2018 extra-curricular run provided bus service to the same students, the same geographical area and followed the same or substantially similar route as the run previously held by [Grievant] the three preceding years."

On November 26, 2019, the undersigned held a telephone conference with the parties via counsel to determine their interest in submitting additional evidence and arguments on remand. Grievant requested that the version of her 2014-2015 contract hand marked "activity run" be deemed the officially executed contract.[2] Respondent countered that it was not conceding this point, but that even if the extracurricular runs originating from Hampshire High School in 2016-2017 and 2017-2018, had the same title does not make them the same run. The parties agreed that the outcome of the case hinges on whether these runs were the same. They disagreed as to whether the undersigned is required to adopt the Circuit Court's finding of fact regarding the similarity

[2]Grievant contends that the 2017-2018 extracurricular run from Hampshire High School was the same as her extracurricular run the three prior years, based partly on her belief that Respondent identified each run as an "activity run."

of runs. They agreed that reduction in force procedures do not apply to Respondent's extracurricular runs. They chose not to supplement the record established at the level three hearing or to resubmit proposed findings of fact and conclusions of law (PFFCL).

Synopsis

Grievant was the least senior of three drivers operating three extracurricular bus runs from Hampshire High School during the 2016-2017 school year. For 2017-2018, Respondent replaced the three runs with one run. Respondent deemed the replacement run a new run and therefore awarded it to the most senior of the three drivers. Grievant contends that the replacement run is the same run she drove the previous year and that she is therefore entitled to retain it under the State code and Respondent's own policy. Respondent contends that it acted reasonably in deeming the replacement run to be different because the replacement run combined the three runs into one, was a truncated run that did not travel to all the ridges or make all the stops of any prior run, and only transported student athletes after eliminating tutoring students. Grievant failed to prove that Respondent acted unreasonably in deciding that the runs were different or in not awarding Grievant the replacement run. Accordingly, the grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is employed as a regular bus run operator by Respondent, Hampshire County Board of Education. She also operated an extracurricular[3] bus run

[3]Generally, extracurricular assignments are activities that occur at times other than regularly scheduled working hours. W. VA. CODE §18A-4-16(1). An employee's contract

from Hampshire High School for the 2014-2015, 2015-2016, and 2016-2017 school years.

2. Carli Malcolm is employed as a bus operator by Respondent. She operated an extracurricular bus run for eleven consecutive school years between 2006-2007 and 2016-2017, the last three of which originated from Hampshire High School.

3. For 2016-2017, there were three extracurricular runs originating from Hampshire High School. These runs were financed through a tutoring grant and transported tutoring students and student athletes to various locations in Hampshire County. (Testimony of Grievant and HR Director Saville[4])

4. Neither the postings nor the employment contracts for the 2016-2017 extracurricular runs from Hampshire High School identified specific routes for the three runs. Instead, the drivers were permitted to divvy up the routes, which they apportioned based on proximity to their homes. (HR Director Saville's testimony & Grievant's Exhibits 10, 11, and 12)

5. Grievant's 2016-2017 extracurricular run originated at Hampshire High School, went through Capon Bridge, and ended at Slanesville, with many stops in between. (Grievant's testimony & Grievant's Exhibit 4)

6. Ms. Malcolm's 2016-2017 extracurricular run originated at Hampshire High School and ended at Levels, with many stops in between. (Grievant's Exhibit 4)

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of employment is separate and distinct from the extracurricular assignment agreement. W. VA. CODE §18A-4-16(4).

[4]Terrie Saville was Respondent's Human Resource Director during the period in question.

7. The third extracurricular run from Hampshire High School for 2016-2017,[5] passed through Springfield and ended at Purgitsville, with many stops in between. (Grievant's Exhibit 4)

8. When extracurricular runs are posted each year, bus operators for existing runs are given the option of retaining their run from the previous year in conjunction with West Virginia Code § 18A-4-16 and internal policy. (HR Director Saville's Testimony)

9. Hampshire County Schools Bylaws & Policies 4120.08[6] states in relevant part, that "[a]n employee who was employed in any service personnel extra-curricular assignment during the previous school year shall have the option of retaining the assignment if it continues to exist in any succeeding school year." It further states that "[i]f an extra-curricular contract has been terminated and is reestablished in any succeeding school year, it shall be offered to the employee who held the assignment at the time of its termination." (Grievant's Exhibit 3)

10. When the financial grant supporting tutoring at Hampshire High School expired at the end of 2016-2017, Respondent determined that the extracurricular runs would no longer be transporting tutoring students in 2017-2018. Whereupon, Respondent eliminated its three extracurricular bus runs from Hampshire High School. (HR Director Saville's testimony)

11. Respondent replaced the three runs with one run after determining that student athletes from Hampshire High School still needed extracurricular transportation

[5]Driven by Tammie Wilfong.
[6]Transposed from West Virginia Code § 18A-4-16(6).

for the 2017-2018 school year and that there were less students to transport due to the absence of tutoring students. (HR Director Saville's testimony)

12. Both Grievant and Ms. Malcolm applied for the 2017-2018 replacement run.

13. Both Grievant and Ms. Malcolm had operated extracurricular runs from Hampshire High School for three consecutive years up through 2016-2017. However, Ms. Malcolm was more senior, having operated extracurricular runs for seven years prior to Grievant. (Grievant's Exhibit 4)

14. Respondent determined that the replacement run was different from the three prior extracurricular runs and therefore awarded the run to Ms. Malcolm since she was the more senior extracurricular bus operator. (Superintendent Jeff Pancione and HR Director Saville's testimony)

15. The 2017-2018 replacement run was substantially different from any of the three 2016-2017 runs from Hampshire High School and was not the same run that Grievant had operated in 2016-2017.

16. The replacement run transformed the prior three extracurricular runs into a single run serving all student athletes from Hampshire High School and no longer transported tutoring students. (HR Director Saville's testimony at 1:13:00)

17. Because the majority of the student athletes lived in the eastern part of Hampshire County in the Augusta-Capon Bridge-Slanesville area, Respondent routed the 2017-2018 run in that direction. (Superintendent Jeff Pancione)

18. Unlike Grievant's 2016-2017 run, the 2017-2018 extracurricular run from Hampshire High School stayed on Route 50; did not go on all the ridges or make all the stops Grievant's run had; only stopped in Augusta, Liberty Station, and Capon Bridge (in

well-lit areas with shelters where parents could meet the bus in their vehicles before transporting students the rest of the way); and did not transport tutoring students. (Superintendent Jeff Pancione and HR Director Saville's testimony & Respondent's Exhibit 1)

19. Grievant's 2016-2017 run had transported tutoring students and student athletes all the way to its endpoint in Slanesville, whereas the 2017-2018 replacement run dropped off at Augusta for private pickup any student athlete needing a ride to Slanesville. (Grievant's testimony)

20. The Notice of Extracurricular Job Openings for the runs differed in total operating time: the 2016-2017 runs were listed at 1.5 hours per day (6:00 – 7:30 PM) and the 2017-2018 run at 2.5 hours per day. (Grievant's Exhibits 10, 11, and 12)

21. Some similarities between both Grievant and Ms. Malcolm's 2016-2017 runs and the 2017-2018 replacement run were that each operated after school for four days a week and paid 1/7 the daily rate. (Grievant's testimony & Grievant's Exhibit 11 and 12)

22. Both Grievant and Ms. Malcolm's 2016-2017 extracurricular runs had the same funding source and were the same type of run. (Grievant's Exhibit 10 and 11)

23. When Grievant met with Respondent's Human Resource Director Terrie Saville, Grievant was informed that the replacement run was different than the prior extracurricular runs from Hampshire High School in that the 2017-2018 replacement run was an "activity run" transporting student athletes whereas the prior runs had been "tutoring runs" transporting both student athletes and tutoring students under a tutoring grant. (Grievant's testimony)

24. After another employee suggested to Grievant that Grievant should have received the 2017-2018 extracurricular run over Ms. Malcolm, because the prior runs and the replacement run were “activity runs”, Grievant requested a copy of her 2014-2015 contract from Respondent. (Grievant’s testimony)

25. When Respondent provided Grievant with a copy of her 2014-2015 “Temporary Part-Time Agreement” for her extracurricular activity run, “activity run” was hand-written across the top. (Grievant’s Exhibit 2)

26. Grievant’s understanding had been and continues to be that both her 2016-2017 extracurricular run and the 2017-2018 replacement run transported both tutoring students and student athletes. (See Grievant’s testimony)

27. Grievant did not file her grievance within the requisite 15 working days of learning she had not been awarded the 2017-2018 run.

28. After the level three hearing, the undersigned dismissed this grievance as untimely filed.

29. On appeal, the Circuit Court reversed the dismissal after determining that Grievant had a legitimate basis for her untimely filing. It found that Grievant proved she did not know she had a grievable action until she saw “activity run” handwritten on her 2015-2016 contract: only then did Grievant determine that her 2016-2017 run and the 2017-2018 replacement run were “activity runs,” which gave her reason to suspect they were the same run.

30. The Circuit Court’s Final Order also included the following finding of fact unrelated to the Circuit Court’s determination that Grievant had provided a legitimate basis for her untimely filing: “The 2017-2018 extra-curricular run provided bus service to

the same students, the same geographical area and followed the same or substantially similar route as the run previously held by [Grievant] the three preceding years." (Judge Salango's FOF 4)

31. After finding this grievance to be timely filed and reversing the level three dismissal thereof, the Circuit Court remanded it to level three for a decision on the merits.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993), ***aff'd***, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

Grievant contends that the 2017-2018 extracurricular replacement run is the same run she drove in 2016-2017, because both were "activity runs" which served the same students and same geographical area and followed the same or substantially similar route. As such, she asserts that Respondent's policy and State code mandate that she be allowed to retain the 2017-2018 replacement run. Grievant argues that both the level three record and the appellate findings of the Circuit Court support her assertion that the runs were the same.

Respondent counters that the runs were different because they had different funding sources, did not make the same stops, and (as the new run no longer served tutoring students) did not serve the same students. Respondent asserts that the

undersigned must base his findings on the level three record rather than on the appellate findings of the Circuit Court. Respondent contends that even if each run was identified as an "activity run" does not make the runs the same. Respondent maintains that it has much discretion in these matters if not done in an arbitrary and capricious manner.

Hampshire County Schools Bylaws & Policies 4120.08 and West Virginia Code § 18A-4-16(6) state, in relevant part, that "[a]n employee who was employed in any service personnel extra-curricular assignment during the previous school year shall have the option of retaining the assignment if it continues to exist in any succeeding school year." They further state that "[i]f an extra-curricular contract has been terminated and is reestablished in any succeeding school year, it shall be offered to the employee who held the assignment at the time of its termination." However, neither Respondent's policy nor the State code addresses the manner of determining whether an assignment continues to exist from one year to the next.

The parties agree that the outcome of this case hinges on whether the 2017-2018 replacement run was the same as Grievant's 2016-2017 extracurricular run. They agree that if the runs are the same, internal policy gives Grievant the right to retain the replacement run. They seem to agree that reduction in force (RIF) procedures, which would have entitled a more senior extracurricular bus run operator like Ms. Malcolm[7] to bump Grievant, do not apply to Respondent's extracurricular runs.[8] They disagree on

[7]There is no evidence that Ms. Malcolm was invited to intervene.

[8]While Respondent agreed more recently in the November 26, 2019 phone conference that RIF procedures do not apply to this matter, it argued in its PFFCL that it correctly awarded the new run to the most senior driver pursuant to the RIF procedures of W. Va. Code § 18A-4-8b.

whether the undersigned must adopt the Circuit Court's finding of fact on this issue. Neither cites any authority.

The Circuit Court ruled on appeal that "[t]he 2017-2018 extra-curricular run provided bus service to the same students, the same geographical area and followed the same or substantially similar route as the run previously held by [Grievant] the three preceding years." This finding of fact was unrelated to the issue[9] and facts before the Circuit Court and is therefore *dictum*.[10] As *dictum*, this finding of fact is non-binding. Moreover, the Circuit Court remanded this matter to the Grievance Board for a determination on the merits. The parties agree that a decision on the merits hinges on a determination of whether the runs were the same.

While the 2017-2018 run went to the same part of the county as Grievant's 2016-2017 run, the evidence shows that this was simply a consequence of being where most of the student athletes lived. The evidence presented at level three does not show that both runs transported the same students or that they were the same or substantially similar routes. Further, there are other factors which differentiate the two runs.

The undersigned will first address conflicting testimony regarding the students transported by the 2017-2018 replacement run. Grievant testified that the replacement run and Grievant's 2016-2017 run both transported tutoring students and student athletes. HR Director Saville testified that the replacement run eliminated tutoring students and

[9]The issue on appeal was whether Grievant timely filed.

[10]"*Dicta*" (the plural of *dictum*) are "opinions of a judge which do not embody the resolution or determination of the specific case before the court. Expressions in court's opinion which go beyond the facts before court and therefore are individual views of author of opinion and not binding in subsequent cases as legal precedent." BLACK'S LAW DICTIONARY 454 (6th ed. 1990)

only transported student athletes. Credibility determinations must therefore be made. In situations where "the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required." *Jones v. W. Va. Dep't of Health & Human Res*., Docket No. 96-HHR-371 (Oct. 30, 1996); *Young v. Div. of Natural Res*., Docket No. 2009-0540-DOC (Nov. 13, 2009); *See also Clarke v. W. Va. Bd. of Regents*, 166 W. Va. 702, 279 S.E.2d 169 (1981). In assessing the credibility of witnesses, some factors to be considered are the witnesses': 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ should consider: 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. *Id*., *Burchell v. Bd. of Trustees, Marshall Univ*., Docket No. 97-BOT-011 (Aug. 29, 1997).

Not all credibility factors are relevant in every case. "Opportunity or capacity to perceive and communicate" and "the consistency of prior statements" are in play here. HR Director Saville had firsthand knowledge through her involvement in these runs, particularly the establishment and funding of the replacement run. As such, she had opportunity to perceive that the 2017-2018 replacement run served all student athletes and did not transport tutoring students. Conversely, Grievant did not present any evidence that she had an opportunity to perceive the students served by the replacement run, or that she ever drove, rode, or even observed students board the run at the high

school.[11] Grievant's testimony was also inconsistent and self-serving in regard to her purported knowledge of who rode the replacement run. When it served the interests of her timeliness argument, Grievant testified that she did not know that the replacement run served the same students and was the same run until she saw "activity run" written on her original extracurricular contract. She argued that she therefore did not know a grievable event existed based on the similarities of the runs until she received a copy of her 2014-2015 contract. Yet, when it enhanced her argument on the merits, Grievant testified that the runs were the same because each run served the same student athletes and tutoring students. Ironically, in testifying that HR Director Saville told her that the replacement run only transported student athletes, Grievant showed the consistency of Saville's prior statement. Therefore, Saville's testimony on this issue is more credible.

The fact that the replacement run was used to transform the three extracurricular runs from the prior year into a single run transporting only student athletes should alone be enough to show that it was a different run. Respondent routed the 2017-2018 replacement run in the direction of Grievant's 2016-2017 run because the majority of the student athletes lived around the eastern part of the county in the Augusta-Capon Bridge-Slanesville area. However, the 2017-2018 replacement run was substantially different from any of the three 2016-2017 extracurricular runs from Hampshire High School. Unlike Grievant's 2016-2017 run, the 2017-2018 extracurricular run from Hampshire High School stayed on Route 50; did not go to all the ridges or make all the stops Grievant's run had made; only stopped in Augusta, Liberty Station, and Capon Bridge at well-lit areas with shelters where parents could meet the bus in their vehicles before transporting students

[11]For 2017-2018, Grievant drove the extracurricular run from the middle school.

the rest of the way; and did not transport tutoring students. Grievant's 2016-2017 run had transported students all the way to its endpoint in Slanesville, whereas the 2017-2018 replacement run dropped off at Augusta for private pickup any student athlete needing a ride to Slanesville. Further, the funding sources were different.

Some similarities Grievant points to between her run and the replacement run are a mirage in that they apply to both Grievant and Ms. Malcolm's 2016-2017 runs. These similarities are that each operated after school and four days a week, and compensated at 1/7 the daily rate. However, all extracurricular runs from Hampshire High School were the same in this regard.

Deference is afforded Respondent's decisions. The burden is on Grievant to prove that Respondent did not reasonably exercise its discretion. "'Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.' Syl. pt. 4, *Security National Bank & Trust Company v. First W. Va. Bancorp, Inc*., 166 W. Va. 775, 277 S.E.2d 613 (1981)." Syl. pt. 3, *Wood County Bd. of Educ. v. Smith*, 202 W. Va. 117, 120, 502 S.E.2d 214, 217 (1998). "'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.' Syl. pt. 3, *Dillon v. Wyoming County Board of Education*, 177 W. Va. 145, 351 S.E.2d 58 (1986)." Syl. Pt. 2, *Baker v. Bd. of Educ*., 207 W. Va. 513, 534 S.E.2d 378 (2000).

"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. S*ee 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), ***aff'd*** Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998). "'[T]he "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ*., 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "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 [the employer]." *Trimboli v. Dep't of Health and Human Res*., Docket No. 93-HHR-322 (June 27, 1997), aff'd Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ*., Docket No. 01-20-470 (Oct. 29, 2001), ***aff'd*** Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

Respondent determined that the 2017-2018 replacement run was different from the prior extracurricular runs. In reaching this conclusion, Respondent looked at the fact that the replacement run transformed the three prior runs into a single run serving all student athletes from Hampshire High School, had a new funding source, and no longer transported tutoring students. It further reasoned that, unlike Grievant's 2016-2017 run, the 2017-2018 extracurricular run from Hampshire High School stayed on Route 50; did

not go to or end in Slanesville, did not go on all the ridges or make all the stops Grievant's run had made; and stopped only three times (in Augusta, Liberty Station, and Capon Bridge) in well-lit areas with shelters where parents could meet the bus in their vehicles before transporting students the rest of the way home.

The primary fact in contention that was relevant to the issue of the sameness of the runs was whether the replacement run served both student athletes and tutoring students or just student athletes. As previously stated, the undersigned found HR Director Saville's testimony that the replacement run served only student athletes to be more credible. Grievant's focus on the title of each run is a red herring. Even if the replacement and prior runs had been titled "activity run," having the same title would not make them the same run. Rather, it is the nature of the runs that determines whether they are the same.

Respondent acted diligently to ensure its actions were reasonable in differentiating the runs and in filling the replacement run. It even contacted the service personnel union representative to determine how to assign the replacement run. The union representative advised Respondent to assign the run to the most senior driver. Respondent complied. Grievant did not prove by a preponderance of evidence that Respondent acted arbitrarily and capriciously in determining that the replacement run was a new run or in assigning it to Ms. Malcolm. The undersigned will therefore not substitute Respondent's judgment with his own.

Moreover, even if the runs had been the same, Respondent correctly assigned the replacement run to Ms. Malcolm since she was the senior-most driver. The West Virginia Supreme Court has ruled that a board of education must follow the reduction in force

procedures of W. VA. CODE § 18A-4-8b when eliminating extracurricular service personnel assignments. *Wood County Bd. of Educ. v. Smith*, 202 W. Va. 117, 502 S.E.2d 214 (1998), *citing Berry v. Kanawha County Bd. of Educ*., 191 W. Va. 422, 446 S.E.2d 510 (1994). W. VA. CODE § 18A-4-8b states, in relevant part, as follows: "(j) If a county board is required to reduce the number of service personnel within a particular job classification, the following conditions apply: (1) The employee with the least amount of seniority within that classification or grades of classification is properly released and employed in a different grade of that classification if there is a job vacancy; . . ." Neither party presented any authority for the proposition that Respondent could ignore this provision with its extracurricular drivers.

Grievant did not prove by a preponderance of evidence that the replacement run was the same as her prior run or that she was otherwise entitled to the replacement run. Consequently, this grievance must be DENIED.

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. W. VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

2. Hampshire County Schools Bylaws & Policies 4120.08 and West Virginia Code § 18A-4-16(6) state, in part, that "[a]n employee who was employed in any service personnel extra-curricular assignment during the previous school year shall have the option of retaining the assignment if it continues to exist in any succeeding school year." They further state that "[i]f an extra-curricular contract has been terminated and is reestablished in any succeeding school year, it shall be offered to the employee who held the assignment at the time of its termination."

3. A board of education must follow the reduction in force procedures of W.Va. Code § 18A-4-8b when eliminating extracurricular service personnel assignments. *Wood County Bd. of Educ. v. Smith*, 202 W. Va. 117, 502 S.E.2d 214 (1998), *citing Berry v. Kanawha County Bd. of Educ*., 191 W. Va. 422, 446 S.E.2d 510 (1994).

4. "'If a board of education decides to reduce the number of jobs for service personnel, the board must follow the reduction in force procedures of W.Va. Code § 18A-4-8b [1996].' Syl., *Berry v. Kanawha County Bd. of Educ*., 191 W. Va. 422, 446 S.E.2d 510 (1994)." Syl. Pt. 2, *Wood County Bd. of Educ. v. Smith*, 202 W. Va. 117, 502 S.E.2d 214 (1998).

5. West Virginia Code § 18A-4-8b states, in relevant part:

> (j) If a county board is required to reduce the number of service personnel within a particular job classification, the following conditions apply:
>
> (1) The employee with the least amount of seniority within that classification or grades of classification is properly released and employed in a different grade of that classification if there is a job vacancy;

6. "'Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.' Syl. Pt. 4, *Security National Bank & Trust*

Company v. First W. Va. Bancorp, Inc., 166 W. Va. 775, 277 S.E.2d 613 (1981)." Syl. pt. 3, *Wood County Bd. of Educ. v. Smith*, 202 W. Va. 117, 120, 502 S.E.2d 214, 217 (1998).

7. "'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.' Syl. pt. 3, *Dillon v. Wyoming County Board of Education*, 177 W. Va. 145, 351 S.E.2d 58 (1986)." Syl. Pt. 2, *Baker v. Bd. of Educ*., 207 W. Va. 513, 534 S.E.2d 378 (2000).

8. 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)). "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), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

9. "'[T]he "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ*., 210

W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "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 [the employer]." *Trimboli v. Dep't of Health and Human Res*., Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); Blake v. Kanawha County Bd. of Educ., Docket No. 01-20-470 (Oct. 29, 2001), *aff'd* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

10. Grievant did not prove by a preponderance of evidence that Respondent acted arbitrarily and capriciously when it assigned the replacement run to Ms. Malcolm and when it determined that the replacement run was different from the extracurricular runs that originated at Hampshire High School the year before.

11. Grievant did not prove by a preponderance of evidence that the replacement run was the same as her run the year before or that she was otherwise entitled to be assigned the replacement run.

Accordingly, the 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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: December 31, 2019

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Joshua S. Fraenkel
Administrative Law Judge