DUANE PRICKETT,

Grievant,

v. **Docket No. 02-30-400**

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Duane Prickett ("Grievant") initiated this proceeding on October 16, 2002, alleging "Violation 18A-4-5b - Performing 'like duties and assignments' of the Director of Transportation." He seeks as relief "uniformity in salary beginning in November of 2001 when Director of Transportation was hired." The grievance was denied at level one on October 28, 2002. At level two, a hearing was held before Dr. Louis Hlad on November 12, 2002, and the grievance was denied in a decision dated November 15, 2002. Level three consideration was bypassed, and Grievant appealed to level four on December 9, 2002. A hearing was held in the Grievance Board's office in Westover, West Virginia, on February 7, 2003. Grievant represented himself, and Respondent was represented by counsel, Kelly J. Kimble. This matter became mature for consideration upon receipt of Respondent's fact/law proposals on March 3, 2003.

The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievant has been employed by Respondent Monongalia County Board of Education ("MCBOE") for nearly thirty years, first as a bus operator, then as School BusSupervisor, and most recently as Supervisor of Transportation since December 1, 2001.

2. When the previous Supervisor of Transportation announced his intention to retire, then-new Superintendent Michael Vetere believed changes were necessary in the structure of the transportation department. Previously, the Supervisor of Transportation reported directly to Assistant

Superintendent Jacob Mullett. Superintendent Vetere felt it was necessary to create a new position to deal with all administrative, budget, and public relations issues of that department, with that individual reporting directly to the superintendent. The new position was entitled Director of Transportation, a professional position.

3. The Director of Transportation position was posted for bid in October of 2001. Irv Scheutzner, who had not previously been employed by MCBOE, was selected to fill the position. Grievant applied for the job, but he did not grieve his non-selection.

4. The Supervisor of Transportation vacancy was posted in November of 2001, and Grievant was selected. Grievant's position is responsible for the overall operation of the buses, paperwork of the department, overseeing maintenance, and operator training. He reports to the Director of Transportation.

5. The transportation department also employs a School Bus Supervisor (Grievant's previous position), who reports to the Supervisor of Transportation. The School Bus Supervisor is responsible for the day-to-day assignments and schedules of the bus drivers.

6. Although Grievant's and Mr. Scheutzner's duties overlap to some extent, Mr. Scheutzner's position is more administrative in nature. Rather than overseeing the day-to- day operations of the transportation department, Mr. Scheutzner deals with legal issues,attends board meetings, and develops the budget. He delegates the daily operations to Grievant and the School Bus Supervisor.

Discussion

As this is a non-disciplinary grievance, Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

Although Grievant's written grievance requests uniformity of pay with Mr. Scheutzner, it is clear from Grievant's testimony that he resents MCBOE's creation of a new position to be “over” him, believing that he should be in charge of the entire transportation department. Prior to the creation of the Director of Transportation position, that would have been the case. However, Respondent has chosen to create a new, professional position in the structure of that department.

As to the uniformity issue, W. Va. Code § 18A-4-5b requires uniformity in “all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county.” In Grievant's case, as in many others, the issue of whether he is performing “like assignments and duties” to Mr. Scheutzner is determinative regarding his entitlement to the same compensation. The West Virginia Supreme Court of Appeals has addressed this issue twice in recent years, finding in Flint v. Board of Education, 207 W. Va. 251, 531 S.E.2d 76 (1999) that employees who do not have the same classifications (in that case, multiclassifications) could not possibly be performing like assignments and duties. Revisiting the issue once again in Board of Education v. Airhart, ___ W. Va. ___, 569 S.E.2d 422 (2002), the Court determined that, although employees' duties need not be “identical” to entitle them to uniformity, the duties must be “substantially similar or essentially identical.”

Whichever terminology is applied to the instant case, the undersigned cannot conclude that Grievant's duties are substantially similar or essentially identical to the Director of Transportation's. While it is undisputed that there are some overlapping duties, due to the supervisory nature of the two positions within the department, it is also clear that Mr. Scheutzner has many administrative responsibilities related to the overall running of the department, such as budgetary and public relations issues, and he is not physically present at the bus garage on a daily basis. Conversely, the majority of Grievant's duties relate to the day-to-day operation of the transportation department, such as supervision of the maintenance employees and overseeing operator training. Accordingly, Grievant and Mr. Scheutzner are not performing like assignments and duties, and Grievant is not entitled to uniformity of pay.

As to what seems to be the “real” issue in this case, i.e. Grievant's resentment of the creation of the Director's position the first place, it is well established that county boards of education have broad discretion in personnel matters, such as creation of new positions. However, they must exercise that discretion in a manner which is not arbitrary or capricious. Dillon v. Wyoming County Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986); Conrad v. Nicholas County Bd. of Educ., Docket No. 97-34-388 (Jan. 12, 1998); Mullins v. Logan County Bd. of Educ., Docket No. 94-23-283 (Sept. 25, 1995); Dodson v. McDowell County Bd. of Educ., Docket No. 93-33-243 (Feb. 15, 1994). Generally, anaction 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.2d1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16., 1996). While a searching inquiry into the facts is required to determine if an action is arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of the board of education. See generally Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982).

The evidence presented does not establish that the creation of the Director of Transportation's position has had a significantly negative impact upon the transportation department as a whole, certainly not to the extent to support a finding that it was an arbitrary and capricious decision. While it is obvious and unfortunate that it has had a negative impact on Grievant, a long-term and valuable employee in the department, the undersigned cannot find that the creation of the position constitutes an abuse of MCBOE's broad discretion.

The following conclusions of law support the decision reached.

Conclusions of Law

1. In a non-disciplinary grievance, Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Holly v. Logan County Bd. of Educ.,Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. W. Va. Code § 18A-4-5b requires uniformity in “all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county.”

3. Grievant has failed to prove by a preponderance of the evidence that he and the Director of Transportation perform like assignments and duties.

4. County boards of education have broad discretion in personnel matters, but they must exercise that discretion in a manner which is not arbitrary or capricious. Dillon v. Wyoming County Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986); Conrad v. Nicholas County Bd. of Educ., Docket No. 97-34-388 (Jan. 12, 1998); Mullins v. Logan County Bd. of Educ., Docket No. 94-23-283

(Sept. 25, 1995); Dodson v. McDowell County Bd. of Educ., Docket No. 93-33-243 (Feb. 15, 1994).

5. The restructuring of the transportation department in Monongalia County did not constitute an abuse of the board's discretion.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Monongalia County, and such appeal must be filed within thirty (30) days of receipt of this Decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required byW. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: March 21, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge