ROBERT HUFFMAN,

Grievant,

v. **DOCKET NO. 03-20-159**

KANAWHA COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

This grievance was filed on June 9, 2003, directly at level four following Grievant's termination from his position as a substitute Bus Operator on June 3, 2003. He alleged his termination was arbitrary and capricious, and that he had been treated differently than other, similarly situated drivers. He seeks reinstatement as a substitute Bus Operator, back pay and restoration of any lost benefits. A hearing was held at the Grievance Board's Charleston office on August 4, 2003, where Grievant was represented by Rosemary Jenkins of the American Federation of Teachers - W. Va., and Respondent was represented by counsel, James W. Withrow, Esq. The matter became mature for decision September 22, 2003, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Based on a preponderance of the evidence adduced at the level four hearing, I find the following facts have been proven:

FINDINGS OF FACT

1. Prior to his termination on June 3, 2003, Grievant had been employed by Respondent since December 14, 2000, as a substitute Bus Operator.

2. On March 15, 2002, Grievant was placed on a plan of improvement because he had had three preventable accidents within one year, and there were several complaints about his operation of a bus. In April 2002, Grievant was informed he had not improved and would be removed from the

substitute driver list.

3. Grievant filed a grievance over his improvement plan. The grievance was resolved at level two when Respondent agreed to continue the plan of improvement, giving Grievant ten additional days of training by operators selected by Grievant (Wade Carnell and Joyce Withrow), followed by an evaluation by Bill Rhodes, a State School Bus Inspector.

4. Grievant's second plan of improvement, created after his first grievance, listed in its Statement of Deficiency:

> The following deficiencies were found during the March 2002 Plan of Improvement:
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> 1. Student Loading - failure to activate the 8-way lighting system
> 2. Railroad Crossing - failure to follow procedures
> 3. Pre-trip Inspection
> 4. Observance of Speed Limits
> 5. Tail Swing - checking for clearance in mirrors
> 6. Reference Points - turning and backing
> 7. Mirror Usage
> 8. Clutch and Gear Usage

Pre-Termination hearing Exhibit KCS No. 2.

5. The improvement plan listed Karen P. Williams, Coordinator of Personnel, Brenda Taylor, Transportation Supervisor of Safety and Training, and George Beckett,Administrative Assistant, as the Improvement Team, and provided that additional support, training and assistance would be provided by Mr. Carnell and Ms. Withrow.

6. The Improvement Plan listed, under "Corrective Action,"

> Evaluation of Robert Huffman's progress will be ongoing and immediate feedback will

be given throughout the retraining period. Unsatisfactory progress will result in Robert's dismissal as a substitute Bus Operator.

7. Mr. Huffman signed the Improvement Plan on September 13, 2002, indicating it was mutually developed and he received a copy of it.

8. During the second improvement plan, Grievant received training for ten days by Ms. Withrow and Mr. Carnell. On each day, the trainer noted Grievant performed adequately on many tasks, but noted several deficiencies and indicated Grievant needed more practice.

9. After the training, Grievant was given a pre-test evaluation by Ms. Taylor. Grievant failed to complete the pre-trip inspection, and Ms. Taylor noted several deficiencies during the driving portion of the pretest, such as problems staying in the driving lane and an inability to follow the student pick-up procedures.

9. On October 15, 2002, Mr. Rhodes administered a road test and a written test, neither of which Grievant passed. (See footnote 1)

10. On the road test, Mr. Rhodes noted Grievant had made an acceptable pre- trip inspection, but in his report noted Grievant “made the following driving errors: used gears improperly (over rev engine), stalled the engine twice and failed to keep the vehicle in lane on several occasions, which indicated a lack of basic control skills.” 11. The road test was made in a spare bus that had been approved by Respondent's mechanics, had a valid inspection, and had been inspected and approved by both Mr. Rhodes and Grievant.

12. On October 22, 2002, Grievant's Improvement Team met with Grievant and his representative. Although Grievant expressed his opinion that he could do the job better than most of the veteran drivers at the terminal, after discussion, the Team concluded Grievant had not showed satisfactory improvement, and recommended his termination to the Superintendent.

13. Any Kanawha County Bus Operator who has had three preventable accidents within one year is given retraining.

DISCUSSION

Grievant is challenging his termination, a disciplinary action in which the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh

County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). The grounds upon which a Board may dismiss any person in its employment are immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance substantiated by an employee performance evaluation, or conviction on a felony charge. W. Va. Code § 18A-2-8. Grievant was dismissed for unsatisfactory performance, which Respondent argues is proven by Grievant's failure to improve his performance despite two improvement plans and extensive retraining. Grievant maintains his termination was the result of discrimination by his immediate supervisor and was excessive given the nature of his driving mistakes. The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8, and must be exercised reasonably, not arbitrarily and capriciously. Bell v Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). 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). "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." Blake v. Kanawha County Bd. of Educ., Docket No. 01-20-470 (Oct. 29, 2001).

Here, the evidence supports Respondent's contention that Grievant's performance as a Bus Operator was unsatisfactory, and that he was unable to improve his performance despite efforts to retrain him. Grievant agreed to the conditions of the second improvement plan, which contained the proviso, “Unsatisfactory progress will result in Robert's dismissal as a substitute bus operator.” The consensus of the Improvement Team, some of which were handpicked by Grievant to eliminate any threat of bias, was that he did not improve, and that his performance merited his termination as a substitute Bus Operator. The Improvement Team considered the reports of the trainers, who worked closely withGrievant, and the report of the State School Bus Inspector who re-tested Grievant. It took into account Grievant's self-assessment. Although Grievant suggested he was in fact terminated because his supervisor, Nancy Bowen-Kerr, disliked his father, there was no evidence she had

anything to do with his improvement plan or that she had any influence on his performance. Respondent investigated Grievant's assertions that the bus on which he took his final road test was defective, and found Grievant's assertions to be unfounded. Grievant failed to prove Respondent's decision was anything but based on the facts and circumstances which should be considered in the employment of a Bus Operator.

Grievant also contended he was discriminated against by being placed on an improvement plan, while other Bus Operators who had preventable accidents were not. "W. Va. Code § 18-29-2(m) defines 'discrimination' as 'any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.'" Hogsett, et al., v. Wayne County Bd. of Educ., Docket No. 01-50-056 (Apr. 5, 2001). In order to establish a claim of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievants must show:

> (a) that they are similarly situated, in a pertinent way, to one or more other employee(s);
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> (b) that they have, to their detriment, been treated by their employer in a manner that the other employee(s) has/have not, in a significant particular; and
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> (c) that such differences were unrelated to actual job responsibilities of the Grievants and/or the other employee(s) and were not agreed to by the Grievants in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Grievant was not similarly-situated in a significant way to the other Bus Operators to which he compared himself. Grievant had had three preventable accidents within a one- year period, while the other drivers had not. Grievant presented no evidence that another driver with the same accident rate had not been retrained. Grievant did not establish a *prima facie* discrimination claim.

Grievant asserted that he should not have been dismissed because his driving errors were minor. A disciplinary action may be mitigated if the penalty assessed is clearly excessive or clearly disproportionate to the offense. Factors to be considered in deciding whether to mitigate a penalty are the employee's past disciplinary record, the clarity of notice to the employee of the rule violated,

whether the employee was warned about the conduct, and mitigating circumstances. *See* Gunnells v. Logan County Bd. of Educ., Docket No. 03-23-135 (Aug. 21. 2003). The burden of proof is on the Grievant to prove these defenses to the disciplinary action. Gunnells, *supra.* Grievant had a record of poor performance as a Bus Operator, and was placed on two improvement plans. The second improvement plan, which Grievant helped develop and to which he agreed, unequivocally notified him of the consequence of a failure to improve. Although Respondent offered to re-employ Grievant in a different service personnel classification, he refused the offer. The only possible mitigating circumstance is the fact that Grievant did not expressly agree to a written test at the end of his second improvement plan, and that he had already passed the same test. Even if this test were removed from consideration, the evidence still supports Respondent's contention that Grievant's performance as a Bus Operator was unsatisfactory. Grievant therefore did not prove his dismissal as a Substitute Bus Operator should be mitigated. The following conclusions of law support this decision:

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CONCLUSIONS OF LAW

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989).

2. The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8, and must be exercised reasonably, not arbitrarily and capriciously. Bell v Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). *See* Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

3. The grounds upon which a Board may dismiss any person in its employment are immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance substantiated by an employee performance evaluation, or conviction on a felony charge. W. Va. Code § 18A-2-8.

4. “W. Va. Code § 18-29-2(m) defines 'discrimination' as 'any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or

agreed to in writing by the employees.'" Hogsett, et al., v. Wayne County Bd. of Educ., Docket No. 01-50-056 (Apr. 5, 2001).

5. In order to establish a claim of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievants must show:

> (a) that they are similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that they have, to their detriment, been treated by their employer in a manner that the other employee(s) has/have not, in a significant particular; and
>
> (c) that such differences were unrelated to actual job responsibilities of the Grievants and/or the other employee(s) and were not agreed to by the Grievants in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

6. 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 Resources, Docket No. 93-HHR-322 (June 27, 1997).

7. Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 196 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)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education. *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). 8. A disciplinary action may be mitigated if the penalty assessed is clearly excessive or clearly disproportionate to the offense. Factors to be considered in deciding whether to mitigate a penalty are the employee's past disciplinary record, the clarity of notice to the employee of the rule violated, whether the employee was warned about the conduct, and mitigating circumstances. Gunnells v. Logan County Bd. of Educ., Docket No. 03-23-135 (Aug. 21. 2003); Knuckles/Burdette v. W. Va. State College, Docket No. 99-BOD-123/131 (Sept. 28, 1999); Jarvis v. W. Va. Dep't of Health and Human Resources, Docket No. 97-HHR-318 (July 22, 1999); Stewart v. W. Va. Alcohol Beverage Control Comm'n, Docket No. 91-ABCC-137 (Sept. 19, 1991). The burden of proof is on the Grievant to prove these defenses to the disciplinary action. *See* Gunnells, *supra*.

For the foregoing reasons, this grievance is hereby **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. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date:

October 14, 2003

M. Paul Marteney

Administrative Law Judge

Footnote: 1

The written test, which Grievant contends was not part of the improvement plan, was the same test Grievant had previously passed in order to obtain his Bus Operator certification.