WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DENNIS COTTRILL,
Grievant,

v. **Docket No. 2011-1495-BraED**

BRAXTON COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Dennis Cottrill, filed a grievance against the Braxton County Board of Education ("BCBE"), Respondent, protesting that he was treated differently and less favorably than other bus operators as it related to merged bus routes and the assignment thereof. The original grievance was filed on April 19, 2011, where Grievant provides that he "discovered that several bus routes resulting from the combination of two or more routes would be assigned to a bus operator rather than posted and filled pursuant to W. Va. Code 18A-4-8b" and "this action is inconsistent with Respondent's treatment of other similar situations in the county and as such constitutes discrimination and favoritism as defined in W. Va. Code §6C-2-2." For relief, Grievant requested "posting of the assignments in question, i.e., bus runs #96, #21, and #89 for the 2011-2012 school year and beyond."

A conference was held at level one on May 19, 2011. The grievance was "Granted, in part, in that all bus operators, by virtue of the Board's action on May 26, 2011, are being treated uniformly and DENIED, in part, in that there will be no need to post the additional bus runs," by an order entered at that level on June 6, 2011. Grievant appealed to level two on June 3, 2011, and a mediation session was held on August 17, 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 actions related to merged and reconfigured county bus routes of school year 2011-2012 and the assignment thereof to bus operators, were inconsistent and improper. Grievant contends violation of W. VA. CODE § 18A-4-8B and discriminatory/favoritism per W. VA. CODE § 6C-2-2.

Respondent's actions could and perhaps should have been less convoluted. However, it is not established that Respondent's actions exceeded its discretionary authority as it relates to the issue(s) in discussion. Respondent's actions were ultimately consistent with the articulated plan for reconfigured/modified bus routes. Grievant filed this grievance aware of his particular status, but not fully aware of the criteria used to determine route assignments. It is not established that Respondent's action(s) were illegal. Further, Grievant did not prove his claims of favoritism and/or discrimination.

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 in Braxton County.

2. The bus routes performed in the 2010-2011 school year by Grievant, Sally Hart and Ernest Bennett were set to be significantly altered for the 2011-2012 school year. Their three runs, in essence, were consolidated into two runs.

3. By letter dated January 3, 2011, the grievant was advised that he was "being considered for transfer because . . . his] current bus run is being eliminated and will be absorbed into other current routes." Resp. Ex. 1.

4. Grievant received the proposed transfer letter, dated January 3, 2011, on January 14, 2011. Resp. Ex. 1.

5. Grievant did not request a hearing protesting the issue of his transfer. An offer of a hearing was provided in the January 3, 2011 letter.

6. On January 24, 2011, Braxton County Board of Education voted to include Grievant on the transfer list and notified him of the same by letter dated January 25, 2011. Resp. Ex. 2.

7. Bus operator Hart was permitted to retain a modified version of her assignment for the 2011-2012.[1] Grievant was placed on the transfer list. Bus operator Bennett was reduced in force.

8. Grievant objects to having been placed on the transfer list. Grievant perceived disparate treatment, alleging Respondent's handling of similar situations with

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[1] The change to bus operator Sally Hart's run was estimated at 43% by Respondent's administration.

regard to other bus operators in the county was different. See Grievance Form and Grievant Testimony.

9. Grievant is more senior than bus operator Hart.

10. Grievant received the transfer letter, dated January 25, 2011, no later than February 20, 2011. Grievant Testimony.

11. The instant grievance was initiated on April 19, 2011, over two months after Grievant was notified of the transfer decision.

12. Respondent eliminated a total of 3 bus operator positions after the 2010-2011 school year, and reconfigured many routes. *See Gr. Exs. 3B, 3E* and *3F* (bus routes of terminated operators whose positions were posted to make room for displaced, more senior operators whose runs were eliminated).

13. Respondent's administrative agent, Superintendent of Braxton County Schools, Dennis 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 minor modifications to the routes. The Superintendent considered those routes that changed less than 50% to be minor modifications, rather than new routes.

14. Superintendent Albright determined that the bus operators who had previously driven routes that, when reconfigured/modified, changed by 50% or more would be placed on transfer and the reconfigured/modified routes would be posted as new routes. This is recognized and/or sometimes referenced by others as "the 50% rule."

15. In all instances in the county, where multiple runs were merged into fewer runs, if the resulting run was substantially the same as one or more of the current bus

operator runs, the more senior bus operator was provided the slightly modified run and the less senior bus operator was placed on transfer. If the modifications to both runs were significant, the newly created run was posted following the transfer of the bus operators impacted.

16. The route Grievant had driven during the 2010-2011 school year was eliminated and split between three bus operators; Sally Hart, Ernie Bennett and Steve Nicholas. Gr. Exs. 1 and 2.

17. Grievant's 2010-2011 school year run was not substantially similar to either Sally Hart's or Ernie Bennett's 2010-2011 school year runs.

18. The route Grievant had driven during the 2010-2011 school year was less like the modified run assigned to Sally Hart for the 2011-2012 school year, than that previously driven by Sally Hart during the 2010-2011 school year.

19. The modifications to the route of Sally Hart, #96, from the 2010-2011 school year to the 2011-2012 school year, amounted to less than a 43% change and bus operator Hart accepted the changes.

20. The route Grievant had driven during the 2010-2011 school year was less like the modified run assigned to Steve Nicholas for the 2011-2012 school year, than that previously driven by Steve Nicholas during the 2010-2011 school year.

21. The modifications to the route of Steve Nicholas, #21, from the 2010-2011 school year to the 2011-2012 school year, amounted to a 42% change and Steve Nicholas accepted the changes to his assigned route.

22. Grievant is interested in both the routes assigned to Sally Hart, #96, and the route assigned to Steve Nicholas, #21, and would apply for both, if posted. It is unknown

how many other more senior bus operators would also apply for the routes assigned to Sally Hart, #96, and the route assigned to Steve Nicholas, #21, if posted.

23. Neither Sally Hart nor Steve Nicholas grieved the modifications to their routes, nor did Ernie Bennett nor Shirley Skidmore, the other bus operators whose routes and assignments were directly impacted by the changes.

24. By way of comparison, Grievant notes that the routes of bus operators Alvie Loyd and Will Scheifer were combined and posted, with Will Scheifer being the successful candidate for the job.

25. After combining the routes previously driven by Loyd and Scheifer in the 2010-2011 school year, the newly configured route for the 2011-2012 school year evidenced a change of greater than 50% for both drivers. The combined route was posted as a new run.

26. Grievant was not and is not interested in the Loyd-Scheifer route and did not apply for the same.[2]

27. The Loyd-Scheifer route was designated a new route and the routes of Sally Hart and Steve Nicholas were identified as modified routes by Respondent.

28. The procedure that Respondent used for assigning bus operators to routes designated "new routes" as opposed to "modified routes," was identified and explained to be a different processes. The two types of identified routes acquired designated bus operators by different assigned processes.

[2] It is believed that Grievant highlights the incidence in an attempt to show that the modified routes of Sally Hart, #96, and Steve Nicholas, #21, should also have been posted, in furtherance of his discrimination/favoritism claim.

29. Grievant was aware of a dispute in the assignment of one or more routes involving bus operators Geary White and Bill Rose. Bus operator Rose specifically spoke with Grievant regarding Respondent's assignment of modified bus routes. A dispute in one form or another regarding the bus route assignment of Rose and White was ongoing for quite some time. *See Bill Rose v. Braxton County Bd. of Educ.*, Docket No. 2011-1442-BraED. Mr. Rose indicated to Grievant a belief that his situation (White-Rose) was being handled different than Grievant's route assignment.

30. While at the bus garage in Flatwoods, WV, to get work performed on his bus, Grievant was present for an unplanned gathering of bus operators, including Bill Rose, Alvie Loyd, Robert & Sherry Stump, and most likely Steve Nicholas. It was being discussed that some reconfigured bus routes would be posted and some reconfigured bus routes would not be posted. While the date of this gathering is not established with much specificity, testimony of various witnesses estimate the time period to be March or April 2011.

31. At the time of the initial filing of his grievance, Grievant 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).

32. 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 bus operator White, thereby 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 White, a more senior driver than Bill Rose, whose route was reconfigured/modified by less than 50%.

33. Grievant was transferred for the current 2011-2012 school year to drive route #97 which was a piece of Ms. Hart's run during the 2010-2011 school year.

34. Pursuant to this grievance action, Grievant seeks the posting of the Hart bus run #96 and the Nicholas bus run #21.

35. Subsequent to events discussed, Grievant bid into a posted vacancy and has been driving the same since the beginning of the 2011-2012 school year. This route is not in the same area of Braxton County as his previously assigned route.

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.*

Grievant does not question the necessity of consolidation of runs, merely the way the new consolidated runs were filled for the 2011-2012 school year. Grievant disputes the assignment of the routes assigned to bus operators Sally Hart and/or Steven Nicolas for

the 2011-2012 school year. Grievant contends the *modus operandi* utilized by Respondent results in discriminatory treatment. Respondent maintains its actions were lawful and within the parameters of the discretionary authority Respondent holds with regard to the operations of a school system.

It is Grievant's contention that had Grievant been accorded the same treatment as other bus operators whether that be by posting of the merged route(s) for the 2011-2012 school year or assignment of the most senior of the involved employees to the "merged" route, he would have received the route performed by Ms. Hart or at least had a chance at it through the posting procedure. Grievant contends he suffered harm and has standing to challenge the actions of Respondent.[3] Pursuant to this grievance action Grievant avers that bus run #96 (Hart) and bus run #21 (Nicholas) should be posted.

Respondent avers that Grievant failed to commence this grievance within the mandatory time-frame for such an action. "If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997)." *Carnes v. Raleigh County Bd. of Educ.,* Docket No. 01-41-351 (Nov. 13, 2001).

W. VA. CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." W. VA. CODE § 6C-2-4(a)(1) identifies the time lines for filing a grievance and states:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent

[3] Grievant contends merged routes should have been posted. It is not clear if Grievant recognizes and challenges "the 50% rule" as legitimate consideration for posting or non-posting of consolidated routes.

> occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing. . . .

The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998); *Goodwin v. W. Va. Dep't of Transp./Div. of Highways*, Docket No. 2011-0604-DOT (Mar. 4, 2011).

When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

Respondent argues that the event giving rise to this grievance was the transfer of Grievant on January 24, 2011 or, at the latest, the Board's action on March 14, 2011 to transfer bus operators Rose and White (the bus operators to which Grievant originally compared himself). Respondent highlights the number of working days between these events and the filing of the Level One grievance filing April 19, 2011, by Grievant, far

exceeds the fifteen day proscription period.[4] In response, among other contentions, Grievant argues it was the discovery that Respondent would not treat all of the consolidated runs in the same manner that constituted the grievable event and not the placement of Grievant on the transfer list which triggers the tolling of the grievance window. The undersigned is persuaded, in part, with Grievant's argument and is of the opinion that further analysis is warranted.[5]

Grievant was aware of his particular placement on the transfer list, he was unhappy with Respondent's determination and he did, in deed, neglect to properly protest that issue.[6] If Grievant was contesting his transfer, *per se*, such a grievance would be time-barred. Grievant is protesting what he perceives as disparate treatment.[7] It is understandable that Grievant would not be aware of his perceived comparative events till such events had transpired.

At the time of the initial filing of this grievance, Grievant 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 voted to rescind the transfer of White. Respondent's ultimate determination with regard to White-

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[4] The issue of timeliness was raised by Respondent prior to the Level Two mediation.

[5] While it is disturbing to this ALJ that Grievant's memory of events has a convenient lapse of specificity regarding dates in conspicuous places, the undersigned will refrain from opining regarding several other contentions presented by Grievant addressing the timeliness of the instant grievance.

[6] Grievant did not request a hearing protesting the issue of his transfer. See Finding of Fact (FOF) 3 through 6 and Resp. Exs.1 and 2.

[7] Grievant maintains that Respondent's actions constitute discrimination and favoritism as defined in W. Va. Code § 6C-2-2.

Rose was not readily known or finalized for quite some time after March 14, 2010. *See Bill Rose v. Braxton County Bd. of Educ.*, Docket No. 2011-1442-BraED. Further, Grievant became aware of other disputes regarding the assignment of reconfigured/modified bus routes, which further lead him to believe Respondent's actions were not consistent. The exact time period of Grievant's so-called enlightenment is not established with sufficient certainty to find that Respondent has met its burden by a preponderance of the evidence to demonstrate an untimely filing. It is more than likely that several bus operators discussed the conduct of Respondent with regard to various altered bus routes and each operator possessed an opinion regarding Respondent's *then ongoing* reconfiguring and assignment of bus routes. (Emphasis added). However, it is not established to any reliable degree, when triggering information was known to Grievant. Thus, the undersigned does not find that Respondent established Grievant was unequivocally notified of the finalized actions being challenged as inconsistent.

For discussion purposes, the undersigned is willing to consider the event giving rise to this grievance was the transfer of Grievant in comparison to Respondent's treatment of bus operators of the same or similar situations. However, regarding the merit of the grievance, Grievant's perception and the facts of the matter are not established to be one and the same. Grievant has not demonstrated that Respondent ultimately treated the consolidated routes he has identified any differently than similarly situated merged bus routes.

For purposes of the grievance procedure, 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). "Favoritism" is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless agreed to in writing or related to actual job responsibilities." W. VA. CODE § 6C-2-2(h). In order to establish either a discrimination or favoritism 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); *also see Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004). In support of his claim of discrimination and/or favoritism, Grievant compared himself and his situation with other identified bus operators. Nevertheless, Grievant has not successfully identified a bus operator, of similar or same circumstance, which in comparison to himself was treated differently and/or more favorably.

Grievant has the burden of proving he was treated differently than similarly-situated employees. The procedure that Respondent used for assigning bus operators to routes designated "new routes" as opposed to "modified routes," was identified and explained to be different processes. *See* uncontested testimony of Assistant Superintendent Dilly and Superintendent Albright. Where multiple runs were merged into fewer runs, if the resulting run was substantially the same as one or more of the current bus operator runs, the more

senior bus operator was provided the slightly modified run and the less senior bus operator was placed on transfer. The superintendent considered those routes that changed less than 50% to be minor modifications, rather than new routes. If the modifications to both runs were significant (in excess of 50%), the newly created run was posted following the transfer of the bus operators impacted. New routes were posted which bus operators could be awarded through the posting procedure. Routes with minor modifications were not posted. Grievant indiscriminately compares bus operators of both new routes and routes with only minor modifications. The two types of identified routes acquired designated bus operators by different assigned processes. Grievant has failed to establish similarly-situated employees were treated differently.

The routes of both bus operators Sally Hart and Steve Nicholas are identified as modified routes. The modifications to the route of Sally Hart, #96, from the 2010-2011 school year to the 2011-2012 school year amounted to less than a 43% change and bus operator Hart accepted the changes. The modifications to the route of Steve Nicholas, #21, from the 2010-2011 school year to the 2011-2012 school year amounted to a 42% change and Steve Nicholas accepted the changes to his assigned route. Neither route fits the designation of "new route." Grievant has not demonstrated that the routes of Hart bus run #96 and the Nicholas bus run #21 must be posted.

After some acknowledged missteps, Respondent implemented a coherent process for assignment of bus operators to reconfigured/modified routes, e.g., referencing White-Rose. Grievant has not established that he has been treated differently and to his detriment, than any other similarly situated bus operator. The route Grievant had driven during the 2010-2011 school year was eliminated and split between three bus operators.

The employee(s) to whom Grievant compared himself are not similarly situated to Grievant with regard to the circumstances of their respective bus route assignments. Specifically, Grievant was not the more senior driver of two combined routes; nor was any driver's route so substantially changed that it created a new route to be posted. All new routes, those that changed by 50% or more, were posted.

Lastly, 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. However, that discretion must be tempered in a manner that is reasonably exercised, in the best interest of the schools, and in a manner which is not arbitrary and capricious. *Syl. Pt. 3, Dillon v. Bd. of Educ.,* 177 W.Va. 145, 351 S.E.2d 58 (1986). "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). 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)).

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).

It was not demonstrated the Respondent's decision to eliminate Grievant's assignment and, subsequently, make minor modifications to the bus routes of other bus operators, was either arbitrary or capricious. Nor has Grievant established such action was 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, or 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 case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008).

2. When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket

No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994).

3. W. VA. CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article. W. VA. CODE § 6C-2-4(a)(1) identifies the time lines for filing a grievance and states:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing. . .

4. The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998); *Goodwin v. W. Va. Dep't of Transp./Div. of Highways*, Docket No. 2011-0604-DOT (Mar. 4, 2011).

5. Respondent has not established by a preponderance of the evidence an untimely filing of this grievance. Respondent did not establish when Grievant was unequivocally notified of the actions being challenged as inconsistent.

6. It is well-recognized that county boards of education have substantial discretion in matters related to hiring, assignment, transfer, and promotion of school personnel. However, that discretion must be tempered in a manner that is reasonably

exercised, in the best interest of the schools, and in a manner which is not arbitrary and capricious. *Syl. Pt. 3, Dillon v. Bd. of Educ. of County of Wyoming,* 177 W. Va. 145, 351 S.E.2d 58 (1986).

7. "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). 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).

8. Respondent's decision to eliminate the assignment of Grievant, and subsequently, make minor modifications to the bus routes of other bus operators, has not been established to be either arbitrary, capricious or an abuse of discretion.

9. In order to establish either a discrimination or favoritism 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); *also see Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004).

10. Grievant did not establish Respondent's collective actions with regard to reconfigured county bus routes to be either an example of favoritism or discriminatory.

11. Grievant has not established that the reconfigured routes of bus run #96 and bus run #21 must be posted to be lawfully awarded to county bus operators.

12. Grievant failed to demonstrate that Respondent's actions violated any statute, rule, or policy, or that the actions were arbitrary or capricious.

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