

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Audra Stephens,
Petitioner Below, Petitioner**

vs) No. 11-0260 (Kanawha County 10-AA-91)

**Wayne County Board of Education
and David Crisel, Respondents Below,
Respondents**

FILED

**November 15, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

MEMORANDUM DECISION

Petitioner Audra Stephens appeals the circuit court's order affirming the decision of the West Virginia Public Employees Grievance Board ("Grievance Board") denying her grievance. This appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The Wayne County Board of Education ("Board") has filed its response.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

Petitioner is a bus operator in Wayne County with twenty-three years of experience. In 1997, petitioner, as well as other service personnel, entered into a "Memorandum of Agreement" with the Wayne County Board of Education. This Memorandum notes in pertinent part that bus operators may only have one extracurricular run, "between his/her a.m. and p.m. regular runs on any school day, either bid or assigned in any said area. A bus operator may have one (1) established extracurricular bus run after his/her p.m. regular run."

In December 2008, the Board posted a Service Personnel vacancy listing including a "Spring Valley Shuttle Run", which pays twenty dollars per day. The run was from Spring Valley High School to the Vocational School at 3:15 p.m., and then the driver would return to the school to "finish evening run." The bid was to close on December 11, 2008. Petitioner bid on this run, but was not awarded the run. Petitioner filed a grievance because another bus operator, David Crisel, was awarded the extracurricular run. Crisel has forty-two

years of experience. Petitioner's brother, Dale Stephens, also a bus operator, bid on the extracurricular run as well. Although the record does not indicate how much experience Mr. Stephens has, it is noted that Mr. Stephens was the second most senior operator to bid on the job. Approximately a month after Mr. Stephens bid on the job, he attempted to rescind his bid in writing, but was not allowed to do so because the job had been awarded by that point.

Petitioner's grievance was denied by the Administrative Law Judge ("ALJ") of the Grievance Board. The ALJ found that Petitioner was not the next most senior bus operator who applied for the job, and the next most senior operator did not file a grievance. Therefore, the ALJ found that petitioner did not have standing. Further, the ALJ notes that prior to this instance, the Board had never scheduled a run during an employee's evening run, and thus this issue has never been addressed. The ALJ also notes that all regular bus drivers within the Spring Valley High School area who would be available to make this "shuttle run" would not have completed their evening run prior to making it, as the "shuttle run" occurs right after school lets out. The job was posted so that whomever makes the run will immediately make the short run after school, and then return to the school immediately to make his or her regularly scheduled evening run. The director of transportation testified that any driver who made the run would not have completed his or her regular daily run at the time he or she made this extracurricular run. Moreover, the ALJ did not find the Board's actions arbitrary and capricious in determining that the shuttle run was an extracurricular daytime run. It was clear that no driver would have completed his or her afternoon run prior to completing the shuttle run; thus, the Board's interpretation of what constitutes an extracurricular day run is consistent with the parameters of conceptual definition.

This Court has found as follows:

"Grievance rulings involve a combination of both deferential and plenary review. Since a reviewing court is obligated to give deference to factual findings rendered by an administrative law judge, a circuit court is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations. Credibility determinations made by an administrative law judge are similarly entitled to deference. Plenary review is conducted as to the conclusions of law and application of law to the facts, which are reviewed de novo." Syllabus Point 1, *Cahill v. Mercer County Bd. of Educ.*, 208 W.Va. 177, 539 S.E.2d 437 (2000).

Syl. Pt. 1, *Darby v. Kanawha County Bd. of Educ.*, 227 W.Va. 525, 711 S.E.2d 595 (2011). Moreover, "[a] final order of the hearing examiner for the West Virginia [Public] Employees Grievance Board, made pursuant to W.Va. Code, [6C-2-1], *et seq.* [], and based upon findings of fact, should not be reversed unless clearly wrong." Syllabus Point 1, *Randolph County Bd. of Educ. v. Scalia*, 182 W.Va. 289, 387 S.E.2d 524 (1989)." Syl. Pt. 2, *Darby*,

227 W.Va. 525, 711 S.E.2d 595. “This Court reviews decisions of the circuit court under the same standard as that by which the circuit court reviews the decision of the [administrative law judge].” *Martin v. Randolph County Bd. of Educ.*, 195 W.Va. 297, 304, 465 S.E.2d 399, 406 (1995). Pursuant to this standard, a party may appeal the decision of an administrative law judge on the grounds that the decision is, *inter alia*, contrary to law or a lawfully adopted rule or written policy of the employer; is clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or is arbitrary or capricious or characterized by abuse of discretion. W. Va. Code § 6C–2–5(b)(1), (4), and (5), in part.

On appeal, petitioner argues that the circuit court erred in affirming the Grievance Board’s decision, because she was the most senior bus operator who bid on the job after her brother withdrew his bid, and because she was eligible for the position under the “Memorandum of Agreement” between the parties. After a thorough review of the record and the parties’ arguments herein, we conclude that the circuit court’s order is not contrary to law or written policy, clearly wrong, arbitrary or capricious, or characterized by an abuse of discretion. We attach and incorporate by reference the circuit court’s well-reasoned “Order Affirming Decision of West Virginia Public Employees Grievance Board” entered on January 10, 2011.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: November 15, 2011

CONCURRED IN BY:

Acting Chief Justice Menis E. Ketchum

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Thomas E. McHugh

DISQUALIFIED:

Chief Justice Margaret L. Workman

FILED
2011 JAN 18 PM 12:23
SATHY S. SUTHERLAND
KANAWHA COUNTY CIRCUIT COURT

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

AUDRA STEPHENS
Petitioner,

v.

Civil Action No. 10-AA-91
(Judge King)

WAYNE COUNTY BOARD OF EDUCATION
and DAVID CRISEL,
Respondents-Appellants.

ORDER AFFIRMING DECISION OF WEST VIRGINIA
PUBLIC EMPLOYEES GRIEVANCE BOARD)

Kind of Proceeding and Procedural History

The present civil action is an appeal to Kanawha County Circuit Court by the above named Petitioner, Audra Stephens, of the decision rendered by an Administrative Law Judge on April 27, 2010 in a Level III grievance appeal hearing before the West Virginia Public Employees Grievance Board (Docket No. 2009-0904-WayED) in which the Respondent, as Grievant, was denied the relief sought in her appeal to Level III. The Petitioner filed her original grievance in January of 2009 and the relief sought in her grievance was denied at Level I in a decision rendered on February 20, 2009; thereafter Grievant appealed to Level II and an unsuccessful mediation session was held on June 12, 2009, resulting in the Petitioner filing the above referenced appeal to Level III.

Statement of Facts

Petitioner, Audra Stephens, is a regularly employed bus operator for the Respondent, Wayne County Board of Education.

On January 23, 2009, the Petitioner filed her grievance with the Respondent, claiming that the Respondent had violated a memorandum of agreement previously agreed upon by the Respondent and its school bus operators when it awarded an extracurricular bus driving assignment, identified herein as the "Spring Valley High School shuttle run" to David Crisel. Petitioner basically claimed that under the terms of the above memorandum of agreement, this bus driving assignment should have been categorized by the Respondent Board as an evening run instead of a daytime run, and that Mr. Crisel, who already had an evening run, should not have been awarded this run because, under the above memorandum of agreement, a county bus operator could only have a maximum of one day and one evening extracurricular driving assignment during any given school day.

The specific relief sought by the Petitioner in her written Level I grievance demanded that the above shuttle run be awarded "to the next senior driver who bid on that position, together with back pay." Subsequently, at the Level I conference, Grievant adjusted the relief requested to contend that she should be awarded this extracurricular assignment.

The parties to this appeal were agreed that the Respondent, Wayne County Board of Education, and various organizations representing Wayne County bus operators, entered into a Memorandum of Agreement in 1997, whereby all agreed to certain procedures to be followed by the parties with regard to various types of bus assignments, etc.

Under the section of this Memorandum entitled “MISCELLANEOUS”, under Subsection “S” appears the following specific language: “NO BUS OPERATOR shall have more than one (1) extra curricular bus run, between his/her a.m. and p.m. regular runs on any school day, either bid or assigned in any said area. A bus operator may have one (1) established extra curricular bus run after his/her p.m. regular run.”

During the Level III hearing concerning this grievance, the Petitioner, the Intervenor (David Crisel) and the Respondent and also the Petitioner’s brother, Dale Stephens, a fellow bus operator within the county, all agreed that the above Subsection “S” meant that a regularly employed Wayne Co. Board of Education bus operator, if the proper successful applicant, in addition to his/or her regular daily bus run, could have on any given school day, a “daytime” extracurricular assignment of a bus run and also an “evening” extracurricular assignment of a bus run. All of the above individuals, together with Supervisor David Thompson of the Respondent’s Transportation Department, also confirmed that various regularly employed bus operators within the Wayne County school system over the past several years and up to the present, have had two such extracurricular assignments during a school day, in addition to their regular bus runs.

With regard to the extracurricular assignment that is the issue of the present appeal, Respondent Board posted a newly created extracurricular bus driving assignment described as “Spring Valley Shuttle Run” for the posting period of December 5-11, 2008. The position was specifically described in the posting as follows: “This run will pay \$20.00 each day when students are transported. This run will end when there is no longer a need. Driver will transport Spring Valley High School students from High School to Vocational at 3:15, then return to finish evening run.”

All of the parties at Level III were also in agreement that the purpose of this extracurricular shuttle bus run was to quickly transport certain Spring Valley High School students who were participating in certain extracurricular activities immediately after school from Spring Valley High School to its Vo-Tech school building located just across the main public road and approximately two hundred yards away. All parties also agreed that this shuttle run would only take between five to ten minutes to complete and that it occurred at a time when all regular bus operators in the area were still in the process of making the afternoon portion of their regular daily runs. Under the terms of the above memorandum of understanding, extracurricular bus driving assignments such as this shuttle run were only available to regular bus operators and not substitute bus operators.

Among the applicants for this position during the posting period were the Petitioner, the Intervenor, David Crisel, and the Petitioner's brother, Dale Stephens. According to the seniority roster submitted as evidence by the Respondent, and also according to the testimony of the above three named applicants, the Intervenor, David Crisel, was the most senior bus operator in the county school system, and Dale Stephens in turn, was a more senior bus operator in the county school system than his sister, the Petitioner, Audra Stephens and the three of them, in the above order, were also the most senior of the applicants for the above shuttle run assignment at issue here.

On December 16, 2008, the Respondent, at its next regular board meeting after the above posting period had concluded, awarded the Spring Valley shuttle run to the Intervenor, David Crisel. Dale Stephens did not file a grievance with regard to Mr. Crisel being awarded the above assignment. However, by letter dated January 16, 2009, thirty days after the Spring Valley assignment had been awarded by the Respondent to Mr. Crisel at a regular meeting held on December 16, 2008, Dale Stephens requested the Respondent's then Service

Personnel/Transportation Director, Tab Mathis, to pull his bid with regard to the Spring Valley shuttle run. By letter dated February 19, 2009, Director Mathis informed Dale Stephens that since Mr. Stephens did not request a withdrawal of his bid upon this position until a month after the position had been awarded to Mr. Crisel, that Mr. Stephens' bid could not be pulled after the fact and therefore "must remain a part of the bid record on this posting."

During his direct testimony at Level III on behalf of the Petitioner, his sister, Dale Stephens claimed that he had orally requested Director Mathis via telephone, to pull his bid on the Spring Valley Shuttle run assignment on December 12, 2008, the day after the closing of the bidding period. He also stated that he had sent the letter of request to pull his bid to Director Mathis a month after the position had been awarded to Mr. Crisel to confirm in writing his request and to make it clear that he was not the next most senior applicant for the position that was to be the subject of his sister's grievance.

However, during cross-examination at Level III, Dale Stephens admitted that his letter to Director Mathis of January 16, 2009 did not in any way mention that he had purportedly previously requested on December 12, 2008 via telephone conversation with Director Mathis that his bid on the Spring Valley shuttle run be pulled. Further, on cross-examination, Mr. Stephens acknowledged that his letter was very detailed otherwise, with regard to the specifics of the run itself, the dates of the posting period, the amount of pay involved, etc.

Mr. Stephens' letter in fact stated in his opening sentence the following: "Please let the record reflect as of January 16, 2009, I am asking to pull the bid I sent to you on December 10, 2008 from the list of drivers who bidded on the extra curricular run from Spring Valley High to Vo-Tech in the evening."

On cross-examination at Level III, Dale Stephens also acknowledged that the letter he received from Director Mathis under date of February 19, 2009 never mentioned anything about Mr. Stephens ever having telephoned Director Mathis and requested that his bid be pulled.

Director Mathis's letter to Dale Stephens refusing Mr. Stephens' request for withdrawal of his bid, in fact stated in part as follows: "(3) Your request for withdrawal of your name for consideration of this position was not made until January 16, 2009, nearly a month after the above assignment had been awarded to Mr. Crisel."

Wayne County Board of Education Transportation Department Supervisor David Thompson testified at Level III that he was involved in the planning and posting of the Spring Valley shuttle bus run assignment along with former Director Mathis.. He stated that this extracurricular assignment created a unique timing situation for the Transportation Department because the run needed to be performed immediately after school let out at Spring Valley High School so as to quickly transport students headed for extracurricular activities at the Vo-Tech Center located across a busy highway from the high school. He stated this run was added to prevent these students from crossing the public highway on foot and that the run needed to be done immediately after school so that these students would not be tempted to cross the highway on foot. He stated that the Transportation Department had previously been paying Dale Stephens extra to transport these students during his p.m. regular daily run without benefit of any job posting, but that since this was actually a separate extracurricular run, the shuttle run was then posted as such.

Supervisor Thompson further stated that all the Respondent's regular bus drivers located in the Spring Valley area during the time of day at which the new extracurricular shuttle run would occur, would all still be in the process of finishing the afternoon portions of their daily runs, so this

extracurricular shuttle run was posted in a way that specifically informed potential applicants that these particular students would be transported at 3:15 p.m. (the time that Supervisor Thompson thought Spring Valley High School students were being dismissed from their classes) by whomever was the successful applicant, and then said successful applicant would then immediately return to Spring Valley High School to finish his or her portion of the p.m. run of his or her daily regular run.

Supervisor Thompson stated that according to his interpretation of Subsection “S” of the section entitled “MISCELLANEOUS” under the Memorandum of Agreement, he was of the opinion that this shuttle run should be considered an extracurricular daytime run assignment by any of the drivers who was the successful applicant, because any such driver would not have completed his regular daily run at the time he or she made this extracurricular run.

Supervisor Thompson was also of the opinion that the Spring Valley shuttle bus run could not be considered as an evening extracurricular bus run because under Subsection “S” of the “MISCELLANEOUS” section of the Memorandum, a bus operator may have one extracurricular bus run after his/her p.m. regular run and since none of these bus drivers would have completed his/her daily bus run at the time of the Spring Valley shuttle run, then none of them could be considered as eligible for an evening extracurricular bus run scheduled for that particular time of the school day.

The afternoon portion of Petitioner’s regular daily bus run begins at around 2:15 p.m. each day and does not conclude until approximately 4 p.m. The Petitioner did not have any extracurricular assignments at the time of filing of her grievance.

The afternoon portion of David Crisel’s regular daily bus run begins around 2:30 p.m. and concludes around 3:35 p.m. Mr. Crisel, the most senior bus operator in the county, has an extracurricular evening run assignment, beginning at 4:30 p.m., that occurs well after the conclusion

of the p.m. portion of his regular daily run, and also has, as his daytime extracurricular assignment the Spring Valley shuttle bus run that is the subject of the present grievance.

The successful applicant, David Crisel, testified at Level III that he picks up and delivers various middle school students during the first part of the afternoon portion of his regular daily run and thereafter travels to Spring Valley High School where his bus is the first bus in line when high school is dismissed; he then picks up and transports the students designated for the Spring Valley shuttle bus run across the public highway to the Vo-Tech Center and then immediately returns to the high school and gets in line and picks up the remainder of the high school students who are part of his daily bus run and delivers these students to their residences or other designated locations. Mr. Crisel stated that the Spring Valley shuttle bus run is very short and only takes about five minutes to complete before he returns to the bus line at the high school.

The Administrative Law Judge at Level III denied the above relief sought by the Petitioner and held that the Respondent, in being confronted with a unique situation in which any of its regular bus operators bidding upon the assignment at issue here, would be compelled to make this extracurricular bus run before the completion of his/her regular afternoon run, did not act arbitrarily or capriciously in determining that this unique extracurricular bus run should be considered as a daytime extracurricular bus run under the definition of such as set out in the Respondent's Memorandum of Agreement with its county bus operators; and further the ALJ denied the above relief sought on the basis that the Grievant could not prove that she had suffered any injury-in-fact from not being awarded this extracurricular assignment because she could not show entitlement to the position because she was not "next in line" for said position.

Issue Presented

A. Was the Administrative Law Judge's decision arbitrary and capricious in determining that the Wayne County Board of Education's decision to consider a unique extracurricular run that occurred before the completion of any regular bus operator's regular p.m. run an extracurricular day run and not an evening run under the terms and conditions of a memorandum of agreement between the Respondent Board and its county bus operators?

B. Was the Administrative Law Judge's decision arbitrary and capricious, or not based upon the facts, in determining that the Petitioner was not "next in line" for the position at issue here and that the Petitioner therefore failed to demonstrate any entitlement to the position or compensation?

C. Was the Level III grievance appeal decision of the Administrative Law Judge clearly wrong based upon any of the appeal provisions of W. Va. Code § 6C-2-5?

Points and Authorities

A party to a proceeding before the West Virginia Public Employees Grievance Board may appeal the matter to the Circuit Court of Kanawha County on the grounds that the administrative law judge's decision (1) is contrary to law or lawfully adopted rule or written policy of the employer; (2) exceeds the administrative law judge's statutory authority, (3) is the result of fraud or deceit, (4) is clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (5) is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. W.Va. Code § 6C-2-5. The circuit court's scope of review of a hearing examiner's decision in a grievance case is limited to the five grounds enumerated in this section. *Parker v.*

Summers County Bd. of Educ., 185 W. Va. 313, 406 S.E.2d 744 (1991).

“Grievance rulings involve a combination of both deferential and plenary review. Since a reviewing court is obligated to give deference to factual findings rendered by an administrative law judge, a circuit court is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations. Credibility determinations made by an administrative law judge are similarly entitled to deference. Plenary review is conducted as to the conclusions of law and application of law to the facts, which are reviewed de novo.” Syllabus Point 1, *Cahill v. Mercer County Bd. of Educ.*, 208 W. Va. 177, 539 S.E.2d 437 (2000).

[A] final order of the hearing examiner for the West Virginia Educational Employees Grievance Board, made pursuant to W. Va. Code § 18-29-1, *et seq.* (1985), and based upon findings of fact, should not be reversed unless clearly wrong. Syllabus Point 1, *Randolph County Bd. of Educ. v. Scalia*, 182 W. Va. 289, 387 S.E.2d 524 (1989); *Keatley v. Mercer County Bd. of Educ.*, 200 W. Va. 487, 490 S.E.2d 306 (1997).

A court may set aside a decision of a hearing examiner for the board if it is arbitrary, capricious, an abuse of discretion, or contrary to law; the scope of the review under the arbitrary and capricious standard is narrow, and a court is not to substitute its judgment for that of the hearing examiner. *Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297, 465 S.E.2d 399 (1995).

County boards have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel, but this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. *Dillon v. Bd. of Educ. of County of Wyoming*, 177 W. Va. 145, 351 S.E.2d 58 (1986).

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 Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996).” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 198 W. Va. 604, 474 S.E.2d 534 (1996).

It is well settled law in West Virginia that an administrative agency’s interpretation of its statutes are given great weight unless clearly wrong. *See Dillon v. Bd. of Educ. of County of Mingo*, 171 W. Va. 631, 301 S.E.2d, 588, 590-91 (1983).

In order for a grievant to demonstrate entitlement to a position or compensation, it is necessary to establish he or she was ‘next in line’”. *See Jamison v. Monongalia County Bd. of Educ.*, Docket No. 2008-0293-MonED (Aug. 27, 2008); *Jamison v. Monongalia Co. Bd. of Educ.*, Docket No. 05-30-338 (Jan. 20, 2006); *Richards v. Kanawha Co. Bd. of Educ.*, Docket No. 99-20-108 (May 5, 1999).

“When the relief sought by a grievant is speculative or premature, or otherwise legally insufficient, [the] claim must be denied.” *Lyons v. Wood Co. Bd. of Educ.*, Docket No. 89-54-601 (Feb. 28, 1990); *See Clark v. Putnam Co. Bd. of Educ.*, Docket No. 97-40-313 (April 30, 1998).

DECISION

After carefully reviewing the Administrative Law Judge’s decision, the record of this grievance as forwarded by the West Virginia Public Employees Grievance Board, and the briefs submitted by opposing parties, the Court finds that the conclusions of law considered by the

Administrative Law Judge in this matter were appropriate to the findings of facts and that the Administrative Law Judge's application of these conclusions of law to the facts in this grievance were also appropriate and within his discretion as an Administrative Law Judge and that the Appellant's arguments that the Administrative Law Judge violated or abused any of the grounds for appeal as listed under W. Va. Code § 6C-2-5 are without real substance or merit.

Out of the five possible grounds for appeal to circuit court provided for an appealing party to employ under W. Va. Code § 6C-2-5, the Appellant/Petitioner appears to have chosen three of the above five grounds for appeal, those being that the Administrative Law Judge's decision is contrary to law or a lawfully adopted rule or written policy of the employer; that his decision is clearly wrong in view of the reliable, probative and substantial evidence on the whole record; and that his decision is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. Since one of the Appellant's contentions is that the Level III decision is contrary to law, then a plenary review must be conducted by the Circuit Court as to the conclusions of law and application of law to the facts established concerning the grievance that is the subject of this present appeal, all of which are reviewed de novo." See Syllabus Point 1, *Cahill v. Mercer County Bd. of Educ.*, 208 W. Va. 177, 539 S.E.2d 437 (2000).

The Petitioner's first basic arguments is that the Administrative Law Judge erred in not finding the Respondent's decision to award this extracurricular assignment to David Crisel to be an arbitrary and capricious act in that the Respondent Board should have considered this assignment as an evening extracurricular assignment and not a daytime extracurricular assignment, therefore negating Mr. Crisel as a possible candidate for the position because he already had one such evening assignment, which is the maximum limit of such assignments for bus operators under

the above memorandum of assignment. The Petitioner's second basic argument is that the Administrative Law Judge erred in not considering the Petitioner as "next-in-line" for the position at issue here and considering her brother, Dale Stephens, as being next-in-line, instead. However, a close examination of the wording of the pertinent portion of this memorandum, together with a review of the circumstances and facts of this matter, indicate that the Administrative Law Judge was correct with regard to his determination of both of the two main issues that are the subject of this appeal.

With regard to the issue of whether the ALJ erred in determining whether the bus run at issue here was a daytime assignment under the terms of the above memorandum, the wording of this memorandum must be carefully considered. The exact wording of the pertinent section of the above memorandum is as follows:

"S. NO BUS OPERATOR shall have more than one (1) extra curricular bus run, between his/her a.m. and p.m. regular runs on any school day, either bid or assigned in any said area. A bus operator may have one (1) established extra curricular bus run after his/her p.m. regular run."

It is obvious from the wording of the above cited section that the parties to this memorandum of agreement were not anticipating that circumstances would ever be such that an extracurricular bus driving assignment might occur at a time when all of the available regular bus operators in the area would not have had opportunity to have completed their p.m. portions of their regular daily runs. Since such extracurricular runs go only to regular bus operators under this memorandum of agreement and since it was necessary for the safety of certain students that this shuttle run be made immediately after school at Spring Valley High School (and could be made within a few minutes), the Respondent Board's Transportation Department Supervisor Thompson

testified at Level III that his Department determined that this little shuttle run should be considered a day run under the memorandum of agreement, since it occurred at a time when none of the area bus operators had completed their daily runs and that it could certainly not be considered an evening run under the above memorandum, because an evening run could only occur after a bus operator had fully completed his daily p.m. run. .

The Administrative Law Judge in his analysis of the issue of how this unique extracurricular run should be considered under the above memorandum, carefully considered the strengths and weaknesses of each parties' contentions. He considered that county boards of education have substantial discretion in matters relating to the hiring of school personnel as long as their decisions are in the best interests of the school and are not arbitrary and capricious. *See, Dillon v. Bd. of Educ. of County of Wyoming*, 177 W. Va. 145, 351 S.E.2d 58 (1986). He also found that "Respondent's motivation, analysis and actions indicate an attempt to insure the safety and welfare of the students intrusted to its care" and that "Respondent's actions were taken after a measure of analysis was given to the overall circumstances" and concluded this line of thought by stating that "It is established that Respondent acted with diligence."

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 Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996). *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable.

State ex rel. Eads v. Duncil, 198 W. Va. 604, 474 S.E.2d 534 (1996). In considering the totality of the circumstances involving the legitimate need for the Respondent Board to create and provide an extracurricular shuttle bus run at Spring Valley High School right after the dismissal of school and at a time when none of the regular bus operators in the area had completed their regular p.m. portions of their daily runs and the dilemma that the Respondent Board faced in making a determination of what kind of run this assignment should be considered under the terms of the memorandum of agreement, the ALJ correctly could not find that Respondent had acted arbitrarily or capriciously, or had abused its discretion in determining that the shuttle run was an extracurricular daytime run. As the ALJ so succinctly stated in his decision: "In the circumstances of this case, Respondent's interpretation of what constitutes an extracurricular day run is consistent with the parameters of conceptual definition."

The Petitioner has an equally difficult, if not more difficult, challenge in attempting to show that the ALJ was incorrect in his finding that the Petitioner had not suffered any injury-in-fact, economic or otherwise, because she was not next in line for the position behind the successful applicant, David Crisel.

In order for a grievant to demonstrate entitlement to a position or compensation, it is necessary to establish he or she was 'next in line'. See *Jamison v. Monongalia County Bd. of Educ.*, Docket No. 2008-0293-MonED (Aug. 27, 2008); *Jamison v. Monongalia Co. Bd. of Educ.*, Docket No. 05-30-338 (Jan. 20, 2006); *Richards v. Kanawha Co. Bd. of Educ.*, Docket No. 99-20-108 (May 5, 1999). "When the relief sought by a grievant is speculative or premature, or otherwise legally insufficient, [the] claim must be denied." *Lyons v. Wood Co. Bd. of Educ.*, Docket No. 89-54-601 (Feb. 28, 1990); See *Clark v. Putnam Co. Bd. of Educ.*, Docket No. 97-40-313 (April 30, 1998). The

facts of this matter are indisputable that of the applicants for this position at issue here, David Crisel was the most senior of the applicants; that the Petitioner's brother and fellow bus operator, Dale Stephens, was the most senior applicant after Mr. Crisel; and that the Petitioner, Audra Stephens was the third most senior of these three. The fact is also indisputable that Dale Stephens timely bid upon this position and did not submit a letter to the then Service Personnel /Transportation Director Tab Mathis until a month after the position had been formally awarded by the Respondent to Mr. Crisel. Mr. Stephens attempted to help his sister at the Level III hearing by claiming that he had informed Director Mathis by telephone prior to the position being awarded that he was withdrawing his bid. However, on cross-examination at Level III, Dale Stephens admitted that his letter to Director Mathis of January 16, 2009 did not in any way mention that he had purportedly previously requested on December 12, 2008 via telephone conversation with Director Mathis that his bid on the Spring Valley shuttle run be pulled. Further, on cross-examination, Mr. Stephens acknowledged that his letter was very detailed otherwise, with regard to the specifics of the run itself, the dates of the posting period, the amount of pay involved, etc.

Mr. Stephens' letter in fact stated in his opening sentence the following: "Please let the record reflect as of January 16, 2009, I am asking to pull the bid I sent to you on December 10, 2008 from the list of drivers who bided on the extra curricular run from Spring Valley High to Vo-Tech in the evening."

On cross-examination at Level III, Dale Stephens also acknowledged that the letter he received from Director Mathis under date of February 19, 2009 never mentioned anything about Mr. Stephens ever having telephoned Director Mathis and requested that his bid be pulled.

Director Mathis's letter to Dale Stephens refusing Mr. Stephens' request for withdrawal of

his bid, in fact stated in part as follows: “(3) Your request for withdrawal of your name for consideration of this position was not made until January 16, 2009, nearly a month after the above assignment had been awarded to Mr. Crisel.”

It is therefore well within reason that the ALJ did not accept Mr. Stephens’ explanations of why he sent in his letter of withdrawal of his bid a month after the position had been awarded to the Intervenor. The ALJ was diplomatic in his conclusions on this issue by stating the following:

“Dale Stephens is Grievant’s brother and it is honorable that he would step aside so that his sister might be awarded an extra assignment. But it is not established to the undersigned that Grievant [actually Dale Stephens and not Grievant] did so prior to it being determined that his bid for the position served as a direct obstacle to Grievant’s legal claim. It is not established by a preponderance of the evidence that Grievant suffered a loss certain. A Grievant must show ‘an injury-in-fact, economic or otherwise’ to have what ‘constitutes a matter cognizable under the grievance statute.’ *Lyons v. Wood County Bd. of Educ.*, Docket No. 89-54-601 (Feb. 28, 1990); *Dunleavy v. Kanawha County Bd. of Educ.*, Docket No. 20-87-102-1 (June 30, 1987).”

And finally, the Petitioner’s claim in her brief to this Court, in a footnote, seems to indicate that the Respondent Board never in fact received a bid upon the position at issue here, from David Crisel. Given that the Petitioner made no reference to such a claim in her original grievance and provided no proof of such a claim at her Level III hearing that could be considered as being by a preponderance of the evidence, the Court will not consider such a claim for purposes of this appeal.

The Court therefore ORDERS, ADJUDGES and DECREES as follows:

1. That the decision of the Administrative Law Judge for the West Virginia Public Employees Grievance Board entered in this matter (Docket No. 2009-0904-WayED) on

April 27, 2010, is hereby AFFIRMED.

2. That the objections and exceptions of the Petitioner/Appellant are noted for for the record.

It is further hereby ORDERED, ADJUDGED and DECREED that the Kanawha County Circuit Clerk, in accordance with Rules 10.04, 11.02 and 12.03 of the West Virginia Trial Court Rules, shall provide notice of this decision by providing a certified copy only to all parties of interest, as they are listed at their last known addresses in the Court's file, by WSPS First Class Mail, certified with return receipt requested; or by hand delivery; or by facsimile transmission/communication at the number for such set out in the Court's file.

ENTER this 10TH day of January, 2011.

Charles E. King, Jr.
Judge Charles E. King, Jr.

Copies to be delivered to:

Andrew J. Katz, Esq.
The Katz Working Families Law Firm, LC
The Security Bldg. Suite 1106
100 Capitol Street
Charleston, WV 25301

David Lycan, Atty.
P.O. Box 337
Wayne, WV 25570

W. Va. Public Employees Grievance Board
1596 Kanawha Blvd, E.
Charleston, WV 25311

Joe White, Employee Rep. for David Crisel
109 Barker's Fork Road
Chapmanville, WV 25508

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF THE CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 21ST
DAY OF January, 2011 CLERK
CATHY S. GATSON
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA