IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

THE BOARD OF EDUCATION
OF THE COUNTY OF WYOMING,
Petitioner,

v.

Civil Action No. 18-AA-246
(Carrie L. Webster, Judge)

MARY DAWSON,
Respondent.

FINAL ORDER DENYING APPEAL
AND AFFIRMING GRIEVANCE BOARD DECISION

This matter comes before this Court pursuant to a petition filed by the Board of Education of Wyoming County ("Petitioner" or "the Board"), which appealed a *Decision* of the West Virginia Public Employees Grievance Board ("Grievance Board") dated September 18, 2018. The *Decision* granted Respondent Mary Dawson's ("Respondent") grievance and ordered the Board to alter Respondent's regular bus run and instate Respondent into an extracurricular vocational bus run, with back pay, less compensation earned from other extracurricular bus runs. The Board asserts the *Decision* was in error.

On November 1, 2018, the Court entered its *Order Setting Administrative Briefing Schedule* establishing certain deadlines. Thereafter, the parties, by counsel, submitted their respective briefs and proposed orders.

This Court has reviewed the record and briefs of the parties, and for the reasons set forth below, concludes that Petitioner's appeal must be **DENIED** and the *Decision* of the Grievance Board dated September 18, 2018, is **AFFIRMED**.

STANDARD OF REVIEW

This Court's scope of review is statutorily limited to the five (5) grounds set forth in W.Va. Code § 6C-2-5, which governs the appeal of decisions of the Public Employees Grievance Board. Those grounds are that the 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.

The circuit court must uphold any of the administrative law judge's factual findings that are supported by substantial evidence. *Martin v. Randolph Cnty. Bd. of Educ.*, 195 W.Va. 297, 304, 465 S.E.2d 399, 406 (1995). Furthermore, a final order of the Grievance Board based upon findings of facts should not be reversed unless clearly wrong. Syllabus Pt. 1, *Ohio County Bd. of Educ. v. Hopkins*, 193 W.Va. 600, 457 S.E.2d 537 (1995).

FINDINGS OF FACT

1. Respondent is regularly employed by Petitioner as a bus operator. Respondent has been so employed since 1980. Respondent entered into a Continuing Contract of Employment with Petitioner in 1983. Respondent is the most senior bus operator in Wyoming county.

2. Respondent's original regular bus run required her to transport both elementary and high school students on the same bus at the same time to and from Huff Elementary School. The elementary students attended Huff Elementary and the high school students transferred from Respondent's bus to another bus at Huff.

3. In or about October 1985, Respondent bid on a vocational school run that was posted as "Vocational School Bus Operator, Baileysville Area." Respondent was awarded this run, effective October 15, 1985. Respondent was the only bus operator who would take this run.

4. Respondent made the vocational run between her regular morning and afternoon runs. The vocational rune was from about 8:30 a.m. to 9:00 a.m. and 11:30 a.m. to 12:00 p.m. daily. At that time, Respondent's regular runs did not conflict with the time of her vocational run.

5. In or about 1987 or 1988, the start times for the high school and/or Huff Elementary changed Because their schools would be starting at different times, the high school students and the elemebntary students could no longer ride the same bus. From the evidence presented before the ALJ, it appears that the high chool began to start earlier than the elementary school.

6. The change in the start time in 1987 or 1988 caused a conflict, or an overlap, between

Respondent's regular bus run schedule and her vocational run. The scheduling conflict prevented Respondent from doing both her entire morning regular run and the vocational run. She could transport the high school students from home to their drop off point but would not have time before her vocational run started to go back to pick up the elementary school students along the same route and transport them to Huff Elementary. As a result, someone in the administrative office, whose identity is unknown, modified Respondent' s regular bus run to remove the morning elementary school portion of her regular run. Another driver was then assigned to transport the elementary students to school in the mornings. Respondent continued to transport the high school students each morning and to make her vocational run each day. Respondent also continued to transport both the elementary school students and the high school students home from school each day as part of her regular afternoon bus run. This continued for approximately 30 years.

7. There was no evidence presented to suggest that the morning elementary portion of Respondent's regular run was posted for bid. Another driver was assigned to make only that portion of the morning run. The record is unclear as to the identity of this other driver. Again, it is unknown who made the decision to modify Respondent' s regular morning run, the reasoning therefore, and the decision to assign it to another driver.

8. Respondent continued to make her modified regular run and the vocational run from the time the administration made the change in 1987 or 1988 until September 8, 2017, about thirty years. It is noted that Respondent had started making her original regular bus run, which was the exact same physical route, in 1983. Therefore, she had driven the same physical route for about thirty-four years when the events leading to this grievance occurred.

9. The Wyoming County Board of Education and the members of the administration of Wyoming County Schools have changed numerous times since the 1980s. The administration in place when the decision to modify Respondent's run was made is no longer there.

10. By letter dated March 7, 2017, Petitioner, by Superintendent Deirdre A. Cline, informed

Respondent that her vocational run would be eliminated "[t]o permit the realignment of staff in accordance with the school funding formula and adjustment of the needs of the Wyoming County School System, due to changes in enrollment."[5] Further, all vocational runs were eliminated that personnel season, not just Respondent's.

11. At the time Respondent' s extra-curricular contract was terminated; she was being paid $30.00 per day to perform the morning vocational run.

12. Vocational runs with new terms were later posted for bid for the 2017-2018 school year.

13. Around this time, another employee, who was bidding on a different run, asked for a "deal" like that of Respondent' s, explaining that a portion of Respondent's morning run had been assigned to another driver years prior so that Respondent could continue to drive her vocational run. This comment prompted an investigation into Respondent' s bus runs.

14. Jeffrey Hylton, Director of Safety and Transportation, researched Respondent's regular bus run and the vocational run she had been driving since 1985. Mr. Hylton discovered that Respondent's original regular run had her transporting both elementary and high school students to school in the mornings and to their homes in the afternoons. Further, the Board's meeting minutes from October 14, 1985, showed that Respondent was awarded the vocational run effective October 15, 1985. He found no record of the elementary school portion of Respondent's regular morning run being posted for bid and no record of the Board approving the modification to the morning portion of Respondent's regular bus run.

15. At the time the 2017-2018 school year started, Respondent's vocational run had not been filled. However, for nineteen days, from August 14, 2017, to September 8, 2017, Respondent was assigned to make the vocational run at the direction of Petitioner.

16. Petitioner posted the vocational run that Respondent had been making and Respondent bid on the same.

17. After his investigation, Mr. Hylton concluded that assigning the morning elementary school portion of Respondent' s original regular run to another driver and allowing Respondent to continue to make the vocational run back in 1987 or 1988 was a mistake. Accordingly, Mr. Hylton changed Respondent' s regular bus run back to what it had originally been before the start times of the schools changed, that being, transporting both elementary and high school students to school in the mornings and from school in the afternoons. Respondent did not consent to this change in her regular run.

18. On or about September 11, 2017, the vocational run Respondent had made since 1985 was awarded to a less senior bus operator who had bid on the posting. Respondent was not offered the vocational run despite her years making that run and even making it at the direction of Petitioner from August 14, 2017, until September 8, 2017. As its reason for not offering the vocational run to Respondent, Petitioner cited the conflict between the start times of her newly changed morning elementary and high school runs and the start time of the vocational run. In other words, Petitioner asserts that Respondent was not available to perform the vocational run because at the time it was to start, she was still driving her newly changed regular morning run.

19. The parties do not dispute that Respondent was the most senior applicant for the vocational run posted in or about September 2017. The parties also do not dispute that, but for Mr. Hylto's change to her morning run in September 2017, she would have been awarded the vocational run.

20. From the time the high school and elementary school's start times changed in or about 1987 or 1988 until the end of the 2016-2017 school year, Respondent drove the same modified regular run and the vocational run without incident or interruption. Further, at the beginning of the 2017-2018 school year, she drove the same runs from August 14, 2017, until September 8,2017.

21. As Respondent lost her vocational run, she was being paid less money per day. Respondent subsequently bid on and was awarded two different extra-curricular runs, that being a block

run and a preschool run. The preschool run paid $15.00 per day and the block run paid $30.00 per day. Respondent gave up the preschool run to take the block run. It is unclear from the evidence presented when Respondent was awarded the preschool run and how long she drove it. Also, it is unclear from the evidence presented when Respondent was awarded the block run and how long she drove it.

22. Respondent is the most senior bus operator employed at Wyoming County Schools.

23. The record of this grievance is silent as to the number of bus operators employed by Petitioner in October 1985 when Respondent was awarded the vocational run and in 1987 and 1988 when Respondent's regular morning bus run was modified by administration.

24. No written contracts were presented as evidence at the level three hearing in this matter.

25. The only witnesses called at the level three hearing were Respondent and Mr. Hylton.

DISCUSSION

Petitioner has advanced in support of its *Petition for Appeal*, to-wit: (1) that "[t]he ALJ erred in failing to conclude that a mistake was made"; (2) that "[t]he ALJ erred in finding the mistake could not be corrected if not so corrected within a certain, unidentified, time frame"; and (3) that "[t]he ALJ erred in concluding that personnel statutes are, or cannot be, contravened to correct a mistake." All three of Petitioner's arguments rise and fall on the same factual premise -- that a "mistake" occurred. In fact, Petitioner contends that Ms. Dawson was only able to perform both her regular and vocational bus runs for more than thirty-one (31) consecutive years ***due to a "mistake" made by the Board*** that was suddenly realized in 2017. In other words, Petitioner asserted the theory of "mistake" as an affirmative defense to Ms. Dawson's grievance presented below to the ALJ.

Petitioner, not Ms. Dawson, had the burden of proof with regards to the affirmative defense it raised before the Grievance Board. Petitioner failed to meet its burden of proof on a material

issue to its defense, because Petitioner failed to prove that a "mistake" occurred. Because Petitioner failed to prove that a "mistake" occurred. Petitioner's second argument likewise fails, because Petitioner can assert no right to correct a "mistake" unless it has first proven that a "mistake" actually occurred. It is noted that Petitioner now attempts to buttress its "mistake argument" by referring to it as being a "substantial change" made to Ms. Dawson's regular bus run without Board approval. However, there is no evidence in the record to support a finding or conclusion that any change made to Ms. Dawson's regular bus run was "substantial." To the contrary, the change appears to have been so insignificant that it raised no issues for three decades. Instead, it was only addressed *because another employee* claimed that Ms. Dawson had gotten a "deal" more than thirty years ago. In order to prevail on its affirmative defense of "mistake," Petitioner had the burden to prove that a substantial change resulting in a mistake and necessitating Board approval actually occurred. Petitioner failed to do so.

The *Decision* of the ALJ was properly made upon the evidence presented. Petitioner simply failed to meet its burden of proof to establish the affirmative defense of "mistake." Petitioner's appeal rests entirely on its contention that the change made to Petitioner's regular bus run was significant enough to require Board approval. However, Petitioner failed to demonstrate that the change was, in fact, significant. The uncontroverted facts of the case indicate the contrary (i.e., that the change was insignificant). Indeed, the change was so slight that it garnered no attention for three decades. Then, it only drew attention when another employee sought a "deal" like that given to Ms. Dawson long ago. No evidence of any "deal" was presented to the ALJ. The Board asserted, but failed to prove, that a change to Ms. Dawson's regular bus run in 1987 or 1988 was a mistake.

The uncontroverted facts are that Ms. Dawson transported students for the Board as part of both her regular and vocational bus runs for more than thirty-one (31) years and that she was the most senior bus operator in the county. In reaching her *Decision,* the ALJ properly found that Ms. Dawson had been performing both the regular and vocations bus runs for thirty-one years, and that the Board had no legal

right to suddenly change her schedule in 2017 without her consent and to strip her of the vocational bus run she had held for thirty-one (31) years. The ALJ properly found that the Board' s action in doing so was unreasonable, arbitrary and capricious.

School personnel regulations and laws are to be strictly construed in favor of the employee. Morgan v. Pizzano, 163 W.Va. 454, 256 S.E.2d 592 (1979); Brum v. Bd. of Educ., 215 W.Va. 372, 599 S.E.2d 795 (2004). The ALJ properly concluded that Ms. Dawson's statutory rights under W.Va. Code §§ 18A-4-8(j), 18A-4-8(m) and 18A-4-16(6) had been violated and that Petitioner could not violate Ms. Dawson's statutory rights to action that it deemed necessary to correct a "mistake" that it failed to prove. Before the ALJ, the Board failed to meet it burden of proof as to the affirmative defense of "mistake" it asserted in this matter.

Because the Board failed to demonstrate that the ALJ committed any reversible error, the *Petition for Appeal* should be denied and dismissed and the Decision of the ALJ should be affirmed by this Court.

CONCLUSIONS OF LAW

1. The Court shall "review the entire record that was before the administrative law judge." See W.Va. Code 6C-2-5(c).

2. The circuit court must show deference to the Grievance Board' s findings of fact. See Syl. Pt. 2, Maikotter v. University of West Virginia Bd. of Trustees/West Virginia University, 206 W.Va. 691, 692, 527 S.E.2d 802, 803 (1999). See also Muscatell v. Cline, 196 W.Va. 588,474 S.E.2d 618, 525 (1996).

3. A final order of an ALJ of the West Virginia Public Employees Grievance Board, based upon findings of fact, should not be reversed unless clearly wrong. See generally, Syl. pt.1, Randolph County Bd. of Educ. v. Scalia, 182 W.Va. 289, 387 S.E.2d 524 (1990).

4. The conclusions of law and application of the law to the facts are reviewed *de*

novo. See Cahill v. Mercer County Bd. of Educ., 208 W.Va. 177, 539 S.E.2d 437 (2000); and Martin v. Randolph County Bd. of Educ., 195 W.Va. 297,465 S.E.2d 399 (1995). School personnel regulations and laws are to be strictly construed in favor of theemployee. Morgan v. Pizzano, 163 W.Va. 454, 256 S.E.2d 592 (1979); Brum v. Bd. of Educ., 215 W.Va. 372, 599 S.E.2d 795 (2004).

5. "An employee who was employed in any service personnel extracurricular assignment during the previous school year shall have the option of retaining the assignment if it continues to exist in any succeeding school year. A county board of education may terminate any school service personnel extracurricular assignment for lack of need pursuant to section seven *[§ 18A-2-7]*, article two of this chapter. If an extracurricular contract has been terminated and is reestablished in any succeeding school year, it shall be offered to the employee who held the assignment at the time of its termination. If the employee declines the assignment, the extracurricular assignment shall be posted and filled pursuant to section eight-b of this article." W. Va. Code§ 18A-4-16(6).

6. The ALJ properly concluded that Ms. Dawson's statutory rights under W.Va. Code § 18A-4-16(6) had been violated, because Ms. Dawson' s was entitled to the option to retain the extracurricular assignment she had held for more than thirty (30) consecutive years. 7.

"A service person may not have his or her daily work schedule changed during the school year without the employee's written consent and the person's required daily work hours may not be changed to prevent the payment of time and one-half wages or the employment of another employee." W. Va. Code§ 18A-4-8a(j).

8. "Without his or her written consent, a service person may not be: ... Relegated to any condition of employment which would result in a reduction of his or her salary, rate or pay, compensation or benefits earned during the current fiscal year; or for which he or she would qualify by continuing in the same job position and classification held during that fiscal year and subsequent years." W. Va. Code§ 18A-4-8(m).

9. The ALJ properly concluded that Ms. Dawson's statutory rights under W.Va.Code §§

18A-4-8(j), 18A-4-8(m) had been violated, because the Board was not permitted to change Ms. Dawson's work schedule or to relegate her conditions of employment without her consent.

10. The ALJ properly concluded that Petitioner could not violate Ms. Dawson's statutory rights by taking action that Petitioner deemed necessary to correct a "mistake" it failed to prove.

11. "'County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious.' Syl. pt. 3, *Dillon v. Wyoming County Board of Education,* 177 W. Va. 145, 351 S.E.2d 58 (1986)." Syl. Pt. 2, *Baker v. Bd of Educ.*, 207 W. Va. 513, 534 S.E.2d 378 (2000).

12. An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil,* 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker,* 547 F. Supp. 670 (E.D. Va. 1982)). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hop. v. Health and Human Serv.,* 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W Va. Schools for the Deaf and the Blind,* Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

ORDER

For the reasons stated hereinabove, the Court does accordingly **DENY** the Petition for Appeal and **AFFIRMS** the *Decision* of the Board dated September 18, 2018. It is therefore **ORDERED** that this matter shall be **DISMISSED** and **STRICKEN** from the docket of the Court, preserving Petitioner's objection to the adverse ruling.

It is finally **ORDERED** that the Clerk of Court shall transmit a copy of this Order, duly

certified, to the following:

Rebecca Roush, Esq.
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ENTER this 3 day of 4, 2022.

CARRIE L. WEBSTER, JUDGE

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON CLERK OF 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 8 DAY OF March 2022
CATHY S. GATSON CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA