GLEN SMITH,

Grievant,

v. **Docket No. 97-ABCA-066**

WEST VIRGINIA DEPARTMENT OF TAX AND REVENUE,
ALCOHOL BEVERAGE CONTROL ADMINISTRATION,

Respondent.

D E C I S I O N

This is a grievance by Glen V. Smith (Grievant) submitted pursuant to W. Va. Code §§ 29-6A-1, et seq., alleging that Respondent West Virginia Department of Tax and Revenue, Alcohol Beverage Control Administration (ABCA), improperly reduced his salary when his position was reallocated from the classification of Computer Programmer to Equipment Operator. This grievance was initiated at Level I on January 18, 1996. Following adverse decisions at Levels I and II, Grievant appealed to Level III. A Level III hearing was conducted on August 9, 1996. On January 24, 1997, ABCA Commissioner Rick Atkinson issued a Level III decision, rejecting the recommendations of the Level III Hearing Examiner, and denying the grievance. Grievant appealed to Level IV on February 4, 1997, indicating that the grievance could be decided on the basis of the recorddeveloped through Level III. The parties were provided an opportunity to submit written arguments in support of their respective positions but neither party availed themselves of this opportunity. This matter became mature for decision on May 7, 1997, upon receipt of the complete record from Level III.

The following Findings of Fact pertinent to resolution of this grievance have been determined based upon a preponderance of the credible evidence contained in the transcript and exhibits at Level III.

FINDINGS OF FACT

1. Grievant has been employed by Respondent Alcohol Beverage Control Administration

(ABCA) since January 1987. HT at 6. (See footnote 1)

2. Grievant was initially hired as a Computer Operator. HT at 6.

3. In March 1991, Grievant was selected as a Programmer Analyst Trainee. After one year of training, Grievant became a Computer Programmer. HT at 6.

4. Grievant's superiors were not satisfied with his job performance as a Computer Programmer, and Gary Phillips, Data Processing Manager, issued a verbal warning for poor job performance on June 21, 1995.

5. On June 21, 1995, Grievant met with Mr. Phillips and ABCA Deputy Director Ron Moats. During the course of that meeting, Grievant voluntarily agreed to move to the ABCA warehouse. HT at 34. Grievant's wages and position title were not discussed at the time he agreed to this change. HT at 7. 6. At the time he authorized Grievant's reassignment in June 1996, Mr. Moats understood that Grievant would be seeking other employment in the computer field. HT at 33-36.

7. On January 9, 1996, Mr. Moats wrote to advise Grievant that his position was being reallocated from Programmer, Pay Grade 11, to Equipment Operator, Pay Grade 4. As a result of this reallocation, Grievant's annual salary would be reduced from $20,772 to $16,524, effective February 1, 1996. HT at 13; G Ex 1.

8. Mr. Moats determined that $16,524 was an appropriate salary within Pay Grade 4 for an Equipment Operator because that was the salary of the lowest paid employee in that classification at that location. Mr. Moats believed that paying Grievant more than an Equipment Operator with greater agency seniority and more warehouse experience could create morale problems. HT at 38.

9. Grievant protested this salary reduction to the West Virginia Division of Personnel (DOP). On January 30, 1996, DOP advised Grievant in a letter from Director Robert L. Stephens, Jr., that such salary reductions were within the discretion of the appointing authority, ABCA. G Ex 2.

10. Grievant's salary was not reduced until July 16, 1996, one year after he began performing duties as an Equipment Operator. As of that date, Grievant's annual salary was $16,824. The maximum annual salary for an employee in Pay Grade 4 is $20,016.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dept. of Energy,

Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

The facts established by the record in this matter indicate that Grievant voluntarily agreed to work in the warehouse rather than continue performing his duties as a Computer Programmer. There is substantial evidence that Grievant was on notice that his employment was in jeopardy unless he improved his performance as a Computer Programmer. In any event, Grievant did not question the salary implications of this change, and ABCA continued paying Grievant his regular salary as a Computer Program mer in Pay Grade 11, $20,772, until July 16, 1996.

As indicated by the testimony of Lowell Basford from the West Virginia Division of Personnel, ABCA neither transferred nor directly demoted Grievant from a Computer Programmer position to an Equipment Operator position. Instead, ABCA moved Grievant's position from the data processing department to the warehouse. At the time this action was initiated, both parties concurred in this arrangement. Moreover, it is clear that Grievant's superiors at ABCA believed this was a temporary arrangement to accommodate Grievant until he could find employment elsewhere. Thereafter, Grievant apparently found the warehouse job to be preferable to computer programming, at least so long as he was being paid $20,772 annually.

Once it became apparent to ABCA management that this arrangement was going to be of indefinite duration, the position was properly reallocated from a ComputerProgrammer in Pay Grade 11 to an Equipment Operator in Pay Grade 4. This reallocation took place within the scope of § 4.07 of the Administrative Rule of the West Virginia Division of Personnel, 143 C.S.R. 1 § 4.07 (1995). Grievant makes no serious claim that this reallocation was improper.

Once a position is reallocated from a higher grade to a lower grade, ABCA was compelled to lower Grievant's salary to no more than "the maximum pay rate of the new classification" under § 5.06 of the Administrative Rule. 143 C.S.R. 1 § 5.06 (1995). Grievant seeks the $20,016 annual salary he would receive under this provision as relief in this matter. However, § 5.06 further provides that "[t]he employee's salary may remain the same if his/her pay is within the pay range of the new classification, or his/her pay may be reduced to a lower pay rate in the new range." Id. ABCA exercised this option, and elected to reduce Grievant's pay to a lower pay rate in Pay Grade 4. Further, Mr. Moats determined that the pay of the lowest paid Equipment Operator in the warehouse, who had more seniority with ABCA than Grievant, and more experience working in the warehouse than Grievant, was a fair rate. Grievant submits that this was an arbitrary and capricious decision,

and constitutes an abuse of discretion by ABCA and Mr. Moats.

The Division of Personnel's Administrative Rule provides ABCA with discretion to set Grievant's new salary within certain limits. ABCA exercised that discretion, neither placing Grievant's salary at the maximum nor minimum points of the pay range for Pay Grade 4. Instead, ABCA set Grievant's salary at the level of the lowest paid employee in the same classification at Grievant's work location. Mr. Moats explained that compensating Grievant at a higher level would impact on the morale of other employees with greater experience and seniority. The undersigned administrative law judge finds this is areasonable consideration. See, e.g., Brutto v. Dept. of Health and Human Resources, Docket No. 96-HHR-076 (July 24, 1996).

In determining whether a discretionary decision was "arbitrary and capricious" a reviewing body applies a narrow scope of review, limited to considering whether relevant factors were considered in reaching the decision, and whether there has been a clear error of judgment. Gruen v. Bd. of Directors, Docket No. 95-BOD-281 (Mar. 6, 1997). See Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982); Hill v. Kanawha County Bd. of Educ., Docket No. 94-20-537 (Mar. 22, 1995), aff'd sub nom. Hill v. Raglin, Circuit Court of Kanawha County, No. 95-AA-106 (Mar. 22, 1995). Moreover, under the arbitrary and capricious standard of review an administrative law judge may not simply substitute his judgment for that of the agency decision maker. Bradley v. Bd. of Directors, Docket No. 96-BOD-030 (Dec. 28, 1997). See Harper v. Mingo County Bd. of Educ., Docket No. 93- 29-064 (Sept. 27, 1993). See generally, Bedford County Memorial Hosp. v. Health & Human Serv., 769 F.2d 1017 ((4th Cir. 1985); Staton v. Wyoming County Bd. of Educ., 184 W. Va. 369, 400 S.E.2d 613 (1990). In the circumstances presented by this grievance, although the undersigned administrative law judge might not have reached the same decision, Mr. Moats provided a rational basis for his decision. Thus, it cannot be concluded that the decision to set Grievant's salary at the level chosen by Mr. Moats constitutes an abuse of discretion, or was arbitrary and capricious.

Consistent with the foregoing discussion, the following Conclusions of Law are appropriately made in this matter.

CONCLUSIONS OF LAW

1. In a grievance which does not involve a disciplinary matter, the grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the

W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. ABCA did not abuse its discretion, nor act in an arbitrary and capricious fashion, when it exercised its discretion under § 5.06 of the Administrative Rule of the West Virginia Division of Personnel to lower Grievant's salary to a point lower than the maximum for Pay Grade 4, upon reallocation of Grievant's Computer Programmer position in Pay Grade 11 to an Equipment Operator position in Pay Grade 4, in accordance with § 4.07 of the Administrative Rule. See 143 C.S.R. 1 §§ 4.07, 5.06 (1995). See generally, Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281 (1974); Bedford County Memorial Hosp. v. Health & Human Serv., 769 F.2d 1017 (4th Cir. 1985); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the circuit court of the county in which the grievance occurred and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of theintent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

Administrative Law Judge

Dated: August 25, 1997

Footnote: 1

All citations are to the Level III hearing transcript and exhibits.