ROBERT WATTERSON,

Grievant,

v.

DOCKET NO. 03-DOH-155

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Robert Watterson, filed this grievance directly to level four on June 11, 2003, against his employer, the West Virginia Department of Transportation/Division of Highways ("Highways"):

> Demoted, transfer in work location and salary reduced. Salary reduction is arbitrary and capricious and not required by state code. Favoritism shown due to the fact that other employees have not had salary reductions in similar situations.
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> The 10 working days limit for the filing of the grievance would necessarily be extended due to the Memorial Day Holiday and four sick days after receipt of the notification of demotion.
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> I did not receive the letter of notification until 5/23/03.
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> Relief sought: Reinstatement of salary level prior to the demotion and reimbursement of any lost wages or costs due to the reduction in salary.

The level four hearing was held on August 18, 2003, at which time this case became mature for decision. Grievant was represented by James B. Lees, Esq., Hunt & Lees, and Highways was represented by Belinda Jackson, Esq.

SUMMARY OF EVIDENCE

Grievant's Exhibits

Ex. 1 -

May 19, 2003 letter from Jeff Black to Robert Watterson, with attached Schedule of Salary Grades, effective 7/1/02.

Ex. 2 -

W. Va. Division of Personnel Administrative Rule 5.6, Pay on Demotion.

Highway's Exhibits

None.

Testimony

Grievant testified in his own behalf. Highways presented the testimony of Jeff Black.

PROCEDURAL BACKGROUND

Grievant has been employed by Highways for approximately thirteen years, and in the Summer of 2001, was employed as a Geologist III in the Materials Control Section. On August 16, 2001, Grievant was promoted to Highway Administrator III in Mason County, which was later reclassified to a Highway Administrator II position. Grievant's selection to the Highway Administrator position resulted in a grievance being filed by two unsuccessful applicants for the position. Grievant intervened in that grievance. In a decision dated February 28, 2002, the undersigned Administrative Law Judge found that Grievant's selection was improperly “based upon political considerations and not on the basis of merit and fitness.” Roush/Forbes v. W. Va. Dept. of Transp., Docket No. 01-DOH-573/561. As a result of that Decision, effective June 16, 2003, Grievant was removed from the Highway Administrator III position, and placed back in his Geologist III position in Materials Control, with a reduction in pay grade. It is the reduction in pay grade that Grievant now challenges. The material facts in this grievance are not in dispute, and are set forth in the following Findings of Fact.

FINDINGS OF FACT

1. Grievant has been employed by Highways for approximately thirteen years, and in the Summer of 2001, was a Geologist III, pay grade 16 in the Materials Control section, with a monthly salary of $2,841.00.

2. On August 16, 2001, Grievant was promoted to Highway Administrator II, pay grade 17, with a monthly salary of $3,398.00.

3. On June 16, 2003, Grievant was demoted to a Geologist III, pay grade 16, with a monthly salary of $2,971.00. The increase from Grievant's original salary of $2,841.00 per month resulted from standard across-the-board raises given to all State employees.

4. The pay range for a pay grade 16 is $2,430 to $4,496 per month. The pay range for a pay grade 17 is $2,600 to $4,810 per month. LIV G. Ex. 1.

5. Shawn Huffman, Joan Childers, and Tamra White, employees of Highways, were demoted without suffering a decrease in their pay.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. Grievant alleges his salary reduction upon demotion was not authorizedby West Virginia Division of Personnel Rules, was arbitrary and capricious, and is evidence of favoritism within the agency.

W. Va. Division of Personnel Administrative Rule 5.6 Pay on Demotion, provides as follows:

> The appointing authority shall reduce the pay of an employee who is demoted and whose current pay rate is above the maximum pay rate for the new classification to at least the maximum pay rate of the new classification or, if the demotion is to a formerly held classification, his or her last pay rate in the formerly held classification, whichever is greater. The employee's salary may remain the same if his or her pay is within the pay range of the new classification, or his or her pay may be reduced to a lower pay rate in the new range.

Grievant first contends that, according to the first sentence of Rule 5.6, it was improper to reduce his salary upon demotion to his formerly held classification of Geologist III, because that sentence mandates the demoted employee's salary be either “his last pay rate in the formerly held classification” or his “current pay rate”, *whichever is greater*. Under this interpretation of the first

sentence, Grievant's Highway Administrator II monthly salary of $3,398.00 is greater than his former pay rate under the Geologist classification, and therefore, his salary should not have been reduced upon demotion.

Rule 5.06 clearly requires the salary of an employee being demoted to be reduced to at least the maximum rate of the lower salary range, but only if his current salary exceeds that maximum rate. Unfortunately for Grievant, therefore, the first sentence of Rule 5.6 simply does not apply to his demotion. That sentence only applies to a situation where the employee's current salary before demotion is above the maximum pay rate for the new classification upon demotion, or if the employee is being demoted to his old classification, the maximum pay rate for that classification. Grievant's HighwaysAdministrator II salary was not above the maximum pay rate for the Geologist classification, which is $4,496; therefore the first sentence does not apply.

Grievant argues, alternatively, that should it be found that the second sentence is the one that applies to his demotion, then the agency exercised the discretion it is given in an arbitrary and capricious manner in reducing his salary. Moreover, the agency engaged in favoritism, because when other employees were demoted, the agency exercised its discretion to allow them to retain their current salaries.

Rule 5.6 gives the employer the discretion to reduce an employee's current salary to a lower pay rate within the pay range of the new, or in this case, formerly held, classification. However, that discretion must be exercised reasonably, and not in a manner which is arbitrary and capricious. See Walton v. W. Va. Div. of Corr., Docket No. 03- CORR-109 (July 22, 2003); Antolini, et al. v. W. Va. Dept. of Transp., Docket No. 01-DOH- 471 (Aug. 30, 2002); McCauley v. W. Va. Div. of Corr., Docket No. 98-CORR-088 (July 10, 1998).

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.2d1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16., 1996). While a searching inquiry into the facts is required to determine if an action is arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of the board of education. See generally Harrison v. Ginsberg, 169 W. Va.

162,286 S.E.2d 276, 283 (1982). The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Adkins v. W. Va. Dept. of Educ., 210 W. Va. 105, 566 S.E.2d 72 (2001)(citing In re Queen, 196 W. Va. 442, 473 S.E.2d 483 (1996).

Jeff Black, Human Resources Director for Highways, explained why Highways decided to reduce Grievant's salary upon demotion to his previous rate under the Geologist III classification. Mr. Black testified that Highways has determined, in conjunction with the Division of Personnel, that when an employee is required to be demoted as the result of a Grievance Board decision which has found the employee was wrongly selected to a position, the employee will be placed back into his former classification at his former rate of pay, as if he had never been selected for the challenged position in the first place. Mr. Black opined that, to allow the wrongly selected employee to retain the higher salary, even though being demoted, could encourage collusiveness among employees and supervisors to attain higher salaries within a unit.

This explanation dovetails into Grievant's final complaint, that Highways engages in favoritism by allowing some employees to keep their current salaries upon demotion, but not others like himself. Grievant contends he is being “punished” by Highways for mistakes made by Highways administrators in the selection process.

W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another orother employees." The test to determine whether a grievant has established a prima facie case of favoritism requires a grievant to establish by a preponderance of the evidence:

> (a) that he is similarly situated in a pertinent way, to one or more other employee(s);
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> (b) that the other employee(s) has/have been given advantage or treated with preference in a significant manner not similarly afforded him; and,
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> (c) that the difference in treatment has caused a substantial inequity to him and that there is no known or apparent justification for this difference.

Hays v. W. Va. Div. of Employment Security, Docket No. 91-ES-505/92-ES-003 (Dec. 31, 1992);

Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990). Once a grievant establishes a prima facie case of favoritism, the burden shifts to Respondent to demonstrate a legitimate, nondiscriminatory reason for the employment decision. Thereafter, the grievant may show the offered reasons are pretextual. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

The parties stipulated that at least three other Highways employees who have been demoted were allowed to retain their current salaries under the discretion permitted by the second sentence of Rule 5.6. Therefore, Grievant has established a prima facie case of favoritism. Mr. Black testified to the circumstances of those three employees' demotions.

Shawn Huffman was hired into a Crew Chief position. Grievance activity followed, and the matter was settled. As a result of the settlement, Mr. Huffman was removed from the Crew Chief position and placed into another position (not a formerly held position). Mr.Huffman's current Crew Chief salary was within the pay range for the new classification, and Highways decided to allow him to retain that salary.

Joan Childers was injured on the job, and could not return to her former position. She applied for and received a vacant position in a lower classification. Her former pay rate was within the range of the lower classification, and Highways permitted her to retain the former pay rate.

Tamra White had been Executive Secretary to the Assistant Commissioner, and was demoted as a result of the administration change in January, 2001. Her former pay was within the pay grade for her new classification, and she was permitted to retain her former salary.

As discussed above, Mr. Black explained the reason for the difference in treatment of Grievant, i.e., he was demoted as the result of a Grievance Board decision finding he had erroneously been selected for the higher position. While Grievant's situation can be closely compared to Mr. Huffman's, a material difference is that Mr. Huffman's salary placement was the result of a negotiated settlement, whereas, Grievant's situation resulted from a Level Four Grievance Board Decision. That is the risk of litigation versus settlement. In the latter, the parties retain some control over the outcome; in the former, the parties roll the dice, and are bound by whatever decision is rendered.

The desired aim of Highways is to place the parties in the positions they would have been in had the mistake not been made in the first place. This is not an arbitrary or capricious decision, nor is it favoritism. Indeed, Mr. Black testified he had discussed the issue with representatives of the Division

of Personnel before implementing the practice. Undoubtedly one of the main reasons employees seek advancement in the work place is to achieve higher salaries. Likewise, one of the main reasons employers promote employees is to reward them for jobs well done. To allow a wrongly promoted employee to retain the benefits of the higher salary only serves to diminish the rewards a promotion gives to a deserving employee. Moreover, a wrongly selected employee has never earned the right to the higher salary, and cannot claim the right to retain it when the mistake is corrected.

CONCLUSIONS OF LAW

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.

2. W. Va. Division of Personnel Administrative Rule 5.6 Pay on Demotion, provides as follows:

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3. Rule 5.6 gives the employer the discretion to reduce an employee's current salary to a lower pay rate within the pay range of the new, or in this case, formerly held,classification. However, that discretion must be exercised reasonably, and not in a manner which is arbitrary and capricious. See Walton v. W. Va. Div. of Corr., Docket No. 03- CORR-109 (July 22, 2003); Antolini, et al. v. W. Va. Dept. of Transp., Docket No. 01-DOH- 471 (Aug. 30, 2002); McCauley v. W. Va. Div. of Corr., Docket No. 98-CORR-088 (July 10, 1998).

4. 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.2d1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16., 1996). While a searching inquiry into the facts is required to determine if an action is arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not

simply substitute her judgment for that of the board of education. See generally Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982). The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Adkins v. W. Va. Dept. of Educ., 210 W. Va. 105, 566 S.E.2d 72 (2001)(citing In re Queen, 196 W. Va. 442, 473 S.E.2d 483 (1996).

5. Grievant has failed to demonstrate by a preponderance of the evidence that Highways' decision to reduce his pay rate upon demotion was arbitrary and capricious. 6. W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." The test to determine whether a grievant has established a prima facie case of favoritism requires a grievant to establish by a preponderance of the evidence:

> (a) that he is similarly situated in a pertinent way, to one or more other employee(s);
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> (b) that the other employee(s) has/have been given advantage or treated with preference in a significant manner not similarly afforded him; and,
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Hays v. W. Va. Div. of Employment Security, Docket No. 91-ES-505/92-ES-003 (Dec. 31, 1992); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990). Once a grievant establishes a prima facie case of favoritism, the burden shifts to Respondent to demonstrate a legitimate, nondiscriminatory reason for the employment decision. Thereafter, the grievant may show the offered reasons are pretextual. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

7. Although Grievant established a prima facie case of favoritism, Highways' decision to reduce his pay rate upon demotion was the result of legitimate reasons.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court

of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7 (1998). Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. However, the appealing party is required by W. Va. Code § 29A- 5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: August 26, 2003