WILLIAM CAYTON,

Grievant,

v. **Docket No. 02-DOH-098**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

DECISION

William Cayton ("Grievant") initiated this proceeding on March 14, 2001, alleging that his reassignment had resulted in a demotion. He seeks to be reassigned as Highway Administrator at the Lewis County maintenance garage. The grievance was denied at level one on March 19, 2001. After a level two conference held on March 29, 2001, the grievance was denied on April 5, 2001. Grievant appealed to level three on April 14, 2001, and a hearing was held on January 31, 2002. (See footnote 1) A level three decision was rendered on April 9, 2002. Grievant filed a request for a finding that a default had occurred at level three, which was denied by this Grievance Board in an Order dated October 21, 2002. A hearing on the merits of the grievance was held in the Grievance Board's office in Elkins, West Virginia, on May 22, 2003. Grievant was represented by counsel, Bernard Mauser, and Respondent was represented by counsel, Barbara Baxter. This matter became mature for consideration on June 27, 2003, the deadline for submission of the parties' written fact/law proposals. The following findings of fact are made based upon a preponderance of the credible evidence of record.

Findings of Fact

1. Grievant has been employed by the Division of Highways since 1985, most recently as a Highway Administrator II ("HE II") in Lewis County.

2. As HE II at the county level, Grievant was responsible for administration of highway

maintenance operations and supervision of all DOH workers in the county.

3. On January 16, 2001, approximately 27 employees of the Lewis County garage filed a grievance, alleging Grievant had shown a continuous pattern of harassing and belittling employees, showing favoritism to some employees over others, retaliating against employees, and numerous other complaints regarding his management techniques.

4. Due to the allegations raised against Grievant by the county employees, Grievant was moved to the district office in mid-April, 2001, and his supervisory duties were removed.

5. After two days of hearing and testimony from numerous witnesses, the level three hearing evaluator concluded that the Lewis County employees had been subjected to harassment, discrimination, and favoritism by Grievant. In the decision dated June 5, 2001, it was ordered that Respondent remove Grievant from Lewis County and from performing any supervisory duties over employees.

6. The evidence in the employees' grievance established that, for several years, Grievant had engaged in such activities as physically threatening employees, granting overtime work only to employees he favored, attempting to delay or prevent the processingof employees' Workers' Compensation claims, retaliation for filing grievances, attempts to circumvent promotions, and instructing employees to work under unsafe conditions. Grievant had been counseled on numerous occasions and had been subjected to focus group meetings in attempts to improve his supervisory skills, which failed.

7. Grievant did not receive any formal discipline as a result of the grievance filed by his subordinates, but he was permanently relocated to the District office. His duties have included checking construction permits, bridge and culvert inspection and, most recently, inspecting DOH road signs for states of disrepair and potential replacement.

8. Since his reassignment, Grievant has performed none of the duties of a Highway Administrator. He does not supervise any employees and has no highway maintenance administrative duties, such as budgeting or scheduling of DOH work.

9. Grievant's job title and salary have remained the same since he was moved to the District office.

10. As a Highway Administrator, Grievant occasionally received overtime pay when emergency projects arose. Since the reassignment, Grievant has received no overtime.

11. At the time this grievance was filed in March of 2001, Grievant had not yet been moved to the District Office, but had only been temporarily assigned duties as a flood preparedness coordinator. These job duties did not involve a transfer.

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. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.

Grievant contends that he has been subjected to a functional demotion and is not being allowed to perform the duties assigned to his classification. He contends that he performed well as the Highway Administrator for Lewis County and wants to return. Respondent counters that Grievant's transfer was necessitated by his own actions, as revealed in the Lewis County employees' grievance. While Respondent admits, in the words of Jeff Black, Human Resources Director, that Grievant is probably currently being “under utilized,” he is still performing duties encompassed by his classification, and that Grievant could have been (and possibly should have been) actually demoted in classification and salary as a result of his egregious conduct as a supervisor.

Respondent is correct in its contention that DOH has the right to transfer and relocate employees, as the need arises. The West Virginia Division of Personnel (DOP) Administrative Rule, § 3.96 defines transfer as"[t]he movement of an employee to a different subdivision or geographic location of the same or a different agency." A state agency is permitted to transfer an employee from one geographic location to another, within the same agency, at any time. The Administrative Rule states in Section 11.6(a) that “appointing authorities may transfer a permanent employee from a position in one organizational subdivision of an agency to a position in another organizational subdivision of the same or another agency at any time.” The West Virginia Supreme Court of Appeals has recognized that state agencies have the right to transfer employees geographically where there is a need, if they remain in the same classification and pay grade, and are notdemoted or reduced in pay. Childers v. Civil Serv. Comm'n, 155 W. Va. 69, 75, 181 S.E.2d 22 (1971). It has also been previously held by this Grievance Board that state agencies have the authority to transfer an employee from one official headquarters to another. Bever v. Dep't of Health & Human Resources, Docket No. 96-HHR-258

(Dec. 31, 1996); Goodnight v. W. Va. Div. of Human Serv., Docket No. 91-DHS-111 (May 31, 1991).

In the instant case, one could easily view Grievant's reassignment to the District headquarters as a transfer, a decision which is within DOH's discretion to make. However, although Grievant has retained the same classification and pay grade, it cannot be disputed that he has been assigned drastically different job duties, which he has characterized as a demotion. DOP Administrative Rule § 3.27 defines demotion as "a change in the status from a position in one class to a position in another class of lower rank as measured by salary range, minimal qualifications, or duties, or a reduction in an employee's pay to a lower rate in the pay range assigned to the classification." Although Grievant's reassignment does not necessarily fit into this definition, it has been recognized by this Grievance Board that a "functional demotion" may occur when an employee is reassigned to duties of less number and responsibility without salary reduction or other alteration, which may impact the employee's ability to obtain future job advancement. Gillespie v. W. Va. Dep't of Corrections, 89-CORR-105 (Aug. 29, 1989).

Whether Grievant's reassignment is viewed as a transfer or a functional demotion, DOH has provided ample justification for its actions, and its decision cannot be found to be arbitrary and capricious. "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 soimplausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Resources, 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, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Id. (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]. See generally, Harrison v. Ginsberg, [168 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

As explained by Mr. Black, due to the outrageous conduct in which Grievant has engaged in

recent years, DOH could easily have justified demoting him and/or disciplining him in some other fashion. Instead, Respondent has chosen to allow Grievant to retain his classification and salary, but perform much more limited job duties without supervisory responsibilities. Grievant is fortunate that his employer has chosen this course of action, although he is understandably frustrated at not being able to utilize his skills in highway maintenance management. Nevertheless, Grievant's plight is a result of his own conduct. Interestingly, Grievant made no attempt during this grievance to deny or explain his misconduct as described by the employees he supervised. Although DOH should be encouraged to attempt to find duties and responsibilities more fitting with Grievant'sclassification, its decision to move him to the District office was justified and was not arbitrary and capricious or an abuse of Respondent's discretion in this matter.

The following conclusions of law support the decision reached.

Conclusions of Law

___1. In a non-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. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29- 6A-6.

2. State agencies have the right to transfer employees geographically where there is a need, if they remain in the same classification and pay grade, and are not demoted or reduced in pay. Childers v. Civil Serv. Comm'n, 155 W. Va. 69, 75, 181 S.E.2d 22 (1971).

3. A "functional demotion" may occur when an employee is reassigned to duties of less number and responsibility without salary reduction or other alteration, which may impact the employee's ability to obtain future job advancement. Gillespie v. W. Va. Dep't of Corrections, 89-CORR-105 (Aug. 29, 1989).

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.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools forthe Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June

27, 1997).

5. Respondent's decision to reassign Grievant to the District office was justified by Grievant's conduct, was not arbitrary and capricious, and was not abuse of discretion. Additionally, removal of all his supervisory duties was justified.

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, and 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.

Date: July 11, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

The record contains no explanation for the lengthy delay in holding the level three hearing.