**DIANE HOLLEY and DONNA THOMASCHEK,**

**Grievants,**

**v. Docket No. 05-HE-101**

**FAIRMONT STATE UNIVERSITY,**

**Respondent.**

## D E C I S I O N

**Diane Holley and Donna Thomaschek ("Grievants"), employed by Fairmont State University ("FSU" or "Respondent") as Campus Service Workers, filed individual but identical grievances on January 24, 2005, complaining that they had been improperly transferred to different work locations and shifts. For relief, they request reinstatement to their previous work locations and shifts. Both parties waived consideration at levels one and two. Following an evidentiary hearing conducted at level three, the grievances were denied by individual, but identical, decisions. The grievances were appealed to level four on March 23, 2005.** (See footnote 1) **Grievants, represented by Diane Parker, Business Manager of Laborer's Local 814, and Respondent's counsel Elaine L. Skorich, Assistant Attorney General, agreed to submit the grievances for decision based upon the level three record. The grievance became mature for decision upon receipt of Respondent's proposed findings of fact and conclusions of law on May 9, 2005. Grievants elected not to file any proposed findings and conclusions.** (See footnote 2) **The following facts derived from the level three record are undisputed, and may be set forth as formal findings of fact.**

## Findings of Fact

**1. Grievants have been employed by FSU as regular, full-time, twelve-month Campus Service Workers at all times pertinent to this grievance.**

**2. Grievant Holley has been employed by FSU for nine years, and prior to January 1, 2005, worked day shift, from 6 a.m. to 2 p.m, in a floating position.**

**3. Grievant Thomaschek has been employed by FSU for twelve years, and prior to January 1, was assigned to work day shift in Morrow Hall, a dormitory.**

**4. Effective January 2005, FSU engaged contract workers to perform the housekeeping**

**duties previously assigned to Grievants. The positions were not posted, and the individuals currently completing these duties are not FSU employees.**

**5. Grievants were reassigned to the FSU Recreational Center. Grievant Thomaschek was assigned to work the afternoon shift, from 2-10 p.m., and Grievant Holley was assigned to the midnight shift, from 10 p.m. to 6 a.m.**

**Discussion**

**Grievants argue that FSU has acted in violation of W. Va. Code §§18B-7-1(d) and 18B-7-6, and cite policies, a Chancellor's opinion and several level four Grievance Board decisions to support their claim. FSU asserts that it has not acted in violation of any statute or policy, and that Grievants have not suffered any harm as a result of the reassignment.**

**As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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 (2004); Howell v. W. Va.Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993).**

**The issue presented is whether an institution of higher learning in West Virginia may outsource services. At this time, there is no prohibition on outsourcing, and it is being implemented to a greater extent by schools to provide necessary services with limited resources. Bookstores, food service, and custodial service are three areas frequently outsourced. The authority cited by Grievants simply does not address this situation. W. Va. Code § 18B-7-1 states, in part:**

**(d) A nonexempt classified employee, who applies and meets the minimum qualifications for a nonexempt job opening at the institution where currently employed, whether the job is a lateral transfer or a promotion, shall be transferred or promoted before a new person is hired.**

**W. Va. Code § 18B-7-6 states:**

**(b) Each governing board, with the advice and assistance of the staff council shall establish a**

**policy regarding the role of part-time classified employees. Such policy shall discourage the hiring of part-time employees solely to avoid the payment of benefits or in lieu of full-time employees and shall provide all qualified classified employees with nine-month or ten-month contracts with the opportunity to accept part-time or full-time summer employment before new persons are hired for the part-time or full-time employment.**

**These statutes address individual employees applying for positions, and part-time employees, neither of which applies in this instance. Similarly, the cases cited byGrievants have distinctly different factual bases. In Hendershot v. HEPC/West Liberty State College, Docket No. 03-HEPC-061(June 18, 2003), involved a transfer as a result of a reduction in force. Kisner and Kisner v. W. Va. Bd. of Trustees/W. Va. Univ., Docket No. 90-BOT-477(April 30, 1991), addressed summer employment for regular employees. In Thompson v. Bd. of Trustees/Marshall Univ., Docket No. 96-BOT-097(Dec. 31, 1996), grievant was denied a transfer. The Chancellor's Interpretive Memorandum No. 3, dated July 3, 2000, simply reiterates the statutory requirements for the internal hiring of non- exempt classified employees, and offers no support to Grievants' claim. The higher education policies cited by Grievants are very general in nature, i.e., Series 39 "Classified Employees" and Series 8 "Personnel Administration", and Grievants did not cite any particular provision, but only asserted they would have "some bearing on the case".**

**Grievants are also unhappy that their assigned shifts have been changed, and assert that an FSU official promised them their work hours would remain the same. It is not unusual for an unwanted schedule change to be resisted; however, public employers have considerable discretion in assigning employees when and where they are needed to meet the needs of the institution or agency. Jarrett v. Dep't of Admn./Purchasing Div., Docket No. 04-ADMN-392 (Apr. 4, 2005); Erby v. Dep't of Admn./Gen. Serv. Div., Docket No. 04- 29-314 (Dec. 16, 2004); Conn v. Mingo County Bd. of Educ., Docket No. 04-29-314 (Dec. 16, 2004). Therefore, the employer's decision will be upheld unless shown to be contrary to law or policy, or that it was 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 so implausible that itcannot 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 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, 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." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.**

**In the present case, FSU could have implemented a reduction in force, potentially leaving Grievants unemployed. The decision to transfer them to another location and shift was not in violation of any statute or policy, nor was it arbitrary and capricious.**

**In addition to the foregoing findings of fact and discussion, the following conclusions of law support this decision.**

## Conclusions of Law

**1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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 (2004); Howell v. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable personwould accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993). 2. Grievants failed to prove that FSU improperly outsourced custodial services, or that their transfer was in violation of any statute or regulation, or was arbitrary and capricious.**

**Accordingly, the grievance is DENIED.**

**Any party 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.**

**DATE: MAY 24, 2005**

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**SUE KELLER**

**SENIOR ADMINISTRATIVE LAW JUDGE**

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***Footnote: 1***

***.The grievances were individually appealed to level four, and Grievant Thomaschek's grievance was assigned 05-HE-086. However, because the grievances involve identical facts and issues, they are hereby consolidated under Grievant Holley's case number for decision at this level.***

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***Footnote: 2***

***[2]Grievant Thomaschek additionally filed a grievance on March 1, 2005, in which she stated, "I was not offered day shift position that came open and I was displaced with someone with less time and seniority." This grievance was consolidated with the prior grievance at level three. In fact, it is the same grievance, and does not require additional consideration.***