BRUCE CHADOCK,

Grievant,

v. **Docket No. 04-CORR-278**

DIVISION OF CORRECTIONS/ST.

MARYS CORRECTIONAL CENTER,

Respondent.

D E C I S I O N

Grievant, Bruce Chadock, filed this grievance against his employer, the Division of Corrections ("CORR"), on June 4, 2004. His Statement of Grievance states:

> I have unfairly been denied the opportunity to obtain a position within Transportation, Arms Crew and Support Services because the officers that are currently assigned in these positions are not being rotated. There is no set policy governing the rotation of officers in these positions. The officers currently assigned to these positions are being given special treatment and not being rotated, as Programs and Security have to do. There is also no written policy stating the selection process used to obtain these positions.

The relief sought requested written policies to govern the selection and rotation of employees for these positions, reassignment of any officer who had served more than two years in these positions, instatement into a Transportation position for two years, for discrimination and favoritism to cease, and to be made whole.

This grievance was denied at Levels I and II. A Level III hearing was held on July 8, 2004, and a Level III Decision denying the grievance was issued on July 9, 2004. Grievant appealed to Level IV on July 19, 2004, and a Level IV hearing was held on October 26, 2004. (See footnote 1) This case became mature for decision on November 16, 2004, after receipt of the CORR's proposed findings of fact and conclusions of law. (See footnote 2) After a thorough review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. Grievant is currently employed as a Correctional Officer 2 at the St. Marys Correctional Center. His date of hire is August 16, 2001.

2. When St. Marys Correctional Center first opened, many of the officers rotated. Currently, there is no regular rotation in any of the positions at St. Marys Correctional Center. The positions in Support Services never rotated.

3. Placement in Transportation, Support Services, and the Arms Crew is a duty assignment, not a position. (See footnote 3) These positions are sought after because they are usually Monday through Friday, day shift. The officers who fill these positions are generally ones who have greater experience and good interpersonal skills, as they are responsible for handling inmates outside the facility. Many officers have filled these assignments for an extended period of time. (See footnote 4)

4. When an opening becomes available for a position in Transportation, Support Services, or the Arms Crew, the work history of any officer who has expressed an interest in these positions is reviewed and an officer selected. All officers have an opportunity to apply for these positions. While the Assistant Warden of Security seeks input from other administrators, the final decision is his.

5. The selection for these assignments is governed by Operational Procedure 3.02-3, the purpose of which is to: "to establish, define, and delineate appropriate guidelines and procedures for transferring officers from assigned units to other units, maintain a procedure for shift assignments of officers in order to provide cross training, reduce complacency and burnout, and provide familiarization in all units." Resp. No. 1 at Level IV.

6. Operational Procedure 3.02-3 states:

> I. Correctional officers may be reassigned to any unit, shift, or support area of SMCC based on the following reasons.
>
> A. Security and operational needs of SMCC
>
> B. To meet training needs
>
> C. Officer request
>
> II. Security and operational needs of the facility will take priority over any individual officer request for transfer.

III. Approval of assignments/reassignments will be authorized by the Chief C.O./AW-Security

IV. In January of each year, Correctional Officers may request job/shift transfers of duty assignments. Reassignments may or may not be approved by the Chief C.O./AW-Security based on seniority, officer knowledge, qualification, facility needs, and leave usage.

V. All staff assignments/reassignments are subject to review by the Deputy Warden/Warden.

Issues and Arguments

While Grievant notes Policy 3.02-3 exists, his request is for CORR to develop a specific policy for officers assigned to Transportation, Support Services, or the Arms Crew. CORR asserts the assignment of officers to these areas is a management decision, and rotation of these position does not best serve the needs of the facility or the public.

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 (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).

W. Va. Code § 25-1-11a identifies the duties of wardens and administrators and notes, "[t]he warden or administrator is the chief executive officer of his or her assigned correctional institution and has the responsibility for the overall management of all operations within his or her assigned

institution." W. Va. Code § 25-1-11c (a) discusses the hiring of employees and gives the warden or administrator of the correctional institution the authority "to hire all assistants and employees required for the management of the correctional institutions or units . . . all of whom shall be under the control of the warden." The administration at St. Marys Correctional Center has decided to fill positions in Transportation, Support Services, or the Arms Crew based on experience and interpersonal skills.

This Grievance Board has frequently ruled that, "[a] [g]rievant's belief that his supervisor's management decisions are incorrect is not a grievable event unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment toor interference with his effective job performance or health and safety." Ball v. Dep't of Highways, Docket No. 96-DOH-141 (July 31, 1997). See W. Va. Code § 29-6A-2(i); Rice v. Dep't of Transp./Div. of Highways, Docket No. 96-DOH-247 (Aug. 29, 1997). Management decisions are to be judged by the arbitrary and capricious standard.

"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 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.

While it is understandable Grievant would want a position that is Monday through Friday, and that is usually on the day shift, he has not demonstrated CORR's management decision to place more experienced officers with good interpersonal skills in these positions is arbitrary and capricious.

Grievant has also asserted he has been treated unfairly. W. Va. Code § 29-6A-2(d) defines discrimination as, "any differences in the treatment of employees unless suchdifferences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." The

West Virginia Supreme Court of Appeals recently revised the legal test for discrimination/favoritism claims raised under the grievance procedure statutes. In The Board of Education of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004), the West Virginia Supreme Court of Appeals held a grievant must establish a case of discrimination by showing:

> (a) that he or she has been treated differently from one or more similarly- situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

Grievant has not shown that he is treated differently than other officers at St. Marys Correctional Center. He can ask to be considered like all other employees. Additionally, his request is actually to treat the positions in Transportation, Support Services, and Arms Crew differently than other positions in the facility. He has presented no reasons for this request, other than his disagreement with the decision of management at St. Marys Correctional Center.

The above-discussion will be supplemented by the following Conclusions of Law.

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 (2004); Howellv. 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).

2. W. Va. Code § 25-1-11a identifies the duties of wardens and administrators and notes, "[t]he warden or administrator is the chief executive officer of his or her assigned correctional institution and

has the responsibility for the overall management of all operations within his or her assigned institution."

3. W. Va. Code § 25-1-11c (a) discusses the hiring of employees and gives the warden or administrator of the correctional institution the authority "to hire all assistants and employees required for the management of the correctional institutions or units . . . all of whom shall be under the control of the warden."

4. Management decisions are reviewed under the arbitrary and capricious standard.

5. "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 for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't ofHealth 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." 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.

6. Grievant has not demonstrated Respondent's decision to place Correctional Officers with greater experience and good interpersonal skills in Transportation, Support Services, and the Arms Crew is arbitrary and capricious.

7. W. Va. Code § 29-6A-2(d) defines discrimination as, "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

8. In The Board of Education of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004), the West Virginia Supreme Court of Appeals revised the legal test for discrimination claims raised under the grievance procedure statutes. A grievant must establish a case of discrimination by showing:

(a) that he or she has been treated differently from one or more similarly- situated

employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004). 9. Grievant has failed to establish he has been treated differently than other similarly situated employees, as he has the same right to apply for these positions as do all other Correctional Officers.

Accordingly, this 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. **JANIS I. REYNOLDS**

ADMINISTRATIVE LAW JUDGE

Dated: February 14, 2005

Footnote: 1

Grievant was represented by a co-worker, Steven Berryman, and the Division of Corrections was represented by John Boothroyd, Esq.

Footnote: 2

Grievant did not submit these proposals.

Footnote: 3

The Arms Crew are the officers who take inmates out to work for the Division of Highways.

Footnote: 4

While Grievant has asserted that filling these positions for a long time can result in "lax" behavior, the evidence revealed that there had been no breaches in security within Transportation, Support Services, or the Arms Crew.