DOUGLAS CRAIG,

Grievant,

v. **Docket No. 06-HHR-052**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILD SUPPORT ENFORCEMENT and DIVISION OF PERSONNEL,

Respondents.

DECISION

Douglas Craig ("Grievant") initiated this proceeding on September 9, 2005, alleging he should be reallocated from his current classification of Child Support Specialist 2 ("CSS 2") to the classification of Child Support Specialist 3 ("CSS 3"). After denials at the lower levels (See footnote 1) , Grievant appealed to level four on February 9, 2006, and a hearing was held in Westover, West Virginia, on April 16, 2006. Grievant represented himself; the Department of Health and Human Resources ("DHHR") was represented by Assistant Attorney General Jennifer Akers; and Respondent Division of Personnel ("DOP") was represented by Assistant Director Lowell Basford. This matter became mature for consideration upon receipt of the parties' fact/law proposals on May 15, 2006.

Issues and Arguments

Although this case involves a request for reallocation due to a change in job duties, it does involve a somewhat unusual factual scenario not usually seen in classificationclaims. In the spring of 2005, Grievant's management team agreed that he should be promoted/reallocated to the CSS 3 classification, and steps were taken in pursuit of that goal. However, after some delays occurred, during which Grievant's number of monthly "legal referrals" fell to below a level deemed acceptable by DHHR, the request for review of Grievant's position by DOP was withdrawn by his superiors.

Therefore, DOP has not reviewed Grievant's position or made any determinations as to whether or not he should be reallocated. While Respondent contends that Grievant should not be reclassified, due to an unacceptable performance level, Grievant argues that a specific number of legal referrals is a performance standard, not a job duty, and that his duties fall squarely within those expected of a CSS 3.

The following material facts have been proven by a preponderance of the evidence of record.

Findings of Fact

1. Grievant has been employed by DHHR's Bureau for Child Support Enforcement ("BCSE") for approximately 12 years, and has most recently been classified as a CSS 2.

2. Pertinent portions of DOP's classification specification for CSS 2 state as follows:

> **Nature of Work** Under limited supervision, performs full-performance level case management work in child support enforcement. Manages a full caseload in providing services of the Bureau for Child Support Enforcement. Performs related work as required.
>
> **Distinguishing Characteristics** Under limited supervision, provides full-performance child support services.Employees assigned to positions at this level will have more independence of action and will have successfully completed a one-year probationary period as a Child Support Specialist 1. The Child Support Specialist 2 will interact with a variety of professional practitioners in the legal community, as well as other agencies. The Child Support Specialist 2 is distinguished from the Child Support Specialist 3 by the complexity of assignments.

3. A large portion of the duties of both the CSS 2 and the CSS 3 involves evaluating cases to determine whether or not legal action is needed, and making recommendations to BCSE attorneys. Legal action most often consists of obtaining a court order to require payment of owed child support, but can also include other issues such as establishment of paternity or medical referrals.

4. BCSE has established an internal performance standard for CSS's, which requires that a CSS 2 generate at least eight legal referrals per month. CSS 3's must exceed that standard.

5. In December of 2004, Grievant requested to be promoted to CSS 3, based upon changes in his job duties. Pertinent portions of that classification specification state:

> **Nature of Work** Under limited supervision, performs advanced level case management work in child support enforcement. Employees at this level serve as a resource person and should have the ability to train and assist Child Support

Specialists 1 and Child Support Specialists 2. Performs related work as required.

Distinguishing Characteristics Employees in this classification will have previously served as a Child Support Specialist 1 and 2 and have received the recommendation of their supervisor to advance.

Under limited supervision, a Child Support Specialist 3 provides advanced level child support services. Employees assigned to positions at this level will have greater independence of action. Interacts with a variety of professional practitioners in the legal community, as well as other agencies. Must be able to assess the customer's needs and the posture of the case and determineappropriate course of action. Employees in this position should have the ability to train employees in the Child Support Specialist 1 and 2 classifications and may serve as a back-up for the supervisor.

6. On April 11, 2005, the Region 9 management team met to discuss Grievant's request for promotion. Using a prepared list of ten criteria which is used to evaluate all CSS 2's requesting promotion, the team determined that Grievant should be recommended for the reallocation. The list of criteria used by the committed was as follows:

1 -- # of legal referrals submitted

2 -- Are they at 80% of cases with court orders?

3 -- Dependable and reliable for planning purposes and work?

4 -- Does the employ[ee] engage in the mentoring of other workers?

5 -- Does employee possess skills that enables them to work independently without supervision?

6 -- Does the employee assume additional responsibilities, not in their assigned caseloads such as print-outs (local and state-office assigned), special projects, task teams, etc?

7 -- Does the employee apply policy with minimal supervision and w/o error?

8 -- Does the employee show initiatives in improving work performance, creativity in working cases, sharing ideas and short cuts with other workers?

9 -- Is the worker dependable in assisting as a back-up to the Supervisor?

10 - Does the worker serve as a role model to fellow workers by observing office policy and procedures, positive attitude, etc.?

7. Grievant was asked to complete a position description form ("PDF"), which would be submitted to the DOP with the request for promotion/reallocation. He completed the PDF, but did not provide the required civil service application to his supervisor until late June of 2005. This information was forwarded to DOP in early July.

8. During the months of April, May, and June of 2005, Grievant's number of legal referrals dropped. He generated four referrals in April, two in May, and none in June. Accordingly, the management team reconvened on July 11, 2005, and determined that, due to his failure to meet the requisite number of referrals, the recommendation for promotion should be rescinded. 9. Because the appointing authority rescinded its request for evaluation of Grievant's position, DOP took no action on the request, and Grievant filed this grievance.

Discussion

As stated above, the instant case involves an unusual posture for a classification case. Ordinarily, DOP would have reviewed Grievant's request for reallocation and made a decision as to whether or not it was merited. However, no such determination has been made here, due to Respondent's withdrawal of their request for review of Grievant's position. In the usual classification case, a grievant must prove by a preponderance of the evidence that his duties for the relevant period more closely match another cited DOP classification specification than that under which he is currently assigned. *See generally, Hayes v. W. Va. Dep't of Natural Res*., Docket No. NR-88-038 (Mar. 28, 1989). In such cases, DOP's interpretation and explanation of the classification specifications at issue is given great weight unless clearly erroneous. *See W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 348, 431 S.E.2d 681, 687 (1993).

Because the dispute here is not whether Grievant's duties fit within the CSS 3 specification, but whether or not it was improper for DHHR to withdraw the request for reallocation (and for DOP to refuse to review the position), this decision must be evaluated under the arbitrary and capricious standard. 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. Dep't of Educ*., 210 W. Va. 105, 556 S.E.2d 72 (2001)(citing *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). A searching and careful inquiry into thefacts is required; however, the scope of review is narrow, and the undersigned may not

substitute her judgment for that of the agency. *See generally, Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276 (1982). Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). 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 undersigned does, indeed, understand Grievant's frustration that, in spite of his employer's admission that he is performing most of the duties of a CSS 3, he is being denied the opportunity for promotion. Nevertheless, Respondent's decision in this regard cannot be found to be arbitrary and capricious. In fact, if not for the specific language of the CSS 3 class specification, it would appear that Grievant would be entitled to at least have DOP review his position. However, the CSS 3 specification contains the specific requirement that the employee “ha[s] received the recommendation of their supervisor to advance.” Obviously, this language was placed in the class specification for a reason. This requirement indicates that DOP and DHHR intended for any employee who is up forpromotion for this position to have his or her supervisor's approval, which would also explain BCSE's system utilizing management team review prior to recommendation for promotion. Although Grievant contends that the requirement of in excess of eight legal referrals per month is not a job “duty” required of a CSS 3, DHHR witnesses explained that review of cases and preparation for legal action encompasses a major portion of the work of these employees. If legal referrals are not being generated, then it is questionable whether, in the absence of placement on a special project, the employee is adequately performing his required job duties. In addition, one of the “examples of work” contained in the CSS 3 specification refers to “evaluat[ion] [of] cases to determine appropriate legal . . . actions to recommend to the BCSE attorney.” Therefore, generation of legal referrals *is* a contemplated duty of all CSS 3s.

Under the circumstances presented, the undersigned does not find Respondent's decision not to recommend Grievant for promotion to be arbitrary and capricious. Pursuant to the specific

requirements of the class specification, supervisor approval is required for an employee to be reallocated to a CSS 3 position. Because of deficiencies in his performance of the required duties of that position, Grievant's superiors did not believe he should be recommended for promotion, which was reasonable and justified under the circumstances.

The following conclusions of law support this decision.

Conclusions of Law

1. In a classification case, a grievant must prove by a preponderance of the evidence that his duties for the relevant period more closely match another cited DOPclassification specification than that under which he is currently assigned. *See generally, Hayes v. W. Va. Dep't of Natural Res*., Docket No. NR-88-038 (Mar. 28, 1989).

2. Respondent's decision not to recommend Grievant for reallocation must be viewed pursuant to the arbitrary and capricious standard.

3. 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. Dep't of Educ*., 210 W. Va. 105, 556 S.E.2d 72 (2001)(citing *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). A searching and careful inquiry into the facts is required; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the agency. *See generally, Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276 (1982).

4. It was not arbitrary and capricious for Respondent to rescind recommendation of Grievant for promotion to CSS 3, the classification specification for which requires the supervisor's recommendation for promotion.

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.

Date: June 8, 2006

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Although the level three grievance evaluator issued a recommended decision granting Grievant's request for reallocation, Rocco Fucillo, General Counsel for DHHR, refused to accept the recommendation and denied the grievance.