THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

DIANA ADAMS,

Grievant,

v. **Docket No. 06-RJA-147**

Janis I. Reynolds

Senior Administrative Law Judge

REGIONAL JAIL AUTHORITY AND CORRECTIONAL

FACILITY AUTHORITY/SOUTHWESTERN REGIONAL JAIL,

Respondent.

D E C I S I O N

Grievant, Diana Adams, filed this grievance against her employer, the Regional Jail and Correctional Facility Authority ("RJA"), on March 30, 2006. Her Statement of Grievance states:

> That permanent shifts, days off and positions have been given to a select few employees without giving the same opportunity to senior officers with the same qualifications.

The relief sought was "[t]hat all employees be given the same opportunity."

This grievance was denied at all lower levels. Grievant appealed to Level IV on May 4, 2006, and a Level IV hearing was held on August 10, 2006, in the Grievance Board's Charleston office. Grievant represented herself, and RJA was represented by Chad Cardinal, Esq. This case became mature for

decision on August 17, 2006, after receipt of a complete copy of the Level III Decision.

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 with the RJA at the Southwestern Regional Jail. Her date of hire was June 1, 1998.

2. When Grievant first started her employment, the more senior employees could receive permanent days off. This policy was changed some years ago. Currently, Correctional Officers work on rotating shifts with rotating days off. All officers, except those on certain assignments, work on this schedule.

3. Assignments, such as a transportation officer, training officer, video arraignment officer, or quartermaster, are not separate positions, but are assignments of certain duties, completed by Correctional Officers. These assignments are highly sought- after because they are usually Monday through Friday, day shift. The officers who fill these positions are generally ones with greater experience, and are dependable and have good interpersonal skills. Transportation officers are also required to be firearm certified, as they are responsible for handling inmates outside the facility.

4. RJA's Policy and Procedure Statement 1001 gives the authority to manage the facility to a single individual, the Administrator, and, at the Southwestern Regional Jail, that person is Tom Scott. He assesses the abilities of his officers and makes the assignments identified in Finding of Fact 3 based on the experience and abilities of the individuals.

5. Some of the officers currently serving in these positions have received severe disciplinary action before they were selected to fill these positions. 6. Grievant was assigned to transportation for two years with set days off. She was removed from this assignment approximately one year ago for her failure to follow policy. (See footnote 1)

7. Grievant has recently requested to be placed in back in transportation.

8. The filling of these identified positions is based on the needs of the facility and abilities of the candidates. Test. Casto, Level IV Hearing.

Synopsis

Grievant asserts it is not fair that only certain people have these assignments, when senior officers meet the qualification for the positions.

RJA asserts the assignment of officers to these areas is a management decision, based on the needs of the facility, the need for public safety, and the qualifications of the officers.

Grievant did not meet her burden of proof and establish any violation of policy or discrimination in the assignment process. Additionally, until a year ago, Grievant was a member of the "select few" and had held one of these sought-after positions for two years.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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).

I. Management Decisions

Grievant basically is asserting a disagreement with the management decisions of RJA. 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 to or 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, she has not demonstrated RJA's management decisions are in error or arbitrary and capricious. Grievant held a position in transportation and was removed from this assignment because she violated procedures. These actions by RJA cannot be seen as unreasonable.

II. Discrimination

Grievant also asserted she was treated differently than other employees. W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, 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." Administrative notice is taken that the West Virginia Supreme Court of Appeals has revised the legal test for discrimination claims raised under the grievance procedure statutes. In The Board of Education of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004), the West Virginia Supreme Court of Appeals held a grievant must establish a case of discrimination by showing: (See footnote 2)

> (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 she is treated differently than other officers at her facility. She held

one of the positions she sought, and lost it for failure to follow the required job responsibilities. In her current position, she treated is the same as other similarly situated Correctional Officers. Grievant has not met her burden of proof and demonstrated discrimination.

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 her 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).

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

3. "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 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.

4. Grievant has not demonstrated Respondent's management decisions are arbitrary and capricious. 5. 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."

6. In The Board of Education of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814, 818 (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).

7. Grievant has failed to establish she has been treated differently than other similarly situated employees.

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

SENIOR ADMINISTRATIVE LAW JUDGE

Date: September 29, 2006

Footnote: 1

Grievant testified she had not received any disciplinary action for this violation, but Mr. Scott said she did. No document was offered to prove Grievant received a written reprimand.

Footnote: 2

In this case the Court distinguished claims of discrimination/favoritism filed under the State's Human Rights Act, in which the employer's motive for the conduct, i.e., treating an employee differently based on one of the impermissible factors stated in the Act (race,religion, color, national origin, ancestry, sex, age, blindness, handicap) is decisive, and those brought under the more general definitions set forth in grievance statutes, W. Va. Code §§ 18-29-1, et seq. and 29-6A-1, et seq. Employees filing discrimination/favoritism claims under the grievance procedures need only meet the legal test as stated above, and employers may no longer present a justification for the difference in treatment. Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).