THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

CHERYL BEASLEY,

Grievant,

v.

Docket No. 07-HHR-376

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/PINECREST HOSPITAL,

Respondent.

DECISION

Grievant, Cheryl Beasley, filed this grievance on June 19, 2007, in which her Statement of Grievance claims, “arbitrarily changed requirements, arbitrarily changed duties, demoted, discriminated.” Her relief sought indicates, “want position back in program services as a skills trainer and no harrasment [sic].”

This grievance was denied at the lower levels. The Grievant appealed to level four on August 3, 2007. (See footnote 1) A level four hearing was noticed to be held on February 26, 2008; however, the parties agreed to submit the grievance on the record developed at the lower levels. The matter became mature for decision on April 16, 2008, following the receipt of the parties' proposed findings of fact and conclusions of law. Grievant was represented by Stacey Lynn Fragile, Esquire, and Respondent was represented by B. Allen Campbell, Senior Assistant Attorney General.

Synopsis

Grievant was transferred from the Program Services Department because she could no longer perform an essential duty of that unit (driving or riding in a van used for the transportation of hospital

residents). Respondent accommodated Grievant's request to not drive the hospital van, and a management decision was made to move Grievant to another department because she could no longer perform an essential function of her job. Grievant suffered no change in classification and no loss in pay. Grievant did not demonstrate that her transfer to another department was a violation of any law, policy, rule or regulation. Respondent's actions were more than justified, and Respondent did not act in an arbitrary and capricious manner in transferring Grievant. Grievant has not met her burden of proof by a preponderance of the evidence.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is currently employed by the West Virginia Department of Health and Human Resources/Bureau for Behavioral Health and Health Facilities ("DHHR") as a Health Service Assistant in the Nursing Department at Pinecrest Hospital. Grievant was previously working in the Program Department of Pinecrest Hospital as a Skills Trainer. Grievant's classification as a Health Service Assistant has remained the same throughout this transfer to a different unit.

2. A Skills Trainer is responsible for organizing, leading, and instructing mentally and/or physically challenged residents in individualized training programs such as self care skills, independent living skills, and social skills.

3. In the spring and summer of 2006, Grievant received training from Joe Smith, Recreation Specialist, on driving the facility van. Grievant received one-on-one training from Mr. Smith in operating the van. Grievant began driving the facility van for resident outings during the summer of 2006.

4. On May 23, 2007, Grievant informed Teresa Croy, Director of Program Services, that she was no longer comfortable with driving the van due to a potential accident that she avoided. (See footnote 2) Ms. Croy attempted to relieve Grievant's concerns by letting her know that it was apparent that her driving skills prevented a serious accident. Nevertheless, Grievant indicated that she did not want to be responsible for operating the van. Grievant made note that the two other Skills Trainers did not drive the van, and claimed she had not received any training on operating the van. Ms. Croy reminded Grievant of the training from Joe Smith, and Grievant denied having adequate training for operating the van.

5. Ms. Croy then met with Angela Booker, Pinecrest CEO, and Aimee Bragg, Human Resources Director. It was determined that driving the van was an essential aspect of the Skills Trainers' duties. Following this management determination, all the Skills Trainers received training on how to operate the van. 6. Grievant was on medical leave from May 29, 2007, to June 5, 2007. Upon her return, Grievant was informed that she would be required to attend mandatory training on operation of the facility van. Ms. Croy informed all Skills Trainers that they would all be given instructions on proper operation of the van; thereafter, driving outings would be rotated between the Skills Trainers.

7. At that time, Grievant noted her doctor had placed her on medication that might make her unable to perform some duties of her job. Ms. Croy pointed out to Grievant that she had been released to work with no restrictions pursuant to her physician's statement.

8. On June 13, 2007, Grievant was scheduled for a one-on-one training with Margaret Robinson, Activities Director. Grievant refused to sign into the training session, citing her nervous condition. Grievant eventually agreed to the training. The lesson had to be cut short because of Grievant's failure to properly operate the van.

9. On June 14, 2007, a meeting was held with Grievant, Teresa Croy, Angela Booker, and Aimee Bragg to discuss Grievant's situation. Efforts were made to accommodate Grievant's condition by allowing her to be a passenger in the van as opposed to operating the van. Grievant was unable to assure Ms. Booker that, in the event of a potential accident, she would be able to provide for the safety of the patients on the van.

10. Consequently, on June 15, 2007, Grievant was reassigned to the Nursing Department because she was unable to perform an essential function of her job in the Program Services Department.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her claim by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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).

Grievant contends that DHHR acted in an arbitrary and capricious manner in transferring her to the Nursing Department. Grievant argues that other Skills Trainers in the Program Services Department were permitted to not drive the facility van without any reassignment. In addition, Grievant was denied any opportunity to receive any further training on the van in order to get past her nervous condition. DHHR counters that it did not act in an arbitrary and capricious manner in transferring Grievant to the Nursing Department. It was within DHHR's discretion to require Skills Trainers to drive the hospital van. This was an essential function of the job requirements of all Skills Trainers. Grievant clearly demonstrated she was not able to operate the hospital van. DHHR accommodated Grievant by transferring her to a Department in which she could perform the job duties.

DHHR is correct in its contention that the agency has the right to transfer and relocate employees, as the need arises. The West Virginia Division of Personnel Administrative Rule § 3.96 defines transfer as “[t]he movement of an employee to adifferent 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 not demoted or reduced in pay. *Childers v. Civil Serv. Comm'n*, 155 W. Va. 69, 181 S.E.2d 22 (1971). The Grievance Board has also ruled that state agencies have the authority to transfer an employee from one official headquarters to another. *Bever v. Dep't of Health & Human Res.*, Docket No. 96-HHR-258 (Dec. 31, 1996); *Goodnight v. W. Va. Div. Of Human Serv.*, Docket No. 91-DHS-111 (May 31, 1991).

The "arbitrary and capricious" standard of review is a deferential one which presumes an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996). "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 HumanRes.*, 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 instant case, DHHR's transfer of Grievant from the Program Services Department to the Nursing Department was not done in an arbitrary and capricious manner. The lower level record does establish that Grievant first volunteered to be a van driver for the Program Services Department; accordingly, it was not an essential duty of her position. However, the lower level record also reflects that the operation of the facility van evolved into an essential duty. In fact, the listed duties for a Skills Trainer clearly indicate they are to schedule opportunities and training for residents in areas of shopping, eating in a restaurant, community or facility social events, etc. Inherent in these duties is the need to provide transportation as either an operator of the facility van, or a passenger assisting hospital patients. Grievant cannot argue that the actions of her employer were unreasonable when considering the fact that DHHR accommodated Grievant's request that she not be the operator or passenger in the facility van.

Management decisions, such as the one here, are to be given great deference. As a general rule, “[A] Grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute,or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety.” *Rice v. Dep't of Transp./Div. of Highways*, Docket No. 96-DOH-247 (Aug. 29, 1997). Grievant did not demonstrate that her being moved to another department was a violation any law, policy, rule or regulation. In fact, § 11.6 of the West Virginia Division of Personnel's Administrative Rules permits this transfer.

While not argued in Grievant's level four proposals, there was a lower level claim of discrimination. This assertion fails because she did not demonstrate that she is similarly situated with another employee who was treated differently from herself. *See Board of Education v. White*, 216 W.

Va. 242, 605 S.E.2d 814 (2004). The lower level record indicates that another employee in the Program Services Department was exempt from having to operate the facility van. However, this is due to the employee providing DHHR with documentation from her physician stating that she is unable to perform that duty. By contrast, Grievant's statement from her physician indicates that she was allowed to return to work on full duty, without restrictions. Level Three, Respondent's Exhibit 6. Grievant has not established by a preponderance of the evidence that she should be transferred back to her previous position as a Skills Trainer in Program Services at Pinecrest Hospital.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her claim by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also Holly v. LoganCounty 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).

2. The West Virginia Division of Personnel 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.” 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.”

3. 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 not demoted or reduced in pay. *Childers v. Civil Serv. Comm'n*, 155 W. Va. 69, 181 S.E.2d 22 (1971).

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 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, andin disregard of facts and circumstances of the case." *Eads, supra* (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

5. "[A] Grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety." *Rice v. Dep't of Transp./Div. of Highways*, Docket No. 96-DOH-247 (Aug. 29, 1997).

6. Respondent's decision to transfer Grievant to the Nursing Department was justified by Grievant's inability to perform an essential duty of her job; was not arbitrary and capricious; and was not a violation of any law, policy, rule or regulation.

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. *See* W. Va. Code § 29-6A-7 (See footnote 1). Neither the West Virginia Public 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 Grievance Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: June 30, 2008

Ronald L. Reece

Administrative Law Judge

Footnote: 1

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former

statutes, which continue to control the proceedings in this case.

Footnote: 2

Grievant related that she was on a four lane highway when a large truck was in the process of passing the van. The truck was going too fast, and almost hit the car in their lane of traffic before that car was able to move over from the passing lane. In the process, the car almost cut the van off when changing lanes.