THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JERRY HARRIS and TERESA BOGGS,

Grievants,

v. **Docket No. 07-DOH-071**

**WEST VIRGINIA DEPARTMENT OF HIGHWAYS/
DIVISION OF TRANSPORTATION,**

Respondent, and

BILL FARREN,

Intervenor.

DECISION

Background

Events that ultimately led to this Grievance occurred years earlier and some background information is necessary to understand how the grievance developed.[1] On July 8, 2003, Teresa Boggs was placed into the Acting Materials Supervisor position by the District 9 District Engineer, Jim Lagos. Prior to that time, Ms. Boggs had applied for that position and was told by Don Beals, Administrative Services Manager for District 9, that she did not meet the minimum qualifications.[2] Ms. Boggs continued to serve as the Acting Materials Supervisor until the position was posted on April 2, 2005. Four applicants

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[1] The facts that make up this background come from a level three grievance hearing and decision in a consolidated grievance filed by Jerry Harris and William Farris contesting the appointment of Teresa Boggs to the Materials Supervisor position in 2005. *Harris/Farren v. W.Va. Dep't of Transp./Div. of Highways,* Docket Nos. 2005-0979-NS-399, (Feb. 21, 2007).

[2] To be qualified to be a Materials Supervisor Ms. Boggs needed to be certified as a Transportation Engineering Technician – Senior. She did not hold that certification when she was in the position in an acting capacity.

applied for the position, met the minimum qualifications, and were interviewed: Ms. Boggs, William T. Farren, Michael Andy Powell, and Jerry Lee Harris. By this time, Ms. Boggs had obtained the certification she needed to qualify for the Materials Supervisor position.

The applicants were interviewed by Greg Hylton and Don Beals. Mr. Hylton and Mr. Beals decided to recommend William Farren for the Materials Supervisor position. However, at the instruction of Mr. Lagos, Ms. Boggs was recommended for and received the job.[3] William Farren and Jerry Harris filed grievances on October 31, 2005, contesting the placement of Ms. Boggs into the Materials Supervisor position. Because the grievances involved basically the same facts and issues they were consolidated for decision. By decision dated February 21, 2007, DOH was ordered to place William Farren into the Materials Supervisor position. The decision also required that the order be implemented immediately.[4] By letter dated May 15, 2007, Jeff Black, Director of Human Resources for the Division of Highways, informed Ms. Boggs that as a result of the February 21, 2007, decision, Ms. Boggs was demoted from the classification of Transportation Engineering Technologist, to the classification of Transportation Engineering Technician-Senior, effective June 1, 2007. Additionally her salary was reduced to the pay level she held prior to being promoted to the Materials Supervisor position.

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[3] Mr. Lagos apparently felt that women, as a class, were under represented in DOH management positions and believed that this was an opportunity to address that issue.

[4] This decision was rendered at level three of the old grievance procedure. W. VA. CODE §§ 29-6A-1 et seq. The level three hearing examiner was an attorney employed by the DOH to hear grievances at that level.

The Present Grievances:

On March 1, 2007, Teresa Boggs ("Grievant") filed a level one grievance form contesting her demotion from the Materials Supervisor position as a result of the level three decision. As relief she sought:

> Reinstatement of the Technologist classification, Level V in District Nine and any back pay, interest or benefits I would have been entitled due to or resulting from the Level III Grievance decision dated February 21, 2007.

Jerry Harris filed an appeal from the same level three decision to level four. As relief he continued to seek placement in the Materials Supervisor position with back pay and benefits.[5] Mr. Harris' appeal was consolidated for consideration with Grievant's claim. However, Mr. Harris retired from Highways on October 31, 2006, and subsequently withdrew his appeal. Bill Farren requested to intervene in the grievance filed by Grievant Boggs and that request was granted by an Order entered March 26, 2007.

After a number of continuances, a hearing was held before the undersigned Administrative Law Judge on May 11, 2009, in Beckley, West Virginia. Mr. Harris had withdrawn his appeal prior to this hearing. Grievant Boggs was present at the hearing and was represented by Steve Hunter, Esquire. William Farren ("Intervenor") attended the hearing pro se and Respondent was represented by Barbara L. Baxter, Esquire from the DOH Legal Division.

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[5] 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). This act became effective July 1, 2007. Because these grievance have been transferred to the new procedure, they are being decided pursuant to the provisions of W. VA. CODE §§ 6C-2-1 to 6C-2-7 (2008).

The record of the prior Farren/Harris grievance was made a part of the record in this matter in anticipation that the relative qualifications of the candidates for the Materials Supervisor position would be an issue since the parties were apparently seeking placement or reinstatement into that position. However, Mr. Harris withdrew and Grievant's Counsel stated that Grievant did not seek to contest whether it was proper to place Mr. Farren in the Materials Supervisor job. "All claims related to obtaining the Materials Supervisor Position were withdrawn."[6] Grievant alleges that it was improper for DOH to reduce Grievant's salary to her previous level after removing her from the Materials Supervisor position and that is the sole issue to be contested in this matter. As relief, Grievant seeks to have her pay returned to the level she received as a Materials Supervisor plus back pay and interest.

The parties were instructed to provide proposed Findings of Fact and Conclusions of Law to be postmarked no later than June 30, 2009. However, problems arose with copies of the recording provided to the parties and extensions were granted to allow the representatives to review the recordings prior to submitting their proposals. Both parties submitted fact/law proposals. The last proposal was received at the Grievance Board on September 24, 2009, and this matter became mature for decision on that date.

Synopsis

Grievant Teresa Boggs was removed from a supervisory position and demoted to her previous job as the result of a decision in a grievance filed by one of the unsuccessful applicants. As part of the demotion, Grievant's pay was reduced from the supervisory rate

[6] Grievant's Proposed Findings of Fact and Conclusions of Law, p. 4.

to the rate she received in her previous position. Grievant argues that it was unreasonable to lower her salary as a result of returning her to her prior job. Grievant failed to prove that Respondent's decision to reduce Grievant's salary to the rate she previously held when she was removed from the supervisory position was arbitrary or capricious. Accordingly the grievance is denied.

The following Findings of Fact are based upon a thorough review of the record in this grievance.

Findings of Fact

1. Prior to 2003 Grievant held the position of Records Coordinator/Lab Supervisor in DOH District Nine. That position is classified as a Transportation Engineer Technician-Senior and is paid at Pay Grade 17. The salary range for that classification is $2,919 per month to $5,401 per month.

2. On July 8, 2003, Grievant was placed in the temporary position of Acting Materials Supervisor in DOH District Nine. Her salary was increased to the supervisor level while she served in that position. The classification for that position is Transportation Engineering Technologist and the Pay Grade is 19. The salary range for that classification is $3,281 per month to $6,070 per month.

3. The Materials Supervisor position was posted on April 2, 2005, to be filled on a permanent basis. Four applicants applied for the position, met the minimum qualifications, and were interviewed: Ms. Boggs, William T. Farren, Michael Andy Powell, and Jerry Lee Harris.

4. Grievant Boggs was selected to fill the position and applicants for the position, Jerry Harris and William Farren, filed grievances contesting Ms. Boggs' selection.

5. At level three of the old grievance procedure, a hearing examiner employed by the DOH determined that William Farren should have been selected for the Materials Supervisor position and Ordered DOH to place Farren in that position immediately. That decision was rendered on February 21, 2007. *Harris/Farren v. W.Va. Dep't of Transp./Div. of Highways,* Docket Nos. 2005-0979-NS-399 (Feb. 21, 2007).

6. Grievant Boggs and Jerry Harris filed two separate actions contesting the February 21, 2007 level three decision. Grievant Boggs' grievance was filed March 1, 2007.[7]

7. Grievant sent a letter to Jeff Black, DOH Director of Human Resources, dated March 12, 2007. In that letter Grievant proposed that she be returned to her previous job, but that her rate of pay remain what it was in the Materials Supervisor position. She noted that her rate of pay in that position fell within the pay range of her prior classification. Grievant's Exhibit 4.

8. By letter dated April 16, 2007, Director Black notified Grievant that the DOH was contemplating demoting Grievant from her present classification of Transportation Engineering Technologist to her prior classification of Transportation Engineer Technician-Senior. Director Black informed Grievant that the demotion would result in a reduction of her rate of pay from $3,600 per month, to her previous rate of pay of $3,279 per month. The reason for the contemplated action was that in the level three grievance decision the DOH had been ordered to immediately place William Farren in the Materials Supervisor

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[7] As previously noted, Mr. Harris has subsequently withdrawn his grievance and Grievant Boggs has narrowed her Grievance to the single issue of whether it was proper for her rate of pay to be reduced when she was demoted to her previous job.

position and "[i]nasmuch as two appointments cannot be made to the same position, your removal from the position, by way of demotion, is required." Respondent's Exhibit 2.

9. By letter dated May 15, 2007, Director Black informed Grievant that she was demoted from the Materials Supervisor position in the Transportation Engineering Technologist classification to her previous job of Records Coordinator/Lab Supervisor in the Transportation Engineer Technician-Senior classification, with the salary reduction set out in his letter of April 16, 2007. The demotion reduced her monthly rate of pay by $321. He also repeated the reasons for the demotion set out in his previous letter. Respondent's Exhibit 2.

10. Both of the pay rates that Grievant was receiving both before and after her demotion fall within Pay Grade 17 required for the classification Transportation Engineer Technician-Senior and Pay Grade 19 required for the classification Transportation Engineering Technologist.[8]

Discussion

As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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).

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[8] The actual salaries for these ranges are set out in Findings of Fact 1 and 2.

The reduction of pay in a demotion is controlled by the Division of Personnel Legislative Rule which states:

> 5.6 Pay on Demotion
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> (a) The appointing authority has the discretion to reduce or not reduce the pay rate of any employee who is demoted if the employee's pay rate is within the pay range of the job class to which the employee is demoted.
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> (b) The appointing authority shall reduce the pay rate of an employee who is demoted if the employee's current pay rate is above the maximum pay rate for the job class to which the employee is demoted. The reduction may be to any pay rate within the pay range of the job class to which the employee is demoted as long as the pay rate does not exceed the maximum pay rate of the pay range. If the demotion is to a formerly held job class and the employee's current pay rate is above the maximum pay rate for the job class, the reduction may be to any pay rate within the pay range of the job class to which the employee is demoted or to his or her last pay rate in the formerly held job class, even if the last pay rate is above the maximum pay rate for the job class.

143 C.S.R. 1 § 5.6.

Paragraph (b) of the rule does not apply to this situation because the pay Grievant was receiving as the Materials Supervisor was not above the maximum rate of pay for Pay Grade 17, which is the pay grade to which she was being assigned. Conversely, paragraph (a) does apply. Pursuant to that rule, the DOH had discretion to reduce or not reduce the pay rate of Grievant since her pay rate as a Materials Supervisor was within the Pay Grade 17. However, as with all discretionary actions, the discretion may not be exercised in a manner which is arbitrary and capricious. *Watterson v. Dep't of Transp./Div. of Highways*, Docket No. 03-DOH-155 (Aug. 26, 2003); *See also Walton v. W. Va. Div. of Corr.*, Docket No. 03- CORR-109 (July 22, 2003); *Antolini, et al. v. W. Va. Dept. of Transp.*, Docket No. 01-DOH- 471 (Aug. 30, 2002); *McCauley v. W. Va. Div. of Corr.*, Docket No. 98-CORR-088 (July 10, 1998). 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. *Watterson, supra; Adkins v. W. Va. Dept. of Educ.*, 210 W. Va. 105, 566 S.E.2d 72 (2001)(citing *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)).

Director Black stated that it is the regular practice of the DOH in situations where an employee is displaced from a promotion by a grievance decision to return the employee to the same position and pay that he or she held prior to the promotion that was found to be improper. This practice is followed so that the employee is placed in the exact position he or she would have been had the improper personnel action not taken place. The employee neither benefits nor suffers from the employer's mistake.[9] This practice is consistent with the practice followed by the DOH in the *Watterson* case cited above. As in this case, the Grievant in *Watterson* was contesting the fact that his rate of pay was returned to the rate that he was paid in his previous position. Mr. Watterson was also demoted by DOH because his promotion was found to be improper and another applicant was ordered to be placed in his position. Finally, just as in the present case, Mr. Watterson's salary which was being reduced, did not exceed the maximum pay rate of the classification to which he was being demoted. The Administrative Law Judge in *Watterson* concluded that the DOH's action was reasonable. She specifically noted:

> To allow a wrongly promoted employee to retain the benefits of the higher salary only serves to diminish the rewards a promotion gives to a deserving employee.

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[9] The employee does benefit from the higher salary he or she received while serving in the position that was filled improperly. However, to expect the employee to return that additional compensation would fail to account for the added responsibility the employee assumed while serving in the promotion position.

Watterson, supra, p 8.

Grievant argued that DOH has, at times, allowed demoted employees to retain their salaries when they were demoted. Even though Grievant did not produce any evidence of specific incidents when that has taken place, Director Black conceded that the DOH has exercised its discretion to occasionally allow employees who were demoted in special circumstances, to retain the salary of the higher position.[10] However, he clarified, that the DOH consistently returns employees who are demoted as the result of personnel actions being overturned, to their original lower salary for the reasons set out above. No evidence was produced to the contrary.

Respondent demonstrated a reasonable basis for its decision to reduce Grievant's salary when she was demoted to her prior position as a result of her promotion being found to be improper. Grievant failed to prove that the action of the DOH was arbitrary and capricious. Consequently, the grievance is denied.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). 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).

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[10] Three examples of circumstances where employees were able to retain higher rates of pay when they were demoted are examined in *Watterson, supra.*

2. Respondent may not exercise its discretion in a manner which is arbitrary and capricious. *Watterson v. Dep't of Transp./Div. of Highways*, Docket No. 03-DOH-155 (Aug. 26, 2003); *See also Walton v. W. Va. Div. of Corr.*, Docket No. 03-CORR-109 (July 22, 2003); *Antolini, et al. v. W. Va. Dept. of Transp.*, Docket No. 01-DOH-471 (Aug. 30, 2002); *McCauley v. W. Va. Div. of Corr.*, Docket No. 98-CORR-088 (July 10, 1998).

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. *Watterson, supra; Adkins v. W. Va. Dept. of Educ.*, 210 W. Va. 105, 566 S.E.2d 72 (2001)(citing *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)).

4. Respondent had a reasonable basis for the decision to reduce Grievant's rate of pay to the rate she received prior to being promoted. Grievant failed to prove that this action was arbitrary and capricious.

Accordingly, the grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: OCTOBER 20, 2009

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE