**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**RODNEY GOFF,**

**Grievant,**

**v.** **Docket No. 2018-1013-DOT**

**DIVISION OF HIGHWAYS,**

**Respondent.**

## DECISION

Grievant, Rodney Goff, is employed by Respondent, Division of Highways. On February 24, 2018, Grievant filed this grievance against Respondent stating, "Reprimand not remoned [sic] as requested". For relief, Grievant seeks "[t]o be made whole in every way including removal of reprimand".

A level one conference was held on March 30, 2018. A level one decision was rendered on April 20, 2018, denying the grievance. Grievant appealed to level two on April 23, 2018. A mediation session was held on August 17, 2018. Grievant appealed to level three of the grievance process on September 6, 2018. A level three hearing was held by phone on January 29, 2019, before the undersigned at the Grievance Board's Westover, West Virginia office. Grievant was represented by Gordon Simmons, Steward, UE Local 170, West Virginia Public Workers Union. Respondent appeared through its party representative, Natasha White, and was represented by, Jason Workman, Esq. This matter became mature for decision on March 1, 2019, after receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

## Synopsis

During the course of his ongoing employment with Respondent, Grievant was disciplined through a written reprimand. Grievant contends he did not grieve the reprimand because the district human resource director informed Grievant he could request its removal from his personnel file after a year. Two years later, Grievant did request removal of the written reprimand. Respondent refused to consider Grievant's request, citing its unwritten policy of not removing written reprimands from employee personnel files. Grievant contends that Respondent's refusal is arbitrary and capricious, because Respondent has no such policy. Consequently, Grievant argues, the Division of Personnel's Supervisor's Guide to Progressive Corrective and Disciplinary action obligates Respondent to remove, or at least consider removing, the written reprimand from his personnel file. While Grievant proved that Respondent did not have a removal policy, he did not prove that Respondent was obligated to even consider his request for removal. Accordingly, the grievance is Denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

## Findings of Fact

1. Grievant is a Transportation Worker 2 Equipment Operator in District Four and has been employed by Respondent since October 1, 2012. (Anthony Paletta's testimony & level one decision)

2. Anthony Paletta has been employed by the Respondent since May 1, 1978, and is an Administrative Services Manager 1, Human Resource Director for District Four.

His duties include preparation of all disciplinary paperwork in District Four. (Mr. Paletta's testimony & level one decision)

3. Respondent issued a written reprimand (RL-544) to Grievant on February 22, 2016, as discipline for unspecified conduct. (level one decision)

4. At the time the written reprimand was issued, Mr. Paletta told Grievant that Grievant could request its removal from his personnel file after one year, but that Grievant would need to contact "Charleston". (level one decision and Mr. Paletta's testimony)

5. In February 2018, two years after the written reprimand, Grievant requested that Mr. Paletta remove the reprimand from his personnel file. Mr. Paletta responded that he did not have the authority to remove the reprimand and told Grievant to contact Drema Smith, acting director for the Respondent's central human resource office in Charleston. (level one decision and Mr. Paletta's testimony)

6. Mr. Paletta forwarded Grievant's request to Respondent's central human resource office in Charleston. (level one decision)

7. On or about February 22, 2018, Mr. Paletta sent Grievant a text message stating, "I told you that you could request it [the written reprimand] be taken out but that it was the HR Director's decision as to whether or not to take it out. I now found out that DOP rules do not allow for it to be taken out." (Grievant's level one exhibit 1)

8. Natasha White is Respondent's Assistant Director of Human Resources in the central office. (Ms. White's testimony)

9. Ms. White was involved in the decision to deny Grievant's request to remove his written reprimand from his personnel file. (Ms. White's testimony)

10. Respondent denied Grievant's request for removal, citing its practice of not removing written reprimands from personnel files and noting that nothing in Respondent's written policy requires Respondent to remove written reprimands. (Ms. White's testimony)

11. The West Virginia Division of Personnel's Supervisor's Guide to Progressive Corrective and Disciplinary Action states that a written reprimand shall be placed in the employee's official agency personnel file and sent to the Division of Personnel and that "the supervisor may remove the written warning from the employee's personnel file after six (6) to twelve (12) months, according to the agency's policy; however, the document remains in the Division of Personnel file." (Emphasis in original) (Respondent's Exhibit 2)

12. Respondent has likely never received a request to remove a reprimand. (Ms. White's testimony)

13. Respondent's written disciplinary policy (West Virginia Division of Highways Administrative Operating Procedures, Section III, Chapter 6) addresses the imposition of written reprimands, but does not address their removal. (Respondent's Exhibit 1)

14. Respondent does not have a written policy concerning the removal of reprimands. (Mr. Paletta's testimony, Ms. White's testimony, and Respondent's Exhibit 1)

15. Respondent never considered Grievant's request to remove his February 22, 2016, written reprimand. (see level one decision, Mr. Paletta's testimony, and Ms. White's testimony)

## Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-

1-3 (2018). "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. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993), ***aff'd***, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

Grievant contends that Respondent should be required to remove the February 22, 2016, written reprimand from his personnel file because he was dissuaded from grieving this reprimand through his reliance on Mr. Paletta's misrepresentation that Grievant could request its removal after one year. Grievant further asserts that Respondent lacks a removal policy and that the West Virginia Division of Personnel's (DOP) Supervisor's Guide to Progressive Corrective and Disciplinary Action therefore controls Respondent's conduct, mandating that Respondent consider removal of a written warning after six to twelve months. Grievant avers that there are a number of factors pointing to Respondent's lack of a removal policy, including the fact that Respondent has never received a request for removal; that Respondent has a written policy for the issuance of written reprimands, but not for their removal; and that Grievant's District Four HR Director, who also happens to be a long time employee, would have been aware of such a policy if it existed. Grievant further contends that Respondent has in the past mitigated discipline through removing it from an employee's record and that Respondent's refusal to consider Grievant's request to remove his written reprimand is arbitrary and capricious. Respondent counters that it is not bound by the *ultra vires*[1] representations

[1]"An act performed without any authority to act on subject." BLACK'S LAW DICTIONARY 1522 (6th ed. 1990)

of its management and that Grievant has not proven that Respondent's actions are clearly wrong or an abuse of discretion.

The evidence shows that Mr. Paletta informed Grievant that Grievant could request the removal of his written warning after a year. However, "[a] state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers and all persons must take note of the legal limitations upon their power and authority. *Cunningham v. County Court of Wood County*, 148 W.Va. 303, 310, 134 S.E.2d 725, 729 (1964)." Syl. Pt. 1, *West Virginia. Pub. Employees Ins. Bd. v. Blue Cross Hosp. Serv. Inc.,* 174 W. Va. 605, 328 S.E.2d 356 (1985). "'Any other rule would deprive the people of their control over the civil service, and leave the status and tenure of all employees to be governed by whatever arrangements incumbent administrators may agree to or prescribe.'" *Freeman v. Poling*, 175 W. Va. 814, 819, 338 S.E.2d 415, 421 (1985) (*citing Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983)). Mr. Paletta's misrepresentation does not obligate Respondent to consider Grievant's request for a removal. Grievant did not cite any authority for his contention that his written reprimand should be removed as a result of his being dissuaded from grieving the reprimand through Mr. Paletta's misrepresentation. However, even if Mr. Paletta's representation had been accurate, it would have still been unreasonable for Grievant to forgo grieving his written reprimand in reliance thereon, because Mr. Paletta did not promise removal or even indicate the likelihood that Grievant's written reprimand would be removed from his personnel file.

The undersigned questions whether Respondent truly had an unwritten policy prohibiting removal of written reprimands. While Grievant cited no authority for his proposition that Respondent's policies must be in writing, the fact that Respondent had a

written policy addressing the issuance, but not the removal, of written reprimands, speaks to the veracity of whether Respondent had an unwritten policy on removal. Respondent's Assistant Director of Human Resources, Natasha White, testified that Respondent denied Grievant's request for removal of his written reprimand due to Respondent's practice of not removing written reprimands from personnel files and due to the fact that nothing in Respondent's written policy requires Respondent to remove written reprimands. Ironically, Ms. White could not recall a single instance of either the removal of a written reprimand or an employee's request for removal. It seems unlikely that Respondent would have had an unwritten policy on requests for removal when it has never received such a request. Mr. Paletta is a long-term employee, the district HR director, and the person responsible for preparing all disciplinary paperwork in District Four. It is therefore revealing that Mr. Paletta was not aware of any policy against removal until Grievant's request was denied.

In light of Respondent's apparent lack of a policy on the removal of written reprimands, DOP's Supervisor's Guide to Progressive Corrective and Disciplinary Action permits Respondent to remove a written reprimand. DOP's guide prescribes that Respondent "may remove the written warning from the employee's personnel file after six (6) to twelve (12) months, according to the agency's policy …". "'May' usually is employed to imply permissive, optional or discretional, and not mandatory action or conduct." BLACK'S LAW DICTIONARY 979 (6th ed. 1990). Therefore, while DOP's guide allows Respondent to remove written reprimands and, by implication, to consider removing written reprimands, it does not obligate Respondent to remove or consider removing written reprimands. Further, DOP's guide is not policy, but is simply guidance that does

not have the authority of policy. As such, it cannot obligate Respondent to consider Grievant's request for removal of his written reprimand.

Grievant cites no authority obligating Respondent to at least consider Grievant's request for removal of a written reprimand. "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." *Ball v. Dep't of Transp*., Docket No. 96-DOH-141 (July 31, 1997); *Mickles v. Dep't of Envtl. Prot*., Docket No. 06-DEP-320 (Mar. 30, 2007), *aff'd*, Fayette Cnty. Cir. Ct. Docket No. 07-AA-1 (Feb. 13. 2008). "Management decisions are to be judged by the arbitrary and capricious standard." *Adams v. Reg'l Jail & Corr. Facility Auth*., Docket No. 06-RJA-147 (Sept. 29, 2006); *Miller v. Kanawha County Bd. of Educ*., Docket No. 05-20-252 (Sept. 28, 2005).

Ultimately, Grievant contends that Respondent's refusal to consider removing Grievant's reprimand is arbitrary and capricious, because Respondent did not have a policy on the removal of reprimands and has mitigated discipline for other employees by removing discipline from their records. An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "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), ***aff'd*** Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998). "'[T]he "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. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ*., 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Res*., Docket No. 93-HHR-322 (June 27, 1997), ***aff'd*** Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ*., Docket No. 01-20-470 (Oct. 29, 2001), ***aff'd*** Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003). Grievant has not provided any instance where Respondent has removed or simply considered a request to remove a written reprimand from an employee's file. Grievant has not provided any proof of inconsistency by Respondent in its refusal to remove or consider removing a written reprimand.

Grievant asserts that Respondent has in the past mitigated discipline by removing it from an employee's record and that Respondent's refusal to do so for Grievant is arbitrary and capricious. "[A]n allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an

affirmative defense and the grievant bears the burden of demonstrating that the penalty was 'clearly excessive or reflects an abuse of agency discretion or an inherent disproportion between the offense and the personnel action.' *Martin v. W. Va. Fire Comm'n*, Docket No. 89-SFC-145 (Aug. 8, 1989)." *Conner v. Barbour County Bd. of Educ*., Docket No. 94-01-394 (Jan. 31, 1995), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No 95-AA-66 (May 1, 1996), appeal refused, W.Va. Sup. Ct. App. (Nov. 19, 1996). "Mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." *Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp*., Docket No. 96-HHR-183 (Oct. 3, 1996); *Olsen v. Kanawha County Bd. of Educ*., Docket No. 02-20-380 (May 30, 2003), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No. 03-AA-94 (Jan. 30, 2004), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 041105 (Sept. 30, 2004). "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." *Phillips v. Summers County Bd. of Educ*., Docket No. 93-45-105 (Mar. 31, 1994); *Cooper v. Raleigh County Bd. of Educ*., Docket No. 2014-0028-RalED (Apr. 30, 2014), ***aff'd***, Kanawha Cnty. Cir. Ct. Docket No. 14-AA-54 (Jan. 16, 2015). Grievant has failed to make a case for mitigation of his punishment. Grievant did not provide even

basic information on the infraction for which he was disciplined and did not specifically compare his situation to that of any other employees guilty of similar offenses. Without providing any specifics, Grievant has not shown that his punishment warrants mitigation and has not proven that the permanent placement of the written reprimand in his personnel file is, in and of itself, arbitrary and capricious.

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 his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

2. "A state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers and all persons must take note of the legal limitations upon their power and authority. Cunningham v. County Court of Wood County, 148 W.Va. 303, 310, 134 S.E.2d 725, 729 (1964)." Syl. Pt. 1, *West Virginia. Pub. Employees Ins. Bd. v. Blue Cross Hosp. Serv. Inc*., 174 W. Va. 605, 328 S.E.2d 356 (1985). "'Any other rule would deprive the people of their control over the civil service, and leave the status and tenure of all employees to be governed by whatever arrangements incumbent administrators may agree to or prescribe.'" *Freeman v. Poling*, 175 W. Va. 814, 819, 338 S.E.2d 415, 421 (1985) (*citing Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983)).

3. “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.” *Ball v. Dep't of Transp*., Docket No. 96-DOH-141 (July 31, 1997); *Mickles v. Dep’t of Envtl. Prot*., Docket No. 06-DEP-320 (Mar. 30, 2007), *aff’d*, Fayette Cnty. Cir. Ct. Docket No. 07-AA-1 (Feb. 13. 2008). “Management decisions are to be judged by the arbitrary and capricious standard.” *Adams v. Reg’l Jail & Corr. Facility Auth*., Docket No. 06-RJA-147 (Sept. 29, 2006); *Miller v. Kanawha County Bd. of Educ*., Docket No. 05-20-252 (Sept. 28, 2005).

4. An action is recognized as arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). “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), *aff’d* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

5. “‘[T]he “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. Syllabus Point 3, *In re Queen*,

196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ*., 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Res*., Docket No. 93-HHR-322 (June 27, 1997), ***aff'd*** Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ*., Docket No. 01-20-470 (Oct. 29, 2001), ***aff'd*** Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

6. Grievant did not prove by a preponderance of evidence that Respondent was obligated to remove or even consider Grievant's request to remove the written reprimand from its personnel file.

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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

**DATE: April 5, 2019**

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**Joshua S. Fraenkel**
**Administrative Law Judge**