CAROL JARRETT,

Grievant,

v. **Docket No. 98-ADMN-165**

DEPARTMENT OF ADMINISTRATION/DIVISION

OF PURCHASING and DIVISION OF PERSONNEL,

Respondents.

DECISION

Grievant, Carol Jarrett, stated in her original grievance:

> On May 29, 1997, Mr. David Tincher, Director of the Purchasing Division and my immediate supervisor, notified me by memo of my demotion, characterized by Mr. Tincher as "reassignment of duties and responsibilities." Because my performance was not in question, I believe that this demotion was based solely on favoritism and age discrimination.

Grievant's statement of relief is:

> I hereby request immediate injunctive and restorative relief, including but not limited to reallocation to ASA III; that my status and work place amenities be made equal to those prior to May 29, 1997, and that I be made whole in every way.

This grievance was denied at all lower levels, appealed to Level IV on May 15, 1998, and a hearing was held on September 23, 1998. At this hearing, the parties clarified the Statement of Grievance, and the relief sought by Grievant. Grievant stated her method of transfer and/or reallocation was improper and based on favoritism. The issue of age discrimination was not addressed in this clarification. (See footnote 1) Grievant also stated she agreed she was not demoted if the definition stated in the Division of Personnel ("DOP") rules was used, but the she had suffered a demotion in status. Grievant's requested relief had alsochanged, and she only asked to be placed in her former position. This case became mature for decision on November 23, 1998, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 2)

Issues and Arguments

Grievant argues she was improperly transferred and/or reallocated, and this action was the result of favoritism. Grievant did not cite any rule or regulation that was violated, but presented the testimony of Dr. Mary Murphy, from DOP's Employee Communications Section, that this action violated "the spirit of the rules", and the rules should not be used to "bludgeon employees". Additionally, Grievant argued the action was arbitrary and capricious and resulted in a demotion because she suffered a decrease in status.

DOP maintains the action was proper, not violative of any rules and regulations, and did not meet the definition of demotion, as a decrease in status is not one of the criteria utilized by DOP to decide whether a demotion occurred. Further, DOP noted an employer has the right to transfer an employee pursuant to Rule 11.06.

Respondent Department of Administration ("DOA") contends Grievant was not demoted as she maintained a comparable level of duties and the same pay grade as she had when she was the Administrative Secretary to the former Director of Purchasing. DOA notes Grievant's current classification, Administrative Services Assistant I, is the same pay grade as her prior classification, Administrative Secretary, and pursuant to the classspecification the duties are comparable. DOA also notes an employer has a right to transfer an employee, and asserted it was not arbitrary and capricious for Mr. Tincher to wish to have his secretary of ten years to remain with him, especially since he retained many of his former duties.

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

Findings of Fact

1. Grievant had been employed for approximately one and one half years as an Administrative Secretary for the Director of the Division of Purchasing, Ron Riley, when he retired. Prior to that time Grievant had been employed as a Secretary II with DOP.

2. Governor Underwood appointed Mr. Tincher to fill this position.

3. Because Mr. Tincher planned to retain his former duties as Assistant Director of the Administrative Services Section when he took the new position, he requested his current secretary, Debbie Watkins, be transferred and promoted into the Administrative Secretary position.

4. Mr. Tincher worked with DOP to see if this transfer could be arranged. Mr. Tincher asked Mr. Harold Curtis, the Assistant Director of the Acquisition and Contract Administration Section, if he would be able to use the services of Grievant. Mr. Curtis was pleased with this suggestion and agreed that an employee such as Grievant would be very useful in his section.

5. Mr. Tincher discussed the situation with Grievant and also sent her a memo about the proposed change. On May 20, 1997, Mr. Tincher sent Grievant a letter whichindicated her duties would change on June 2, 1997. He briefly identified her duties in an attachment and explained the position had been classified by DOP as an Administrative Services Assistant I, which was in her current pay grade. Mr. Tincher also indicated Grievant would be reporting directly to the Assistant Director of Acquisition and Contract Administration, and stated this transfer would improve operations by consolidating several important responsibilities into one position.

6. On May 22, 1997, Grievant responded to Mr. Tincher's letter and stated, "[t]he purpose of this memorandum is to communicate to you my willingness to assume the duties of the new position . . . and my belief that the new position is not appropriately classified." Grievant stated the list of job duties more closely matched those of an Administrative Services Assistant III. Grievant was fearful Mr. Tincher would remove some of the stated duties, and this removal would result in "a functional demotion . . ." from an Administrative Services Assistant III. Grievant asked Mr. Tincher to agree to requesting that DOP reconsider its initial classification determination. Grievant indicated she would be willing to accept the new duties "on an 'acting' basis" so the classification issue could be resolved prior to her official assumption of the duties. In the alternative, Grievant recommended Mr. Tincher assign the duties to her, then ask DOP to reallocate the position to an Administrative Services Assistant III, and then process the resulting promotion.

7. Also on May 22, 1997, Mr. Basford wrote Mr. Tincher to confirm that Grievant's position should be placed in the Administrative Services Assistant I classification. He noted Grievant had discussed the alleged misclassification with the Director of Personnel, and the Assistant Director of Personnel for Employee Relations. Mr. Basford noted the term "manage" in Grievant's Job Description meant to provide technical assistance and to oversee procedures, instead of the usual sense of planning, directing, and coordinating the work of subordinate employees. This interpretation was required because Grievant would not be supervising anyone. Mr. Basford confirmed the duties assigned to Grievant were "clearly within the Administrative Services Assistant I classification."

8. Mr. Tincher responded to the May 22, 1997 memo on May 27, 1997, and noted the duties of the position had been reviewed by DOP prior to his May 20, 1997 discussion with Grievant. He explained he did not intend to elevate her position to a higher pay grade, and stated his belief that Grievant's duties were in the proper classification and pay grade. Although Mr. Tincher believed Grievant's new position was correctly classified, he encouraged Grievant "to exercise your right to this review if you feel your position was not correctly classified." Mr. Tincher directed Grievant to begin her revised duties on June 2, 1997.

9. On June 9, 1997, Grievant wrote Joe Smith, then Acting Director of DOP, and requested that she be promoted, and her position be reallocated. Grievant stated she had willingly assumed the new duties and responsibilities. Grievant also asserted the following:

> Mr. Smith it should be obvious to the reasonable, prudent person that this adverse personnel action by Mr. Tincher represents a classic case of age discrimination. I am a professional secretary, nearly 60 years old and [with] 25 years of experience - 10 years of which is with the state of West Virginia. I have been replaced by a 32-year old woman with only fourteenyears of experience. (See footnote 3) I am being forced to accept a humiliating downgrade in my job title with its attendant loss of status, as well as being forced to bear the pain and embarrassment of vacating my spacious office and moving to a six by six cubicle in the clerical section. I also believe that Mr. Tincher caused the incident to be published in the Charleston Gazette on June 3, 1997, further adding to my emotional distress and trauma. (See footnote 4)
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> The reason for all this public humiliation has never been explained to me - no cause for this action has been expressed or implied. Mr. Tincher in fact, has had little to say to me since he was appointed Division of Purchasing . His communication method of choice has been to drop memos into my "in- box."
>
> In closing, I ask that you not allow this illegal, wrongful, unethical, and contriving conduct to stand. Please let me know your decision on this matter as soon as possible.

10. On June 19, 1997, Grievant sent Mr. Smith a copy of her revised Position Description Form. She did not indicate what she expected DOP to do with this document.

11. On September 5, 1997, Edison Casto, the Director of DOP responded to Grievant's June 19, 1997 memo. He apologized for the delay in his response, but noted this memo did not specifically state she was appealing her classification, thus it was assumed the Position Description Form was submitted for informational purposes. Mr. Casto noted DOP Rule 11.06 gave agencies broad

discretion in assigning its employees. He related the Position Description Form had been reviewed by Mr. Basford, and he had determined the position she occupied was correctly classified as an Administrative Services Assistant I, and Mr. Casto concurred. 12. In her Position Description Form Grievant gave her working title as Administrative Services Coordinator, and identified her position as a professional one.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Howell v. W. Va. Dep't of Health & Human Resources, 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).

Grievant has alleged the transfer/reallocation was improper, constituted a demotion, resulted from favoritism, and was arbitrary and capricious. These issues will be examined separately.

1. Transfer/Reallocation

The West Virginia DOP Administrative Rule Section 11.06 discusses and states:

> (a) Except as otherwise provided in Section 10.05 (See footnote 5) of this rule, appointing authorities may transfer a permanent employee from a position in one organizational subdivision of an agency to a position in another organizational sub-division of the same or another agency at any time. In the case of inter-agency transfers, annual and sick leave and all seniority rights shall be transferred with the employee.
>
> (b) Appointing authorities shall report all inter and intra-agency transfers within a class to the Director on appropriate forms at the time of the transfer. The Director shall approve transfers to comparable classes prior to thetransfers and shall require that the employee must meet the minimum qualifications of the new class.

West Virginia DOP Administrative Rule Section 3 (77) defines reallocation as “[r]eassignment by the Director of Personnel of a position from one classification to a different classification on the basis of a significant change in the kind or difficulty of duties and responsibilities assigned to the position or to correct a position misclassification.” West Virginia DOP Administrative Rule Section 5.07 discusses

pay on lateral class change and says, "[a]ny employee who receives a lateral class change shall be paid the same salary received prior to the change."

In addition to these definitions, Mr. Basford testified that the transfer of Grievant was proper and did not violate any DOP rules. Even Dr. Murphy (See footnote 6) who testified on Grievant's behalf, and who believed the transfer was wrong could only say the transfer violated the "spirit of the rules" and agreed there was no violation of the rules dealing with transfer and reallocation.

It is well settled that agencies under civil service regulations have wide discretion in the reassignment of employees. 67 **C. J. S.** *Officers* § 98. See also Stoneking v. W. Va. Div. of Corrections, Docket No. 93-CORR-530 (Nov. 30, 1994); Titus v. W. Va. Div. of Corrections, Docket No. 93-CORR-528 Nov. 22, 1994). A civil service employee may be transferred from one distinct classification to another when "the duties, qualifications, responsibilities, and salaries are substantially the same." Id. Thus, the undersignedAdministrative Law Judge finds the reallocation and transfer of Grievant was not improper based the West Virginia DOP Administrative Rules.

2. Demotion

West Virginia DOP Administrative Rule Section 3 (27) defines demotion as: "a change in the status from a position in one class to a position in another class of lower rank as measured by salary range, minimal qualifications, or duties, or a reduction in an employee's pay to a lower rate in the pay range assigned to the classification."

West Virginia DOP Administrative Rule Section 11.04 states:

> There are two types of demotion, involuntary and voluntary. An involuntary demotion is a reduction in pay and/or a change in classification to a lower classification due to the inability of an employee to perform the duties of a classification or for improper conduct. A voluntary demotion is a change is classification of an employee to a lower classification, a transfer of employee to a lower classification or a reduction in pay due to business necessity. An appointing authority may demote a permanent employee after presenting the employee with the reasons for the demotion stated in writing, and allowing the employee a reasonable time to reply thereto in writing, or upon request to appear personally and reply to the appointing authority or his/her designee. The appointing authority shall file the statement of reasons for the demotion and the reply with the Director of Personnel.

It is clear from the rules and definitions that Grievant was not demoted. Her pay and compensation did not change. The minimum qualifications for the two positions are comparable, as are the duties. Although Grievant believes the duties are not comparable, this belief alone without facts to support it is not sufficient to prove her feelings or contention. Mere allegations alone without

substantiating facts are insufficient to prove a grievance. Baker v. Bd. of Directors/W. Va. Univ. at Parkersburg, Docket No. 97-BOT- 359 (Apr. 30, 1998); See Harrison v. W. Va. Bd. of Directors/Bluefield State College, Docket No. 93-BOD-400 (Apr. 11, 1995). While it is understandable Grievant would notlike leaving her "spacious office", easy access to a printer designated only for her, and a filing cabinet within her office space, these are not the things that are examined when considering whether a demotion has taken place.

3. Whether the action was arbitrary and capricious

DOP has wide discretion in performing its duties although it cannot exercise its discretion in an arbitrary or capricious manner. The rules promulgated by the Personnel Board are given the force and effect of law and are presumed valid unless shown to be unreasonable or not to conform with the authorizing legislation. Moore v. W. Va. Dep't of Health and Human Resources/Div. of Personnel, Docket No. 94-HHR-126 (Aug. 26, 1994). See, Callaghan v. W. Va. Civil Serv. Comm'n, 166 W. Va. 117, 273 S.E.2d 72 (1980). Finally, and in general, an agency's determination of matters within its expertise is entitled to substantial weight. Princeton Community Hosp. v. State Health Planning, 174 W. Va. 558, 328 S.E.2d 164 (1985).

This standard of entitlement to substantial weight applies when a grievant attempts to review DOP's interpretation of its own regulations and classification specifications to determine if DOP's decision was arbitrary and capricious or an abuse of discretion. Farber v. W. Va. Dep't of Health and Human Resources/Div. of Personnel, Docket No. 95-HHR- 052 (July 10, 1995).

A grievant may prevail by proving DOP's action was taken in an arbitrary and capricious manner. See Kyle v. W. Va. State Bd. of Rehabilitation, Docket No. VR-88-006 (Mar. 28, 1989). 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 amanner contrary to the evidence before it, or reached a decision that is 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). 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 DOP. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

An employee who alleges impropriety regarding the placement of his or her duties and challenges

the pay grade to which his or her position was assigned, bears the burden of proving the claim by a preponderance of the evidence. This is a difficult undertaking. W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1995); Bennett v. Dep't of Health and Human Resources/Div. of Personnel, Docket No. 93-HHR-518 (June 23, 1995); Johnston v. Dep't of Health and Human Resources/Div. of Personnel, Docket No. 94-HHR-206 (June 15, 1995); Thibault v. Div. of Rehabilitation Services/Div. of Personnel, Docket No. 94-RS-061 (May 31, 1995); Frame v. Dep't of Health and Human Resources/Div. of Personnel, Docket No. 94-HHR-140 (Nov. 29, 1994). See O'Connell v. W. Va. Dep't of Health and Human Resources/Div. of Personnel, Docket No. 95-HHR-251 (Oct. 13, 1995).

Unless a grievant presents sufficient evidence to demonstrate DOP's determination is clearly wrong, inappropriate, or the result of an abuse of discretion, an administrativelaw judge must give deference to DOP and find the determination was correct. Farber, supra; O'Connell, supra.

Grievant did not demonstrate that 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 is so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp., supra. Although Grievant disagrees with DOP's determination that the duties of the two positions are comparable, this belief alone does not make DOP's determination arbitrary and capricious. The two positions are within the same pay grade, and this is accepted as a determination that the duties, while not exactly the same, are the same level of difficulty and responsibility. See Trimboli v. Dep't of Health and Human Resources/Div. Of Personnel, Docket No. 93-HHR-322 (June 27, 1997). Grievant presented no evidence to the contrary. The testimony of Dr. Murphy that she believes a Secretary II position is more responsible than an Administrative Services Assistant I is not determinative, especially since Dr. Murphy has never worked in the Compensation and Classification Section, was not familiar in any detailed way with the Administrative Services Assistant I class specification, and had not worked closely either with an Administrative Services Assistant I or an Administrative Secretary. Accordingly, this argument must also fail.

4. Favoritism

W. Va. Code 29-6A-2 (h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or otheremployees." To prove favoritism a grievant must establish a prima facie case which consists of demonstrating:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated [to] actual job responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

If a grievant establishes a prima facie case, a presumption of favoritism exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, a grievant may still prevail if he can demonstrate the reason given by the respondent was pretextual. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievant has failed to establish a prima facie case. Although Ms. Watkins was given a promotion, and was treated favorably, this promotion did not harm Grievant, and Grievant was not treated unfairly or in a detrimental fashion. Grievant maintained her pay grade and continued to be employed in a similar position with comparable duties. Indeed, Grievant identified her position as a professional one. Although it could be said that Ms. Watkins was treated in a preferred manner, Ms. Watkins was not favored over Grievant. While it is true Grievant was reallocation and transferred to another position, her salary was not decreased, and her duties remained on a comparable level. It is correct that Grievant no longer has a spacious office, but this fact standing alone does not mean that she was harmed. Further, in her new position, Grievant's job duties required her tobe placed in the proper office section and work area. The transfer of a civil service employee was "never intended to be dictated by employee likes and dislikes", and the employing agency has the right to transfer employees based on need. 67 **C. J. S.** *Officers* § 98. According to the memo of May 22, 1997, Grievant agreed to the change and placement, when she thought it would result in a raise of three pay grade levels. Further, the reasons for the reallocation and transfer were job-related. Mr. Tincher was retaining his former duties, as well as assuming multiple additional duties. Having Ms. Watkins as his secretary would certainly assist him in the performance of these duties, while Grievant, although a competent secretary, would have no knowledge of these former duties and could not relieve Mr. Tincher of any of them. Thus, when reviewing both the definition and the required

elements of favoritism, it is clear favoritism has not been shown.

Additionally, it must be noted that if indeed favoritism had been demonstrated in some small way, not clearly defined by the rules and regulations, but as Dr. Murphy says in the "spirit of rules and regulations", then the relief Grievant seeks could still not be granted. It is certainly clear Grievant loved the referent power and position of being the secretary to the Director of Purchasing. Apparently, no longer being in this position has caused Grievant to think less of herself and her skills, and for her to believe others also think less of her. This opinion was not demonstrated during the Level IV hearing, where all concerned believed Grievant had many abilities and skills.

The situation that developed at the Division of Purchasing had nothing to do with Grievant personally. Mr. Tincher was moving into a new and more responsible position, as well as retaining many of the prior duties of his former position. It is understandablethat he wished to retain the services of the secretary who assisted him in his former position. Thus, Grievant was moved to comparable position, with opportunities for promotion, and where her considerable skills could be utilized. Given the legitimate, job- related reasons for the reallocation and transfer, Respondents did not treat Grievant unfairly.

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 each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Howell v. W. Va. Dep't of Health & Human Resources, 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).

2. Grievant has failed to demonstrate that either her employer or DOP violated any rules or regulations when she was transferred and reallocated to an Administrative Services Assistant I position.

3. Grievant has failed to demonstrate her transfer and reallocation were improper.

4. Grievant has failed to demonstrate that her transfer and reallocation were arbitrary and capricious. 5. Grievant has failed to demonstrate that her transfer and reallocation were the

result of favoritism within the meaning of W. Va. Code § 29-6A-2(h).

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 suchappeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

Janis I. Reynolds

ADMINISTRATIVE LAW JUDGE

Dated: January 29, 1999

Footnote: 1

Since very little evidence was presented on this issue either at Level III or Level IV, it will not be addressed in this Decision. Grievant basically stated she was replaced by a younger woman.

Footnote: 2

The Department of Administration was represented by Senior Assistant Attorney General Rex Burford, the Division of Personnel was represented by Mr. Lowell Basford, Assistant Director of Classification and Compensation, and Grievant was represented by Attorney George Surmaitis.

Footnote: 3

Grievant did not note that her replacement had more tenure than she with the State.

Footnote: 4

Testimony at hearing revealed that the discussion in the newspaper was a factual one stating Grievant had been laterally transferred to a similar position and Ms. Watkins had been placed in Grievant's former position.

Footnote: 5

Section 10.05 discusses dismissal during probation.

Footnote: 6

Dr. Murphy is Assistant Director of the Employees Communications Section of DOP, and is not, and has never been, involved with the Classification and Compensation Section of DOP.