RAYMOND HOPKINS,

Grievant,

v.

DOCKET NO. 00-41-206

RALEIGH COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Raymond Hopkins, filed this grievance against his employer, the Raleigh County Board of Education ("Board"), on April 24, 2000, alleging:

> This grievance is filed pursuant to violations, misrepresentations or misinterpretation of West Virginia Code 18-29-2(g)-(sic) & West Virginia Code 18-29-3(a)-(v) & West Virginia Code 18A-4-8 through 18A-4-8(g) by the Raleigh County Board of Education & any other violations of the reduction process and grievance procedure rights of employees under the West Virginia law.

The grievance was denied at level one by Gilbert Pennington, Director of Maintenance, on May 3, 2000. In that denial, Mr. Pennington advised Grievant he needed to state a more specific claim before any relief could be awarded. Grievant submitted an amended grievance detailing his complaints to Superintendent Dwight Dials on May 12, 2000, along with his appeal to level two. A level two hearing was held on May 18, 2000, and a level two decision denying the grievance was issued by Grievance Evaluator Kathryn R. Bayless, on May 25, 2000. The Board waived the appeal at level three, and Grievantproceeded to level four on June 19, 2000. A level four hearing was held in the Grievance Board's Beckley, West Virginia office, on April 4 and 12, 2001, before Administrative Law Judge Andrew Maier. This matter became mature for decision on May 15, 2001. Grievant was represented by Benny G. Jones, Esq., and the Board was represented by Erwin L. Conrad, Esq., Conrad Law Offices. (See footnote 1)

SUMMARY OF EVIDENCE

LII Grievant's Exhibits

Ex. 1 -

W. Va. Code § 18A-4-8.

Ex. 2 -

Foreman Seniority List, updated February 1, 2000.

Ex. 3 -

March 31, 2000 letter from Dwight D. Dials to Benny G. Jones.

Ex. 4 -

January 31, 2000 memorandum from Racine O. Thompson to Raymond Hopkins.

LII Board Exhibits

Ex. 1 -

Transcript of March 20, 2000 Personnel Hearing.

Ex. 2 -

March 29, 2000 letter from Dwight D. Dials to Raymond E. Hopkins.

Ex. 3 -

April 7, 1997 Vacancy List.

Ex. 4 -

August 9, 1995 letter from Pravin G. Sangani, P.E. to Raymond Adkins, with attached Water Pollution Control Permit.

Ex. 5 -

1998-1999 Water Bill.

Ex. 6 -

April 14, 2000 letter from Gilbert Pennington to Raymond Hopkins, with attached grievance procedure forms.

LIV Grievant's Exhibits

Ex. 1 -

March 31, 2000 letter from Dwight D. Dials to Benny G. Jones (same as LII Ex. 3).

Ex. 2 -

Miscellaneous correspondence of Racine O. Thompson, Jr.

Ex. 3 -

Foreman Seniority List, updated February 1, 2000 (same as LII G. Ex. 2).

Ex. 4 -

January 31, 2000 memorandum from Racine O. Thompson, Jr. to Raymond Hopkins (same as LII G. Ex. 4).Ex. 5 -
Transcript and Tape Recording of meeting on April 12, 2000.

Ex. 1 (Day2)- Board of Health Legislative Rule 16-1, Series IV, Section 4.8.

LIV Board Exhibits

Ex. 1 (Day 1)-Packet of Request for Personal Leave Documents.

Ex. 1 (Day 2)-August 9, 1999 letter from Pravin G. Sangani, P.E. to Raymond Adkins, with

attached Water Pollution Control Permit (same as LII Board Ex. 4).

Ex. 2 -

January 28, 1993 recommendations to the Board for 1992-93 school year; January 27, 1993 memorandum from Racine O. Thompson, Jr. to Dwight D. Dials.

Ex. 3 -

August 23, 2000 letters from Dwight D. Dials to Joseph W. Diclaro, Jack O. Keen, Dwight W. Reggi, and Arlie Porter, with attached Independent Contractor Agreements.

Ex. 4 -

Charts depicting Water Use by Month, 1999-2000 and Water Cost by Month, 1999-

2000.

Ex. 5 -

Sanitation Plant Supply Expenses 1999-00.

Ex. 6 -

Actual PSD Costs Based on Water Use For 1999-00.

Ex. 7 -

Transcript of March 20, 2000 Personnel Hearings (same as LII Board Ex. 1).

Testimony (LII and LIV)

Grievant testified in his own behalf, and presented the testimony of Dwight Dials, Racine Thompson, Gilbert Pennington, and Larry Robertson. The Board presented the testimony of Gilbert Pennington, Danny Kidwell, and Racine Thompson.

PROCEDURAL BACKGROUND

Grievant, Raymond Hopkins, was, at the time of the reduction in force decision of the Board on March 28, 2000, effective June 30, 2000, multi-classified as a Sanitation Plant Operator/Foreman.

Grievant filed a previous grievance concerning a reduction in force taken by the Board in 1996. A Level IV Grievance Board decision was issued in that matter on February 26, 1998, denying the grievance. (See footnote 2) A subsequent appeal to the Circuit Court of RaleighCounty resulted in an order reinstating Grievant to his former position with the Board and was based upon the employer having defaulted at the Level II stage of the grievance. The Circuit Court's Order did not address the substantive merits of the grievance. (See footnote 3) Pursuant to the Order, Grievant was returned to his position with the Board on February 1, 2000.

After a careful review of all of the testimony and evidence presented, I find the following facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. At all times pertinent herein, Grievant was employed by the Board as a Sanitation Plant Operator/Foreman. The Board took action on March 28, 2000, which resulted in the reduction-in-force of Grievant, effective June 30, 2000.

2. Grievant had filed a previous grievance concerning a reduction-in-force action taken by the Board in 1996. The Level IV Grievance Board decision in that matter (Docket No. 96-41-432) denied the grievance. The Circuit Court of Raleigh County reinstated Grievant to his former position based upon the employer having defaulted at Level II.

3. Hearings were conducted before the Circuit Court on the issue of “appropriate back pay.” At the time of the “appropriate back pay” hearings before the Circuit Court, Grievant was serving as an independent contractor with the Board,performing the same duties which he provided as Sanitation Plant Operator prior to the 1996 reduction-in-force.

4. Grievant was given the option to elect between continuing as an independent contractor, or, pursuant to Court Order, returning to his former position on February 1, 2000. Prior to any decision being made, Grievant was informed that his position might be considered again for elimination for the 2000-2001 school year. Grievant chose to return to his employment with the Board, and the independent contract for services was rescinded at that time.

5. When Grievant's position was reduced-in-force in 1996, he supervised another employee, Normal Pannell, who was classified as a Sanitation Plant Operator. Prior to the time Mr. Pannell was hired, Grievant was not classified as a Foreman. Grievant's reclassification as a Foreman resulted directly from his supervision over Mr. Pannell. The 1996 RIF affected both of them and effectively eliminated sanitation plant operation and maintenance from the duties assigned to service personnel. After the 1996 RIF, the Board contracted out the operation and maintenance of the sanitation plants and water treatment facilities located at various schools throughout the county. For the 1999- 2000 school year and the two previous school years, Grievant was the independent contractor responsible for the operation and maintenance of the sanitation and water plants.

6. When Grievant grieved the 1996 RIF, he suggested the Board had acted in an arbitrary and capricious manner by eliminating his job, and then contracting out the duties he had previously performed to an independent contractor who received minimalassistance from a custodian employed by the Board. The Grievance Board rejected these assertions.

7. When Grievant returned to his former position on February 1, 2000, he returned to his duties

as a Sanitation Plant Operator. He did not return to his duties as a Foreman because there was no employee assigned to work under his supervision as a Sanitation Plant Operator. As noted above, Mr. Pannell had also been RIF'd in 1996, and did not return to employment with the Board as a Sanitation Plant Operator. Nevertheless, Grievant still retained his multi-classification as Sanitation Plant Operator/Foreman.

8. Since the time of his return to employment, Grievant has worked as a Sanitation Plant Operator. He has received assistance from Gilbert Pennington, Assistant Director of Maintenance, and Danny Kidwell, Maintenance Coordinator. Neither of those employees are classified as Sanitation Plant Operators, and each has volunteered to work out of classification to some extent in order to keep the plants operating and properly inspected.

9. By letter dated March 9, 2000, Superintendent Dwight Dials informed Grievant he would recommend his position be terminated for lack of need resulting from loss of student enrollment and the number of service positions to be funded under the state aid formula. Grievant requested and was offered a hearing on the proposed reduction-in- force by the Board on March 20, 2000. Subsequent to that hearing, the Board approved the recommendation of Superintendent Dials that the position held by Grievant be eliminated for the upcoming school year. 10. Grievant concedes there were no procedural irregularities concerning the reduction-in-force, but grieved the action taken by the Board, asserting that a less senior Foreman was retained, and that his reduction-in-force constituted reprisal, harassment, or favoritism.

11. The less senior employee whom Grievant believes should have been subjected to a reduction-in-force is Calvin Daniel. Mr. Daniel is listed as a “shop foreman” on the Foreman seniority list and is shown as having a seniority date of April 2, 1997. Mr. Daniel is assigned to the Transportation Department.

12. The posting for the job now held by Mr. Daniel refers to the position as “shop mechanic foreman”, and the job description lists several requirements, including at least ten year's experience in repair and maintenance of heavy and medium duty equipment, and possession of a valid commercial driver's license.

13. The Board believes that contracting services concerning the operation and maintenance of its sewage and water plants results in a cost savings as compared to the expense it would incur if those duties were assigned to employees. Superintendent Dials does not believe one employee can

handle all duties associated with the plants. Previously, before the 1996 RIF, two employees were assigned full-time to those duties, and since February 1, 2000, when Grievant returned to work, other employees have been providing assistance to Grievant. Essentially, the Board believes it would be necessary to hire another employee to assist Grievant if the Board continues to operate and maintain all of its plants. 14. Furthermore, the Board believes that it should get out of the business of operating sewage and water plants, both due to cost and liability concerns, and it is the intention of the Board to “turn over” certain of the plants to local public service districts willing to accept the plants and, for the remaining plants, to enter into contracts with local public service districts (“PSDs”) for the operation and maintenance of the plants. The Board has been working for several years in an effort to get local PSD's to accept the various plants. As of the time of the Level II hearing, it was anticipated that at least two of the plants would be accepted by local PSD's and contracts with local PSD's regarding the remaining plants were in the process of being drafted; the Board anticipated that those contracts would be finalized prior to the end of June 2000. After completion of the Level II hearing and between the Level II and LIV hearings, all sanitation plants had been accepted by publically owned treatment works (either municipalities or PSD's) pursuant to contracts entered into evidence. See R. Ex. 3-Day 2, Level IV.

15. There is no evidence to support Grievant's assertion that he supervised any Board employees other than Mr. Pannell. A custodian for the Board takes water samples at one of the plants under the licensure held by Grievant, but there was no showing that Grievant supervised that employee.

16. Immediately prior to his return to work, Grievant was mailed a memorandum from Assistant Superintendent Racine O. Thompson, Jr., which memorialized matters discussed in a conference held between Mr. Thompson and Grievant on February 1, 2000. The memo advised Grievant that he would be working under the supervision of Mr. Pennington, Director of Maintenance. The memo provided some detail as to theresponsibilities assigned to Grievant, and advised him the job would basically be the same as it had been during the three previous years when he provided contracted services.

17. Because it had been approximately four (4) years since Grievant's prior employment with the Board, some administrative changes had been made. For instance, the Board began utilizing Crew Leaders during this time, and the Maintenance Department had developed inventory lists for

each employee to keep track of tools and equipment. The memorandum provided by Mr. Thompson to Grievant indicated that he would be required to keep an inventory list of tools provided to him for the performance of his job. The memorandum also advised Grievant that if he needed any additional materials, he was to tell the Crew Leaders, and they would get the necessary supplies for him. Finally, the memorandum directed Grievant that he was to call Mr. Thompson before 6:30 a.m. if he was going to be absent on any given day.

18. After returning to work on February 1, 2000, Grievant reported for a few days, and then was essentially on leave of absence for one reason or another for the remainder of the 2000-2001 school year. During that time, he only called Mr. Thompson before 6:30 a.m. once to report his absence, and no action was taken against him by Mr. Thompson. The Board does not dispute that all of Grievant's absences were valid and authorized. The same reporting requirement was imposed by Mr. Thompson on secondary school principals and, for a period of time, on Maintenance Director Pennington.

19. The permit issued to the Board by the West Virginia Department of Environmental Protection ("DEP") required the Board to perform routine examinations of the waste water treatment facilities at least three times per week and also required theBoard to connect to a municipal or public service district sewage collection system when one became available. R. Ex. 1, Day 2-Level IV. The permit was issued in 1995 and was due to expire August 7, 2000.

20. DEP Inspector Larry Robertson, responsible for inspection of the Board's sewage and water facilities, would not commit to the Board that two sanitation plant operators were required, but opined that, under the requirements of the permit, thirty-nine (39) visits per week to the thirteen plants would be required, and that would be simply for routine examinations if no maintenance or adjustments or other work was required. The 39 visits alone would take approximately forty hours per week without anything else being done. Based on those requirements, Superintendent Dials believed that two sanitation plant operators were needed for proper operation and maintenance of the plants.

21. On April 12, 2000, Grievant and Gilbert Pennington, Director of Maintenance, had an exchange in which both of them used profanity.

DISCUSSION

Grievant has the burden of proving his 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 (2000); 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). See W. Va. Code § 18-29-6. Grievant alleges that his reduction-in-force in June 2000 was arbitrary and capricious, and demonstrated reprisal, harassment, and favoritism on the part of the Board. The Board contends that its decision to RIF Grievant was based on careful considerations of cost and liability, and its ultimate determination to "turn over" the sanitation and water plants to municipalities or public service districts was in the best interests of the schools.

Grievant first challenges the RIF on the basis that he holds the multi-classification title of Sanitation Plant Operator/Foreman, and there was a less senior Foreman retained by the Board. Grievant contends he should have had the opportunity to "bump" that individual before being reduced. (See footnote 4) Concerning reductions-in-force, W. Va. Code § 18A-4-8b provides, in pertinent part:

> If a county board is required to reduce the number of employees within a particular job classification, the employee with the least amount of seniority within that classification or grades of classification shall be properly released and employed in a different grade of that classification if there is a job vacancy: Provided, That if there is no job vacancy for employment within the classification or grades of classification, he or she shall be employed in any other job classification which he or she previously held with the county board if there is a vacancy and shall retain any seniority accrued in the job classification or grade of classification.

W. Va. Code § 18A-4-8g [1993] discusses multi-classification titles, and clarifies how they are to be treated in a reduction-in-force situation. It states:

> [s]chool service personnel who hold multi-classification titles shall accrue seniority in each classification category of employment which said employee holds and shall be considered an employee of each classification category contained within his multi-classification title. Multi-classified employees shall be subject to reduction in force in any category of employment contained within their multi-classification title based on the seniority accumulated within said category of employment: Provided, That if a multi-classified employeeis reduced in force in one classification category, said employee shall retain employment in any of the other classification categories that he holds within his multi-classification title.

W. Va. Code § 18A-4-8 defines "Foremen" as "skilled persons employed for supervision of personnel who work in the areas of repair and maintenance of school property and equipment." W. Va. Code § 18A-4-8 defines "Sanitation plant operator" as "personnel employed to operate and

maintain a water or sewage treatment plant to ensure consumption or environmental protection." W. Va. Code § 18A-4-8 defines "Multi- classification" as "personnel employed to perform tasks that involve the combination of two or more class titles in this section." There is no dispute that Grievant has held the multi- classification title Foreman/Sanitation Plant Operator since 1992, or that Calvin Daniel was classified as a Foreman in 1997. LIV G. Ex. 3.

The Board argues that Grievant was reduced-in-force in June 2000 as a Sanitation Plant Operator. As Grievant was the only Sanitation Plant Operator employed by the Board, there was no least senior employee in that classification to "bump". In addition, the Board argues that Grievant was not performing any supervisory duties at the time of the June 2000 RIF, and was thus, not employed as a Foreman at that time. Finally, as there were no Foreman vacancies for Grievant to move into, it was proper to RIF Grievant.

I agree with the Board that Grievant was not employed in his capacity as Foreman at the time of the June 2000 RIF, and that the position that was reduced-in-force was his position as Sanitation Plant Operator. Thus, Grievant was not entitled to "bump" Mr. Daniel from his Foreman position in the Transportation Department. Grievant's next argument is that the decision to eliminate the Sanitation Plant Operator position was arbitrary and capricious, and the Board's stated reason, lack of need, is not supported by the evidence. The Board responds that it intended to, and indeed has, turned over all of its sanitation and water plants to municipalities or public service districts, and get out of the business of operating and maintaining these facilities. Therefore, there simply is no need to employ a Sanitation Plant Operator.

County boards of education have broad discretion in personnel matters, including making job assignments and transfers, but must exercise that discretion in a manner which is not arbitrary or capricious. Dillon v. Wyoming County Bd. of Educ., 351 S.E.2d 58 (W. Va. 1986); Conrad v. Nicholas County Bd. of Educ., Docket No. 97-34-388 (Jan. 12, 1998); Mullins v. Logan County Bd. of Educ., Docket No. 94-23-283 (Sept. 25, 1995); Dodson v. McDowell County Bd. of Educ., Docket No. 93-33-243 (Feb. 15, 1994).

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.2d1017 (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 is arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of the board of education. See generally Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982). The evidence and testimony made it quite clear that cost factors and liability concerns were tantamount to the decisions of the Board to turn over the plants to publically owned treatment works ("POTW"). Indeed, the liability has now been completely assumed by the POTWs. Grievant attempted to show that a sole Sanitation Plant Operator could handle the operation and maintenance of all of the plants, and that the cost savings to the Board was nonexistent or insignificant. The bottom line, however, is that the Board engaged in discussions and negotiations with the municipalities and public service districts for approximately five years, and ultimately relinquished control of the plants. The undersigned finds no evidence that this decision was entered into lightly, or that the Board's stated reasons, cost and liability, were fictional. The undersigned finds no evidence that the Board's decision to turn over its sanitation and water plants to POTWs was arbitrary or capricious, even if Grievant alone could have satisfactorily operated and maintained the plants.

Finally, Grievant alleges the actions taken by the Board in reducing him in June 2000 were the result of reprisal, harassment, and favoritism. W. Va. Code § 18-29-2(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." A grievant claiming retaliation may establish a prima facie case of reprisal by establishing:

(1) that he engaged in protected activity, e.g., filing a grievance;

(2) that he was subsequently treated in an adverse manner by the employer or an agent;

(3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and

(4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Fareydoon-Nezhad v. W. Va. Bd. of Trustees/Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, nonretailatory reasons for its actions. See Mace v. Pizza Hut, Inc., 377 S.E.2d 461 (W. Va. 1988); Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 309 S.E.2d 342 (W. Va. 1983); Webb, supra.

Grievant has made a prima facie case of reprisal. He filed a grievance over his RIF in 1996, which ultimately resulted in him being reinstated on February 1, 2000, to his former position with the Board, with all back pay and benefits to which he was entitled. Subsequently, approximately one month later, the Board took action to reduce Grievant's position again effective June 30, 2000. Clearly, the Board had knowledge of the prior grievance, and its action to RIF him again followed close in time to his reinstatement. However, as discussed above, the Board has articulated legitimate business reasons for its decision to turn over all of its sanitation and water plants to the POTWs. Having done that, there simply is no need for the Board to employ a Sanitation Plant Operator, and its decision to RIF Grievant was not retaliatory. W. Va. Code § 18-29-2(n) defines harassment as “repeated or continued disturbance, irritation, or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession.” Grievant alleges he was harassed by his superiors, specifically Assistant Superintendent Thompson, upon his return to employment in February 2000, culminating with his reduction-in-force in June 2000. Grievant points to the memorandum Mr. Thompson gave him when he returned to work, detailing his job responsibilities and Mr. Thompson's expectations. While Grievant may have been “irritated” or “annoyed” by this memorandum, Grievant has failed to prove that the memorandum was issued with the intent to harass Grievant. Further, other than this memorandum, Grievant pointed to no other specific incident, save the reduction-in-force, which would constitute harassment. The undersigned finds Grievant has failed to establish a case of harassment.

Favoritism is defined by W. Va. Code § 29-6A-2(h), as “unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.”

In order to establish a prima facie case of favoritism, Grievant must establish the following:

(a)

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

(b)

that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded him;

and,

(c)

that the difference in treatment has caused a substantial inequity to him and that there is no known or apparent justification for this difference.

Frantz v. W. Va. Dept. of Health and Human Resources, Docket No. 99-HHR-096 (Nov. 18, 1999); Blake v. W. Va. Dept. of Transp., Docket No. 97-DOH-416 (May 1, 1998). See McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). If Grievant establishes a prima facie case of favoritism, the Board may rebut this showing by articulating a legitimate reason for its action. However, Grievant can still prevail if he can demonstrate that the reason proffered by the Board was mere pretext. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990).

Grievant has failed to establish a prima facie case of favoritism, simply because he has failed to identify any other employee similarly situated to him who was treated in a preferential manner. As noted above, Grievant was reduced-in-force from his employment as a Foreman, but as a Sanitation Plant Operator. He was the only Sanitation Plant Operator employed by the Board, and was not eligible for any other position with the Board. Therefore, Grievant's allegation of favoritism must fail.

CONCLUSIONS OF LAW

1. Grievant has the burden of proving each element of his 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); 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). See W. Va. Code § 18-29-6. 2. "County boards of education have substantial discretion on matters related to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary or capricious." Dillon v. Board of Education, 177 W. Va. 145, 351 S.E.2d 58 (1986). Consistent with Dillon, county boards have discretion to determine the number of positions it will fill and the employment terms of such positions provided that the requirements of W. Va. Code § 18A-4-8 are met. Lucion v. McDowell County Board of Education, 191 W. Va. 399, 466 S.E.2d 487 (1994).

3. W. Va. Code § 18A-4-8 provides authority for a county board to conduct a reduction in force, specifically providing that the employee with the least amount of seniority within a classification shall be properly released. Pursuant to W. Va. Code §18A- 4-8g, service employees who are multi-classified accrue seniority in each classification title they hold and a classified employee reduced in force in one classification category shall retain employment in any of the other classification categories that he holds within his multi-classification title.

4. Because of the employer's default in a prior grievance concerning the reduction in force of Grievant's position in 1996, the Grievant was returned to work on February 1, 2000, with the classification title of "Sanitation Plant Operator/Foreman." The Court required that Grievant be returned to the position that he held at the time of the 1996 RIF. The other sanitation plant operator, Norman Pannell, was also RIF'd in 1996, but did not challenge his RIF. 5. Since Mr. Pannell was also RIF'd in 1996, when Grievant was returned to work in February 2000, there was no subordinate employee for him to supervise, and Grievant was no longer working as a "Foreman". The position that was RIF'd in June 2000, was the position of Sanitation Plant Operator. There were no vacant Foreman positions which Grievant could be placed into, and thus the Board correctly acted to RIF Grievant effective June 2000.

6. County boards of education have broad discretion in personnel matters, including making job assignments and transfers, but must exercise that discretion in a manner which is not arbitrary or capricious. Dillon v. Wyoming County Bd. of Educ., 351 S.E.2d 58 (W. Va. 1986); Conrad v. Nicholas County Bd. of Educ., Docket No. 97-34-388 (Jan. 12, 1998); Mullins v. Logan County Bd. of Educ., Docket No. 94-23-283 (Sept. 25, 1995); Dodson v. McDowell County Bd. of Educ., Docket No. 93-33-243 (Feb. 15, 1994).

7. 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.2d1017 (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 is arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of the board of education. See generally Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982). 8. The Board's decision to turn over all of its sanitation and water plants to POTWs or PSDs was not arbitrary or capricious. Thus, the decision to eliminate the position of Sanitation Plant Operator was likewise not arbitrary or capricious.

9. W. Va. Code § 18-29-2(p) defines “reprisal” as “the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it.” A grievant claiming retaliation may establish a prima facie case of reprisal by establishing:

(1) that he engaged in protected activity, e.g., filing a grievance;

(2) that he was subsequently treated in an adverse manner by the employer or an agent;

(3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and

(4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Fareydoon-Nezhad v. W. Va. Bd. of Trustees/Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). If a grievant establishes a prima facie

case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its actions. See Mace v. Pizza Hut, Inc., 377 S.E.2d 461 (W. Va. 1988); Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 309 S.E.2d 342 (W. Va. 1983); Webb, supra. 10. Grievant established a prima facie case of reprisal. However, the Board articulated legitimate, non-retaliatory reasons for its decision to eliminate the position of Sanitation Plant Operator.

11. W. Va. Code § 18-29-2(n) defines harassment as "repeated or continued disturbance, irritation, or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession."

12. Grievant failed to prove by a preponderance of the evidence the Board engaged in harassment of him from February 1, 2000, to the effective date of his RIF, June 30, 2000.

13. Favoritism is defined by W. Va. Code § 29-6A-2(h), as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." In order to establish a prima facie case of favoritism, a grievant must establish the following:

(a)

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

(b)

that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded him;

and,

(c)

that the difference in treatment has caused a substantial inequity to him and that there is no known or apparent justification for this difference.

Frantz v. W. Va. Dept. of Health and Human Resources, Docket No. 99-HHR-096 (Nov. 18, 1999); Blake v. W. Va. Dept. of Transp., Docket No. 97-DOH-416 (May 1, 1998). See McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). As with discrimination, if a grievant establishes a prima facie case of favoritism, a respondentmay rebut this showing by

articulating a legitimate reason for its action. However, the grievant can still prevail if they can demonstrate that the reason proffered by respondent was mere pretext. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990).

14.

Grievant failed to establish a prima facie case of favoritism.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Raleigh County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. 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.

_____

MARY JO SWARTZ

Administrative Law Judge

Dated: July 9, 2001

Footnote: 1

For administrative reasons, this grievance was reassigned to the undersigned on June 4, 2001.

Footnote: 2

The transcript of the previous grievance (Docket No. 96-41-432) and the decision rendered therein was admitted into evidence, and administrative notice was taken of thecontents thereof, including all exhibits.

Footnote: 3

The Order of the Circuit Court of Raleigh County in Civil Action No. 98-AA-18, and the transcript of all evidence and exhibits presented at the "appropriate back pay" hearing before the Circuit Court have been provided, and administrative notice is taken thereof.

Footnote: 4

As noted above, Grievant acknowledges there were no procedural irregularities concerning the RIF action.