DAVID THOMPSON,

Grievant,

v.

DOCKET NO. 01-RS-361

WEST VIRGINIA DIVISION OF

REHABILITATION SERVICES,

Respondent.

D E C I S I O N

Grievant, David Thompson, filed this grievance against his employer, the West Virginia Division of Rehabilitation Services ("DRS"), on January 8, 2001:

> This grievance on administration for closing small engine training program and removing students from that program before their graduation.
>
> Relief sought: Keep small engine open.

Grievant received a level one response from Dr. John D. Riffe on January 10, 2001. A level two hearing was held on January 16, 2001, and William Tanzey, Administrator, issued a level two decision on January 16, 2001. A level three hearing was held on March 1 and 15, 2001, and a decision was rendered on May 17, 2001 by Hearing Examiner Katherine Dooley, denying the grievance, which was accepted by Interim Executive Director Janice Holland on May 18, 2001. Grievant appealed to level four May 23, 2001, a level four hearing was held on August 13, 2001, and this case became mature for decision on November 29, 2001, the deadline for the parties' submission of proposedfindings of fact and conclusions of law. Grievant was represented by Scott Elswick, Esq., Law Offices of John R. Mitchell, Jr., and DRS was represented by Warren Morford, Esq.

SUMMARY OF EVIDENCE

Level Three Stipulated Exhibits

Ex. 1 -

December 8, 2000 letter from Janice A. Holland to Joe E. Smith with attachments.

Ex. 2 -

December 13, 2000 letter from Janice A. Holland to Joe E. Smith re: reduction- in-force with attachment.

Ex. 3 -

December 27, 2000 letter from Joe E. Smith to Janice A. Holland.

Level Three Grievant's Exhibits

Ex. 1 -

West Virginia Careers: West Virginia Bureau of Employment Programs chart of Training Areas.

Ex. 2 -

February 13, 2001 letter from R. Alan Radford.

Ex. 3 -

November 9, 2000 memorandum from Dr. John D. Riffe to William Tanzey re: Vocational Training Areas.

Ex. 4 -

Class rosters and status for school years 1997-98, 1998-99, 1999-2000, 2000-01.

Ex. 5 -

Internet search for small engine businesses in region.

Level Three DRS Exhibits

Ex. 1 -

West Virginia Rehabilitation Center, Costs Per Student Day Analysis For The Year Ended June 30, 1998.

Level Four Grievant's Exhibits

Ex. 1 -

November 22, 2000 memorandum from Ann S. Kautz to Michael Meadows, William Tanzey, and Laine Wiler re: Completion Statistics Report for July 1, 1995 to November 10, 2000.

Ex. 2 -

November 28, 2000 unsigned letter from John D. Riffe to Dorris Walls.

Ex. 3 -

Packet of information submitted by Grievant subsequent to level four hearing.

Level Four DRS Exhibits

Ex. 1 -

March 5, 2000 memorandum from Jack McClanahan to John Riffe re: staff reduction in small engine repair.

Ex. 2 -

March 14, 2001 letter from Janice A. Holland to David Thompson.

Testimony

Grievant testified in his own behalf, and presented the testimony of Michael Meadows, Wayne Pauley, Gregory Harrison, Alan Radford, John Riffe, Timothy VanMeter, Ann Kautz, James Quarles, William Tanzey, Tonya Sisson, Carolyn Jones, Brenda King, Carolyn Smith, Perry Dotson, and Joe E. Smith. DRS presented the testimony of Rhonda Dunning and Michael Meadows.

FINDINGS OF FACT

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

1. DRS, as part of its services offered to clients, operates vocational training programs in various disciplines.

2. Grievant was the instructor of the small engine repair course formerly offered by DRS.

3. As part of its continual review of programs offered and deployment of resources, DRS decided in late 2000 to close its small engine repair program.

4. By letter dated December 8, 2000, the Interim Director of DRS, pursuant to West Virginia Division of Personnel ("DOP") Administrative Rule 12.04, requested the State Personnel Board approval of its plan to initiate a reduction in force (or layoff) which would affect Grievant, between January 1, 2001 and March 31, 2001. LIII Stip. Ex. 1.

5. DRS also submitted a follow-up letter in response to a request from the State Personnel Board, dated December 13, 2000. LIII Stip. Ex. 2.

6. The December 8, 2000, letter recites that a careful examination of DRS' vocational training programs revealed that the closure of the small engine repair program was necessary to keep within "the mission, scope and goals of the training programs." A review of the WVRC Evaluation Committee Report of 1999, "along with recent years ofclass enrollment graduation rate, employment outcomes, and employment projections statistics", led DRS Interim Director Janice Holland to request termination of the small engine repair class.

7. DRS' December 13, 2000 letter establishes that its overriding concern was future prospects of job openings in the small engine repair field of employment. As the Interim Director stated in that letter, DRS must "insure that we do not train people for jobs that do not exist in our economy."

8. There is no dispute that Grievant provided excellent instruction, or that he is an expert in the field of small engine repair. Nevertheless, Michael Meadows, Assistant Director for Client Services, concluded that, because utilization of the small engine repair program had been low and produced a small number of graduates, DRS would best be served by redeploying the assets from small engine repair into other areas. LIII Tr., Meadows, p. 26.

9. In making his decision, Mr. Meadows relied upon information provided to him by Dr. John Riffe, Principal and Manager of Career Development Services, and data he obtained from the Bureau of Employment Programs ("BEP") on the small engine repair employment market.

10. Dr. Riffe gathered data on the small engine repair program from enrollment statistics, monthly reports, graduation records, and placement information available in the state office (which included information furnished by Grievant on his monthly reports).

11. Dr. Riffe considered the following factors in his decision whether to close the small engine repair program: (1) the number of students enrolled in the program; (2) number of students enrolled in the recent past; (3) number of graduates in relation tostudents enrolled (i.e., completion rate); (4) number of placements; and (5) projections for job openings in the future and wage earnings, possibility for advancement, and benefits. He also considered previous evaluation reports which recommended closure of the small engine repair program, the requirements of the Rehabilitation Act, along with demand from the rehabilitation counselors statewide for persons trained in small engine repair.

12. DRS' training programs are under continual review, and other vocational training programs have closed before, while some are redeveloped to meet the needs of its clients.

13. Mr. Meadows determined, based upon his knowledge and research, that the job market was relatively small and average wages relatively low in the small engine repair market.

14. During this same time frame, a small engine repair program at a neighboring vocational training center was closed because of lack of demand for small engine repairmen.

15. Students displaced by the closure of the small engine repair program were offered the alternative to complete the program at the Putnam County Vocational Technical Center or to train in another area at the Rehabilitation Center.

16.

The small engine repair training program was closed on March 31, 2001.

DISCUSSION

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 § 4.21 (2000); Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996). W. Va. Code § 29-6A-7.

Grievant clarified his grievance throughout the grievance process, and at level four the issue to be decided is whether DRS' decision to close the small engine repair shop violated W. Va. DOP

Administrative Rule 12.04, W. Va. Code § 29-6-21, and/or was arbitrary and capricious. West Virginia DOP Administrative Rule 12.04, “Layoff”, provides, in pertinent part:

> (a) When it becomes necessary by reason of shortage of work or funds, or to permit reinstatement of employees released from periods of military service in the armed forces of the United States or to implement the provisions of this subdivision, the appointing authority may initiate a layoff in accordance with the provisions of this rule.
>
> (b) Organizational Unit. The appointing authority shall submit to the State Personnel Board for approval a description of the unit or units to which a layoff will apply. The organizational unit may be an entire agency, division, bureau, or other organizational unit.
>
> (c) Prior to the separation or involuntary demotion of any employee by layoff, the appointing authority shall file with the Director a proposed plan which shall include:
>
> 1. a statement of the circumstances requiring the layoff;
> 2. the approved organizational unit(s) in which the proposed layoff will take place; and,
> 3. a list of the employees in each class affected by the layoff in order of retention.
>
> (d) It is the duty of the Director to verify the details on which the lists are based and to notify the appointing authority in writing of the plan's approval.

W. Va. C.S.R. § 143-1-12.04.

___The evidence shows there were no procedural flaws with respect to the closure of the small engine repair program, or Grievant's layoff from DRS. DRS filed a proposal with the State Personnel Board which outlined its reasons for closing the small engine repair program, and provided it with the name of the one employee who would be affected by the proposal - Grievant. DRS also provided additional information upon request by the State Personnel Board, and appeared before that panel to present its proposal. The State Personnel Board approved DRS' proposal, and the closure and layoff were effected according to statutory procedures.

Grievant alleges, however, that DRS provided “false” statistics and other information to the State Personnel Board in violation of W. Va. Code § 29-6-21 in order to mislead the Board into approving its proposal to close the small engine repair program. In addition, by utilizing this “false” information, DRS' decision to close the program was arbitrary and capricious.

W. Va. Code § 29-6-21, “Acts prohibited”, provides:

> (a) No person shall make any false statement, certificate, mark, rating or report with regard to any test, certification or appointment made under any provisions of this article or in any manner commit or attempt to commit any fraud preventing the impartial execution of this article and the rules.
>
> (b) No person shall, directly or indirectly, give, render, pay, offer, solicit or accept any money, or other valuable consideration for or on account of any certification, appointment, proposed appointment, promotion or proposed promotion to, or any advantage in, a position in the classified service.
>
> (c) No employee of the division, examiner, or other person shall defeat, deceive or obstruct any person in his right to examination, eligibility, certification or appointment under this article, or furnish to any person any special or secret information for the purpose of affecting the rights or prospects of any person with respect to employment in the classified service.

Grievant argues that the information provided to the State Personnel Board regarding placement for graduates of the small engine repair program was wrong. He claims the numbers were purposely skewed to discontinue the program, and that some individuals were persuaded to pursue other vocational options rather than small engine repair in order to present a negative picture of the program. Grievant points to a report prepared by Ann Kautz, Supervisor, Admissions, entitled “Completion Statistics Report for July 1, 1995 to November 1, 2000" (“Kautz's Report), as evidence of DRS' fraudulent portrayal of the small engine repair program. Kautz's Report was furnished to DRS administrators on November 22, 2000.

Grievant points out that statistics in Kautz's Report are different than statistics compiled by Dr. Riffe (LIII G. ex. 30) on or about November 9, 2000, and that it was Dr. Riffe's numbers that were presented to the State Personnel Board. Specifically, Grievant notes that Dr. Riffe's graduation statistics report for school year 1997-98 zero (0) graduates, while Kautz's Report shows two (2). For school year 1998-99, Riffe's report shows four (4) graduates, and Kautz's Report shows five (5). For school year 1999-2000, both Riffe's and Kautz's Report show three (3) graduates.

Dr. Riffe testified he had not seen Kautz's Report before the level four hearing in this matter,

however, while compiling information for his own use, discrepancies in numbers were found. He did not do any “investigation” into the discrepancies because he felt they were not of major concern. Dr. Riffe pointed out in his testimony that there were discrepancies in statistics in Kautz's Report for other programs as well, and that the small engine repair program was not singled out in any manner. Grievant also claims that placement projections presented to the State Personnel Board were understated, and that information he had compiled from the Internet showed there were more jobs in the West Virginia market than Riffe was reporting. Grievant presented the testimony of Joe Smith, then-Acting Director of Personnel, who testified he felt the discrepancies in the numbers were a significant factor that should have been reconciled before presentation to the State Personnel Board. Mr. Smith opined that as long as there is work and needs are being met, he saw no reason for DRS to close a program. Perry Dotson, Assistant Director of Personnel, also testified he felt the numbers discrepancies were “significant”. Mr. Dotson was the individual who briefed the State Personnel Board on the small engine repair closure and layoff. He testified that, based on the numbers in Kautz's Report, it would have been tough to recommend closure of the small engine repair shop.

Despite the discrepancies in the statistics between Kautz's Report and the statistics presented by DRS as found in Dr. Riffe's report, however, the undersigned concludes that DRS did not present “false” information to the State Personnel Board in its proposal to close the small engine repair program. It presented information gleaned from its own staff, utilizing monthly reporting systems, much of which information is provided by the instructors of the programs, including Grievant. There was no reason for Dr. Riffe to doubt the information being presented to him, and he prepared his report from this information. Dr. Riffe did not see Kautz's Report until the level four hearing, and there is no evidence that Dr. Riffe deliberately changed numbers in his own report to support closure of the program. Further, while Grievant argued repeatedly that Dr. Riffe's numbers must be wrong because they did not comport with Kautz's Report, there was no evidence presentedto prove to the undersigned that the numbers in Kautz's Report were right. Therefore, the undersigned cannot conclude that the information compiled by Dr. Riffe which ultimately was presented to the State Personnel Board was false or fraudulent or presented with the intent to mislead the State Personnel Board regarding the viability of the small engine repair program.

Finally, there is no evidence that DRS' decision to close the small engine repair program was

arbitrary or capricious. 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 agency. See generally Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982). 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. Adkins v. W. Va. Dept. of Educ., W. Va. Supreme Court of Appeals No. 29066 (2001)(citing In re Queen, 196 W. Va. 442, 473 S.E.2d 483 (1996)).

Abolition of a position pursuant to reorganization of a unit of state government is proper when shown to have been made to meet changing needs or to promote efficiency in government. W. Va. Dept. of Health v. Mathison & Civil Serv. Comm., 171 W. Va. 693,301 S.E.2d 783 (1983). The evidence shows without doubt that much thought, deliberation, and investigation went into the decision to close the small engine repair program. Discussions were had among top DRS administrators, and Grievant was included in some of those discussions. A report was prepared for the State Personnel Board, reviewed by the Board, additional information provided, and approval was given. Clearly, Grievant believes DRS erred in deciding to close his program, and others may even agree, but an agency must have the ultimate discretion and authority to make decisions regarding the programs it chooses to provide and services it chooses to render. In this instance, DRS concluded that closing the small engine repair program was economically advisable, and presented adequate reasons to support its decision.

CONCLUSIONS OF LAW

1. In non-disciplinary matters the grievant must prove all the allegations constituting his grievance by a preponderance of the evidence. Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (Jan. 22, 1996).

2. Grievant failed to prove any procedural violations of W. Va. Code § 29-6-21, with respect to DRS' proposal to the State Personnel Board to eliminate the small engine repair program, which would result in his layoff from employment.

3. Grievant failed to prove by a preponderance of the evidence that DRS made false or fraudulent representations to the State Personnel Board, in violation of W. Va. Code § 29-6-21, with the intent of misleading that Board with respect to the elimination of the small engine repair program, or respecting his layoff.

4. Abolition of a position pursuant to reorganization of a unit of state government is proper when shown to have been made to meet changing needs or to promote efficiencyin government. W. Va. Dept. of Health v. Mathison & Civil Svc. Comm., 171 W. Va. 693, 301 S.E.2d 783 (1983).

5. 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).

6. 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 agency. See generally Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

7. 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. Adkins v. W. Va. Dept. of Educ., W. Va. Supreme Court of Appeals No. 29066 (2001)(citing In re Queen, 196 W. Va. 442, 473 S.E.2d 483 (1996).

8. Grievant has failed to prove by a preponderance of the evidence that DRS' decision to eliminate the small engine repair program and lay him off was arbitrary and capricious.

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 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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: December 18, 2001