CARL ANTOLINI et al.,

Grievants,

v v.

Docket No. 01-DOH-471

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/ DIVISION OF

HIGHWAYS and DIVISION of

PERSONNEL,

Respondents.

D E C I S I O N

Grievants, Carl Antolini, James Markle, Paul Reese, Robert DuVaul, and Anthony Marascio, are employed by the West Virginia Division of Highways ("DOH"). They filed this grievance directly to Level IV on August 29, 2001. To summarize their lengthy Statement of Grievance, they are grieving their demotion and the attendant loss of pay. The Relief Sought is:

> Reinstatement of district organization as prior to Commissioner's organizational change with all previous employees reinstated. That all salaries be reinstated and promotions/raises be applied as awarded to newly assigned employees. That the State Department of Transportation comply with procedure and guidelines in administrative policies and be mandated from utilizing job assignment, reclassification and other reprisals as a result of political affiliation or presumed support. That the grievant be made whole and right. (See footnote 1)

A Level IV hearing was held on December 10, 2001, and April 30, 2002. This case was to become mature for decision on June 28, 2002, after receipt of the parties' proposedfindings of fact and conclusions of law, but the date was extended to July 15, 2002, at the request of the parties. (See footnote 2)

Issues and Arguments

Grievants assert the reorganization of the DOH by Commissioner Fred VanKirk, Secretary of Transportation, was a poor management decision. Grievants maintain their removal from their administrative positions and the resulting demotions, with loss of pay, reallocations, and/or transfers was arbitrary and capricious. Additionally, Grievants alleged the notice they received prior to the change was insufficient, and the Division of Personnel's ("DOP") Rules were not followed, thus, the reorganization was unlawful and should be reversed. (See footnote 3)

Respondents maintain the reorganization was accomplished to improve efficiency and to ensure the effective use of DOH's resources and personnel. Respondents aver all DOP Rules were followed, and Commissioner VanKirk had the authority to design and carry out a plan of reorganization, and DOP approved his actions. Respondents also assert the notice was sufficient as it followed both DOH and DOP rules, and Grievants were given all the rights required in this personnel action.

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

Findings of Fact

1. DOH has historically, since 1917, been an organization managed by engineers. Test., Commissioner VanKirk.

2. The three functions of DOH are to: 1) plan and design highways and roads; 2) perform reconstruction, as needed; and 3) maintain the roadways by patching potholes, clearing brush, etc. Test., Commissioner VanKirk.

3. Commissioner VanKirk has served as the Secretary of Transportation and Commissioner of DOH for many years. During his years as Commissioner, DOH was organized on an engineering model, with the top administrators in each district being engineers.

4. In 1997, Commissioner VanKirk was replaced, and the new Commissioner developed and implemented a reorganization plan utilizing non-engineers in the top two administrative spots.

5. This reorganization plan was put into place in 1998, and Grievants were hired into their administrative positions as a result of this plan. Grievants are not engineers. Some of the personnel chosen to fill these new administrative positions were engineers.

6. Commissioner VanKirk became Commissioner again on January 16, 2001. He found problems within the district organization that he believed were caused by the failure of an engineer to

be in charge of the districts. He thought decisions on engineering matters were being made by non-engineers, who did not have the necessary expertise.

7. The problems Commissioner VanKirk identified were: 1) over-obligation of resources resulting in the organization being "grossly overextended;" 2) improper maintenance; 3) too many roads taken into the orphan road system which resulted in anover-expenditure of those funds; (See footnote 4) 4) maintenance was overspent and over obligated; and 5) maintenance was engaging in major reconstruction, such as building bridges.

8. Commissioner VanKirk decided to return management of the districts to the engineers.

9. Grievant DuVaul began employment with DOH on December 22, 1997, as a Transportation Service Manager II with a starting salary of $3,000 a month. At the time of his appointment to the newly created Highway District Administrator ("HDA") position his monthly salary was $3,293. Grievant DuVaul was appointed to this new position on December 1, 1998, with a starting monthly salary of $3,590, and this salary increased during his tenure in that position to $5,961, on October 1, 2000. This increase represented a raise of $2,371 per month, for a 64% increase within twenty-two months. This salary remained the same until his demotion. (See footnote 5) On August 1, 2001, Grievant DuVaul was demoted to a Transportation Services Manager II, the same position he had previously held, and his salary was set at $3,837. (See footnote 6)

10. Grievant Markle has a total of 23 years of service with DOH, but there have been breaks in this service. His latest employment with DOH began on June 25, 1985, and he had served in a variety of maintenance positions. At the time of his appointment to thenewly created Highway District Assistant Administrator ("ADA") position, his monthly salary was $2,752. Grievant Markle was appointed to this new position on December 11, 1998, with a starting monthly salary of $3,000, and this salary increased during his tenure in that position to $4,997, on October 1, 2000. This increase represented a raise of $1,997 per month, for a 66% increase within twenty-two months. This salary remained the same until his demotion. On August 1, 2001, Grievant Markle was demoted to a Transportation Engineering Technician, and his salary was set at $3,149. (See footnote 7)

11. Grievant Reese began employment with DOH on September 20, 1989, and he had served in a variety of maintenance positions. At the time of his appointment to the newly created ADA position, his monthly salary was $3,106. Grievant Reese was appointed to this new position on November 11, 1998, with a starting monthly salary of $3,524, and this salary increased during his

tenure in that position to $5,121, on October 1, 2000. This increase represented a raise of $1,597 per month, for a 45% increase within twenty-two months. This salary remained the same until his demotion. On August 1, 2001, Grievant Reese was demoted to a Transportation Engineering Technician, Senior, and his salary was set at $3,716. (See footnote 8)

12. Grievant Marascio began his employment with DOH when he was appointed to the newly created ADA position on October 1, 1998. His starting salary was $3,386 monthly, and this salary increased during his tenure in that position to $4,997, on October1, 2000. This increase represented a raise of $1,611 per month for a 48% increase, within twenty-two months. This salary remained the same until his demotion. On August 1, 2001, Grievant Marascio was demoted to an Inspector, and his salary was set at $2,300 monthly. (See footnote 9)

13. Grievant Antolini began his employment with DOH on May 1, 1964, and he had served in a variety of maintenance positions. At the time of his appointment to the newly created ADA position, his monthly salary was $3,092. Grievant Antolini was appointed to this new position on December 11, 1998, with a starting salary of $3,278, and this salary increased during his tenure in that position to $4,997 a month, on October 1, 2000. This increase represented a raise of $1,719 per month, for a 52% increase within twenty-two months. This salary remained the same until July 31, 2001, when Grievant Antolini elected to retire, as this was a better financial decision than to accept the offered demotion.

14. On February 12, 2001, Commissioner VanKirk wrote Joe Smith, Acting Director of DOP. Attached to this letter were the revisions the Commissioner wanted to make in the Engineer IV and V class specifications. (See footnote 10) Commissioner VanKirk requested these revisions be effective March 1, 2001.

15. On February 16, 2001, Commissioner VanKirk entered an Order reorganizing the management structure of DOH's districts. This Order rescinded the priorreorganization, and stated the purpose of the current change was to provide for the "proper and efficient transaction of business. . . ." This Order was to be effective on March 16, 2001, and identified the positions that would be eliminated in DOH. Among the positions eliminated were the HDA and ADA positions. Additionally, the position of District Engineer was established, and this position would report directly to the Deputy State Highway - Operations. The Order further established other engineering positions, and denoted their reporting structure. Attached to this Order were the corresponding organizational charts.

16. On February 20, 2001, Commissioner VanKirk sent a copy of this Order and the accompanying charts to all District Administrators, with a memo detailing the positions to be eliminated and the positions to be created, as well as the proposed time frames. The new positions were to be posted from February 20 through March 5, 2001, and selections for the District Engineer positions were to be made by March 16, 2001. Thereafter, the other positions were to be filled by March 30, 2001.

17. The February 20, 2001 memo stated, "Incumbents in the positions being eliminated may apply for the newly created positions, subject to required minimum qualifications, and will be eligible for appointment to other positions in accordance with the West Virginia Administrative Rule. Any such incumbent not so appointed will be laid off according to applicable provisions of the Rule."

18. Grievants received this memo, but did not believe the proposed changes would ever take effect.

19. On February 26, 2001, Jeff Black, Director of the Human Resources Division, sent a memo about the "NEW DISTRICT ORGANIZATIONAL STRUCTURE" to a variety of administrators including Grievants. This memo was a follow-up to the neworganizational structure memo sent earlier, and the purpose was to clarify the employment status of the employees whose positions were being eliminated. Mr. Black indicated that while the new chart would be effective on March 16, 2001:

> that does not mean incumbents in positions being eliminated are terminated on that date. Once the District Engineer in each district is appointed, additional steps will be taken to further implement the new structure. During that time, other positions may be posted and incumbents in the discontinued positions may be appointed to such positions. District Engineer will be responsible for assigning work to employees in affected positions during the interim period between displacement from their former positions and appointment to another.
>
> Only after all steps have been taken to implement the new structure[,] will final decision be made regarding incumbents who have not been selected for other positions. Incumbents not selected will be notified in writing as to their employment status.
>
> . . .
>
> Should you have any questions, please contact me.

20. Grievants received this memo, but did not really believe there would be any reorganization or change in their positions.

21. On February 28, 2001, Commissioner VanKirk sent Mr. Smith a proposal for a reduction in force to work in tandem with the reorganization, if it were needed. Commissioner VanKirk noted the reorganization would be completed by April 16, 2001, and any incumbents who had not been placed, would be provided their rights to bump or would be laid off. These layoffs would not occur any sooner than May 1, 2001.

22. On that same date, Commissioner VanKirk again sent Mr. Smith the proposed class specifications Engineer IV and V, again requesting these changes be made effective March 16, 2001. 23. On March 15, 2001, at a meeting of the State Personnel Board, Commissioner VanKirk presented his proposals for reorganization and reduction in force. DOP Assistant Director Perry Dotson explained the positions that would be affected by the changes and the reduction in force request. Commissioner VanKirk clarified the reduction in force plan would only be necessary if an agreement for another position could not be reached with the people to be displaced. There was no intent to lay off any employee. The Commissioner's proposal was approved.

24. On March 30, 2001, Mr. Smith wrote Commissioner VanKirk noting the State Personnel Board approval of the plan.

25. On May 10, 2001, Commissioner VanKirk sent a memo to Grievants noting the individuals hired to fill the District Engineer positions, and that these selections would be effective on May 14, 2001. It was again noted that the District Engineers would now be interviewing for the other posted positions, with the entire process to be completed by June 1, 2001.

26. This memo went on to outline the effect the reorganization would have on the employees in the eliminated positions.

> Employees in position being eliminated will be considered for other jobs based on organizational needs and their relevant qualifications. In those incidences where no other job is available[,] and the affected employee chooses not to accept an offered position or no bumping rights can be exercised[,] the employee will be laid off effective June 30, 2001. District Engineers will be responsible for making job assignments during this interim period. The Human Resources Division will work with effected employees to find a suitable placement if at all possible.

I realize there is always a feeling of uncertainty when changes are necessary and that

> this reorganization may have an unsettling effect on some district personnel; however, I ask that all employees and managers give the District Engineers their fullest cooperation as we complete the process.

27. Grievants received this memo, but still did not believe this change would really take place. (See footnote 11)

28. On May 30, 2001, Director of DOP, Nichelle Perkins, wrote Commissioner VanKirk informing him the class specifications had been approved and the effective date was March 16, 2001.

29. For a period of time, Grievants were in eliminated positions that no longer had class specifications, but they continued to receive their prior rate of pay.

30. On July 17, 2001, Mr. Black wrote Grievants, reviewing the recent past events, noting Grievants' class specifications had been eliminated, and recognizing DOH wanted to make an offer of continued employment to all effected employees. (See footnote 12) Each Grievant was offered a position and informed of the rate of pay for that position. Grievants were informed if they did not accept the offer of employment, their employment would be "terminated due to layoff." If Grievants did not want to accept this offer of employment, the letter also briefly informed them of their potential right to bump another employee within the district, and they were given a list of the classifications they could bump, if they had sufficient seniority.

31. This letter clearly noted the offer of employment would be considered a demotion in title and salary, and Grievants were informed of their grievance rights. Grievants were given an opportunity to respond to this letter by either writing or talking toAssistant Commissioner Jack White, with a deadline of July 27, 2001. Grievants were also told they could call Mr. Black if they had questions. At the bottom of the letter was a signature line for Grievants to either accept or decline the offer of employment.

32. All Grievants, with the exception of Grievant Antolini, accepted the offer of employment, but they signed the letter under protest, as they believed the action taken against them was without their consent, and they had not been informed of their bumping rights.

33. Some Grievants had little or no opportunities to bump because of their lack of seniority, and failure to meet the qualifications of many positions. There was, in essence, no opportunity for Grievants to bump into the management positions because they did not meet the qualifications; they were not engineers.

34. Although not the main focus of the reorganization, the decrease in the number of

administrative positions in the Districts resulted in, at least, a $250,000 per year saving in salaries.

35. DOP Rule 3.73. defines a Position Description Form as "[t]he document prepared by the position supervisor or the employing agency and approved by the appointing authority, which describes the officially assigned duties, responsibilities, supervisory relationships and other pertinent information relative to a position. This document is the basic source of official information in position allocation. Position description forms shall be prescribed by the Director."

36. Although DOP's Rules indicate a Position Description Form "shall" be completed on the position an employee is reallocated to, no Position Description Forms were completed prior to Grievants' demotion. The failure to complete this Form prior toreallocation is not unusual and does not result in the failure of DOP to approve the transaction. Testimony, L. Basford.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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 (2000); 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).

Grievants' arguments will be addressed one at a time.

I. Failure to follow DOP Rules

A. Position Description Forms

Grievants note DOP Rule 4.5 requires an agency to have a current Position Description Form for each position it utilizes, and these forms are to be completed prior to reallocation. Lowell Basford, Assistant Director of Compensation and Classification, noted that frequently this requirement was not met, and DOP approves the action anyway. That is what happened here. DOP approved Commissioner VanKirk's actions without requiring DOH to complete these forms. Mr. Black and Mr. Basford indicated there were class specifications and postings that defined the duties of the position, and Position Description Forms were not really needed. This minor failure to follow the rules to the letter should not result in the overturning of DOH's reorganization. Grievants were aware what their duties would be through postings and class specifications. Additionally, if these forms were essential

paperwork that should have been completed, DOP was the party to mandate this action. DOH should not be punished for this failure to strictly enforce this rule.

B. Authority of Commissioner VanKirk

Grievants assert Commissioner VanKirk did not have the authority to eliminate positions through an Executive Order, and note that while Mr. Smith indicated Commissioner VanKirk had the authority to reorganize his Department, he did not have the authority to remove positions by his Order. The Order indicates Commissioner VanKirk will no longer be using these classifications, and the "positions and offices to be eliminated." The undersigned Administrative Law Judge does not find Commissioner VanKirk intended to remove class specifications or eliminate these positions from DOP's lists, his intent was to indicate these positions would no longer be used by DOH. Accordingly, the undersigned Administrative Law Judge does not find any violation of the Rules which would warrant the overturning of Commissioner VanKirk's reorganization plan.

C. Bumping rights

Grievants assert they were not clearly informed of their bumping rights. Grievants were informed of their bumping rights in the letter from Mr. Black, and were told to call if they had questions. The majority of Grievants did not ask about bumping and signed their letters accepting the new positions. Some Grievants had little opportunity for bumping given their seniority with DOH. DOP Rule 12.4(g) defines and describes bumping rights.

> **A permanent employee who is to be laid off may request a lateral class change or an involuntary demotion to a job class in a lower pay grade in the occupational group in the same unit approved by the Board for reduction in force** unless the results would be to cause the layoff of another permanent employee who possesses greater seniority than the employee who is exercising the request for lateral class change or involuntary demotion. The employee requesting the lateral class change or involuntary demotion must be available for the work schedule and at the work location of the job to which he or she has requested the change or demotion. A permanent employee who is laid off under these provisions as a result of another employee having a greater seniority has the same right of demotion or reassignment as provided for in this procedure. The Director shall develop the occupational groups in the classified service based on similarity of work and required knowledge, skills and abilities.

(Emphasis Added.)

As clearly stated by the Rule, bumping rights apply in layoffs. Since Grievants accepted the

positions that were offered to them, they were not laid off, and they no longer had any bumping rights to utilize.

II. Failure to use the proper terminology

Grievants also assert that because DOH used a variety of terms on their GL-5 personnel transaction forms, they did not know what action was being taken against them. Because DOH used this assortment of terms, they argue the elimination of their positions should be overturned. It should be noted that there was no testimony Grievants ever saw these forms until after they had accepted their present positions.

It is true there were a variety of terms used on these forms. These transactions were called transfers, reallocations, and demotions. These terms have the following definitions:

> Rule 3.27 Demotion: A change in the status of an employee from a position in one class to a position in another class of lower rank as measured by salary range, minimum qualifications, or duties, or a reduction in an employee's pay to a lower rate in the pay range assigned to the classification.

> Rule 3.78. Reallocation: Reassignment 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 level of duties and responsibilities assigned to the position.

> Rule 3.96. Transfer: The movement of an employee to a different subdivision or geographic location of the same or a different agency.

These forms were filled out in the various districts, and not all the individuals who completed the forms at the initial level are aware of the subtle differences that can be applied to these terms. Grievants appear to be upset because more than one term was used. More than one of the above cited terms can be utilized at the same time. A demotion can be a transfer and a reallocation. A person whose position is reallocated can be transferred, and if the duties of the position were changed to result in a decrease in responsibilities, then this reallocation could be a demotion. The fact that more than one term was used is during this process is normal, and again would not require overturning Commissioner VanKirk's reorganization plan.

The key issue here is that Grievants were demoted. This is the essential word that must be utilized, and the main piece of data Grievants needed to know, as demotion affected their pay grade

and status. They were informed the action was a demotion, and they received this information along with notice of their right to file a grievance.

III. Demotion was not voluntary

Grievants assert their demotion was not voluntary because they did not agree with the change. DOP Rules distinguish the two types of demotion as cited below:

> 11.4. Demotions - 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 in classification of an employee to a lower classification, a transfer of an 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 in writing, or upon request to appear personally and reply to the appointing authority or his or her designee. The appointing authority shall file the statement of reasons for the demotion and the reply with the Director of Personnel.** An appointing authority may demote a probationary employee as provided for in subsection 10.4 of this rule.

(Emphasis Added.)

Grievants argue this cannot be a "voluntarily demotion" because it occurred without their consent. This assertion is incorrect. Respondent DOP notes that nowhere in the Rule is the consent of the employee required. DOP's interpretation of this Rule is entitled to great weight. Rule v. Dep't of Health and Human Resources, Docket No. 99-HHR-130 (Oct. 25,1999). Respondent identified the decision to reorganize the districts was based on "business necessity," and the "changes were effected for legitimate reasons." Ashley v. Dep't of Health and Human Resources, Docket No. 94-HHR-070 (June 2, 1995). See Coddington v. W. Va. Dep't of Health & Human Resources, Docket Nos. 93-HHR-265/266/267 (May 19, 1994).

To overturn this decision Grievants must demonstrate Commissioner VanKirk determination was arbitrary and capricious. "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 adecision 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 Resources, Docket No. 93-HHR- 322

(June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). "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 a board of education. See generally, Harrison v. Ginsberg, [168 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

Grievants have not demonstrated this decision was incorrect, or that the reasons for the change were arbitrary and capricious. For Commissioner VanKirk to return the system to one he was comfortable with and knew had worked in the past, is a legitimate reason to reverse the recent changes made by the prior Commissioner.

IV. Management decisions

Grievants also assert Commissioner VanKirk's decision to return to the prior organizational system was incorrect. As this is a management decision, it is assessed by the arbitrary and capricious standard. See Ball v. Dep't of Transp., Docket No. 96-DOH- 141 (July 31, 1997). Commissioner VanKirk's decision cannot be viewed as unreasonableor arbitrary and capricious, as he articulated legitimate business reasons for his decision as identified in the Findings of Fact.

V. Pay on demotion

Grievants assert their pay was improperly reduced, and DOP Rule 5.6 requires they be paid the maximum amount listed in the new pay grade. Rule 5.6 discusses pay on demotion.

> The appointing authority shall reduce the pay of an employee who is demoted and whose current pay rate is above the maximum pay rate for the new classification to at least the maximum pay rate of the new classification or, if the demotion is to a formerly held classification, his or her last pay rate in the formerly held classification, whichever is greater. The employee's salary may remain the same if his or her pay is within the pay range of the new classification, or his or her pay may be reduced to a lower pay rate in the new range.

Mr. Basford interpreted this Rule, and he described the Rule as providing a "floor" and a "ceiling." Again, as previously noted, DOP's interpretation of its own Rules is given great weight. This interpretation was accepted in McCauley v. Division of Corrections/Division of Personnel, Docket No. 98-CORR-088 (July 10, 1998), and the administrative law judge held:

> Division of Personnel Administrative Rules and Regulations, Rule 5.06, clearly requires the salary of an employee being demoted to be reduced to at least the maximum rate of the lower salary range, but also gives the employer the discretion to reduce the employee's salary to a lower pay rate within the new range. Grievant did not establish a violation of this administrative regulation.

The same reasoning applies here. The majority of Grievants were returned to their former positions, and their rates of pay, as revealed by the Findings of Fact, indicate their salaries in these positions were notably increased over the amount they received before their reallocations, transfers, and/or demotions. While it is understandable Grievants weredispleased with the decrease, there was nothing in this action that violated any rule or regulation.

Grievants also argued that tenured classified employees have a property interest in their employment and right to have their employment, benefits, and pay to remain the same without change. (See footnote 13) This is incorrect, as demonstrated by the above stated Rule. A change in pay cannot be arbitrary and capricious, but can occur when dictated by business necessity.

VI. Notice

Grievants assert the notice they received was insufficient as the letters from Mr. Black did not give two weeks, or one pay period, to respond. DOH Administrative Rule, Volume IX, Chapter14, "Transfers and Reassignments Ordered by Management" states an employee will be given a minimum of ten calendar days advance notice in writing, prior to a transfer. DOP Rule 11.4 identifies the required notice for a voluntary demotion is to be in writing, and to afford the employee a reasonable time to reply. Additionally, the employee is to be given the opportunity "to appear personally and reply to the appointing authority or his or her designee."

Grievants were informed many months earlier of the changes to be made, and of the fact their positions had been eliminated in May 2001. They were informed in letters dated July 17 and 19, 2001, of their new positions. The final change would occur on August 1, 2001. That final letter was dated fifteen and thirteen days before the last act would occur. While this final notice could certainly have been given sooner, theundersigned Administrative Law Judge cannot say it was unreasonable, as it followed DOH's Rule and DOP's rule.

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, Grievants have the burden of proving their 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 (2000); 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. The action taken against Grievants was essentially a demotion and all required procedural safe guards and rules were followed in the implementation of this change.

3. "Division of Personnel Administrative Rules and Regulations, Rule 5.06, clearly requires the salary of an employee being demoted to be reduced to at least the maximum rate of the lower salary range, but also gives the employer the discretion to reduce the employee's salary to a lower pay rate within the new range." McCauley v. Division of Corrections/Division of Personnel, Docket No. 98-CORR-088 (July 10, 1998).

4. The decrease in pay Grievants received upon demotion did not violate rule 5.6. 5. The reorganization is a management decision, and it is assessed by the arbitrary and capricious standard. See Ball v. Dep't of Transp., Docket No. 96-DOH-141 (July 31, 1997).

6. "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 Resources, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). "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 a board of education. See generally, Harrison v. Ginsberg, [168 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

7. DOH's reorganization was not arbitrary and capricious as Commissioner VanKirk articulated legitimate reasons for the action.

8. Grievants' demotions did not violate any statute, rule, regulation, policy, or written agreement. 9. The final notice received by Grievants was reasonable.

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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: August 30, 2002

Footnote: 1

Grievant Antolini had retired instead of accepting the demotion. The relief he sought was to rescind his resignation, and to be returned to his prior position and salary for approximately seven months, before he would retire again.

Footnote: 2

Grievants were represented by Attorneys Elizabeth Farber and William Garrett, Respondent DOH was represented by Attorney Belinda Jackson, and Respondent DOP was represented by Assistant Attorney General Robert Williams.

Footnote: 3

In the original Statement of Grievance, Grievants also asserted the reorganization was politically motivated. This allegation was dropped prior to the Level IV hearing.

Footnote: 4

Commissioner VanKirk testified that several of the roads taken into the system were no more than private driveways.

Footnote: 5

It is noted that the parties disagreed somewhat on some of the dates Grievants began their HDA and ADA positions.

When these discrepancies occurred the dates supplied by Grievants were used.

Footnote: 6

This salary was a $6,528 yearly increase over the salary he had received in this same position two years and eight months earlier.

Footnote: 7

This salary was a $4,764 yearly increase over the salary he had received two years and eight months earlier.

Footnote: 8

This salary was a $7,320 yearly increase over the salary he had received two years and eight months earlier.

Footnote: 9

Grievant Marascio had retired, or was in the processing of retiring, from the military just prior to his appointment to this position.

Footnote: 10

The Engineer IV and V class specifications at issue had last been revised on September 11, 1995, and September 15, 1998, respectively.

Footnote: 11

Some Grievants were unsure if they received this memo, or if they were just told about it.

Footnote: 12

Grievant Marascio's letter was dated July 19, 2001, as his first letter incorrectly identified the position he was being offered.

Footnote: 13

Grievants cited to Memphis Light, Gas & Water v. Craft, 436 U.S. 1 (1978) to support the proposition. This case dealt with the termination of service to customers.