JOHN COLLINS,

Grievant,

v.

DOCKET NO. 02-DOH-277

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, John Collins, filed this grievance against his employer, the West Virginia Department of Transportation/Division of Highways ("DOH") on July 3, 2002:

> My grievance is, I subpoenaed Scotty Dingess to a level III hearing. He (Scotty) failed to show up, because he felt he didn't have to. I feel that he is being rewarded by letting him work out of the county, and working 12-14 hr. days. I feel this should be stopped. I also feel he has damaged my level III hearing and disciplinary actions should be taken against him.
>
> Relief sought: Disciplinary actions be brought against Mr. Dingess and he be brought back in the county immediately.

This grievance was denied at the lower levels of the grievance procedure, and Grievant appealed to level four on September 3, 2002. A level four hearing was held on March 13, 2003, and this matter became mature at the close of the hearing. Grievant was represented by Roger Sowards, and DOH was represented at level three by Carrie Dysart, Esq., and at level four by Barbara Baxter, Esq.

SUMMARY OF EVIDENCE

Grievant's Exhibits

None.

LIII DOH Exhibits

Ex. 1 -

DOH-12 Daily Work Report for June 10, 2002 for Organization 0280.

Ex. 2 -

Notice to Employee of Warning to Scott Dingess approved on July 17, 2002.

Testimony

Grievant testified in his own behalf, and presented the testimony of Watt Vance, Randy Adkins, and Wilson Braley. DOH presented the testimony of Wilson Braley.

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

FINDINGS OF FACT

1. Grievant is employed by Highways in District Two as a Transportation Worker II/Craft Worker Technician.

2. Scott R. Dingess is employed by Highways in District Two as a Transportation Worker II/Equipment Operator.

3. Mr. Dingess was subpoenaed, on behalf of Grievant, to appear as a witness in Grievant's level three hearing, DOH designation 2002-0222-DFH-058, scheduled for July 1, 2002.

4. Mr. Dingess told Grievant at the Harts Creek substation that he did not have to honor a subpoena, and if Grievant subpoenaed him, he would “get him” for harassment. 5. Mr. Dingess did not attend the level three hearing, and indeed, did file a grievance against DOH alleging harassment by Grievant.

6. Prior to the events described above, the Highways Commissioner instructed District Engineer Wilson Braley to put together a special crew to work in Mingo County. He asked each county supervisor to contribute one person based upon skills and equipment certification. Larry

Pauley, then-county supervisor for Lincoln County, sent Mr. Dingess. 7. Mr. Dingess was working in Mingo County with the special crew on the day of the level three hearing, and when he did not show up for the hearing, Mr. Braley tried unsuccessfully to contact him.

8. Later, Mr. Braley discussed the matter with Mr. Dingess, who told him he forgot about the hearing.

9. Grievant filed this grievance on July 3, 2002, two days after the level three hearing.

10. Mr. Braley issued Mr. Dingess a written reprimand on July 16, 2002, for failing to honor the level three subpoena. LIII DOH Ex. 2.

DISCUSSION

As this grievance does not involve a disciplinary matter, 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); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. Grievant alleged Mr. Dingess has been “rewarded' for failing to appear at his level three hearing due to being allowed to continue with his assignment to the special crew in Mingo County, and requested Mr. Dingess be taken off that crew and disciplined. DOH asserts Mr. Dingess was disciplined through a written reprimand, and no further action is necessary.

It is clear Grievant is not satisfied with the written reprimand given to Mr. Dingess for his failure to appear at the level three hearing, and believes the discipline imposed to be 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 thedecision 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 “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., 210 W. Va. 105, 566 S.E.2d 72 (2001)(citing In re Queen, 196 W. Va. 442, 473 S.E.2d 483 (1996).

Grievant has failed to demonstrate that any further, or more severe, discipline is required or warranted in this situation. This is not to say the undersigned Administrative Law Judge condones Mr. Dingess' decision not to appear at the level three hearing. She does not. But Mr. Braley's determination that a written reprimand be issued was neither arbitrary or capricious, and was sufficient given the totality of the circumstances. Moreover, Mr. Dingess' assignment to the special crew in Mingo County occurred long before he ever decided not to appear at Grievant's level three hearing. Again, while Grievant may desire to see Mr. Dingess taken off of that crew, he has not proven to the undersigned that such an action is necessary or warranted in this situation.

CONCLUSIONS OF LAW

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.

2. Grievant has failed to prove by a preponderance of the evidence that Highways violated any statute, rule, procedure, or law.

3. Grievant has failed to prove by a preponderance of the evidence that Mr. Braley's decision to issue Mr. Dingess a written reprimand for failing to appear at the level three hearing was arbitrary or 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.

MARY JO SWARTZ

Administrative Law Judge

DATED: March 28, 2003