JEFFREY CRAIG,

Grievant,

v. **Docket No. 05-DNR-030**

DIVISION OF NATURAL RESOURCES,

Respondent.

DECISION

Jeffrey Craig ("Grievant") initiated this proceeding at level two on November 19, 2004, challenging the decision to transfer him to Raleigh County from his previous assignment to Grant County, in connection with his duties as a Conservation Officer. He seeks reinstatement to his assignment in Grant County. The grievance was denied at level two on December 7, 2004. A level three hearing was conducted on December 22, 2004, and the grievance was denied in a decision dated January 24, 2005. Grievant appealed to level four on January 31, 2005. After an unsuccessful attempt to mediate the dispute, a level four hearing was conducted in Elkins, West Virginia, on April 28, 2005. (See footnote 1) This matter became mature for consideration upon receipt of the parties' final fact/law proposals on June 7, 2005.

The following material facts have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant is employed by the Division of Natural Resources ("DNR") as a Conservation Officer. He had been assigned to Grant County for many years.

2. As an officer, Grievant is responsible for enforcing West Virginia laws related to hunting, trapping and conservation of wildlife. In conjunction with these duties, Grievant investigates criminal violations of these laws and is often involved in criminal prosecutions, which includes testifying in court.

3. In late 2003, another DNR officer was present when Grievant hand-fed a young black bear at the Wildernest Inn, which is a "bed and breakfast" type of motel located in Grant County, that is

known for its rural setting and frequent visits by local wildlife. The Wildernest Inn advertises the variety of wildlife which visits the facility, through pictures of various animals on its Internet website, including deer, bears, and birds.

4. Grievant is close friends with the owners of the Wildernest Inn and was a frequent visitor to their facility.

5. West Virginia law prohibits the deliberate feeding of a bear in order to lure or “bait” the animal for the purpose of hunting or trapping it. In addition, DNR distributes information to the public, which explains the danger of feeding bears and that it is illegal to do so. Feeding bears can cause them to lose their natural fear of humans, leading to property destruction or even attacks upon people.

6. Grievant was also present at the Wildernest Inn when one of the owners hand-fed the same bear.

7. On February 4, 2004, Grievant wrote a letter to Dennis DiBenedetto, Grant County Prosecuting Attorney, seeking his opinion regarding the requirements for prosecution of persons for feeding bears. In this letter, Grievant stated that he knew it wasillegal to feed bears in West Virginia, but inquired whether a person could be charged with this offense if they placed food in a feeder for other wildlife, but bears happened to eat it.

8. Mr. DiBenedetto discussed this matter with Grievant and informed him that, if a person knows that a bear is eating food that has been put out for any purpose, they could be charged with illegal feeding of bears. Also present at the meeting were Captain Jerry Jenkins and Sergeant Willenborg, Grievant's supervisors.

9. Around the time of the February 2004 meeting with the prosecutor, some complaints had been received by the Grant County DNR office and by the prosecutor's office that bears were being fed at the Wildernest Inn. At that time, Grievant denied any knowledge of bear-feeding at the inn and stated that he would prosecute anyone who committed such a violation.

10. In the fall of 2004, complaints were received by Captain Jenkins that there had been incidents of bears being fed at the Wildernest Inn, along with allegations that Grievant favored the owners of the facility by not turning them in for DNR violations.

11. During an investigation into the complaints, Grievant admitted to feeding a bear and being present when it was hand-fed by others, which he knew was illegal.

12. In early October of 2004, another DNR officer was notified that some private individuals had been taking care of a baby “fawn” deer at their home and wanted to release it into the wild. The officer picked up the deer and transported it to Grievant, who took the deer to the Wildernest Inn. With Grievant's assistance, the owners of the inn fed and cared for the fawn. Although they did not “cage” the fawn, it remained at the Wildernest Inn, roaming the grounds and even coming into the owners' house. 13. DNR regulations require that, if young wildlife has been abandoned, DNR employees are to either return the animal to the spot where it was abandoned, or, if that is not possible, the animal must be turned over to the district biologist.

14. On November 9, 2004, Colonel James Fields, Chief of DNR's Law Enforcement Section, met with Grievant regarding the deer and bear incidents, along with some other allegations. (See footnote 2) Grievant admitted to his conduct, and Colonel Fields advised Grievant that, due to his loss of credibility with the citizens and hunters of Grant County, he would be recommending that Grievant be transferred to Raleigh County.

15. Grievant was transferred to Raleigh County, effective December 1, 2004. Since his transfer, he has been staying free-of-charge in living quarters at the county's DNR office, and he continues to reside in Grant County.

Discussion

As a preliminary issue, Grievant has argued that this was a disciplinary transfer. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988).

Grievant contends that the instant case is comparable to the situation presented in Swope v. Board of Directors, Docket No. 94-BOD-1095 (July 11, 1995). In that case, the grievant was informed by letter that his job assignment was being changed, “because of misconduct by you during your work,” and he was advised that “further misconduct mayresult in more severe disciplinary conduct, including dismissal.” In addition, the letter reflected that a copy was being placed in the employee's personnel file. The administrative law judge concluded that Mr. Swope's transfer was disciplinary, and the burden of proof was placed upon the employer.

Similarly, in the instant case, the November 15, 2004, letter advising Grievant of his impending

transfer discussed the incidents involving the bear and the fawn deer, and further stated:

> The Division has the right to demand that uniform officers not manifest disrespect toward the statutes that have been legislated, thus undermining their prestige and authority. This unacceptable and unprofessional behavior is counter productive and undermines the conservation officer's ability to credibly administer their duties as law enforcement officers.
>
> I advised you . . . that I would recommend to the Director of [DNR] that, due to your loss of credibility and for the good of the Division, you be transferred from Grant County. The Director has concurred with this decision.

The letter reflects a “cc” to Grievant's personnel file. Both the language of the letter and the fact that it was copied to the personnel file lend credence to the disciplinary nature of the transfer. Moreover, a formal “Notice of Transfer” was issued by Colonel Fields on November 15, 2004, notifying Grievant of his transfer, its effective date, and stating “[t]his transfer is being effected *for cause*.” (Emphasis added.) In view of all of these factors, the undersigned concludes that Grievant's transfer was disciplinary, in that it was punishment for misconduct, and the burden of proof will rest with Respondent.

The West Virginia Supreme Court of Appeals has recognized that state agencies have the right to transfer employees geographically where there is a need, if they remain in the same classification and pay grade, and are not demoted or reduced in pay. Childersv. Civil Serv. Comm'n, 155 W. Va. 69, 75, 181 S.E.2d 22 (1971). It has also been previously held by this Grievance Board that state agencies have the authority to transfer an employee from one official headquarters to another. Bever v. Dep't of Health & Human Res., Docket No. 96-HHR-258 (Dec. 31, 1996); Goodnight v. W. Va. Div. of Human Serv., Docket No. 91-DHS-111 (May 31, 1991). The West Virginia Division of Personnel (DOP) Administrative Rule, § 3.96 defines transfer as"[t]he movement of an employee to a different subdivision or geographic location of the same or a different agency." A state agency is permitted to transfer an employee from one geographic location to another, within the same agency, at any time. The Administrative Rule states in Section 11.6(a) that “appointing authorities may transfer a permanent employee from a position in one organizational subdivision of an agency to a position in another organizational subdivision of the same or another agency at any time.”

As to transfer of employees in lieu of other methods of discipline, such as suspensions without

pay, demotions or even dismissal, this Grievance Board has recognized that a transfer--justified by the employee's misconduct--is a viable option for an employer. See Cayton v. Dep't of Transp., Docket No. 02-DOH-098 (July 11, 2003). In Cayton, supra, the employer's decision was analyzed pursuant to the arbitrary and capricious standard, and it was held that the action was justified. "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 Res., 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." Id. (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 [the employer]. See generally, Harrison v. Ginsberg, [168 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

Under the facts and circumstances presented, the undersigned cannot find Respondent's decision to be arbitrary and capricious. Obviously, Grievant's close relationship with the owners of the Wildernest Inn had created issues in the community regarding his enforcement of applicable laws, as evidenced by his actions with regard to the bear and the fawn deer. Moreover, Grievant was not honest with Mr. DiBenedetto or his superiors when the issue of bear feeding at the Wildernest Inn was initially raised in early 2004, further raising legitimate questions regarding whether he was carrying out his responsibilities with regard to law enforcement, or even whether he was potentially protecting legal violators. Accordingly, Respondent has justified its decision to transfer Grievant.

The following conclusions of law support this Decision.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence.

W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't of Health, Docket No. H-88-005 (Dec. 6, 1988).

2. State agencies have the authority to transfer an employee from one official headquarters to another. Bever v. Dep't of Health & Human Resources, Docket No. 96- HHR-258 (Dec. 31, 1996); Goodnight v. W. Va. Div. of Human Serv., Docket No. 91-DHS- 111 (May 31, 1991).

3. "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 Res., Docket No. 93-HHR-322 (June 27, 1997).

4. Respondent's decision to transfer Grievant to Raleigh County was justified under the circumstances, and it was not 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, and 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.

Date: July 20, 2005

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant represented himself at level three, and Respondent was represented by counsel, Kelley Goes. At level four,

Grievant was represented by counsel, Bridgette Wilson, and Respondent was represented by Doren Burrell, Senior Assistant Attorney General.

Footnote: 2

The other allegations involved some traffic violations, which were apparently dropped at a later time.