WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

CAROL MILLER,

Grievant,

v. **Docket No. 07-HHR-077**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/WELCH COMMUNITY HOSPITAL,

Respondent.

DECISION

Carol Miller ("Grievant") initiated this grievance on January 3, 2007, requesting that she be given "seniority as a Tech over Robert Starkovich." After denials at levels one and two, a level three hearing was conducted by Christopher Amos, Esquire, Grievance Evaluator, and the grievance was denied in a level three decision dated February 26, 2007. Grievant appealed to level four of the grievance procedure (See footnote 1) on March 7, 2007. Due to changes in the grievance procedure and this Grievance Board, a level four hearing was not held until August 21, 2007, before Senior Administrative Law Judge Janis Reynolds. Grievant represented herself at that hearing, and Respondent was represented by Jennifer K. Akers, Assistant Attorney General. Although given until September 9, 2007, to file post-hearing proposals, neither party submitted any such proposals. Due to the retirement of Judge Reynolds, this grievance was reassigned to the undersigned administrative law judge for a final decision on April 19, 2008.

Synopsis

Grievant contends that another laboratory employee should not receive preference over her with regard to shift assignments. Welch Community Hospital has policies in place which define seniority and state that laboratory employees are assigned to shifts, with seniority being recognized for preferential assignments. The other lab employee has far more seniority than Grievant, and he is also in a classification which requires supervision by other employees. Therefore, Respondent established reasonable justification for assigning him only to day shift. Grievant failed to prove this decision was arbitrary and capricious or in violation of any law or policy. The grievance is denied.

Findings of Fact

After a detailed review of the record in its entirety, the undersigned makes the following findings of fact:

1. Grievant is employed at Welch Community Hospital ("WCH") as a Medical Technologist ("Tech") in the hospital's laboratory. She has been serving in her current position since being re-employed by Respondent in 1998, after two voluntary breaks in her employment that occurred in 1974 and 1987.

2. Robert Starkovich is also employed in the laboratory at WCH, and he is classified as a Medical Laboratory Technician ("MLT"). Mr. Starkovich has been employed at WCH continuously for nearly 20 years. 3. The Tech classification is in a higher pay grade than MLT and requires more knowledge, education and experience than what is required for MLTs. Employees who are Techs are qualified to perform advanced levels of laboratory testing and may work unsupervised in the lab. An MLT is supposed to work under the direct supervision of a Tech.

4. WCH has adopted a policy entitled "Seniority Practice," which states that seniority is determined by continuous, permanent employment, and an employee's seniority begins with their most recent employment date, following any voluntary resignation.

5. The WCH Policy Manual contains a policy regarding laboratory scheduling, revised as of April 14, 2005, which states that the seniority of lab personnel will be taken into consideration when scheduling shifts, with the least senior person covering the night shift, the next person in line covering the evening shift, and everyone else working day shift. This policy does not address any differences in employee classifications within the lab.

6. Grievant is normally assigned to day shift, but she is periodically assigned to evening or

night shift to cover for absent Techs.

7. Mr. Starkovich works only day shift, due to his seniority and status as an MLT. He is the only MLT currently employed at WCH.

Discussion

Because this grievance does not involve a disciplinary matter, Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2007); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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).

Grievant believes that Mr. Starkovich should not be given seniority over her for scheduling purposes and contends that he is not competently performing his job duties. Grievant was advised repeatedly by the level three evaluator and the Grievance Board's administrative law judge that Mr. Starkovich's competence and whether or not he is misclassified were not proper issues to be raised in the context of her grievance regarding shift assignments. Interestingly, while at one point arguing that Mr. Starkovich should not receive preferential assignments over her because he is not competent, she also stated at the level four hearing that he should be expected to do everything that Techs do, and that all lab employees should have the same job title.

While extraneous issues were argued at all levels of this grievance, the crux of Grievant's claim is that she does not want Mr. Starkovich to receive a preferential shift. Therefore, in accordance with the requirements of the grievance statutes, she must prove violation of a law, policy, rule or regulation, or identify actions of her employer that constitute discrimination, favoritism, harassment, or “a substantial detriment to or interference with” her job performance. W. Va. Code § 29-6A-1(l) (2007).

As Respondent has noted, WCH has adopted specific policies and procedures applicable to shift assignments, which are largely determined by seniority. Grievant does not dispute that Mr. Starkovich is far more senior than she is at WCH, due to her voluntary breaks in employment. Moreover, there is no stated requirement with regard to lab scheduling which designates that employees' seniority is only considered within particularjob classifications, as the policy appears to

group all lab employees together for the purpose of determining seniority.

Finally, Grievant has failed to counter Respondent's testimony from Cathy Addair, WCH Human Resources Director, who explained that Mr. Starkovich is not supposed to be assigned to evening or night shifts by himself, due to the lack of supervision by Techs. Although Grievant stated that many MLTs have “worked alone” in the lab over the years, no other evidence supported this contention, and the classification specifications for both MLTs and Techs clearly provide for direct supervision of MLTs. It would seem logical for WCH to avoid having the entire lab under the sole supervision of the lowest classified and least qualified employee, which would be Mr. Starkovich.

The Grievance Board does not have authority to substitute its judgment for agency management in such matters as determining the work schedule for employees assigned to a particular department. *Rodeheaver v. Dep't of Health and Human Res.*, Docket No. 00-HHR-312 (July 31, 2001); *See Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997) (*per curiam*); *Board v. Dep't of Health and Human Resources/Lakin Hospital*, Docket No. 99-HHR-329 (Feb. 2, 2000). Such management decisions are evaluated pursuant to the arbitrary and capricious standard. "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 whether 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 decision maker whose action is challenged. *See Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

The undersigned concludes that Grievant has failed to establish any misapplication of established policy or law, and Respondent's system for assigning shifts cannot be found to be arbitrary and

capricious. Respondent has articulated a logical, reasonable basis for assigning Mr. Starkovich to the day shift, which is in accordance with WCH's policy. Accordingly, Grievant has failed to establish by a preponderance of the evidence that she is entitled to shift or seniority preference over Mr. Starkovich.

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2007); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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 Grievance Board does not have authority to substitute its judgment for agency management in such matters as determining the work schedule for employees assigned to a particular department. *Rodeheaver v. Dep't of Health and Human Res.*, Docket No. 00-HHR-312 (July 31, 2001); *See Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997) (*per curiam*); *Board v. Dep't of Health and Human Resources/Lakin Hospital*, Docket No. 99-HHR-329 (Feb. 2, 2000).

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. Grievant has failed to establish by a preponderance of the evidence that she is entitled to the relief requested.

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. *See* W. Va. Code § 29-6A-

7 (repealed, *See Footnote 1, supra)*. Neither the WestPublic 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: April 30, 2008

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DENISE M. SPATAFORE

Acting Chief Administrative Law Judge

Footnote: 1

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.