# THE WEST VIRGINIA PUBLIC EMPLOYEES

# GRIEVANCE BOARD

**BRIAN HERDMAN,**

**Grievant,**

**v. Docket No. 06-DOH-200**

**DEPARTMENT OF TRANSPORTATION/**
**DIVISION OF HIGHWAYS,**

**Respondent.**

## D E C I S I O N

**Grievant Brian Herdman filed this grievance to challenge his non-disciplinary demotion from Transportation Crew Supervisor II to Transportation Crew Supervisor I (to a position he had previously occupied). His Statement of Grievance was, "Grievant was wrongfully demoted." The relief he sought was, "Grievant be restored to position as Transportation Crew Supervisor II with same pay and benefits." Grievant's demotion came about after the Mason County Circuit Court reversed the Education and State Employees Grievance Board's decision in *Roush/Forbes v. Department of Transportation/Division of Highways*, Docket No. 01-DOH-573/561 (February 28, 2003), *rev'd sub nom. Watterson v. Roush*, Mason Co. Cir. Ct., Civ. Action No. 03-AA-44-N (January 19, 2006). Respondent ["DOH" or "the Department"] contends that the Circuit Court's decision required it to return two employees _ including the Grievant _ to the positions they had occupied before the litigation in the *Roush* grievance.**

**DOH transferred Grievant back to his former position effective June 1, 2006, by non-disciplinary demotion, without loss of pay or benefits. The Grievant's appeal of his demotionto the Education and State Employees Grievance Board at Level Four was received on June 12, 2006. The record contains no information regarding the processing of the grievance directly to Level Four, but neither party objected to the procedure, and on September 26, 2006, former ALJ Campbell conducted a Level Four hearing in the case. During that hearing the parties and Judge Campbell apparently discussed the pendency of a petition for appeal in the Supreme Court of Appeals from the Mason County Circuit Court decision in *Watterson v. Roush,* No. 03-AA-44-N. Because an appeal would have the potential to alter the staffing situation involved in this grievance, Judge Campbell ordered the case held in abeyance pending action by the Supreme Court of Appeals.**

**The Supreme Court refused the petition for appeal in *Watterson* on January 10, 2007, but the parties did not so advise the Grievance Board, and in an apparent administrative oversight, this case was again scheduled for a Level Four hearing, with neither party objecting. By Order entered November 30, 2007, the undersigned, to whom the case had been reassigned, canceled the (second) Level Four hearing and directed the parties to submit proposed findings of fact and conclusions of law, which were received by December 21, 2007, at which point the case became mature for decision.**

## Summary

**Precedent by which this Board is bound holds that a grievant may not base a grievance on an employer's reasonable implementation of a decision made in another grievance. Because this grievance is based exclusively on such action by the Grievant's employer, and particularly in light of the fact that Grievant's non-disciplinary demotion did not cost him pay or benefits, his grievance must be denied. A description of theproceedings in the *Roush* grievance, including its history on appeal to the circuit court, is essential to an understanding of this grievance and is contained in the Findings of Fact set forth below.**

**After thorough review of the record, the undersigned makes the following Findings of Fact:**

## Findings of Fact

**1 1. In 2001, Hamilton Roush and Gregory Forbes filed separate grievances against DOH, challenging their non-selection for the position of Highway Administrator III ("County Administrator") in Mason County. Robert Watterson, the incumbent Highway Administrator, intervened, and the grievances were consolidated under Docket No. 01-DOH- 573/561.**

**2 2. On February 28, 2003, Administrative Law Judge Mary Jo Swartz granted the Roush grievance and ordered DOH to instate him as County Administrator in place of Mr. Watterson. Watterson, the incumbent and intervenor in No. 01-DOH-573/561, appealed Judge Swartz's decision to the Mason County Circuit Court.**

**3 3. On November 1, 2005, with the circuit court appeal still pending, DOH transferred Mr. Roush to the Mason County Highway Administrator position, as the Board's decision had directed. This created a vacancy in Mr. Roush's former Transportation Crew Supervisor II position. Grievant Herdman applied to fill the vacancy and was selected for it.**

**4 4. On January 19, 2006, Mason County Circuit Judge David W. Nibert filed his "Opinion Order Reversing Decision of West Virginia Education and State EmployeesGrievance Board"** (See footnote 1) **in Civil Action No. 03-AA-44-N, ordering DOH to reinstate Mr. Watterson as County Administrator.**

**5 5. In a letter to Grievant Herdman dated April 3, 2006, DOH Human Resources Director Jeff Black advised Mr. Herdman that DOH would comply with the Circuit Court order by reinstating Mr. Watterson as County Administrator, and by returning Mr. Roush to his former Transportation Crew Supervisor II position. This would result in Grievant Herdman's ouster from that job. Mr. Black's letter advised the Grievant that he, in turn, would be transferred back to his former position of Transportation Crew Chief (Transportation Crew Supervisor I).**

**6 6. DOH took that action effective June 1, 2006, by non-disciplinary demotion, without loss of pay or benefits to the Grievant.**

## Discussion

**Because this grievance does not involve a disciplinary matter, the Grievant has the burden of proving his 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). Recognized in *State v. Miller*; 194 W. Va. 3, 459 S.E.2d 114 (1995) (*see* Section II of opinion). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).**

**The absence from the record in this case of any facts tending to constitute or support a grievance under West Virginia's grievance statutes requires that the grievance be denied. In *Gillman v. Logan County Board of Education*, Docket No. 91-23-196 (Nov. 7, 1991), the Education and State Employees Grievance Board declared:**

> **Simply stated, an employee cannot, within the context of a grievance procedure, successfully claim that his employer has discriminated against him in its reasonable implementation of the decision in another grievance.**

***Id*. The rule announced in *Gillman* has been applied in the Grievance Board's subsequent decisions, (See footnote 2) e.g., *Toney v. Lincoln County Board of Education*, Docket No. 95-22-118 (June 30, 1995); *Martin/Holcomb v. Mason County Board of Educ*ation , Docket No. 94-26-261 (Oct. 19, 1994).**

**To put the rule announced in *Gillman* another way, in order to be considered by this Board, a grievance must itself allege a violation of the grievance statutes, in this case W. Va. Code § 29-6A-2(l) (2006):**

> **"Grievance" means any claim by one or more affected state employees alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment,employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of their employer; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective job performance or the health and safety of the employees.**

**The fact that an employer's action is adverse to a grievant, or that the grievant experiences it negatively, does not alone make the action grievable. In addition to affecting the grievant**

**negatively, the action must fit one of the categories specified in the definition quoted above.** (See footnote 3)

**Under *Gillman* and its line of cases, to prevail in a situation such as the one in which this Grievant finds himself, he would have to prove that his employer's action was not a "reasonable implementation of the decision in another grievance." *Gillman, supra.* Our cases declare that the Grievance Board may correct an employer's unreasonable actions if they are arbitrary and capricious. In *In re: Queen, Executrix*, 196 W. Va. 442, 473 S.E.2d 483, 487 (1996), a case involving a civil service commission, the Supreme Court (Justice Cleckley) said that the commission's actions could be considered arbitrary or capricious:**

> **if the Commission used a misapplication of the law, entirely failed to consider an important aspect of the problem, offered an explanation that ran counter to the evidence before the Commission, or offered one that is so implausible that it could not be ascribed to a difference in view or the product of Commission expertise. *See generally Martin v. Randolph County Bd. of Educ*., 195 W.Va. 297, 304, 465 S.E.2d 399, 406 (1995).**

***See 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).**

**The Grievant in this case neither alleged nor offered proof of anything other than DOH's unwinding of the employee transfers it undertook to comply with the Education and State Employees Grievance Board's decision in the *Roush* grievance.** (See footnote 4) **The Grievant did not explain what DOH should or could have done differently to comply with the Circuit Court's order. Under these circumstances, the only possible conclusion is that unwinding the transfers was the most logical and reasonable way for DOH to comply with the Circuit Court's reversal of the Grievance Board's decision. Indeed, DOH was presumably not obliged to allow the Grievant to retain his Transportation Crew Supervisor II salary and benefits, but it nonetheless did so. There is nothing in the record of this case which could form the basis of a grievance, as grievance is defined in W. Va. Code § 29-6A-2(I) (2006).**

**Because the Grievant has failed to meet his burden of proof, his grievance must be denied.**

## Conclusions of Law

**1 1. Because this grievance does not involve a disciplinary matter, the Grievant has the**

**burden of proving his 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). Recognized in *State v. Miller*; 194 W. Va. 3, 459 S.E.2d 114 (1995) (*see* Section II of opinion). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).**

**2 2. "[A]n employee cannot, within the context of a grievance procedure, successfully claim that his employer has discriminated against him in its reasonable implementation of the decision in another grievance." *Gillman v. Logan County Board of Education*, Docket No. 91-23-196 (Nov. 7, 1991). The rule announced in *Gillman* has been applied in the Grievance Board's subsequent decisions, e.g., *Toney v. Lincoln County Board of Education*, Docket No. 95-22-118 (June 30, 1995); *Martin/Holcomb v. Mason County Board of Educ*ation , Docket No. 94-26-261 (Oct. 19, 1994). The absence from the record in this case of any facts tending to constitute or support a grievance under West Virginia's grievance statutes requires that the grievance be denied.**

**3 3. Under *Gillman* and its line of cases, to prevail in a situation such as the one in which this Grievant finds himself, he would have to prove that his employer's action was not a "reasonable implementation of the decision in another grievance." *Gillman, supra.* Our cases declare that the Grievance Board may correct an employer's unreasonable actions if they are arbitrary and capricious. In *In re: Queen, Executrix*, 196 W. Va. 442, 473 S.E.2d 483, 487 (1996), a case involving a civil service commission, the Supreme Court (Justice Cleckley) said that the commission's actions could be considered arbitrary or capricious:**

> **if the Commission used a misapplication of the law, entirely failed to consider an important aspect of the problem, offered an explanation that ran counter to the evidence before the Commission, or offered one that is so implausible that it could not be ascribed to a difference in view or the product of Commission expertise. *See generally Martin v. Randolph County Bd. of Educ*., 195 W.Va. 297, 304, 465 S.E.2d 399, 406 (1995).**

***See 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 4. The Grievant in this case neither alleged nor offered proof of anything other than DOH's unwinding of the employee transfers it undertook to comply with the Education and State Employees Grievance Board's decision in the *Roush* grievance. Under these circumstances, the only possible conclusion is that unwinding the transfers was the most logical and reasonable way for DOH to comply with the Circuit Court's reversal of the Grievance Board's decision.**

**5 5. There is nothing in the record of this case which could form the basis of a grievance, as grievance is defined in W. Va. Code § 29-6A-2(l) (2006).**

**Accordingly, the grievance is DENIED.**

**Any party 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 § 1 29-6A-7 (2006) (repealed, *see* fn. 1 above). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and they 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 theBoard with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.**

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**Thomas J. Gillooly**

**Administrative Law Judge**

**Date: February 15, 2008**

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***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.***

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***Footnote: 2***

***Although Gillman involved a claim of discrimination, its application in other decisions has not been limited to grievances claiming discrimination.***

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***Footnote: 3***

***This discussion assumes, without deciding, that the employer's non-disciplinary demotion in this case constituted an adverse action in the legal sense. This is not a foregone conclusion, because the Grievant's pay and benefits were left intact. Because the case is resolved on other grounds, however, it is unnecessary to resolve this issue.***

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***Footnote: 4***

***The Grievant contended at Level 4 that his non-disciplinary demotion might be perceived by others as reflecting adversely on him. This testimony was speculative, but even if it were factual, it would not meet the statutory definition of a grievance. Similarly, Grievant's preference to remain in the more advanced position is not a sufficient basis for this Board to reverse the Respondent's action.***