THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BEVERLY MORRIS,
Grievant,

v. **Docket No. 2012-0943-CONS**

WORKFORCE WEST VIRGINIA,
Respondent.

DECISION

Grievant, Beverly Morris, is employed by Respondent, Workforce West Virginia. On December 20, 2011, Grievant filed a grievance against Respondent alleging she had been functionally demoted and seeking to be maintained in her position as before the alleged functional demotion among numerous other related requests.[1] The grievance was assigned docket number 2012-0658-DOC. On January 31, 2012, Grievant filed a second grievance stating, "On January 9, 2012, I was unceremoniously removed from my duty station and moved to central office. This is a continuation of the ongoing pattern of harassment and maltreatment that I receive."[2] Grievant sought "to be returned to work at my duty station at Plaza East." The grievance was assigned docket number 2012-0787-DOC.

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[1] Grievant's Statement of Grievance and Relief Sought was placed on a two-page single-spaced attachment. The allegations contained in the Statement of Grievance assert she was functionally demoted and complains about various decisions made by her management. The relief sought encompasses nine bulleted points comprising a page of text.

[2] Grievant's counsel argued that Grievant had been functionally demoted and discriminated against. To the extent that Grievant's allegations in her grievance filings may have raised other legal issues, the Grievance Board has long held that elements or allegations of a grievance which are raised, but not pursued or developed will be considered abandoned. *Bias v. Dep't. of Transportation/Division of Highways*, Docket No. 2008-1520-DOT (Sept. 22, 2009) (citing *Church v. McDowell County Bd. of Educ.*, Docket No. 33-87-214 (Nov. 30, 1987)).

On January 6, 2012, a level one conference was held in docket number 2012-0658-DOC, for which a level one decision was rendered on Janaury 12, 2012, denying the grievance. Grievant appealed to level two on January 30, 2012. On February 14, 2012, a level one hearing was held in docket number 2012-0787-DOC, for which a level one decision was rendered on February 28, 2012, denying the grievance. By order entered March 15, 2012, the two grievances were consolidated into the above-styled action. Mediation was held on the consolidated action on June 29, 2012. Grievant perfected the appeal to level three of the grievance process on July 17, 2012. A level three hearing was held on November 1, 2012, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by counsel, Katherine L. Dooley, Respondent was represented by counsel, Doren Burrell, Senior Assistant Attorney General. Two additional days of hearing were held at the same location with the same participants on January 10, 2013 and January 17, 2013. The parties jointly sought extension of time to file Proposed Findings of Fact and Conclusions of Law, which was granted. This matter became mature for decision on March 18, 2013, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law[3].

Synopsis

Grievant alleges she was functionally demoted and discriminated against when Respondent reassigned her management responsibility from two units to one and changed her office location. Grievant asserts these decisions were arbitrary and

[3]On January 30, 2013, Mr. Burrell's supervisor, Kelli D. Talbott, Senior Deputy Attorney General, submitted a letter explaining the Mr. Burrell was no longer employed by the Attorney General's office. Ms. Talbott prepared and submitted Respondent's Proposed Findings of Fact and Conclusions of Law.

capricious. Grievant did not prove she was functionally demoted or discriminated against. Respondent's decisions were not arbitrary and capricious as they violated no law, rule, or policy and were reasonable in light of the circumstances. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant has been employed by Respondent since 1999. In 2006, she was promoted to Employment Programs Manger II, with a working title of Assistant Director. At the time of her hire as Assistant Director, she was given responsibility for the Unemployment Compensation Audit Unit ("Audit") and the Unemployment Compensation Compliance Unit ("Compliance"), which entailed responsibility for approximately seventeen people total.

2. Grievant reports to Michael Moore, Unemployment Compensation Director. Mr. Moore reports to Valerie Comer, Deputy Executive Director. Ms. Comer reports to Russel Fry, Acting Executive Director of Workforce.

3. Upon her hire, Grievant and her units were stationed at Respondent's California Avenue location. In June 2011, Grievant and her units were moved to Respondent's Plaza East location.

4. Fairly immediately upon Grievant's promotion to Assistant Director, tensions arose between Grievant and Audit employees. Employees complained of Grievant's micromanagement. The auditors are required to travel extensively, which made it difficult for them to conform to a rigid schedule. Although the unit was

exceeding performance requirements, Grievant focused on control of the auditor's time reporting. She required the auditors to take lunch at exactly noon, even when they were in the field. If an audit was scheduled for nine, Grievant required the auditor to still come to the office at eight thirty, only to turn around and go right back out to travel to the audit location. This was a significant change from the way this high-performing unit had been previously managed.

5. Tensions escalated between Grievant and several of the Audit employees over several years, and culminated in an incident between Grievant and Dani Asseff. In monitoring Ms. Asseff's time, Grievant was convinced Ms. Asseff was falsely reporting her time. After Grievant spoke to Mr. Moore about these issues multiple times, Mr. Moore lost his temper and angrily told Grievant to just go to Asseff's house to check up on her. Grievant did, in fact, go to Ms. Assef's house and was seen by Ms. Asseff. Ms. Asseff was greatly upset by this action and complained to the Governor, who was a personal friend. Ms. Asseff was then removed from Grievant's supervision.

6. Under just a few years of Grievant's management, Audit had lost approximately half of its tenured staff. After the departure of these tenured employees, there were no continuing complaints from Audit.

7. Tensions also began to arise between Grievant and employees in Compliance. Although also a unit meeting its performance goal, Compliance has a difficult history for management. The employees within the unit do not get along with each other and numerous grievances have been filed by Compliance employees since the unit's inception in the nineties. Compliance had been previously managed by Assistant Director Wade Wolfingbarger. During his tenure, a Compliance employee

filed a sexual harassment lawsuit against Mr. Wolfingbarger, which was later dismissed when several other Compliance employees recanted their stories and the plaintiff could not answer questions about certain physical characteristics. The lawsuit dragged on for four years and was very expensive to defend.

8. Before she was hired, Grievant was aware of the problems with Compliance and what had happened to Mr. Wolfingbarger.

9. Although Compliance was difficult for any manager, Grievant's management style appeared to exacerbate the problems. Compliance employees were continually complaining to Mr. Moore and Ms. Comer about Grievant. Mr. Moore and Ms. Comer discussed Grievant's management style and requested she focus more on performance and less on minutia. Grievant refused to change her management style. Complaints continued and grievances were filed and threatened. The cycle continued until 2011, when the employee who had previously filed the lawsuit against Mr. Wolfingbarger threatened to file a grievance for hostile work environment against Grievant and another employee filed an EEOC complaint against Grievant for sexual harassment.

10. Respondent began an investigation into the unrest at Plaza East, which began after Grievant and her units were moved to Plaza East in June 2011. On August 17, 2011, Compliance was removed from Grievant's supervision and returned to Mr. Wolfingbarger pending the completion of the investigation.

11. On December 5, 2011, Grievant was informed in a meeting with her supervisor that the removal from her supervision of Compliance would be permanent and that Compliance would be moved back to the California Avenue location.

12. When Compliance was moved back to California Avenue, Assistant Director Gail Vittatoe and her unit were moved in to Plaza East. Tensions immediately began between Grievant, Ms. Vittatoe, and Ms. Vittatoe's employees.

13. On January 3, 2012, Grievant used her personal cell phone to take pictures of the desks of Ms. Vittatoe's employees. Employees had also reported to the office manager that Grievant had taken pictures while seated in her car of the outside of the building and employees standing around the outside of the building.

14. On January 4, 2012, Mr. Moore received a formal complaint of prohibited workplace harassment from Ms. Vittatoe relating to Grievant's taking pictures.

15. In response to the complaint, Grievant was temporarily relieved of all supervisory duties and was moved back to California Avenue. The record is unclear as to when, but responsibility for Audit was later returned to Grievant, although the move back to California Avenue was made permanent.

16. Grievant complained that her office at California Avenue is inadequate, but all the facilities at California Avenue are outdated. Though small, Grievant's office is actually larger than Mr. Moore's office, who is her supervisor. Both Grievant and Respondent contributed to difficulties Grievant experienced setting up her new office. In the beginning, Grievant had not been provided all she needed to perform her duties, but then Grievant later failed to follow up when she was given permission to request items.

17. Historically, Respondent has realigned units under different Assistant Directors and made changes to office locations.

18. Grievant's title, classification and salary have not been changed. Grievant has received no disciplinary actions for any of the allegations in the complaints received about her from employees and Ms. Vittatoe.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2008); *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). "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).

Grievant alleges she was functionally demoted when Respondent removed from her supervisory responsibility one of two units she had previously been assigned to manage. Grievant further alleges she was discriminated against when Respondent moved Grievant's office location. Respondent denies that Grievant was functionally demoted or discriminated against, asserting that the removal of the unit and movement of Grievant's office were management decisions supported by legitimate reasons.

Demotion is governed by the Division of Personnel's administrative rules. "There are two types of demotion, demotion with prejudice and demotion without prejudice. A demotion with prejudice is a reduction in pay and/or a change in job class to a lower job class due to the inability of an employee to perform the duties of a position or for

improper conduct. A demotion without prejudice is a change in job class of an employee to a lower job class, a transfer of an employee to a lower job class, or a reduction in the employee's pay due to business necessity." W. VA. CODE ST. R. § 143-1-11.4 (2012). There are strict requirements for how an employer may demote an employee under the rule. *Id.* However, "[i]t has been recognized by this Grievance Board that a 'functional demotion' may occur when an employee is reassigned to duties of less number and responsibility without salary reduction or other alteration, which may impact the employee's ability to obtain future job advancement." *Dudley v. Bureau of Senior Serv*., Docket No. 01-BSS-092, (July 16, 2001) (citing *Gillespie v. W. Va. Dep't of Corrections*, 89-CORR-105 (Aug. 29, 1989)).

Grievant was not formally demoted as neither her job classification, title, nor pay were changed. To support her contention that she was functionally demoted, Grievant presented evidence about the reassignment of one of her two units to another Assistant Director. Grievant previously had responsibility as an Assistant Director for two units, which numbered approximately seventeen people. Respondent removed from Grievant's responsibility one of the two units, which reduced the number of people she managed to approximately ten. Grievant has retained her responsibility over the remaining unit. Grievant asserted that her duties and responsibilities have changed, but provided little evidence of this alleged change other than the bare fact that she manages one unit instead of two, which entails managing fewer people. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Directors/W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30,

1998) (citing *Harrison v. W. Va. Bd. of Directors/Bluefield State College,* Docket No. 93-BOD-400 (Apr. 11, 1995)).

Grievant provided no law to support that a reduction in the number of people managed would support a finding of functional demotion, especially when there are other Assistant Directors in the organization who manage a comparable number of people, although most do manage more. In fact, a review of the relatively few cases in which this Board has reviewed allegations of functional demotion, the only three that have been granted show a very clear change in duties. *Koblinsky v. Putnam County Health Dep't.,* Docket No. 2011-1772-CONS (October 23, 2012) (Registered Sanitarian, who previously performed inspections in the field, confined to desk to perform only clerical tasks not ordinarily done by Registered Sanitarians); *Watson v. Dep't. of Health and Human Resources/Mildred Mitchell-Bateman Hospital*, Docket No. 2009-0558-DHHR (Dec. 31, 2009) (Security Guard reassigned to perform the duties of a Food Service Worker); *Lilly v. Dep't of Transportation/Division of Highways*, Docket No. 07-DOH-387 (June 30, 2008) (As part of a written reprimand all managerial duties of Highway Administrator removed). Even if Grievant had proven some changes in her duties due to the removal of one unit, those changes would not rise to the level of previous cases finding functional demotion.

Although Grievant testified regarding her fear that the reduction of supervised employees would result in the reclassification of her position to a lower classification, Grievant provided no evidence that this was happening, or that the number of employees supervised could even be used in determining her classification. She provided no evidence that the reduction in the number of employees managed would

impact her ability to obtain future job advancement. In fact, as there are other Assistant Directors within the agency who supervise comparable numbers of people, it seems unlikely there would be an impact on future job advancement.

Grievant further argues she has been discriminated against by Respondent in her management's decision to change her office location.[4] In the grievance process, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm., 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant asserts she has been treated differently than Ms. Vittatoe and Mr. Wolfingbarger, other Assistant Directors supervised by Mr. Moore. Grievant proved she

[4] Grievant appears to argue as part of this assertion the inadequacy of her new office. However, as discussed in the Finding of Facts, the inadequacies that have now been addressed were partially Grievant's fault, and she admits her office is actually larger than that of her own supervisor. The California Avenue facilities are outdated, and Grievant's office at Plaza East was much nicer, but that is irrelevant. Respondent is not required to provide Grievant with a nice office, just an adequate one. Grievant's complaints about her office space, such as the lack of a doorstop, appear mostly frivolous.

was treated differently than Ms. Vittatoe and Mr. Wolfingbarger with regards to her office location in that Ms. Vittatoe and Mr. Wolfingbarger are located in the same location as the employees they manage. However, Grievant is not similarly situated to Ms. Vittatoe and Mr. Wolfingbarger regarding a decision on office location. Although all three are Assistant Directors within the same division supervised by the same person, Grievant manages only field employees. Ms. Vittatoe and Mr. Wolfingbarger supervise office employees. Of Grievant's ten employees, only two[5] are located in the same city as her office location, and those staff members are required to travel extensively. Even if Grievant can be said to be similarly situated to Ms. Vittatoe and Mr. Wolfingbarger, the difference in office location is directly related to Grievant's job responsibilities as the supervisor of only field staff.

Grievant contends that the decisions to remove a unit from Grievant's supervision and to move her office location were 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 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

[5] There are two auditors assigned to the Charleston area, but one of those positions has remained vacant throughout this proceeding.

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)).

Grievant asserts she is a completely innocent party and that Respondent engaged in a “witch hunt” in order to ruin her career. Grievant believes that the problem is her management’s refusal to support her over the other employees who are complaining about her. "'A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety.' *Rice v. Div. of Highways*, Docket No. 96-DOH-247 (Aug. 29, 1997)." *Viski v. Preston County Bd. of Educ*., Docket No. 99-39-271 (Nov. 30, 1999). The Grievance Board may not substitute its management philosophy for that of an employer. *Skaff v. Pridemore*, 200 W. Va. 700, 709, 490 S.E.2d 787, 796 (1997).

Grievant was tasked with managing a very difficult workforce with Compliance. Clearly, over the course of several years of Grievant’s leadership, difficulties with Compliance escalated. Given the history of this unit, Respondent was understandably concerned. Grievant’s management discussed their concerns with Grievant’s management style with Grievant, asking her to focus more on performance than minutia. Grievant refused to change her approach. As Grievant was not violating any law, rule, or policy with her management style, her management did not feel they could require her to change. However, problems continued within the unit, culminating in a hostile work environment complaint against Grievant.

Grievant had already had conflict with the tenured workers of Audit. That situation had continued to escalate until the unit had lost approximately half of the tenured Audit employees. Grievant's conflict with Ms. Assef cost a significant amount of time for Grievant's managers in attempting to resolve the conflict, and eventually lead to the involvement of the Governor's office. Then the same unrest began to escalate with Compliance. Again, Mr. Moore and Ms. Comer were spending a significant amount of time dealing with the complaints of employees about Grievant and vice versa. Clearly, once the employee who had previously filed a costly lawsuit against Respondent, alleged hostile work environment, Respondent had to take action to defuse the situation. It was reasonable for Respondent to remove that unit from Grievant's supervision while the investigation was ongoing.

It is important to note that Grievant had never taken any responsibility for her actions. She never admitted there was any problem with going to Ms. Assef's house to stake it out. Even though she had lost most of her tenured staff in Audit, she never considered changing anything about her management style. While Ms. Assef and Ms. Smith admitted to their sometimes inappropriate behavior towards Grievant, Grievant steadfastly denied any part in the conflict. When the same types of conflict arose in Compliance and Mr. Moore asked her to change her management approach again, Grievant refused to make any changes. The investigation revealed that almost everyone identified Grievant as a significant source of the conflict and tension in the office.[6] Respondent made clear that it believed some of the employees' complaints to

[6] The investigation was not properly conducted and the investigator had absolutely no credibility. The investigator refused to answer questions in her level three testimony even when directed by the ALJ, and failed to demonstrate even a basic recall

be frivolous and that it never considered taking disciplinary action against Grievant. Grievant's approach did not violate any rule, law, or policy; however, it was a bad fit for that particular team that was causing continual strife. Faced with escalating tension, possible additional legal action by employees, and Grievant's unwillingness to do anything to help diffuse the situation, it was not unreasonable for Respondent to decide to remove Compliance from Grievant's supervision permanently.

After Compliance was removed from her supervision, again Grievant was involved in conflict with other employees. Respondent had decided Compliance should be moved back to the California Avenue location, which required that another unit and Assistant Director be moved into Plaza East. Assistant Director Gail Vittatoe's unit was chosen to move. Mr. Moore directed Ms. Vittatoe and Grievant to work together to make seating arrangements for staff. At that time, Grievant's employees were mostly field staff, so she would only need physical space in the Plaza East location for three employees, two of whom would be field employees. Ms. Vittatoe's had approximately ten employees, who were all office staff. Grievant and Ms. Vittatoe were immediately in conflict and could not reach an agreement. This conflict continued when some of Grievant's supplies were moved without her permission and Grievant was also observed taking pictures of the workspaces of Ms. Vittatoe's employees and was

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of important events. However, the statements collected were all attested by the individual witnesses. Though the questioning was not conducted using appropriate methods of investigation, it is too much of a coincidence that almost everyone attested to tension and conflict caused by Grievant. Few of the witnesses interviewed were called to testify. However, this was not a disciplinary action, so Respondent has no burden of proof. While Respondent might have had difficulty meeting the burden of proof had they used the flawed investigation for discipline, it was reasonable for Respondent to consider the statements collected in the investigation in deciding to separate Grievant from Compliance.

alleged to also have been taking pictures of employees standing outside of the building. When asked about the pictures, Grievant replied, "I really don't need them watching me like a mother or whatever and telling on me. I am not doing anything wrong and I have never done anything wrong." Mr. Moore was required to travel to Plaza East to attempt to resolve the issues, and at that time received a formal complaint regarding Grievant's behavior from Ms. Vittatoe.

As a result of receiving yet another complaint against Grievant, Grievant was moved back to the California Avenue location. Reassignment of office location "has been recognized as within the purview of the employing agency, where 1) there is a need, 2) the employee remains in the same classification and pay grade, and 3) is neither demoted nor reduced in pay. *Childers v. Civil Serv. Comm'n*, 155 W. Va. 69, 75, 181 S.E.2d 22 (1971). "[M]oving an employee to a different location has been recognized by the Grievance Board as a legitimate method of resolving certain location-specific problems in an employee's performance. *Craig v. Div. of Natural Res*., Docket No. 05-DNR-030 (July 20, 2005) ("[D]ue to his loss of credibility with the citizens and hunters of Grant County," the grievant, a Conservation Officer, was transferred to Raleigh County.)." *MacDonald v. Dep't. of Transportation/Division of Highways,* Docket No. 04-DOH-155 (Dec. 12, 2005).

At the time of the move, there was no need for Grievant to remain at Plaza East. She was no longer supervising office staff. Her responsibility was supervising Audit[7], of whom only two employees would be assigned to the Charleston area, and those two

[7] According to Grievant's Exhibit No. 2, at the time Grievant was moved to California Avenue, she was also relieved of all supervisory responsibilities temporarily. Although the date is not clear from the record, Grievant's supervisory responsibilities for Audit were later returned.

would spend limited time in the office due to extensive travel. When Grievant was involved in yet another conflict which resulted in yet another complaint, it was reasonable for Respondent to correct the situation by separating Grievant and Ms. Vittatoe. Given that Ms. Vittatoe supervised office staff and Grievant did not, the logical conclusion would be to move Grievant.

In sum, Grievant denies doing anything that contributed to the interpersonal problems she experienced, and refused to make any changes to her behavior or management style. In reality, Grievant sowed strife wherever she went. It defies belief that almost everyone with whom she comes into contact is out to get her while her own behavior in no way contributes to her difficulties. As Grievant refused to do anything to help her management resolve these situations, it left Respondent little choice on how to proceed. Respondent did not believe Grievant had done anything to warrant disciplinary action, and chose not to treat these problems as a performance issue regarding Grievant's ability to manage people. Instead, Respondent allowed Grievant's decision to make no changed to her management style and instituted changes in her assignment and work location instead in an attempt to diffuse the problems. Respondent violated no law, rule, or policy in its decisions, and Grievant failed to prove by a preponderance of the evidence she was functionally demoted, discriminated against, or that Respondent's actions were arbitrary and capricious.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST.

R. § 156-1-3 (2008); *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). "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. "There are two types of demotion, demotion with prejudice and demotion without prejudice. A demotion with prejudice is a reduction in pay and/or a change in job class to a lower job class due to the inability of an employee to perform the duties of a position or for improper conduct. A demotion without prejudice is a change in job class of an employee to a lower job class, a transfer of an employee to a lower job class, or a reduction in the employee's pay due to business necessity." W. VA. CODE ST. R. § 143-1-11.4 (2012). There are strict requirements for how an employer may demote an employee under the rule. *Id.* However, "[i]t has been recognized by this Grievance Board that a 'functional demotion' may occur when an employee is reassigned to duties of less number and responsibility without salary reduction or other alteration, which may impact the employee's ability to obtain future job advancement." *Dudley v. Bureau of Senior Serv*., Docket No. 01-BSS-092, (July 16, 2001) (citing *Gillespie v. W. Va. Dep't of Corrections*, 89-CORR-105 (Aug. 29, 1989)).

3. Grievant was not formally demoted as neither her job classification, title, nor pay were changed.

4. A review of the relatively few cases in which this Board has reviewed allegations of functional demotion, the only three that have been granted show a very clear change in duties. *Koblinsky v. Putnam County Health Dep't.,* Docket No. 2011-1772-CONS (October 23, 2012) (Registered Sanitarian, who previously performed inspections in the field, confined to desk to perform only clerical tasks not ordinarily done by Registered Sanitarians); *Watson v. Dep't. of Health and Human Resources/Mildred Mitchell-Bateman Hospital*, Docket No. 2009-0558-DHHR (Dec. 31, 2009) (Security Guard reassigned to perform the duties of a Food Service Worker); *Lilly v. Dep't of Transportation/Division of Highways*, Docket No. 07-DOH-387 (June 30, 2008) (As part of a written reprimand all managerial duties of Highway Administrator removed).

5. In the grievance process, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d).

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 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." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

7. "'A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety.' *Rice v. Div. of Highways*, Docket No. 96-DOH-247 (Aug. 29, 1997)." *Viski v. Preston County Bd. of Educ*., Docket No. 99-39-271 (Nov. 30, 1999). The Grievance Board may not substitute its management philosophy for that of an employer. *Skaff v. Pridemore*, 200 W. Va. 700, 709, 490 S.E.2d 787, 796 (1997).

8. Reassignment of office location "has been recognized as within the purview of the employing agency, where 1) there is a need, 2) the employee remains in the same classification and pay grade, and 3) is neither demoted nor reduced in pay. *Childers v. Civil Serv. Comm'n*, 155 W. Va. 69, 75, 181 S.E.2d 22 (1971). "[M]oving an employee to a different location has been recognized by the Grievance Board as a legitimate method of resolving certain location-specific problems in an employee's performance. *Craig v. Div. of Natural Res*., Docket No. 05-DNR-030 (July 20, 2005) ("[D]ue to his loss of credibility with the citizens and hunters of Grant County," the grievant, a Conservation Officer, was transferred to Raleigh County.)." *MacDonald v. Dep't. of Transportation/Division of Highways,* Docket No. 04-DOH-155 (Dec. 12, 2005).

9. Respondent violated no law, rule, or policy in its decisions, and Grievant failed to prove by a preponderance of the evidence she was functionally demoted, discriminated against, or that Respondent's actions were arbitrary and capricious.

Accordingly, the grievance is DENIED**.**

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. Va. Code § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: August 20, 2013

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Billie Thacker Catlett
Administrative Law Judge