DONALD SMITH,

Grievant,

v. DOCKET NO. 97-PEDTA-484

WEST VIRGINIA PARKWAYS ECONOMIC

DEVELOPMENT AND TOURISM AUTHORITY,

Respondent.

D E C I S I O N

This grievance was filed by Grievant Donald Smith, represented by Boyd Lilly and Lynn Belcher, against Respondent West Virginia Parkways Economic Development and Tourism Authority, represented by A. David Abrams, Jr., Esquire, on or about April 29, 1997, alleging that the schedule he was required to make for the employees he supervised was unsafe and unnecessary. He sought as relief "make things whole again." (See footnote 1)

Parkways has in place Personnel Policy III-1, effective March 1, 1994 ("the Policy"), the purpose of which "is to provide managers with formal guidelines for establishing a normal workweek and for addressing the administration of those workdays which must be expanded or shortened." The Policy states that during the "summer months" the "normal workweek" formaintenance employees, such as Grievant and his subordinates, is Monday through Thursday, ten hours a day. The Policy provides, however, that "[m]anagement has the right to establish work schedules necessary to achieve the goals and objectives of the Parkways Authority." It further provides:

> **The Supervisor will be the approving authority for the scheduling of work on holidays, overtime and any permanent workweek that differs from the normal work week. Deviations from the normal workweek can be made if deemed necessary by the Parkways Authority. These changes may be made due to unforeseen circumstances including, but not limited to, inclement weather or project changes due to the establishment of new priorities.**

This grievance arose when Grievant's supervisor, Roger Trzicak, Maintenance Supervisor, directed that the Ghent maintenance shop, where Grievant works, would be open on Fridays during the summer, and directed Grievant to prepare a work schedule for himself and his two

employees to implement this change. Grievant prepared a schedule where each of the three employees, including himself, would work four, ten hour days, Monday through Thursday. This schedule was, of course, rejected by Mr. Trzicak. Grievant then prepared a schedule where he and one other employee would work four, ten hour days, Monday through Thursday, and the third employee would work four, ten hour days Tuesday through Friday. The employee working on Friday alone agreed to this arrangement, and liked working alone on Friday. (See footnote 2)

The following Findings of Fact are made based upon the record developed at Levels III and IV.

Findings of Fact

1. Grievant is employed by the West Virginia Parkways Economic Development and Tourism Authority ("Parkways") as the Shop Manager of the Ghent maintenance shop. He is responsible for the Ghent maintenance shop. Three mechanics, including Grievant, work in the shop.

2. The Ghent maintenance shop maintains equipment used by Parkways road maintenance crews, so that the shop provides support services to the road maintenance crews. The shop's primary goal is to keep equipment maintained so that the road maintenance crews do not lose work time due to equipment failures. The road maintenance crews work Monday through Thursday, ten hours a day, from late April through October. During the remaining months of the year they work five, eight hour days, plus additional hours as needed.

3. Parkways also has maintenance shops in Beckley and Standard. The Beckley shop has several more mechanics than either the Standard or Ghent shops, maintains more vehicles than the other two shops, and has remained open five days during the summer months for several years. In past years when the Ghent and Standard shops were closed on Fridays during the summer months, if equipment needed to be repaired out of those two shops on a Friday, a mechanic was sent from Beckley to the shop to perform the work.

4. When a mechanic goes to the Standard or Ghent shop from the Beckley shop, the repair job takes longer than it normally would due to the travel time of about one hour, and

because the Beckley mechanic is not familiar with the layout and inventory of the Standard and Ghent shops.

5. In April of 1997, Roger Trzicak, Maintenance Supervisor, directed Grievant to prepare a work schedule which would keep the Ghent shop open five days a week. Grievant talkedto his two employees and they agreed that one employee would work four, ten hour days, Tuesday through Friday, during the summer months of 1997; Grievant and the other employee would work four, ten hour days, Monday through Thursday; and the three would rotate their work days in subsequent years, with each working Tuesday through Friday an entire summer.

6. Parkways has in place Personnel Policy III-1, effective March 1, 1994 ("the Policy"), which provides "formal guidelines for establishing a normal workweek and for addressing the administration of those workdays which must be expanded or shortened." The Policy states that during the "summer months" the "normal workweek" for maintenance employees, such as Grievant and his subordinates, is Monday through Thursday, ten hours a day. The Policy gives management "the right to establish work schedules necessary to achieve the goals and objectives of the Parkways Authority."

7. Mr. Trzicak decided the Ghent shop should be open on Fridays because some amount of equipment must be serviced on Fridays in order to keep the road maintenance crews functioning. When this occurred in the past, it was not efficient to send a mechanic from Beckley to Ghent, and it affected the productivity of the Beckley shop. Mr. Trzicak also considered that the Beckley employees were complaining because they had to go to Ghent to do that shop's work on Fridays.

Discussion

The first issue is whether Grievant has standing to pursue this grievance. A grievant must be affected (harmed) in some way; he must have a personal stake in the outcome of the controversy, in order to have standing to challenge the employer's action. See Farley, et al., v. Wayne County Bd. of Educ., Docket No. 96-50-272 (Feb. 28, 1997); Mullins v. Kanawha County Bd. of Educ., Docket No. 94-20-364 (Dec. 29, 1994). W. Va. Code § 29-6A-2(i) defines "Grievance" as

> 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.
>
> Any pension matter or other issue relating to public employees insurance in accordance with article sixteen, chapter five of this code, retirement, or any other matter in which authority to act is not vested with the employer shall not be the subject of any grievance filed in accordance with the provisions of this article.

A philosophical disagreement with a policy does not in and of itself equate to an adverse impact. McDonald, et al., v. Hancock County Bd. of Educ., Docket No. 15-88-055-3 (Sept. 30, 1988). "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. W. Va. Code § 29-6A-2(i). See Ball v. Dept. of Highways, Docket No. 96-DOH-141 (July 31, 1997)." Rice v. Dept. of Transp./Division of Highways, Docket No. 96-DOH-247 (Aug. 29, 1997). In Farley v. West Virginia Parkways Authority, Docket No. 96-PEDTA-204 (Feb. 21, 1997), the grievant was not allowed to grieve the alleged misapplication of a nepotism policy, even though it was possible that if one employee provided preferential treatment for his spouse, this could impact the grievant. However, this had not occurred, and such a potential action was found too speculative.

> The grievance procedure "is designed to address specific problems or incidents and not general and speculative apprehensions of employees. . ." Wilds v. W. Va. Dept. of Highways, Docket No. 90-DOH-446 (Jan. 23, 1991). "The Grievance Board has consistently refused to issue decisions where it appears the grievant has suffered noreal injury on the basis that such decisions would be merely advisory." Khoury v. Public Serv. Comm'n., Docket No. 95-PSC-501 (Jan. 31, 1996).

Id.

Likewise, in Cremeans v. Board of Trustees, Marshall University, Docket No. 96-BOT-099 (Dec. 30, 1996), the grievant claimed a policy violation when a person was allowed to serve in a position for more than one year. Grievant alleged standing based upon the fact that decisions made by the person serving in the position illegally, could directly impact him; for

example, that person made decisions on whether to update the employee handbook, and whether to fill vacant positions or simply realign job duties thus affecting the grievant's promotion opportunities. The grievant was not allowed to "`bootstrap' his standing to challenge specific personnel actions into standing to challenge the capacity of the person taking such actions. See Mills v. W. Va. Dept. of Transp., Docket No. 92-DOH-053 (Apr. 24, 1992)." Cremeans, supra.

However, in Wilds v. West Virginia Department of Highways, Docket No. 90-DOH-446 (Jan. 23, 1991), the grievant's presence at his work site when work-release prisoners drove state vehicles to the site was found sufficient to constitute a grievance as "a substantial detriment to or interference with. . . [his] health and safety," where the grievant feared that work-release prisoners could not safely operate such vehicles.

Grievant continues to work Monday through Thursday, ten hours a day. Further, he is in charge of scheduling the employees' work hours in the Ghent shop, so that if he does not wish to work alone on Friday, he simply would not have to schedule himself to do so. Grievant alleges he has an interest in this matter because he is responsible if one of his employees is injured on Friday when working alone. This is somewhat tenuous and speculative. Grievant has been directly affectedby his supervisor's directive, however, because he was directed to prepare a work schedule which he believes is violative of the Policy. Rather than disobeying his supervisor's order and risking disciplinary action for insubordination, he properly did as he was told, and filed a grievance challenging the directive as a violation of policy. This falls within the definition of grievance, and Grievant has demonstrated standing to challenge Mr. Trzicak's action as violative of the Policy.

The next issue is whether Grievant has demonstrated a violation of the Policy. Grievant bears the burden of proving his allegations by a preponderance of the evidence. W. Va. Code § 29- 6A-6. Mowery v. W. Va. Dept. of Nat. Resources, Docket No. 96-DNR-218 (May 30, 1997). "An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs. Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977)." Finver v. W. Va. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-271 (Oct. 15, 1997). However, Parkways' "interpretation of the provisions in its own internal policy is entitled to some deference by this Grievance Board, unless it is contrary to the plain meaning of the language, or is inherently

unreasonable." Dyer, et al., v. Lincoln County Bd. of Educ., Docket No. 95-22-494 (June 28, 1996) (citations omitted).

The Policy clearly gives discretion to the supervisor to decide whether employees need to work a schedule other than Monday through Thursday, ten hours a day in order "to achieve the goals and objectives of the Parkways Authority." It is clear that some amount of equipment must be repaired on Fridays so that the road maintenance crews are not idle on Mondays, and that the Beckley shop has taken care of this for the Ghent shop in the past. Mr. Trzicak quite reasonably decided that it was not fair or productive for the Beckley shop to work a Friday schedule in order toservice equipment on Fridays, while the Ghent shop, which also had equipment which needed to be serviced on Fridays, did not work on that day.

Although the Policy states in another section that changes in the normal work week "may be made due to unforeseen circumstances including, but not limited to, inclement weather or project changes due to the establishment of new priorities," this provision does not affect the provision which allows management to make changes when necessary to achieve the goals and objectives of Parkways. Further, this provision does not state that changes in the normal work week may only be made due to unforeseen circumstances, and may be read as simply another instance when the schedule may change.

Both parties presented evidence regarding the productivity of the Ghent shop during the summer of 1997. This evidence is of little relevance as the question is whether Mr. Trzicak's decision at the time he made it, met the Policy guideline that it be necessary to achieve the goals and objective of Parkways, not whether the Ghent shop was any more productive. Mr. Trzicak decided to have the Ghent shop open because some amount of equipment must be repaired on Fridays at the Ghent shop, and the Ghent shop should be doing this work. Obviously, the Ghent shop is not going to be as productive on Fridays as it is when there are two or more mechanics there; however, the Beckley shop should be more productive because its mechanics are not being taken away from their own work to work in the Ghent shop on Fridays, unless the mechanic at Ghent needs assistance.

Finally, Grievant alleged it was unsafe for a mechanic to work alone on Fridays. The undersigned concludes that Grievant has no standing to grieve this particular alleged effect of the Policy, as he is not the person working alone on Friday. "One person cannot grieve on

behalf of another party." Farley v. W. Va. Parkways Auth., supra. Although Grievant asserted an interestbecause he feels responsible for the person working alone on Fridays, Mr. Trzicak testified that is not the case, and he does not expect as much productivity from the person working alone on Fridays as he does when two or more mechanics are working.

Even if Grievant had standing to contest the safety of working alone, he failed to meet his burden of proof on this issue. Grievant presented evidence of two accidents which had occurred involving mechanics. In one instance a mechanic was working alone in the Beckley shop and fell while trying to get a tire off a rack. He was found on the floor in pain by another employee, who happened to return to the shop for some reason, and was taken to the hospital. Apparently, the employee was not following the proper safety procedure at the time he fell. The other accident involved a tire exploding. The tire was in a cage, as was the proper safety procedure. The employee involved was shaken up by the sound and impact of the explosion.

Grievant's concern for the safety of his employees when working alone is not unreasonable. However, he failed to establish that one mechanic working alone constitutes a substantial detriment to, or interference with, the mechanic's health and safety. While having a second employee on hand would likely be of assistance in emergencies, if safety precautions are followed, and the lone employee does not attempt a job which requires two people or is inherently dangerous, the potential for harm is minimal. Mr. Trzicak's instruction is that smaller, less dangerous repair jobs are to be left for the employee working alone to perform, he is not to perform any work which he believes is dangerous, he is to follow safety rules, he can call the Beckley shop for assistance if a job requires two men, and he may perform other duties when working alone which do not involve machinery, such as cleaning the shop, stocking shelves, and taking inventory. Mr. Trzicak is not holding the employee working alone to the same production standards he otherwise expects of the mechanics,he has provided additional hand held radios, and police officers and the night watchman have been instructed to stop at the Ghent shop periodically to check on the lone employee. These precautions adequately address Grievant's concerns. See Freeman, et al., v. W. Va. Div. of Highways, Docket No. 90-DOH-107 (Dec. 28, 1990). Further, Grievant was assured he was not responsible for the safety of his employees when they are working alone. See Bradley, et al., v. Bd. of

Directors, Fairmont State College, Docket No. 96-BOD-030 (Jan. 28, 1997); Brown v. Logan County Bd. of Educ., Docket No. 95-23-443 (Apr. 16, 1996).

Finally, Parkways has not required Grievant to develop a schedule which leaves one man working alone all day. Grievant chose this schedule based upon the desires of his employees. Grievant could have set a schedule in which all employees worked ten hours a day, four days a week, with one working Monday through Thursday, one working Tuesday through Friday, and one working Monday, Friday, and two other days of the week, so that no employee was ever working alone. (See footnote 3)

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant bears the burden of proving his allegations by a preponderance of the evidence. W. Va. Code § 29-6A-6. Mowery v. W. Va. Dept. of Nat. Resources, Docket No. 96-DNR-218 (May 30, 1997).

2. A grievant must demonstrate he has standing to grieve a particular matter. A grievant must be affected (harmed) in some way, he must have a personal stake in the outcome of the controversy, in order to have standing to challenge the employer's action. See Farley, et al., v. Wayne County Bd. of Educ., Docket No. 96-50-272 (Feb. 28, 1997); Mullins v. Kanawha County Bd. of Educ., Docket No. 94-20-364 (Dec. 29, 1994).

3. Grievant has been directly affected by his supervisor's directive, as he was directed to prepare a work schedule which he believes is violative of the Policy.

4. Mr. Trzicak had the authority to require employees to work a summer work schedule other than ten hours a day, Monday through Thursday, if necessary to meet the goals and objectives of Parkways.

5. Grievant failed to prove a violation of Parkways' Personnel Policy III-1, or that Mr. Trzicak's action was arbitrary and capricious.

Accordingly, this grievance is DENIED.

Any party may appeal this decision 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. 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

BRENDA L. GOULD

Administrative Law Judge

Dated: April 17, 1998

Footnote: 1

Grievant's supervisor responded on May 13, 1997, denying the grievance. Appeal was made to Level II, and the grievance was denied on May 21, 1997. Grievant appealed to Level III, a Level III hearing was held on October 9, 1997, and the grievance was denied on October 17, 1997. Grievant appealed to Level IV on October 30, 1997. A Level IV hearing was held on December 5, 1997, and this matter became mature for decision on January 23, 1998, upon receipt of Respondent's post-hearing written argument. Grievant declined to submit written argument.

Footnote: 2

Although Grievant's supervisor could decide that the Ghent shop should return to the summer schedule set forth in the Policy this summer, thus rendering this grievance moot, there was no indication that this would occur. Rather it is more likely, from the testimony of the parties, that the decision to have the Ghent shop open on Fridays is permanent.

Footnote: 3

It is not clear whether Grievant could have scheduled all employees to work eight hours a day, five days a week.