GREG KEYS and PATTY KEYS,

Grievants,

v. DOCKET NO. 97-DEP-425

DIVISION OF ENVIRONMENTAL PROTECTION/

OFFICE OF MINING AND RECLAMATION,

Respondent.

D E C I S I O N

Grievants, Greg Keys and Patty Keys, filed this grievance against the Division of Environmental Protection/Office of Mining and Reclamation ("OMR") on or about June 3, 1997. Grievants alleged that Ed Griffith, Assistant Chief, OMR, Southern Operations, had acted in an arbitrary manner and had overstepped his authority by eliminating sections of the Alternative Work Schedule Policy ("the Policy"), when he issued a November 6, 1996 memorandum which precluded employees working four ten hour days from working two hours one day to make up the difference during a holiday week. Employees could only revert to a five eight hour day schedule, or take two hours of annual leave during a holiday week. (See footnote 1) They sought as relief that the memorandum berescinded, and reimbursement of annual leave they had used during the week of Veterans Day in November 1996. (See footnote 2)

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

Findings of Fact

1. Grievants are employed by OMR in the Oak Hill office, Southern Operations.
2. Ed Griffith is Assistant Chief, OMR, for Southern Operations. Southern Operations is comprised of five counties. There are five OMR regions.
3. Effective September 1, 1995, the Bureau of Environment adopted an Alternative Work Schedule Policy which, among other things, offers employees various options for flexible

work schedules. One of those options is four ten hour days each work week. During a week which included an eight hour holiday, the Policy provided three work schedule options as follows, which could be utilized by the employee, with his supervisor's permission:

1. Work additional time to make up the difference;

2. Revert to a four (4) day work week consisting of eight (8) hours per day; or

3. Use accrued annual leave time to make up the difference.

4. On November 6, 1996, Mr. Griffith issued a memorandum which set forth the procedure which would become effective for OMR employees on an Alternative Work Schedule ("AWS") during weeks containing a holiday. Those employees "shall either: 1. Revert to a four (4) day, eight (8) hour work week or; 2. Take annual leave to make up the difference." For all employees in the Southern Operations only, this memorandum eliminated the option set forth in the Policy which allowed employees to work additional time to make up the difference between an eight hour holiday and a ten hour AWS work day.

5. During the fourteen months the Policy was in effect preceding Mr. Griffith's November 6, 1996 memorandum, numerous questions were brought to Mr. Griffith by supervisors in the region, causing him to detect a problem. Supervisors were getting requests to work many different hours to make up the two hours, making it difficult to manage the 115 eligible employees, and to keep track of who was working when. The first option was especially difficult to manage during a week with two holidays. He decided to eliminate the first option to make the Policy easier to administer, deciding that the individual adjustments were not going to work.

6. On November 11, 1996, a state holiday (Veterans Day), Grievants were on an AWS of four ten hour days. They wanted to work three ten hour days and two hours on Friday, November 15, 1996, to make up for the eight hour holiday on Monday. They were not allowed to do this, and used two hours of annual leave. Grievants could also have worked four eight hour days that week, in addition to the holiday.

Discussion

Grievants bear the burden of proving their 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). Grievants allege that Mr. Griffith had no authority to eliminate one option from the Policy, and that the reason given by Respondent for elimination of one of the options was invalid and arbitrary. Respondent argued that the right to approve or disapprove use of any of the options by employees remained with the manager. Grievants agree with this, and they agree that the Policy can be interpreted, but disagree that this authority to disapprove an employee request or to interpret the Policy extends to complete elimination of one part of the Policy.

The Policy provides in its Policy Statement, that the Division of Environmental Protection and other offices within the Bureau of Environment,

> shall allow all employees to vary their work schedules from the Standard Work Day. Provided, however, that in all cases the efficient and effective operation of the Work Unit shall be the primary consideration in approving or denying an employee's request for a particular Schedule Option.
>
> It is not the intent of this AWS Program Policy to restrict or limit any particular schedule that is acceptable to management and the employees whether in effect prior to or proposed after the implementation of this policy.

The Policy defines Alternative Work Schedules as:

> A series of work Schedule Options, either daily, weekly, or bi-monthly, which provides the employee with the opportunity to deviate from the requirements of the Standard Work Day. The employee may, within certain limitations, vary their shift start time, shift end time, the beginning time and duration of the meal break, as well as the number of days during the work week.The Policy states that the standard work day is 8:30 a.m. to 4:30 p.m., with a thirty minute paid meal period. The Policy further specifically states that the employee's eligibility to participate in the program is a privilege, and in order to be eligible,
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> The employee's participation in the AWS Program will not reduce the effectiveness or efficiency of their Section, Work Unit, or any member thereof. (See footnote 3)

The Policy states that five listed schedule options "shall be offered." (Emphasis added.) One of those options is four ten hour days each work week. The schedule option selected by the employee, however, must be approved by his supervisor, as must the option desired by the employee for a holiday week.

Sandra Kee, Human Resources Manager in the Nitro Office of the Division of

Environmental Protection, testified at Level II that she was a member of the committee formed to look at the issue of alternative work schedules. She stated the committee set boundaries and guidelines, and another team took their work product and developed the Policy. She stated the committee felt that managers and supervisors had the right to limit options available to employees, because it was a new concept for the agency, and managers needed to see that the offices were adequately maintained. She pointed out an AWS is a privilege. She also pointed out the need to be consistent in application of the Policy. She opined that Mr. Griffith's November 6, 1996 memorandum did not violate the Policy. Tr. pp. 13-15. Ms. Kee is the person who, under the Policy, is to review questions regarding any aspect of the Policy which needs to be clarified, and issue the necessary clarification.

The Policy clearly gives discretion to the supervisor to decide whether allowing employees to select an option offered by the Policy will impact the efficient and effective operation of the WorkUnit, which "shall be the primary consideration." This was a new policy for the agency. Mr. Griffith observed what worked and what did not work over a period of fourteen months, and determined that Option 1 for working holiday weeks continually had an adverse impact upon the efficient and effective operation of the work unit. Accordingly, he issued a memorandum notifying employees that Option 1 would not be approved. Given the language of the Policy, this was within his discretionary authority, and his decision was based upon sound reasons.

"In applying the `arbitrary and capricious' standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that decision and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, supra, at 286." Hill and Cyrus v. Kanawha County Bd. of Educ., Docket No. 96-20-362 (Jan. 30, 1997). Mr. Griffith had legitimate concerns regarding Option 1, which he believed were best addressed by eliminating that option. Grievants failed to demonstrate Mr. Griffith's action was arbitrary and capricious.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievants bear the burden of proving their 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. Mr. Griffith had the authority to deny employees the option of their choice for working flexible schedules, and for working holiday weeks, with the efficient and effective operation of the Work Unit being the primary consideration.

3. Grievants failed to demonstrate Mr. Griffith'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 7, 1998

Footnote: 1

For example, an employee working four ten hour days, as Grievant's did, would either work three ten hour days and take two hours of annual leave, as the holiday would count as the fourth day and is only eight hours; or work four eight hour days during the holiday week, and the fifth eight hour day would be the holiday. Grievants wanted the option to work three ten hour days, and then work two additional hours one day during the holiday week to make a forty hour week.

Footnote: 2

Grievants had previously filed a grievance in which they had challenged the denial of their request to make up

time during the Columbus Day holiday week. They indicated in their statement of grievance that after a conference call on May 20, 1997, apparently held in regard to the other grievance, Administrative Law Judge Jerry Wright had given them ten days to file this grievance as a separate grievance, apparently in accordance with the provisions of W. Va. Code § 29-6A-3(j). Respondent did not dispute this, nor did it raise a timeliness defense. Grievants' supervisor responded on June 12, 1997, that he had no authority to grant the requested relief, and the grievance was forwarded that same day to Level II. The grievance was denied at Level II on June 30, 1997, and Grievants appealed to Level III. A Level III hearing was held on August 28, 1997, and a Decision denying the grievance was issued on September 18, 1997. Grievants appealed the Level III Decision to Level IV on October 6, 1997. A Level IV hearing was held on January 20, 1998, and this grievance became mature for decision at the conclusion of that hearing.

Footnote: 3

There are other eligibility requirements not at issue here.