SHIRLEY MCCOY AND ELAINE DOMINGUES,

Grievants,

v. Docket No. 99-PEDTA-074

WEST VIRGINIA PARKWAYS DEVELOPMENT

AND TOURISM AUTHORITY,

Respondent.

D E C I S I O N

Grievants, Shirley McCoy and Elaine Domingues, filed this grievance against the West Virginia Parkways Economic Development and Tourism Authority ("PEDTA"), on or about December 14, 1998. The Statement of Grievance says:

> **Failing to abide by policy. Assignment of shifts [should be] based on seniority as posted by Jim Kelley['s], Letter dated Oct. 20, 1998. RELIEF SOUGHT: Make whole and complete[.]**

This grievance was denied at all lower levels and appealed to Level IV on February 17, 1999. A Level IV hearing was held on April 16, 1999. After several requests for extensions by the Grievants' representative, (See footnote 1) this grievance became mature for decision on June 10, 1999, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 2) After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievants have been employed by PEDTA for nineteen years, first as Toll Collectors and later as Toll Foremen. They are sisters, and Grievant Domingues has been employed by PEDTA longer than her sister.

2. Grievants have been a Toll Foreman for approximately six years.

3. On October 20, 1998, James Kelley, Director of Toll Operations, sent a memo to all toll

plazas on scheduling of work. This memo informed all plazas that by January 1, 1999, they "must conform to a normal workweek schedule composed of three (3) daily shifts." These shifts were: Midnight, Day, and Afternoon. This memo went on to discuss shift assignments and included the following statements which are at issue in this grievance: "The assignments of shifts will be based on seniority. If necessary, your Plaza Supervisor will contact you regarding your first, second, and third choice of shifts." L III, Grt. Ex. No. 1

4. The memo further stated that, "This action conforms to policy, ensures uniformity between toll plazas, and provides collectors and foreman (sic) with balance and equity in relation to days off and peak traffic periods." Id. 5. The Toll Division's past procedure has been to assign shifts on the basis of seniority in a job classification. Additionally, when vacant Toll Foreman positions have been posted they are shift specific.

6. PEDTA's policy is that certain types of employee actions or benefits count seniority from the date of hire; such as sick leave, annual leave, and increment pay. Certain types of employee actions or benefits count seniority from the time in grade or time in job classification; such as layoff of employees. Level III, Grt. Exs. 2 & 3. Test. at Level IV Hearing.

7. In December 1998, Grievant McCoy asked her supervisor, Wesley Roles if he planned to enforce the memo. He responded he would do so if an employee requested that changes be made. Grievant McCoy then requested shift assignments be based on seniority.

8. Mr. Roles complied with this request and asked all Toll Collectors and Toll Foremen for their first, second, and third choice of assignments.

9. Grievants, based on their seniority as Toll Foremen, received their second choice. If seniority had been based on date of hire, Grievants would have received their first choice. The Toll Foremen who received their first choice of shift position over Grievants had more seniority in the Toll Foreman position.

10. Grievant McCoy received a more desirable shift as the result of her classification seniority; Grievant Domingues did not. Both Grievants' shifts were changed as the result of these seniority changes.

Issues and Arguments

Grievants argued that the term seniority as used in the memo means seniority from date of

hire, and argue the decision of shift assignments must be based on employees' date of hire, not on their time in grade. If the assignment had been made based on seniority from date of hire, then Grievants would have received their first choice. Grievants aver there can be only one definition for seniority, and they were never told that certain seniority decsions could be based on seniority as time in grade or classification.

Respondent argues the policy of making these decisions based on time in grade has been in place for at least ten years, no policy has been violated, and that this decsion prevents Toll Foremen with only a few years of seniority from receiving preference over Toll Foremen who have held the position for many years. Respondent also notes the policy was applied equally among all employees, and all employees were treated the same. It is noted Grievant McCoy's date of hire seniority was utilized and was helpful to her, when deciding between two employees who had the same amount of time in grade in the Toll Foreman position. By using her date of hire seniority, she was able to receive her second choice.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. 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).

Director Mr. Kelley's interpretation of his own memo would be judged by 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 is 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). While a searching inquiry into the facts is required to determine if 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 PEDTA .

See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

Additionally, where the plain language of a policy or a memo does not compel a different result, some deference must be extended to the agency in interpreting its own memos. See Dyer v. Lincoln County Bd. of Educ., Docket No. 95-22-494 (June 28, 1996). Where the language in a policy is either ambiguous or susceptible to varying interpretations, this Grievance Board will give reasonable deference to the agency's interpretation of its own policy. See Dyer, supra; Edwards v. W. Va. Parkways Dev. and Tourism Auth., Docket No. 97-PEDTA- 420 (May 7, 1998). See generally W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); Princeton Community Hosp. v. State Health Planning & Dev. Agency, 174 W. Va. 558, 328 S.E.2d 164 (1985);Jones v. Bd. of Trustees, Docket No. 94-MBOT-978 (Feb. 29, 1996); Foss v. Concord College, Docket No. 91-BOD-351 (Feb. 19, 1993). Thus, PEDTA's "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, supra.

In deciding if Director Kelley's memo is arbitrary and capricious the definition of the word seniority must be examined. It should be noted that even dictionaries offer varying definitions of this word. Grievants submitted a dictionary definition of seniority which defined seniority as "a privileged status attained by length of continuous service (as in a company)." Level IV, Grt. Ex. No. 1. The American Standard Dictionary defines seniority as "[p]recedence of position, esp. precedence over others of the same rank by reason of a longer span of service." at 1116 (2d college ed. 1991). Black's Law Dictionary defines, seniority as "[p]recedence of preference in position over others similarly situated." at 708 (5th abr. ed. 1983). Further, although Grievants placed several policies into evidence, these policies did not support their position, but only served to demonstrate that the general term seniority can have several different interpretations, depending on the situation. See Findings of Fact 5 & 6. Given these definitions and policies, it is clear Mr. Kelley's interpretation of the meaning of seniority is not arbitrary and capricious, and his explanation of his memo is reasonable. See Watts v. W. Va. Dep't of Health & Human Resources, 195 W. Va. 430, 465 S.E.2d 877 (1995).

Basically, this grievance represents Grievants' disagreement with Director Kelley's interpretation of his memo, and their argument is based on their own interpretation of

thememo. While it is understandable that Grievants would wish seniority was interpreted the way they wanted, Director Kelley's interpretation is reasonable, based on past practice, and is not arbitrary and capricious.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving of their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. 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. 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, Rice v. Dep't of Highways, Docket No. 96-DOH-247 (Aug. 29, 1997); Ball v. Dep't of Highways, Docket No. 96-DOH-141 (July 31, 1997).

3. Grievants did not present evidence to demonstrate that PEDTA's interpretation of Director Kelley's memo violated some rule, regulation, or statute, orconstituted a substantial detriment to, or interference with, their effective job performance or health and safety.

4. The assessment of whether Director Kelley's interpretation of his memo was incorrect should be judged by the arbitrary and capricious standard.

5. 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 is 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).

6. While a searching inquiry into the facts is required to determine if 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 employer. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

7. Where plain language does not compel a different result, some deference must be extended to the agency in interpreting its own memos. See Dyer v. Lincoln County Bd. of Educ., Docket No. 95-22-494 (June 28, 1996). See generally W. Va. Dep't of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); Princeton Community Hosp. v. State Health Planning & Dev. Agency, 174 W. Va. 558, 328 S.E.2d 164 (1985); Jones v. Bd. of Trustees, Docket No. 94-MBOT-978 (Feb. 29, 1996); Foss v. ConcordCollege, Docket No. 91-BOD-351 (Feb. 19, 1993). See Edwards v. W. Va. Parkways Dev. and Tourism Auth., Docket No. 97-PEDTA- 420 (May 7, 1998).

8. PEDTA 's "interpretation of the provisions in its own internal [memo] 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, supra.

9. Grievants have not met their burden of proof and demonstrated Respondent violated any policy, or that Respondent's interpretation of its own memo was arbitrary and capricious.

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. W. Va. Code §29-6A-7 (1998). 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. 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.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: July 19, 1999

Footnote: 1

At the Level IV hearing, Grievants' representative, Boyd Lilly, noted there was a problem with his subpoenas. Discussion among the parties revealed some of the possible witnesses had not received their subpoenas, and these subpoenas had been improperly served by interdepartmental mail. In an effort to resolve this issue, Mr. Lilly was offered the opportunity for a continuance or an additional hearing if necessary. At the close of the hearing on April 16, 1999, Mr. Lilly was still undecided about this decision and was eventually given until May 7, 1999, to decide this issue. No additional witnesses were called at Level IV.

Footnote: 2

Grievants were represented by fellow employees, Boyd Lilly and Fred Elmore, and Respondent was represented by General Counsel, David Abrams.