**LARRY FARLEY,**

**Grievant,**

**v.**

**DOCKET NO. 99-PEDTA-486**

**WEST VIRGINIA PARKWAYS ECONOMIC**

**DEVELOPMENT AND TOURISM AUTHORITY,**

**Respondent.**

**D E C I S I O N**

Grievant, Larry Farley, filed this grievance against his employer, the West Virginia Parkways Economic Development and Tourism Authority ("Parkways") on July 2, 1998, alleging:

> Discrimination and disparity in treatment of the dispensing of leave with pay for hours scheduled and worked during the state of emergency of January 28-31, 1998.
>
> Relief sought: Equal and impartial treatment for the appropriate number of hours scheduled and worked during the state of emergency.

The grievance was denied at level one by Stephen W. Wyant on July 9, 1998, and denied at level two by James Kelley, Director of Toll Operations, on July 16, 1998. Grievant appealed to level three July 20, 1998. Upon receipt of the appeal, Grievance Evaluator Donald Lake noted that this grievance was identical to eight other grievances filed jointly by Grievant's co-workers; therefore, Mr. Lake scheduled a combined level three hearing for November 5, 1998. However, Grievant claimed a default for the failure to holdthe level three hearing within the statutory guidelines, and that issue came before Administrative Law Judge Andrew Maier on May 12, 1999. ALJ Maier concluded no default had occurred by Order dated June 24, 1999, and remanded this case to level three for hearing. Subsequently, after several continuances, a level three hearing on this grievance only was held on September 16, 1999, and the decision was denied by Mr. Lake by decision dated October

26, 1999. Grievant appealed to level four on November 17, 1999, and after many continuances, the matter was submitted for decision based upon the record developed at levels one through three. This case became mature for decision on December 4, 2000, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant was represented by Mr. Boyd Lilly, and Parkways was represented by A. David Abrams, Jr., Esq.

SUMMARY OF EVIDENCE

Grievant's Exhibits

Ex. A -

March 1, 1994 memorandum from Carrie Roache to All Directors and Supervisors re: Revised Personnel Policy III-1, Scheduling and Reporting to Work.

Ex. B -

February 2, 1998 memorandum from Carrie Roache to All Department Heads, Supervisors, and Foremen re: Addendum to Previous State of Emergency Memorandum.

Ex. C -

June 18, 1998 Application for Leave and handwritten note from Steve Wyant.

Ex. D -

Memorandum from William Gavan to All Toll Department Employees re: Southern West Virginia Snow Storm.

Parkways' Exhibits

Ex. 1 -

West Virginia Parkways Authority Time Report for Raymond Pettrey from January 25 through February 7, 1998.

Ex. 2 -

West Virginia Parkways Authority Time Report for Jerry Lilly from January 25 through February 7, 1998.Ex. 3 -

West Virginia Parkways Authority Time Report for Jimmy Settle from January 25 through February 7, 1998.

Ex. 4 -

February 2, 1998 memorandum from James W. Teets to Cabinet Secretaries and Bureau Commissioners re: Snow Emergency.

Ex. 5 -

January 28, 1998 memorandum from Richard W. Jemiola to Division of Motor Vehicles; Division of Public Transit; Public Port Authority; Railroad Maintenance Authority; C and H Level; District Engineers; Division Directors re: Snow Emergency.

Ex. 6 -

February 2, 1998 memorandum from Carrie Roache to All Department Heads, Supervisors, and Foremen re: Procedures for Time Recording and Reporting during the State of Emergency.

Ex. 7 -

WV Parkways Authority Maintenance Performance Standards and time reports for January 28 through 31, 1998.

Testimony

Grievant testified in his own behalf, and presented the testimony of Raymond Pettrey, Jerry Lilly, and James Settle. Parkways presented the testimony of Carrie Roache.

## FINDINGS OF FACT

The following facts have been derived from the record presented in this grievance, incorporating levels one through three of the grievance procedure.

1. This grievance arose after heavy snowfall in southern West Virginia that began on or about January 27, 1998, prompting Governor Cecil H. Underwood to declare a State of Emergency in the affected areas.

2. Grievant was employed as a toll collector by Parkways at Toll Barrier A near Ghent, Raleigh County, West Virginia, an area affected by the heavy snowfall.

3. Because a large number of State employees in the affected areas were unable to report to work during the snow storm, Governor Underwood issued an Executive Order, applicable to the Department of Transportation and Parkways, directing thatemployees who missed work between

January 28 and January 31, 1998, would receive pay for the days missed without having to take leave.

4. On January 28, 1998, Secretary of Transportation Richard Jemiola, issued a memorandum restating the Governor's approval of leave with pay for Department of Transportation employees unable to report to work between January 28 and 31, 1998, because of the heavy snowfall. In addition, the memorandum stated that “[e]mployees who reported to work despite the snow emergency should be recorded as time worked, with the notation that they are due eight hours off (or the appropriate number of hours according to their work schedule).” LIII Parkways' Ex. 5.

5. By memorandum dated February 2, 1998, and Addendum dated February 2, 1998, Parkways adopted procedures for providing the appropriate leave time to all Parkways employees based upon the instructions from the Office of the Governor and the Department of Transportation. LIII G. Ex B; Parkways' Ex. 6.

6. Pursuant to those directives, employees who were able to make it to work on those days would receive compensatory time off, in the future, with pay, for the appropriate number of hours according to their work schedule, i.e, eight hours off if they worked a scheduled eight hour shift.

7. Grievant was scheduled to work three eight-hour shifts between January 28 and January 31, 1998. Despite the snowfall, Grievant was able to report to work on each scheduled workday.

8. Because a number of other toll collectors were unable to report to work, Grievant stayed beyond his scheduled eight hour shifts on two days, and worked an additional sixteen hours.

9. For the twenty-four scheduled hours Grievant worked between January 28 and January 31, 1998, Grievant received hour-for-hour compensatory time off with pay.

10. Grievant also received proper pay for the sixteen hours he worked beyond his scheduled hours, but no hour-for-hour compensatory time off for those hours.

11. It is and has been the policy of Parkways with regard to Parkways' maintenance employees, that when it snows, their regular eight-hour shifts are converted to two, twelve-hour shifts.

12. Parkways' maintenance employees received hour-for-hour compensatory time for working their scheduled twelve-hour shifts during the snow emergency.

## DISCUSSION

Because this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the West Virginia Education and State Employees Grievance Board, 156 C.S.R. 1 § 4.21; McCoy and Domingues v. W. Va. Parkways, Economic Dev. and Tourism Auth., Docket No. 99-PEDTA-074 (July 19, 1999); Howell v. W. Va. Dept. of Health and Human Resources, Docket No. 89-DSH-72 (Nov. 29, 1990). See, W. Va. Code § 29-6A-6.

Grievant claims he has suffered from discrimination and disparity in treatment because Parkways maintenance employees were treated differently in terms of the number of compensatory time off hours granted based on work performed during the snowemergency. Parkways responds that Grievant was paid properly, and received the appropriate number of compensatory hours off dictated by the Governor's Executive Order and the memorandum of the Secretary of Transportation.

The issue of whether the Parkways' toll collectors were treated differently than the Parkways' maintenance employees with respect to receiving hour-for-hour compensatory time off has recently been decided by this Grievance Board in Worrell, et al. v. West Virginia Parkways Economic Development and Tourism Authority, Docket No. 00-PEDTA- 298 (Dec. 17, 2000). In Worrell, it was held that Parkways' practice dealing with work performed by the maintenance workers during snow and ice removal operations was clearly established and supported by the authorization of Personnel Policy III-1, Scheduling and Reporting to Work. See LIII G. Ex. A. It was also held that the toll collectors were treated exactly the same as the maintenance workers with respect to receipt of hour-for- hour compensatory time off with pay for each scheduled work hour they worked during the 1998 snow storm.

This Grievance Board adheres to the doctrine of stare decisis (See footnote 1) in adjudicating grievances that come before it. Chafin v. W. Va. Dept. of Health & Human Resources, Docket No. 92-HHR-132 (July 24, 1992), citing Dailey v. Bechtel Corp., 157 W. Va. 1023, 207 S.E.2d 169 (1974). See also Belcher v. W. Va. Dept. of Transp./Div. of Highways,Docket No. 94-DOH-341 (Apr. 27, 1995). This adherence is founded upon a determination that the employees and employers whose relationships are regulated by this agency are
best guided in their actions by a system that provides for predictability, while retaining the discretion necessary to effectuate the purposes of the statutes applied. Consistent with this approach, this Grievance Board follows precedents established by the Supreme Court of Appeals of West Virginia

as the law of this jurisdiction. Likewise, prior decisions of this Grievance Board are followed unless a reasoned determination is made that the prior decision was clearly in error.

Grievant's claim that he was discriminated against is the identical issue raised and decided in Worrell, supra, and no new issues or facts were raised in this grievance which would warrant a different outcome. Grievant has failed to show he was discriminated against by application of the emergency snow and ice removal policies of Parkways and the Department of Transportation.

CONCLUSIONS OF LAW

1. This Grievance Board adheres to the doctrine of stare decisis in adjudicating grievances that come before it. Chafin v. W. Va. Dept. of Health & Human Resources, Docket No. 92-HHR-132 (July 24, 1992), citing Dailey v. Bechtel Corp., 157 W. Va. 1023, 207 S.E.2d 169 (1974). See also Belcher v. W. Va. Dept. of Transp./Div. of Highways, Docket No. 94-DOH-341 (Apr. 27, 1995). This adherence is founded upon a determination that the employees and employers whose relationships are regulated by this agency are best guided in their actions by a system that provides for predictability, while retaining the discretion necessary to effectuate the purposes of the statutes applied. 2. Grievant has failed to prove by a preponderance of the evidence that he was treated differently than the maintenance employees with respect to the snow emergency of January 28-30, 1998. In fact, Grievant and the maintenance employees were treated the same under the snow policies.

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.

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**MARY JO SWARTZ**

**Administrative Law Judge**

**Dated: January 22, 2001**

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Footnote: 1

*Literally, "to stand by things decided." This is the doctrine that when a court has laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases, where the facts are substantially the same. Black's Law Dictionary 1577 (Revised 4th Ed. 1968). See W. Va. Dept. of Admin. v. W. Va. Dept. of Health & Human Resources, 451 S.E.2d 768, 771 (W. Va. 1994).*