JAMES ROSE,

Grievant,

v. **Docket No. 01-PEDTA-008**

WEST VIRGINIA PARKWAYS ECONOMIC DEVELOPMENT

AND TOURISM AUTHORITY,

Respondent.

D E C I S I O N

Grievant, James Rose, employed by the West Virginia Parkways Economic Development and Tourism Authority (PEDTA or Respondent), as a Highway Technician assigned to the Ghent facility, filed a level one grievance on August 16, 2000, after his name was placed at the bottom of the rotating list for overtime work when he did not respond to a call on August 5, 2000. Grievant requested that he be reinstated to his prior position on the list, that he not be similarly penalized in the future, and that Respondent adopt a "better policy to give employees reasonable notice of scheduled work. The grievance was denied at all lower levels, and appeal was made to level four on January 9, 2001. Grievant, represented by John F. Parkulo, Esq., and PEDTA, represented by A. David Abrams, Jr., Esq., agreed to submit the matter on the record, supplemented by proposed findings of fact and conclusions of law. The grievance became mature for decision upon receipt of the lower-level record on May 22, 2001.

The essential facts of this case are not in dispute, and may be set forth as the following formal findings of fact.

Findings of Fact

1. Grievant has been employed by PEDTA for approximately eight years, and has held the classification title of Highway Technician at all times pertinent to this grievance. 2. PEDTA utilizes two work schedules, winter and summer. When on the summer schedule, employees work Monday through Thursday from 7:00 a.m. to 5:30 p.m.

3. On Friday, August 4, 2000, a fatal accident involving a cattle truck occurred at or near milepost 16 on the West Virginia Turnpike. The accident required immediate traffic control to facilitate the removal of the wreckage and dead cattle, destroying and removing injured cattle, and clean-up of

debris.

4. Grievant was called to work at the scene of the accident on August 4, 2000, but was not available. There was no change in Grievant's status on the rotational overtime call list as a result of his unavailability for the emergency work.

5. PEDTA employees worked at the scene of the accident until approximately 1:30 a.m. on Saturday, August 5, at which time foreman Larry Farley determined that sufficient progress had been made to insure public safety, and a second clean-up crew could be scheduled to complete the job later in the morning.

6. Grievant was called at approximately 6:05 a.m. to come to work at 7:00 a.m. on August 5, 2000. Grievant was not at home, and therefore, unable to respond.

7. Supervisor Dale Wooten rotated Grievant's name to the bottom of the scheduled overtime call out list because he was unavailable when called on August 5, 2000.

Discussion

Although Grievant characterizes his rotation on the call list as disciplinary, referring to it as a sanction, it was not an action taken by the employer to correct or punish Grievant, and will not be considered disciplinary for purposes of this grievance. Because thegrievance does not involve a disciplinary matter, Grievant has the burden of proving his claim by a preponderance of the evidence. Procedural Rule of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); W. Va. Code §29-6A-6; Howell v. W. Va. Dept. of Health & Human Resources, Docket No.89-DHS-72 (Nov. 29, 1990).

The sole issue in this case involves the application of PEDTA Personnel Policy III-2, “Overtime,” which states in pertinent part:

B. Policy

* * *

2. Scheduled overtime _ Scheduled overtime may be for a planned or anticipated event. Personnel called for scheduled overtime will be determined by the capability of the eligible individuals to perform the task/work and will be assigned on a rotating basis among such eligible individuals to insure fairness and equitability of distribution to qualified employees, within the section or shop that has the responsibility to perform the work.

3. Emergency Response Overtime _ Emergency response situations are generally matters of concern for public safety and may be categorized as major or minor. (a) Major emergencies are those that involve disruption of traffic flow, danger to the public such as a large accident, a chemical spill, etc. In such cases those qualified personnel assigned to the affected section who live nearest or who may respond the fastest will be called first. (b) Minor emergencies also require fast response, but after immediate needs are satisfied, personnel within the assigned section may be called on an equity basis. A workers' eligibility for scheduled overtime will not be affected by emergency response call out.

Grievant asserts that Mr. Wooton acted in an arbitrary and capricious manner, and in violation of Policy III-2, when he interpreted the August 5 work to be scheduled rather than emergency overtime. Grievant opines that the situation arose from a vehicular accident which first created a major emergency, and then evolved into a minor emergency the following morning. Had Mr. Wooton properly considered the August 5 assignment asan emergency, Grievant argues that he would not have lost the opportunity to accept the next scheduled overtime assignment. Grievant concludes that Policy III-2 is deficient in that it does not require any specific notice be given for scheduled overtime, and requests that Respondent be required to provide reasonable notice for those assignments to insure that employees' eligibility will not be affected by emergency call outs.

Respondent denies any wrongdoing, noting that while the event prompting the overtime may occur within a short time before the call out, it may not be of an emergency nature, and employees are provided as much notice of overtime call outs as is practical under the circumstances. With respect to the accident in question, PEDTA argues that once the roadway was cleared and traffic flow restored, the emergency ceased to exist. The work completed on August 5 was determined by Respondent to be scheduled overtime based on the non-emergency nature of the situation, and to facilitate the equitable distribution of overtime. Supervisor Wooton testified at level three that employees could have been called at 2:00 a.m. to have given them more notice, but as a common courtesy, he waited until 6:00 a.m. on a non-work day to contact them. PEDTA concludes that it must exercise some flexibility to perform the various missions for which it is responsible, and that Policy III-1 B.4. provides that it may establish work schedules necessary to achieve goals and objectives. (See footnote 1)

Grievant's interpretation of PEDTA's overtime policy is understandable. Scheduled overtime is

defined as “planned” or “anticipated,” while emergency overtime is generallyunderstood to be the result of an unplanned incident, and requiring an immediate response. It appears that the differing interpretations arise from Policy III-2's categorization of emergencies as major and minor in nature. There is no dispute between the parties that the accident on August 4, 2000, was a major emergency. Since the situation on August 5 arose from a major emergency, and advance notice was not provided to the employees, Grievant concludes that the assignment was a minor emergency, and that he should not have lost his place on the rotation list because he was not available.

However, the testimony offered by Mr. Wooton at level three indicates that PEDTA attempts to equitably distribute the opportunity to work overtime, whenever possible. This practice is consistent with Policy III-2 which does not define a minor emergency, but provides that any additional work beyond the immediate response should be considered assigned equitably, i.e., from the rotational list. Grievant's primary concern is that he missed the next opportunity to work scheduled overtime due to the insufficient notice. While notice was indeed short in this instance, the Policy does not include any requirement of a specific notice period, and as noted by Mr. Wooton, the nature of work completed by PEDTA sometimes requires that overtime be scheduled with short notice. Had he determined the work on August 5 to be emergency in nature, it is likely that another grievance(s) would have been filed claiming the assignment was scheduled since it was not emergency in nature, and had been planned several hours earlier.

An action is arbitrary and capricious if the agency making the decision 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., 769 F2d 1017(4thCir.1985). An action may also be arbitrary and capricious if it is willful and unreasonable without consideration of facts. Black's Law Dictionary, at 55 (3d Ed. 1985). Arbitrary is further defined as being “synonymous with bad faith or failure to exercise honest judgment.” Id, Trimboli v. W. Va. Dept. of Health and Human Servs./Div. of Personnel, Docket No. 93-HHR-322 (June 27, 1997). In determining whether an action was arbitrary or capricious, a searching inquiry into the facts is required, but the scope of review is narrow. 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 (1982), and McCoy and Dominguez v. W. Va. Parkways Economic Dev. and Tourism Auth., Docket No. 99-PEDTA-074 (July 19, 1999).

The record establishes that Mr. Wooton considered the facts, and that his determination that the August 5 work was scheduled overtime was consistent with the Policy III-2 objective that overtime be offered on an equitable basis, and was not arbitrary and capricious in nature. While Policy III-2 can result in an employee missing an opportunity for overtime which is scheduled with short notice, as illustrated by the present case, the nature of PEDTA's responsibilities does not allow for any set period of notice.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following conclusions of law.

Conclusions of Law

1. This grievance does not involve a disciplinary matter, and Grievant has the burden of proving his claim by a preponderance of the evidence. Procedural Rule of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); W. Va. Code§29-6A-6; Howell v. W. Va. Dept. of Health & Human Resources, Docket No.89-DHS-72 (Nov. 29, 1990).

2. An action is arbitrary and capricious if the agency making the decision 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., 769 F2d 1017 (4thCir.1985). An action may also be arbitrary and capricious if it is willful and unreasonable without consideration of facts. Black's Law Dictionary, at 55 (3d Ed. 1985). Arbitrary is further defined as being “synonymous with bad faith or failure to exercise honest judgment.” Id, Trimboli v. W. Va. Dept. of Health and Human Servs./Div. of Personnel, Docket No. 93-HHR-322 (June 27, 1997).

3. In determining whether an action was arbitrary or capricious, a searching inquiry into the facts is required, but the scope of review is narrow. 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 (1982), and McCoy and Dominguez v. W. Va. Parkways Economic Dev. and Tourism Auth., Docket No. 99- PEDTA-074 (July 19, 1999).

4. PEDTA's determination that overtime assigned on August 5, 2000, was scheduled rather than emergency in nature was neither contrary to Policy III-2, nor arbitrary and capricious in nature.

5. The rotation of Grievant to the bottom of the scheduled overtime call out list when he was not available to work scheduled overtime on August 5, 2000, was consistent with PEDTA Policy III-

2. Accordingly, the 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.

Date: June 11, 2001 _____ Sue Keller

Senior Administrative Law Judge

Footnote: 1

Policy III-1B.4. states that "[m]anagement has the right to establish work schedules necessary to achieve the goals and objectives of the Parkways Authority. Scheduled shifts may vary according to the operational requirements of the Parkways Authority, such as the seasonal work load."