DIANA KINCAID and PRISCILLA SKIDMORE,

Grievants,

v. Docket No. 04-PEDTA-176

WEST VIRGINIA PARKWAYS ECONOMIC

DEVELOPMENT AND TOURISM AUTHORITY,

Respondent.

D E C I S I O N

Grievants, Diana Kincaid and Priscilla Skidmore, filed this grievance against the West Virginia Parkways Economic Development and Tourism Authority ("PEDTA"), on or about December 16, 2003. Grievants disagree with PEDTA's decision to require Toll Collectors who are assigned to the adjoining toll booth to collect money from vehicles that incorrectly drive into the E-Z PASS toll lane. The

> **relief sought is for PEDTA to either 1) place a Toll Collector in the E-Z PASS lane; or 2) have the Toll Collector collect only that money that can be collected without leaving the toll both, and exempt the Toll Collector from toll accuracy standards on any date when they are assigned to collect tolls from the E-Z PASS lane in addition to their own regular toll lane.**

This grievance was denied at all lower levels and appealed to Level IV on May 10, 2004. A Level IV hearing was held on August 18, 2004, in the Grievance Board's Beckley Office. This grievance became mature for decision on September 27, 2004, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

Grievants contend that requiring them to collect money from the E-Z PASS lane is "a Safety Hazard and an Unfair Labor Practice," and places the Toll Collector underadditional stress. Grievants also contend there is no way to account for the money collected from the E-Z PASS lane.

Respondent asserts Grievants did not specify or demonstrate any "Unfair Labor Practice,"

and have not established collecting this money is a safety hazard, increases stress, and/or effects the Toll Collector's accuracy.

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 are Toll Collectors and are occasionally asked to collect tolls from the E-Z PASS lane as part of their duties.

2. PEDTA currently has a toll system that allows vehicles to use an electronic device called a transponder. When this device is installed in a vehicle, it allows the driver to pass through the toll booth without stopping to pay tolls because they are prepaid.

3. During certain times of the day, PEDTA establishes E-Z PASS only lanes, and only vehicles with transponders may use this lane. No Toll Collectors are assigned to accept tolls in these lanes, and these lanes are clearly marked as E-Z PASS only.

4. Occasionally, vehicles without a transponder enter the E-Z PASS lane, and a Toll Collector in the next booth is assigned to collect the required toll from this vehicle.

5. Toll Collectors are given detailed instructions to follow as to how to deal with this situation.

6. Toll Collectors are given monthly safety training. Areas covered in this training include: lane crossing, booth safety, plaza safety, prevention of slips, trips and falls, and proper toll collection to prevent injury. 7. No accidents have occurred as the result of collecting tolls from both the E-Z PASS lane and the Toll Collector's regular lane.

8. Toll Collectors receive a bonus based on accuracy, and the accuracy of a Toll Collector is checked by the toll computer system. Toll Collectors are expected to enter certain information on their computers to reflect the type of vehicles that paid tolls and the amount of toll charged and received.

9. Because this computer system is only for the Toll Collector's regular lane, it is not possible for the Toll Collector to input money received from the E-Z PASS lane. All the Toll Collector assigned to cover the E-Z PASS lane is expected to do is place the E-Z PASS money in a separate envelope provided by PEDTA, total up the amount of money the envelope

contains, and turn it in at the end of shift.

10. Approximately $30,000 is collected each year from vehicles incorrectly in the E-Z PASS lane.

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 CSR 1 § 4.21 (2000); Howell v. W. Va. Dep't of Health & Human Res., 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).

This grievance basically deals with Grievants' disagreement with a PEDTA management decision. This Grievance Board has previously held, "[a] [g]rievant's beliefthat his supervisor's management decisions are incorrect is not a grievable event unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with his effective job performance or health and safety." Ball v. Dep't of Highways, Docket No. 96-DOH-141 (July 31, 1997). See W. Va. Code § 29-6A- 2(i); Rice v. Dep't of Transp./Div. of Highways, Docket No. 96-DOH-247 (Aug. 29, 1997). Such management decisions are to 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 was 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)." Trimboli v. Dep't of Health and Human Res., Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). The arbitrary and capricious standard is a high

one, requiring willful and unreasonable action and disregard of known facts.

Grievants did not identify any statute, policy, rule, or regulation violated by PEDTA's decision to require Toll Collectors to collect tolls from the E-Z PASS lane. Indeed, it is the Toll Collector's job to collect these tolls. Additionally, Grievants did not identify any injuries caused as a result of this practice, nor did they demonstrate this practice created adecrease in a Toll Collector's efficiency. **(See footnote 2)** **While it is reasonable that Grievants could have this issue as an area of concern, they have not met their burden of proof and demonstrated that PEDTA's requirement that they collect tolls from both lanes "constitute[s] a substantial detriment to or interference with [their] effective job performance or health and safety." Ball, supra. See W. Va. Code § 29-6A-2(i).**

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, Grievant has the burden of proving of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 CSR 1 § 4.21 (2000); Howell v. W. Va. Dep't of Health & Human Res., 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 an agency'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, DocketNo. 96-DOH-247 (Aug. 29, 1997); Ball v. Dep't of Highways, Docket No. 96-DOH-141 (July 31, 1997).

3. Grievants did not demonstrate PEDTA's decision to require Toll Collectors to collect tolls from the E-Z PASS lane violated a rule, regulation, policy, or statute, or constituted a substantial detriment to, or interference with, their effective job performance or health and safety.

4. Grievant did not demonstrate PEDTA's management decision was arbitrary and capricious.

Accordingly, this grievance is DENIED.

Any party 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 theBoard 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: November 4, 2004

Footnote: 1

Grievant Kincaid represented both Grievants, and Respondent was represented by General Counsel, David Abrams.

Footnote: 2

Grievants' suggestion that a Toll Collector be placed full time in the E-Z PASS lane negates one of the purpose of the E-Z PASS lane and would increase expenditures for PEDTA. Grievants' suggestion that a vehicle incorrectly in the E-Z PASS lane should be waived through is also not fiscally sound. Further, the West Virginia Supreme Court of Appeals in Skaff v. Pridemore, 200 W. Va. 700, 709, 490 S.E.2d 787,796 (1997), stated the Grievance Board "does not have the authority to second guess a state employer's employment policy."