MARSHALL LEO,

Grievant,

v. **Docket No. 03-DEP-235**

DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

DECISION

Marshall Leo ("Grievant") initiated this proceeding on March 28, 2003, alleging his employer, the Department of Environmental Protection ("DEP"), acted improperly when it took away his assigned state vehicle. The grievance was denied at level one on April 8, 2003, and at level two on May 6, 2003. Grievant alleged a default occurred at level three, and, after a hearing conducted by the undersigned, an Order Granting Default was entered by this Grievance Board on October 8, 2003. Thereafter, a hearing was held in Elkins, West Virginia, on November 4, 2003, regarding whether Grievant's requested remedy-- return of his assigned vehicle--would be contrary to law or clearly wrong. Grievant represented himself, and Respondent was represented by Senior Assistant Attorney General Doren Burrell. This matter became mature for consideration upon receipt of Respondent's fact/law proposals on November 26, 2003. (See footnote 1) The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievant has been employed by DOP for approximately 29 years, most recently assigned to the Abandoned Mines Lands Program ("AML") as an Environmental Resources Specialist II (ERS II), in its Phillipi office.

2. Grievant's working job title is "planner," because he is involved in finding and evaluating sites for mine reclamation. His tasks include describing the problem, devising a plan to reclaim the

property, developing a cost estimate for the project, and coordinating the activities of the various individuals involved in the project, including engineers, real estate representatives, designers, and construction personnel. Grievant must assess environmental impact and document the findings of the various individuals involved. Grievant's assigned territory includes 21 counties across northern West Virginia, and he spends a great deal of time traveling to reclamation sites.

3. In 1992, Grievant accepted a voluntary demotion to his current classification of ERS II. At that time, Grievant's then-supervisor gave a him a full-time assigned state vehicle, as a term of Grievant's employment in the new position.

4. By Executive Order dated January 8, 2003, Governor Bob Wise ordered that the fleet of state vehicles be reduced by 555 vehicles no later than March 31, 2003. Specifically, DEP was ordered to return 53 vehicles.

5. AML is completely funded by federal money, although it is administered through DEP. Grievant's assigned vehicle was entirely funded by the federal government. When AML notifies the federal grant administrators that the vehicle funds are no longer needed, those funds are diverted to other aspects of the reclamation program.

6. Charles Miller, Assistant Director of AML, determined which vehicles would be returned to the Department of Administration pursuant to the fleet reduction order. In order to be as fair as possible, full-time assigned vehicles were only allowed for employees whose jobs are entirely field-based or who must respond to emergency situations during non-working hours.

7. Grievant's assigned vehicle was taken away pursuant to the fleet reduction order, because many of his duties are office-based, and his travel can usually be planned in advance. He now has access to a “pool vehicle” that he shares with one other employee in the AML Phillipi office. Grievant and the other employee must reserve the vehicle in advance if they wish to use it.

8. Use of the pool vehicle is, at times, inconvenient for Grievant. Because he lives in Elkins and the vehicle is parked at the office in Phillipi, picking up the vehicle can add significant travel time to his day, depending on which direction he needs to go.

9. All of the employees in the planning section of AML were given pool vehicles as a result of the fleet reduction.

10. Grievant was severely injured in an accident in 1981, and suffered extensive injuries. Grievant has never complained to his supervisors of any disability as a result of this accident, nor has

he requested any accommodation in order to accomplish his job duties. Grievant experiences discomfort in his legs when he spends long periods of time in a car. 11. Pursuant to DEP's policy regarding the use of assigned vehicles, dated May 7, 2001, “field based employees [50% of whose job duties occur in the field] may be assigned a state vehicle on a permanent basis for official use.”

Discussion

When determining whether the remedy requested is contrary to law or clearly wrong, it is presumed that the grievant prevailed on the merits of the grievance. W. Va. Code § 29-6A-3. The burden of proof is on Respondent to prove by clear and convincing evidence that the remedy requested would be contrary to law or clearly wrong. This standard requires Respondent to produce evidence substantially more than a preponderance of the evidence, but less than that required to prove the matter beyond a reasonable doubt. Lohr v. Div. of Corrections, Docket No. 99-CORR-157D (Nov. 15, 1999).

Consistent with the statutory presumption that Grievant prevailed on the merits, the undersigned must presume Grievant established that the revocation of his vehicle assignment was discriminatory, violated his rights as a disabled person, was a condition of his employment, and was unnecessary due to the federal funding source which paid for the vehicle.

Respondent contends that the return of Grievant's vehicle would be contrary to law and clearly wrong on several levels. First, DEP's actions pursuant to the fleet reduction order were accomplished in a non-discriminatory manner. The only employees who have retained assigned vehicles are those whose jobs require them to be in the field on a full- time basis, such as construction personnel, or those who must respond to emergency situations, such as the realty section employees. Therefore, the return of an assigned vehicle to Grievant, whose duties are both field and office based, and who is not requiredto respond to emergencies, would result in discrimination against all similarly situated employees who do not have an assigned vehicle. See W. Va. Code § 29-6A-3(a)(2). (See footnote 2) Clearly, as Respondent contends, it has related vehicle assignments to job duties, fulfilling its legal requirement not to discriminate against employees when such employment decisions are made. Accordingly, the undersigned finds that a finding of discrimination under the facts and circumstances as presented is clearly wrong.

Respondent further contends that it would be a blatant violation of law to find that Grievant's evidence supports the conclusion that he was entitled to an assigned vehicle as an accommodation for his “alleged” disability. This Grievance Board has determined that it does not have authority to determine liability for claims that arise under the West Virginia Human Rights Act (.WVHRA., W. Va. Code §§ 5-11-1, et seq.), including a claim of handicap discrimination, or the federal Americans with Disabilities Act (.ADA., 42 U.S.C. §§ 12111, et seq.). Bowman v. W. Va. Educational Broadcasting Auth., Docket No. 96- EBA-464 (July 3, 1997); Rodak v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R- 536 (June 23, 1997).
Nevertheless, the Grievance Board's authority to provide relief to employees for .discrimination., .favoritism., and .harassment., as those terms are defined in W. Va. Code § 29-6A-2, includes jurisdiction to remedy discrimination that would also violate the Human Rights Act. In other words, the Grievance Board does have subject matter jurisdiction over handicap- based discrimination claims. Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996). See Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995).

Bowman, supra. Once again, Respondent has clearly established that a finding that Grievant was subjected to discrimination on the basis of a disability would be blatantly wrong. Grievant admitted that he never complained to his employer of any disability resulting from his previous accident, nor did he request any specific accommodation for it. Therefore, a finding that Grievant was treated differently because of this alleged disability would, again, be clearly wrong.

As to Grievant's claim that his assigned vehicle was a “condition of employment,” Grievant's previous supervisor testified that he did, in fact, use those terms to define the vehicle assignment for Grievant when he accept his demotion. However, that supervisor left DEP's employ in 1999, and DEP contends that his representation was an ultra vires act, and would not be enforceable. Cook v. Mason County Bd. of Educ., Docket No. 96- 26-105 (Aug. 19, 1996). “A state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers and all persons must take note of the legal limitations upon their power and authority. [Citations omitted.]” Syl. Pt. 2, W. Va. Public Employees Ins. Bd. v. Blue Cross Hosp. Serv., Inc., 179 W. Va. 605, 328 S.E.2d 356 (1985). “'Any other rule would deprive the people of their control over the civil service, and leave the status and tenure of all employees to be governed by whatever arrangements incumbent administrators may agree to or prescribe.'” Freeman v. Poling, 175 W. Va. 814, 819, 338 S.E.2d 415, 421 (1985),

citing Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983). DEP's policy states that the assignment of vehicles is permitted, but not required. Accordingly, the undersigned finds that it would be clearly wrong and contrary to law to bind DEP as a result of it's employee's ultra vires act. Additionally, as noted in Ritchie v. Dep't of Health and Human Resources, Docket No. 96-HHR-181 (May 30, 1997), practicesand policies may change over an extended period of years, giving more reason not to hold an employer to an unauthorized promise made more than 11 years ago.

Finally, Respondent contends that it would be clearly wrong to require that it ignore a directive from the governor of the state of West Virginia to reduce its assigned vehicles, merely because the funding was provided through a federal grant. Respondent notes that the funding for vehicles is only provided to AML pursuant to an annual request from the federal government, and if that money is not needed for vehicles, it is used for other purposes within the AML program. Moreover, the vehicles are owned by the state through the Department of Administration, so DEP is not authorized to hold them hostage in the name of funding for their leases. Accordingly, the undersigned finds that it would be clearly wrong to presume that Respondent had the authority to refuse to relinquish a state-owned vehicle, merely because it was leased with federal funds.

Consistent with the foregoing findings and discussion, the following conclusions of law are made.

Conclusions of Law

1. When determining whether the remedy requested is contrary to law or clearly wrong, it is presumed that the grievant prevailed on the merits of the grievance. W. Va. Code § 29-6A-3.

2. The burden of proof is on Respondent to prove by clear and convincing evidence that the remedy requested would be contrary to law or clearly wrong, whichrequires Respondent to produce evidence substantially more than a preponderance of the evidence, but less than that required to prove the matter beyond a reasonable doubt. Lohr v. Div. of Corrections, Docket No. 99-CORR-157D (Nov. 15, 1999).

3. Respondent has proven by clear and convincing evidence that granting Grievant's requested remedy of returning his assigned vehicle would be clearly wrong and contrary to law, due to the executive order requiring fleet reduction and the manner in which it was accomplished by DEP.

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, and 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: January 21, 2004 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

On January 5, 2004, Grievant attempted to claim default had occurred at level four, because this Decision was not issued within thirty days of the hearing. Pursuant to W. Va. Code § 29-6A-2(a)(2), default occurs when a "grievance evalutor" fails to respond within the statutory time limits. As defined by W. Va. Code § 29-6A-2(j), "grievance evaluators" are the decision-makers at levels one, two and three of the grievance process. Accordingly, there is no mechanism for claiming default at level four.

Footnote: 2

That statute defines discrimination as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."