VIRGINIA JONES,

Grievant,

v. Docket No. 05-PEDTA-025

WEST VIRGINIA PARKWAYS ECONOMIC

DEVELOPMENT AND TOURISM AUTHORITY,

Respondent.

D E C I S I O N

Grievant Virginia Jones, a Toll Collector, filed three separate grievances against the West Virginia Parkways Economic Development and Tourism Authority ("PEDTA"), on or about July 16, 2004. One of these grievances requested an apology and was dismissed below.

In the first grievance, Grievant stated she had been discriminated against because of her disability when she was not allowed to work all toll lanes, and her "Fourteenth Amendment Rights guaranteeing equal protection" were being violated. The Relief Sought was for her "schedule and lane assignments to be made equal with all other toll collectors."

In the second grievance, Grievant wanted the new ergonomic chair replaced with the old, previously used chair. That portion of this grievance was granted to her satisfaction in November 2004. Currently, she is only seeking the return of 4½ days of sick leave she took in July and August 2004, because of pain she alleges was caused by the new chair. (See footnote 1)

Grievance number one was denied at all lower levels. The parties noted in the Level III hearing that the chair selected by Grievant and her doctor had been ordered andshould be received shortly. The new request for the return of sick leave, not made until the Level III hearing in grievance number two, was denied by Decision dated January 18, 2005. A Level IV hearing was held on May 26, 2005, in the Grievance Board's Beckley Office and on June 30, 2005, in the Grievance Board's Charleston Office. This grievance became mature for decision on August 16, 2005, after receipt of Respondent's proposed findings of fact and conclusions

of law. **(See footnote 2)** **Grievant elected not to submit these proposals.**

Issues and Arguments

Grievant asserts she should be allowed to work all lanes at the toll plaza because remaining in the same lane is boring, and she had been allowed to walk to the more distant lanes in the past. She believes her leave should be returned because she was required to take sick leave because of the pain caused by Respondent's failure to provide her with an appropriate chair.

Respondent asserts that because of her disability, Grievant's doctor has stated she cannot use the underground tunnel and stairs to the other toll booths like the other toll collectors are required to do, and it is dangerous for her to walk from toll booth to toll booth with all the traffic. Respondent also asserted it worked diligently to find a chair to meet Grievant's needs, and after providing her with several different chairs, and seeking input from her physician, without success, it then worked with Penny Hall, the State Americans with Disabilities Act ("ADA") Coordinator, and Dawn Jordan, State Equal Opportunity Employment Commission ("EEOC") Specialist, to establish what chair Grievant should have. As soon as this chair was identified, PEDTA provided Grievant with the chair shenow has, and it has proven to be satisfactory. As for the use of sick leave, Respondent avers Grievant has not met her burden of proof and did not establish the number of sick leave days she took because of "chair problems," or that any of the alleged sick leave days were caused by the chair she was using.

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. Grievant is a Toll Collector. She has worked for PEDTA for 13 years, but has been off work for two years due to a work-related injury and three years because of a motor vehicle accident. Grievant also has residual muscular difficulty as the result of polio. Grievant was off due to the accident from December 1999 to February 2003. On her return to work, Grievant presented documentation from her doctor, and PEDTA allows Grievant to work only three days a week, only work eight-hour shifts, and does not require her to work the midnight shift.

(See footnote 3)

2. When Grievant returned to work from her accident, several changes had been instituted during her absence. All toll plazas now used E-Z PASS transponders, and vehicles with this equipment are not required to stop at the toll plaza, only to slow down. These transponders are used in all lanes. Sometimes these vehicles go through the toll plaza at forty to fifty miles per hour. Further, Steve Maynard, the former Safety Director was now the Director of Tolls, and he was actively looking for ways to decrease the high number of on-the-job injuries. 3. There is a tunnel with stairs underneath the toll road that all toll collectors are required to use to enter the toll booths. Grievant's doctor has stated she cannot use these stairs because the risers are too high for her to negotiate. PEDTA has accommodated this request and does not require Grievant to use the tunnel.

4. Prior to Mr. Maynard's tenure as Director of Tolls, Grievant and other employees with disabilities were assigned to all the toll lanes. Grievant was allowed to walk around each toll booth as she went to her assigned station. Grievant could not walk across directly from toll booth to toll booth because the concrete riser/curb on which the toll booth sits is too high. As a result, Grievant would walk down the curb a couple of car lengths, and then she would cross in front of the traffic either entering or exiting the toll booth.

5. Mr. Maynard decided, with input from other administrators, that now that E-Z PASS was in effect, it was dangerous for Grievant and others to walk lanes to reach a toll booth. The individuals who could not use the stairs in the tunnel were now assigned to the lanes closest to the office to decrease the number of lanes they would have to cross. (See footnote 4)

6. To decrease the number of toll collector on-the-job injuries, PEDTA also asked a certified specialist in ergonomics, Karl Marion from Workers' Compensation, to give suggestions.

7. At about the same time, Mr. Maynard noted the current toll booth chairs were wearing out, were difficult to repair, too big for the booth, and seemed to promote injury. 8. Mr. Marion studied the problem and recommended a sit/stand stool whichwould allow the toll collector to be in a semi-standing position, still be able to sit, and not have to rise from a complete sitting position each time a toll is collected. The sit/stand stool would also require the collector to vary his/her position and prevent the collector from remaining in a static

position which promotes injury. The sit/stand stool was also smaller and allowed the employee more room to move around in the toll booth. Mr. Marion also made a number of recommendations that were accepted by PEDTA to improve the functionality and comfort in the toll booth.

9. Although unclear from the record, it appears these stools were placed at Grievant's toll plaza around the first weeks of July 2004.

10. Grievant did not like the sit/stand stool and did not find it comfortable. She requested another chair.

11. PEDTA discussed the issue with Mr. Marion, and he recommended the Ergo Perfect 600 with a saddle seat to accommodate Grievant.

12. Grievant also found this seat to be uncomfortable and testified it caused her pain requiring additional days off after each time she used it. (It is assumed it was during this time Grievant took the sick leave she wishes to recover.)

13. On July 14, 2004, Grievant told her supervisor she was hurting from the "black chair," asked for a different chair, and Mr. Maynard said no. Grievant said if she did not get a different chair she was going home. Mr. Maynard said to go then. Grt. No. 3 at Level III. Grievant filed this grievance on July 17, 2004.

14. Grievant did not submit any sick leave slips to support her requested leave request, but Respondent placed three signed sick leave requests into evidence. All of these sick leave slips were completed after the grievance was filed. Resp. Nos. 6, 7, & 8at Level IV. The first sick leave slip was for July 19, 2004, and was completed July 31, 2004. It states "Due to back and leg problems. The chair doesn't help any." The second sick leave slip was for July 25, 2004, and was completed July 31, 2004. It states "Due to back and leg problems. The chair sure doesn't help any." The third sick leave slip was for August 8, 2004, and was completed August 27, 2004. It states "Down in my back the ergonomic chairs don't help any."

15. On July 19, 2004, Grievant's doctor, Dr. R. C. Wiseman, wrote stating Grievant "suffers from Lumbar and Cervical sprain. It is my understanding the patient is being made to use an ERCANOMIC CHAIR [sic] at her place of employment." Grt. No. 1 at Level III. Dr. Wiseman had been incorrectly informed that the seat for this chair was like a bicycle seat, and he thought this chair would be very uncomfortable for her condition. He then recommended

"a more comfortable chair."

16. On July 20, 2004, Grievant became upset at the toll plaza because Mr. Maynard denied her request for one of the old, heavy chairs after she gave him the doctor's slip. This discussion is noted on the Toll Foreman Daily Report of Activity. Grt. No. 3 at Level III.

17. On July 20, 2004, Carrie Rouché, Director of Human Resources, wrote Dr. Wiseman and explained the current ergonomic program and the duties Grievant was expected to perform, described the saddle seat, noted some of the discomfort report by employees was caused by incorrect usage of the stool, and asked him to inspect the toll booth and chair so he would know Grievant's exact circumstances. PEDTA received no response from this letter. 18. Sometime later, Grievant refused to go to the toll booth unless she received one of the old chairs. Ms. Rouché told Mr. Maynard to give one of these chairs until the issues could be resolved.

19. Sometime in early August 2004, Grievant filed an informal EEO complaint alleging she had been discriminated against because of her disability, in that she was now required to work only in lane 2, the busiest lane **(See footnote 5)****, and PEDTA had not provided her with a reasonable accommodation for her disability. While the EEO investigation into Grievant's ADA complaint was in process, Grievant's foreman carried one of the old, heavy chairs out to her toll booth each day.**

20. On August 13, 2004, Ms. Rouché, at EEOC's direction wrote Grievant to obtain medical information from Dr. Wiseman. PEDTA never received a response. **(See footnote 6)**

21. On August 30, 2004, Grievant was seen by Dr. Wiseman. This appointment occurred after Grievant had been given the old chair she said did not cause her pain. He noted the "[s]ame complaint of back, leg, feet, neck pain. Has pain at work due to having to stand due to limitation of standing due to cervical, lumbar and leg pain from prior injuries and hx. (history) Of [sic] polio." He recommended Grievant receive a high back chair. There was no indication PEDTA received this document at the time. While the Toll Collectors' Job Description requires them to be able to stand most of the time, Grievant had been exempted from this requirement. Test. Rouché & Maynard, Level IV Hearing. 22. PEDTA cooperated with the informal procedure, and on September 17, 2004, all parties met to attempt to resolve the accommodation issue. Grievant decided the Ergo- Perfect 600 chair with a round seat would

be acceptable.

23. PEDTA, on the advice of Mr. Marion, obtained the Ergonomic 600 with a round seat to accommodate Grievant. After a brief attempt to use this chair, Grievant refused it, and on September 20, 2004, Grievant retracted her acceptance of this resolution and requested a formal investigation which EEO then conducted. Jt. Exh. No. 1.

24. On September 29, 2004, Dr. Wiseman made a recommendation for a chair for Grievant. There is no indication PEDTA received this information at that time, but when PEDTA did obtain this data, the agency worked with Mr. Marion, and a chair was selected. Grievant reported in November/December 2004 that this chair was an acceptable accommodation.

25. Each time Grievant works, the shift foremen must carry her chair to her toll booth and then carry the other chair back to the office. At the end of Grievant's shift the process must be repeated in reverse.

26. The EEO Findings and Conclusions state:

> [C]omplainant failed to establish her disability prior to filing this complaint regarding failure to accommodate and discrimination on the basis of her disability. Despite this fact, management went beyond what was required of them in the accommodation process and worked with the complainant to provide a reasonable accommodation which was acceptable to her. Additionally, limiting the complainant's work area to lanes one and two was done to provide an entrance and exit to her work station which did not pose a threat to her or to the coworker who transported her chair to the work station. . . . [A]nother employee cannot and should not be required to place themselves in jeopardy while carrying a chair across lanes of traffic . . . .

Discussion

As these grievances do not involve a disciplinary matter, Grievant has the burden of proving her grievances by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 CSR 1 § 4.21 (2004); 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). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

I. Changing lanes

This grievance basically deals with Grievant's disagreement with a PEDTA management decision. This Grievance Board has previously held, "[a] [g]rievant's belief that 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). 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." 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.

Grievant did not identify any statute, policy, rule, or regulation violated by PEDTA's decision to assign Toll Collectors, who could not use the underground tunnel to go to distant lanes because of mobility disabilities, to the lanes closest to the office, and thus have fewer lanes of moving traffic to cross. Indeed, it would actually "constitute a substantial detriment to or interference with [their] effective job performance or health and safety . . . ." to have toll collectors cross these lanes of traffic. See Ball, supra; W. Va. Code § 29-6A-2(i).

Additionally, Grievant also asserts that requiring her to work in certain toll booths and not allowing her to cross moving lanes of traffic constitutes discrimination. W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, 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." In The Board of Education of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004), the West Virginia Supreme Court of Appeals held a grievant must establish a case of discrimination by showing:

> **a) that he or she has been treated differently from one or more similarly-situated employee(s);**
>
> **(b) that the different treatment is not related to the actual job responsibilities of the employees; and,**
>
> **(c) that the difference in treatment was not agreed to in writing by the employee.**

Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

Grievant is not similarly situated to employees who are able to use the tunnel to reach the toll booths that are farther away. She is not able to use this tunnel and its stairs, and the only way she can reach these other toll booths is to walk on the interstate. While it is true that oncoming traffic has to slow down to use the E-Z PASS transponder, these vehicles no longer have to stop. It should also be noted that Grievant's foremen must carry her special chair to her toll booth at the beginning and end of every shift. (See footnote 7) **Accordingly, the undersigned Administrative Law Judge finds no discrimination in PEDTA's management decision to assign Grievant to the toll booths closest to the office.**

II. Sick leave **Grievant asserts 4½ days of sick leave should be returned to her because she was compelled to use these days when PEDTA required her to use an uncomfortable chair that caused her so much pain she could not return to work for several days after each shift. Grievant has not met her burden of proof on this issue. Grievant did not submit any sick**

leave slips, and those presented by PEDTA that were completed and signed by Grievant and do not support her testimony. These slips do not say the ergonomic chair hurt her back, they say it is not "helping her back." Additionally, it is noted that PEDTA was trying to work with Grievant to find a suitable accommodation for all involved. Grievant received the old chair she wanted until a new one was obtained, and her doctor's report completed after that time does not report any change and actually states Grievant had the "same complaints." Accordingly, it would appear the return of the old chair was not helpful to Grievant. Further, although Grievant complained about the incident of July 14, 2004, she did not present a sick leave slip indicating she went home that day, and/or that it was counted as sick leave. Given the evidence of record, Grievant did meet her burden of proof and demonstrate she was entitled to the return of 4½ days of sick leave.

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 her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 CSR 1 § 4.21 (2004); 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(Assistant Principal. 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, Docket No. 96-DOH-247 (Aug. 29, 1997); Ball v. Dep't of Highways, Docket No. 96-DOH-141 (July 31, 1997).

3. Grievant did not demonstrate PEDTA's decision to require her to work in the lanes closest to the office violated a rule, regulation, policy, or statute, or constituted a substantial detriment to, or interference with, their effective job performance or health and safety. PEDTA did demonstrate this decision was for the health and safety of herself, her foremen, and the drivers who use the toll road.

4. Grievant did not demonstrate PEDTA's management decision to restrict what lanes she could work was arbitrary and capricious.

5. Discrimination is defined for purposes of the grievance procedure a s, "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." W. Va. Code § 29-6A-2(d).

6. A grievant must establish a case of discrimination by showing:

a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

Bd. of Educ. of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004); Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

7. Grievant did not establish she was similarly situated to the employees who are allowed to work in lanes which are distant from the office, as she cannot use the tunnel and stairs and would place herself and her foreman in a dangerous situation if allowed to work in these lanes.

8. Grievant did not prove that she used 4½ days of sick leave because of any action on the part of PEDTA.

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 the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDSADMINISTRATIVE LAW JUDGE

Dated: September 29, 2005

Footnote: 1

Grievant had not taken any of the sick leave at the time she filed this grievance, and this issue is not alleged in her Statement of Grievance or her relief sought. Respondent did not raise this issue as a problem. See Resp. Nos. 6, 7, & 8 at Level IV.

Footnote: 2

Co-worker Diana Kincaid represented Grievant, and Respondent was represented by General Counsel, David Abrams.

Footnote: 3

On May 1, 2003, Grievant's doctor indicated she could now work four, eight-hour shifts.

Footnote: 4

When there are two disabled Toll Collectors working, one of them is required to walk to the next nearest toll booth.

Footnote: 5

Later, Grievant complained to EEOC she was now required to work in Lane 1, a slow lane.

Footnote: 6

PEDTA finally received this information from EEOC on November 11, 2004.

Footnote: 7

The parties noted at Level IV, that the foreman is now also required to carry a foot stool as well as the chair.