THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

KENNETH PATRICK,

Grievant,

v. **Docket No. 06-DOH-279**

Sue Keller

Senior Administrative Law Judge

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Kenneth Patrick ("Grievant"), employed by the Division of Highways ("DOH") as an Area Maintenance Assistant, filed a level one grievance on or about March 30, 2004, in which he alleged: Without my request or knowledge I was removed as District Three duty officer for a portion of my scheduled month (March 2004). Another Assistant Maintenance Engineer (Dale Deuley) advised that he was instructed to be duty officer on 3/19/04 and to date (3/30/04) has taken three or four duty officer calls. This ongoing arbitrary, capricious and discriminatory action resulted in my ability to respond to (and be compensated for) any and all duty officer work after 3/19/04 to be denied me [sic].

For relief, Grievant requested a written apology, to be paid for the time required to respond to the calls referred to Mr. Deuley, and to never again be removed from scheduled period as duty officer unless properly notified and offered reasonable facts for the action.

The grievance was denied at levels one and two. An evidentiary hearing was conducted at level three, at which time Grievant amended his requested relief by limiting it to only the back pay at issue. The grievance was subsequently denied at level three, and appeal was made to level four August 14, 2006. Grievant, appearing *pro se*, and DOH counsel Barbara Baxter, agreed to submit the grievance for a decision based on the lowerlevel record. The grievance was reassigned to the undersigned on October 25, 2006, and became mature for decision upon receipt of proposed findings of fact and

conclusions of law filed by the parties on or before November 1, 2006.

The following facts have been derived from the evidence made part of the record at level two.

Findings of Fact

1. Grievant was employed by DOH as an Area Maintenance Assistant, assigned to District Three, at all times pertinent to this grievance.

2. The duties of a Maintenance Assistant include assignment as a duty officer, which is the primary or alternate contact to respond to accidents and emergency situations.

3. Grievant was assigned as the primary duty officer for the month of March 2004.

4. Grievant informed his supervisor that his retirement was imminent, but that he would not give any notice, and that he wished to take his earned compensation time before he departed. After taking several days off in early March, Grievant notified DOH management on Friday, March 19, 2004, that he wanted to use more of his earned time from March 22 - 30, 2004.

5. Because the alternate duty officer was unavailable, management assigned Dale Deuley to serve as the primary duty officer in Grievant's absence, to ensure there would be a response to any roadway concerns.

6. While serving as the primary duty officer, Mr. Deuley responded to three calls from his home, requiring approximately thirty-five minutes of his time. Mr. Deuley did notreport to the scenes involved, nor did he turn in any time worked. He received no compensation for the handling of these matters.

Discussion

Grievant argues that “no time before or since [has] a duty officer been reassigned during his monthly assignment period.” Further, the decision whether to respond to calls is within the duty officer's discretion, and it was possible that he may have elected to respond to the three calls received by Mr. Deuley. Although Mr. Deuley elected not to charge for the time he spent answering the calls, Grievant asserts that it is routinely claimed, and requests payment for the time he would have left his domicile until his return to same. DOH asserts that it did not treat Grievant in a discriminatory manner, or otherwise act arbitrarily and capriciously, given the uncertainty of his continued employment status.

As 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 W. Va. Educ. & State

Employees Grievance Bd. 156 C.S.R. 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. "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).

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 theemployees." To establish a case of discrimination under this grievance procedure, a grievant must show:

(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.

The Bd. of Educ. of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004) *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

Grievant did not meet his burden of proof and demonstrate he was treated differently than other similarly situated employees. Grievant did not identify any other employees who had remained as duty officer after announcing their forthcoming, but unspecified retirement. Accordingly, no discrimination was established.

Neither was the decision to remove Grievant as the duty officer arbitrary and capricious. Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its 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 view. *Bedford County Memorial Hosp. v. Health and Human Serv*., 769 F.2d 1017 (4th Cir. 1985). 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). Additionally, an action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of thecase." *Eads, supra* . "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment

for that of [the employer]." *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

DOH acted appropriately to ensure coverage of emergencies and accidents on the roadways for the nine days Grievant requested leave, particularly in consideration of his intent to resign or retire without notice.

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

Conclusions of Law

1. As 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 W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 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.

2. *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."

3. To establish a case of discrimination under this grievance procedure, a grievant must show:
(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,

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4. Grievant failed to establish that DOH engaged in discrimination, or acted in an arbitrary and capricious manner when it removed him from the duty list.

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: November 6 , 2006

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SUE KELLERSENIOR ADMINISTRATIVE LAW JUDGE