WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

DIANA KINCAID and PRISCILLA SKIDMORE,

Grievants,

v. Docket No. 07-PEDTA-127

PARKWAYS ECONOMIC DEVELOPMENT

AND TOURISM AUTHORITY,

Respondent.

DECISION

Diana Kincaid and Priscilla Skidmore ("Grievants") are both employed by the Parkways Economic Development and Tourism Authority (PEDTA) as toll collectors on the West Virginia Turnpike. They initiated these grievances on January 31, 2006, alleging they were being denied the opportunity to receive their choice of vacation times as a result of the issuance of guidelines that change how vacations were scheduled at their work site. After denials at the first two levels of the grievance procedure, a level three hearing was held in Beckley, West Virginia, on March 22, 2007. Grievants received an unfavorable level three decision on May 10, 2007, and appealed to level four on May 17, 2007. (See footnote 1) A hearing was held in the Grievance Board's office in Charleston, West Virginia, on February1, 2008, before Administrative Law Judge Landon R. Brown. Grievants were both represented by Grievant, Diana Kincaid; the PEDTA was represented by A. David Abrams, Jr., Esquire. This grievance became mature for decision when the parties submitted fact/law proposals on March 3, 2008. (See footnote 2)

Synopsis

Grievants contend they were denied the opportunity to receive choice vacation times by guidelines established by the PEDTA Director of Tolls, Steve Maynard. These guidelines changed how seniority was calculated for vacation priority at their work site. Grievants allege that the guidelines violate a long-standing practice in the calculation of seniority that allows both part-time and full-time toll collectors to compete for vacation days based upon their initial hire date in either category. Further, Grievants allege that the guidelines violate PEDTA Personnel Policy III-4 relating to attendance and leave, by adopting a definition of seniority for selecting vacation periods that was not previously utilized for toll collectors. However, the evidence shows that there is no specific definition of seniority in Personnel Policy III-4 that was violated by the guidelines. Additionally, even though the method for the calculation of seniority that is set out in the guidelines of January 2006, is different from the method previously used at the Grievants' work site, Director Maynard was able to demonstrate reasons for the calculations that were reasonably related to the differences in the classification of employees. The reasons were not arbitrary or capricious. The following findings of fact are based on the record of the hearings held at level three and level four.

Findings of Fact

1. At all times relevant to this action, Grievants were employed by PEDTA as toll collectors. At the time of the filing of the grievance Diana Kincaid was classified as part-time and Priscilla Skidmore was classified as full-time.

2. There are three toll collection plazas on the West Virginia Turnpike operated by the PEDTA. These are referred to as Barriers A, B and C. Grievants are assigned to Barrier A.

3. PEDTA employs toll collectors at the various barriers in three categories; temporary toll collectors, part-time toll collectors and full-time toll collectors.

4. Toll collectors begin to become eligible for leave and vacation benefits when they achieve part-time status.

5. The basic duties of all toll collectors are the same, but there are significant differences in how each group is treated with regard to reporting to work and accumulation of benefits.

6. An employee must be a part-time toll collector for a significant period of before being considered for a full-time position.

7. The toll barriers operate twenty-fours a day, 365 days a year. It is difficult to schedule vacations for holidays such as Thanksgiving, Christmas, and the Fourth of July because these are very heavy travel times and most of the toll collectors are needed at thebarriers to keep the traffic flowing. These dates are highly prized vacation days among the toll collectors and usually go to the most senior employees.

8. On January 27, 2006, the Director of Tolls, Steve Maynard, issued a memorandum titled “Guidelines for shift and vacation seniority for toll personnel”. In this document Mr. Maynard established a uniform method for assigning vacation dates among employees by seniority in classification of employment. Full-time toll collectors receive first priority for vacation assignments based upon their hire date in that category. Ties in seniority are broken by utilizing the tied employees' hire dates as part-time collectors. Part-time toll collectors get their choice of vacation assignment after all the full-time toll collectors, based upon each employee's hire date as a part-time employee. The part-time employee who was hired first gets first choice of vacation assignments. Seniority ties among part-time employees are broken by referring to the dates the tied employees were hired as temporary toll collectors.

9. According to the testimony of Barrier A Foreman, Tim Feijo, the procedure for choosing vacation days at Barrier A prior to January 27, 2006, was the following:

Each year toll collectors submitted to their supervisor the days they would like to have as vacation days for the upcoming year prior to January 31st. The collectors submitted their top three choices for consideration. The supervisor then took the requests and developed a vacation calendar based upon the requests he received. If two employees chose the same period, the more senior of the employees received the date and the other employee's second choice was considered. Seniority was based upon the initial part-time hire date of the employee regardless of whether the employee was full-time or part-time. Some part-time collectors did not become full-time employees when theopportunity became available. Consequently, some part-time employees have initial hire dates that are before the initial hire date for some full-time employees.

10. There is some evidence that prior to January 27, 2006, the same practice for choosing vacation days that took place in Barrier A was also followed in Barrier C. However, the system for vacation approval was not consistent among all three Barriers.

11. Prior to the issuance of the January 27, 2006, guidelines Mr. Maynard received a complaint from one of the full-time toll collectors that sometimes part-time collectors received their vacation choices prior to full-time employees. As a result of this complaint, Mr. Maynard put the issue of vacation assignments on a bimonthly meeting agenda for discussion with the supervisors from the various barriers.

12. At the meeting of the supervisors, it became apparent that not all the work sites were following the same procedures for assigning vacations. After discussing the issue, the supervisors and the director agreed on the procedure set out in the guidelines issued by Mr. Maynard.

13. Director Maynard gave the following reasons for adopting the guidelines of January 27, 2006, for shift and vacation assignments that calculated seniority based upon time in classification rather than date of initial hire:

1 *

To establish a uniform method for calculating seniority when assigning vacations among all of the work sites.

2 *

Part-time employees can block off ten days per year when they cannot be called out for work. They do not have to use accrued leave for these days. Full-time employees do not have this opportunity.

3 *

Part-time employees can request to work as few as three days per week giving them more opportunity to be away from work than full-time employees who have a set work week with set days off.

4 *

Part-time employees sometimes work different shifts. If a full-time employee is assigned to a shift he or she must stay on that shift until an opening becomes available for another shift. Consequently, full-time employees may end up working all evening or night shifts which limits time they have available with their families.

5 *

Because of the ability of part-time employees to have more days off during the year,

the full-time employees should be entitled to first choice for vacation assignments.

6 *

By allowing employees three choices of preferred vacation days sometimes more senior employees got their third choice before other employees receive their first choice. In the new guidelines, employees were limited to one choice of preferred vacation days to give everyone a better opportunity to get their choice of vacation days.

7 *

There are approximately 92 full-time toll collectors and 27 part-time toll collectors. The largest number of employees benefitted from seniority being defined by time in classification rather than initial hire date.

14. Grievants have moved down in overall seniority ranking for selection of their vacation days at Barrier A. Diana Kincaid dropped form 20th to 29th out of a total of 36l employees. Patricia Skidmore dropped from 23rd to 24th position overall.

Discussion

Grievants argue they are being denied the chance to receive their choice of vacation times as a result of the change of the past practice. At their work site, seniority was based upon the overall first hire date. Grievants feel that the guidelines which define seniority for vacation assignment based upon time in classification are an arbitrary and capricious change from a long-standing past practice.

Unfortunately, resorting to the language of the policy in question provides little guidance. The only statement about seniority in Personnel Policy III-4 related to the assignment of vacation days, is that “in cases of conflicts in dates the employee with the most seniority will be given preference on his/her first choice”. There is no furtherdefinition. Seniority is an imprecise term. It can be based upon the date a person is hired or on the date an employee commences performance of his/her duties. *See* W. Va. Code § 18A-4-7a (a). It can also differ for substitute employees and regular employees. *See* W. Va. Code § 18A-4-8g (a) and (b). (See footnote 3) Grievants point to the accumulation of service credit for retirement as an example of how seniority is based upon initial hire date. However, the accumulation of retirement service credit is based upon a statutory definition and does not rely

solely upon the date of hire but other factors as well, including military service and workers compensation credited service. W. Va. Code § 5-10-2 (10). Seniority as a concept is ambiguous and subject to a variety of interpretations.

Where the language in a policy is either ambiguous or susceptible to varying interpretations, this Grievance Board will give reasonable deference to the agency's interpretation of its own policy. *McCoy and Domingues v. W. Va. Parkways Economic Dev. and Tourism Auth.,* Docket No. 99-PEDTA-074 (July 19, 1999)*; Dyer v. Lincoln County Bd. of Educ.* Docket No. 95-22-494 (June28, 1996)*; Edwards v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 97-PEDTA- 420 (May 7, 1998). *See generally W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993); *Princeton Community Hosp. v. State Health Planning & Dev. Agency*, 174 W. Va. 558, 328 S.E.2d 164 (1985); *Jones v. Bd. of Trustees,* Docket No. 9 4-MBOT-978 (Feb. 29, 1996); *Foss v. Concord College*, Docket No. 91-BOD-351 (Feb. 19, 1993). Thus, PEDTA's interpretation of the provisions in its own internal policy is entitled to some deference by this GrievanceBoard, unless it is contrary to the plain meaning of the language, or is inherently unreasonable. *Dyer, supra*.

Director Maynard's interpretation of the Authority's policy must be judged by the arbitrary and capricious standard. *McCoy and Domingues v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 99-PEDTA-074 (July 19, 1999). 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 is 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). 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))." 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 his judgment for that of PEDTA . *See generally*, *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

Director Maynard presented sound reasons for the guidelines that clarified the method for

assigning vacation days at the toll barriers, not the least of which was to establish a uniform practice for all employees. The Grievants attempted, without success, to establish that there was a uniform past practice among the work sites for allocation of vacation days. However, even if that were the case it would not change the results. The Grievance Board has held that deviation from past practice simply represents one of a number of factors to be considered when determining if a discretionary decision by the employer is arbitrary and capricious. See *Cromley v. Mason County Bd. of Educ*., Docket No. 94-26-573 (Apr. 27, 1995) .

This grievance does not involve a disciplinary matter so Grievants have the burden of proving of their grievance by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Resources*, 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 Grievants failed to meet that burden of proof because the disputed guidelines do not violate law or policy and are based upon reasons related to the operation of the workplace. The guidelines are not arbitrary and capricious.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Resources*, 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. The assessment of whether Director Maynard's guidelines for implementing Personnel Policy III-4, related to attendance and leave, were incorrect must be judged by the arbitrary and capricious standard. *McCoy and Domingues v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 99-PEDTA-074 (July 19, 1999).

3. 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 is 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). 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)).

4. 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 his judgment for that of the employer. *See generally*, *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

5. A deviation from past practice simply represents one of a number of factors to be considered when determining if a discretionary decision by an employer is arbitraryand capricious. *See Cromley v. Mason County Bd. of Educ*., Docket No. 94-26-573 (Apr. 27, 1995).

6. The guidelines implemented by Director Maynard for the assignment of vacation days were based upon reasons related to the differences in the classifications of the employees and related to the efficient operation of the toll barriers. The Grievants did not prove by a preponderance of the evidence that the guidelines were arbitrary or capricious.

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. *See* W. Va. Code § 29-6A-7 *(repealed*, *See footnote 1, supra*). Neither the West Public 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: September 29, 2008

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WILLIAM B. MCGINLEY

Administrative Law Judge

Footnote: 1

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.

Footnote: 2

The grievance was reassigned to the undersigned Administrative Law Judge for administrative reasons.

Footnote: 3

While these example referred to education statutes they are indicative of how the concept of seniority is subject to a variety of permutations.