THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MARVIN BELL and RICHARD DODGE,
Grievants,

v. **Docket No. 2008-0826-CONS**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievants, Marvin Bell[1] and Richard Dodge, filed a grievance against their employer, Division of Highways ("DOH"), on December 8, 2008. The statement of grievance reads:

> Was placed on night shift, while two other employee's [sic] with less seniority were granted day shift. I've been an employee here for 11 years and endured several years on night shift. I don't believe younger employees should surpass senior employees.

For relief, Grievants seek "job placement be made by seniority."

The first day of a level three hearing was held on February 11, 2009, and the second day of hearing was held on February 20, 2009, at the Grievance Board's Westover office. Grievants were represented by Steven L. Shaffer, Esquire, Estep and Shaffer, L.C., and Respondent was represented by Robert Miller, Esquire. This case was heard by Administrative Law Judge ("ALJ") Spatafore, and then transferred to the undersigned when ALJ Spatafore left the Grievance Board. This case became mature on April 24, 2009, upon receipt of the parties' Findings of Fact and Conclusions of Law.

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[1]Grievant Bell was dismissed from this grievance on February 11, 2009, upon Respondent's motion. Respondent asserted Grievant Bell's grievance was moot, as he retired. Grievant's attorney argued Grievant Bell left as the result of a constructive discharge. ALJ Spatafore held that the issue of constructive discharge was a separate issue to be addressed in a separate filing, and because Grievant Bell was no longer employed by Respondent, his grievance was moot.

Synopsis

Grievant Dodge asserts the past practice at the Preston County DOH has been to allow the more senior workers to choose whether they wanted to work day or night shift during Snow Removal/Ice Control ("SRIC") season which lasts from approximately October 31 through April 15. Grievant Dodge asserts that, even though he had more seniority than most in the county, he was placed on night shift after having an argument with the supervisor that resulted with Grievant calling Human Resources in Charleston to discuss the incident. Grievant Dodge also argues that his physician recommended he work day shift, given an issue with his blood pressure. Still, Grievant was placed on night shift during the SRIC season. He avers the decision to place him on night shift was arbitrary, capricious and unreasonable.

Respondent argues it is the policy of DOH not to take seniority into consideration when making shift assignments. Respondent avers that it is important to have a mixture of experienced and less experienced drivers on each shift. Respondent also asserts that Preston County has been understaffed for sometime which affects shift assignments.

Grievant Dodge met his burden of proof that his assignment to night shift during the SRIC season was arbitrary, capricious, and unreasonable.

Findings of Fact

1. Grievant Dodge is employed by DOH as an Equipment Operator 2, has worked for Respondent since July 10, 1995, and is assigned to the Albright garage in Preston County.

2. Late in the afternoon in May 2007, Grievant, along with other employees, were told by their supervisor, Larry Weaver, they had to stay late to handle the flagging for an Appalachian Power installation on the roadway in Kingwood. Grievant was upset and this led to an incident between Grievant and Mr. Weaver. The workers did not have to stay late, as the installation was completed prior to the end of their shift.

3. Shortly after this incident, Grievant called Jeff Black, the Human Resource Director in Charleston, to discuss what had occurred on the job site.

4. Grievant did not speak to Mr. Black, but conveyed the incident to Mr. Black's secretary.

5. In June 2007, while working his shift, Grievant was asked to meet Anthony Paletta, the Administrative Services Manager for District 4, and Mr. Weaver at the Brown Mill Convenience Store in Preston County.

6. Mr. Paletta and Mr. Weaver both spoke to Grievant in their vehicle and directed that he not call Charleston in that manner. The discussion involved a directive that this type of complaint be taken through the County or the District before being taken to the headquarters in Charleston.

7. On June 11, 2007, Mr. Paletta issued a memo explaining that, "Employees are not to be calling Charleston unless directed to do so by Charleston or the district." Level III, Respondent's Exhibit 6.

8. During SRIC season, which lasts from October 31 through April 15, the DOH County Supervisor assigns employees to work on night crews, as well as the regular daytime work schedules.

9. Before 2004, Preston County DOH senior employees were permitted to pick whether they preferred day or night shift for SRIC duty. The less senior employees were placed on the shifts remaining.

10. On February 20, 2004, Fred VanKirk, then Secretary/Commissioner, issued a memo stating seniority was not to be taken into account when making shift assignments.

11. According to Davie Martin, Supervisor in Preston County until 2006, Preston County did not follow the memo. Therefore, senior people received the shift they preferred.

12. Other DOH county garages did not utilize seniority with respect to shift assignments.

13. In November 2006, Grievant was taken off of night shift during SRIC season and placed on day shift, per his choice.

14. For the 2007-2008 SRIC season, Grievant Dodge and Marvin Bell were senior employees who requested to work day shift.

15. Mr. Weaver placed both Grievant Dodge and Mr. Bell on night shift. Grievant Dodge and Mr. Bell were the only two senior employees to have a confrontation with Mr. Weaver and the only two employees placed on night shift against their wishes.

16. In January 2008, Grievant Dodge presented a note from Lynette Cline, P.A.-C, stating:

> I am writing this letter in regards to Mr. Richard Dodge desire to be placed on day shift to help control his hypertension better. I do feel he may be experiencing more stress and the frequent change in sleep patterns which will negatively affect his blood pressure. I do recommend he be placed on day shift to help combat these effects. If you have any questions, please contact

me at 304-329-6963. Patient is needing 2 weeks off to adjust to new dayshift [sic] and get his blood pressure controlled.

17. Grievant was able to take the two weeks off, but was not placed on day shift as requested.

Discussion

Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. *Id.*

Mr. Weaver's decision as to who works night shift during SRIC season must be judged by the arbitrary and capricious standard. "In applying the 'arbitrary and capricious' standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that decision and whether there has been a clear error of judgment. *Bowman Transp. v. Arkansas-Best Freight System*, 419 U.S. 281, 285 (1974); *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276 (1982). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. *Bowman, supra*, at 286." *Hill and Cyrus v. Kanawha County Bd. of Educ.*, Docket No. 96-20-362 (Jan. 30, 1997). "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). 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 agency . *See generally*, *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

Grievant asserts it has been the past practice of Preston County DOH to allow the more senior workers to choose whether they would prefer day or night shift during SRIC season. 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 arbitrary and capricious. See *Cromley v. Mason County Bd. of Educ.*, Docket No. 94-26-573 (Apr. 27, 1995).

The first issue to be decided is whether Grievant proved Preston County DOH has had a consistent past practice of allowing the more senior employees to choose their shift assignment during SRIC season. Given the testimony from Grievant and his witnesses, this has been the past practice. It should be noted that this practice is in contradiction to DOH's overall policy. However, Mr. Martin testified a decision was made not to follow the overall policy, and the testimony did not appear as if Mr. Weaver changed that decision

when he took over as county supervisor. While that decision may be inappropriate, that has been the practice of this particular county.

Given that Preston County has followed that practice, the next issue to be decided is whether placing Grievant on night shift was arbitrary and capricious. As stated above, the deviation from the past practice is only one factor to consider. Quite frankly, the undersigned has two concerns with the night shift assignment. First, Grievant Dodge and Mr. Bell were the only two senior employees on night shift, and they were placed on that shift against their wishes. Ironically, they were also the only two employees who had a confrontation with Mr. Weaver.[2] Second, even after Grievant Dodge presented the doctor's excuse, no accommodations were made to assist him with respect to his shift assignment with his medical issue.[3]

Respondent asserts Mr. Weaver needed a mixture of more and less experienced drivers on the night shift. While this is understandable, it is clear there was tension between Mr. Weaver and the Grievant. There was testimony that Mr. Weaver and Mr. Paletta had a discussion with Grievant in their car about his calling Charleston. This seems highly unusual. To meet in a state car is inappropriate, unorthodox and could be viewed as intimidating.

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[2]This is not to say the undersigned believed either Grievant Dodge or Mr. Bell handled the confrontation with Mr. Weaver in the appropriate manner. It is merely to say that the circumstances surrounding what occurred after the confrontation are troubling, to say the least.

[3]While this is of concern to the undersigned, Grievant did not argue or assert a violation of the Americans with Disabilities Act.

From the facts of this case, it is clear the decision to place Grievant on the night shift was arbitrary and capricious. Grievant has requested that shift assignment be based on seniority. However, DOH policy prohibits that. Because that is the policy of the agency, the undersigned does not believe she can uphold Preston County's continued violation. Therefore, Grievant's requested relief is unavailable. Preston County DOH should follow the required policy as set forth by DOH. Should Grievant ask for a reasonable accommodation due to his health with respect to shift assignment and provide the appropriate documentation, such accommodation should be considered and followed if it is deemed appropriate.

Conclusions of Law

1. Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met her burden. *Id.*

2. "In applying the 'arbitrary and capricious' standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that decision and whether there has been a clear error of judgment. *Bowman Transp. v. Arkansas-Best Freight System*, 419 U.S. 281, 285 (1974); *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276 (1982). Moreover, a decision of less than ideal clarity may

be upheld if the agency's path in reaching that conclusion may reasonably be discerned. *Bowman, supra*, at 286." *Hill and Cyrus v. Kanawha County Bd. of Educ.*, Docket No. 96-20-362 (Jan. 30, 1997).

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 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).

4. 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). 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).

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 arbitrary and capricious. See *Cromley v. Mason County Bd. of Educ.*, Docket No. 94-26-573 (Apr. 27, 1995).

6. The past practice for Preston County DOH was to assign SRIC shifts based on seniority.

7. Grievant Dodge's assignment to night shift was arbitrary and capricious.

Accordingly, this grievance is **GRANTED** in part, and **DENIED** in part. It is ordered that Preston County DOH follow the state-wide policy of not considering seniority when making shift assignments. It is further **ORDERED** that should Grievant ask for a reasonable accommodation based on health, his superiors consider it and if deemed appropriate, assist with the request.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: July 8, 2009

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Wendy A. Elswick
Administrative Law Judge