THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

PATTY ROGERS,
Grievant,

v. **Docket No. 2008-0854-DEP**

DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondent.

D E C I S I O N

Grievant, Patty Rogers, is employed by the Department of Environmental Protection ("DEP") in the Division of Water and Waste Management ("WWM"). She filed this grievance on or about December 11, 2007. Her Statement of Grievance states, "[d]enial of secondary employment opportunity, discrimination. . . ." Attached to the grievance form was a lengthy statement with Grievant's arguments. The Relief Sought is, "[a]pproval of secondary employment/volunteer work."[1]

This grievance was denied at Level One, and mediation was unsuccessful. A Level Three hearing was conducted at the Grievance Board's Charleston office on September 22, 2008. Grievant represented herself, and DEP was represented by Raymond Franks, General Counsel. This matter became mature for decision on October 28, 2008, after the submission of the parties' proposals.

Synopsis

Grievant requested permission to hold outside, secondary employment, and this request was denied by DEP. Grievant asserts DEP's denial of her request was arbitrary and capricious and discriminatory. She contends there is no conflict because the

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[1]The record below does not mention any desire on Grievant's part to perform volunteer work, and this issue will not be discussed further.

secondary employment she wishes to engage in is regulated by the Department of Health and Human Resources ("HHR") and not related to her current employment.

Respondent contends the denial of Grievant's request was appropriate because the agency concluded this secondary employment would conflict with the organizational interest of the agency and would create the appearance of impropriety or conflict. Respondent notes it has denied other requests of a similar nature.

Grievant did not meet her burden of proof and demonstrate DEP's ruling was arbitrary and capricious, or that she had been treated differently from similarly situated employees. For the reasons stated below, this grievance must be DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. At the time of filing this grievance, Grievant was classified as an Environmental Inspector in Training. She was hired in approximately June of 2007.

2. The duties of an Environmental Inspector are to: "perform technical and field inspection work in environmental protection programs to determine compliance with applicable laws, regulations, permits, best management practices and/or contracts within an assigned region of the state." Environmental Inspector class specification. Grievant was employed by WWM in the inspection of underground storage tanks, which routinely hold gasoline and crude oil products.

3. Prior to her employment with DEP, Grievant worked constructing and installing sewage systems. Grievant planned to continue this work after she "settled into" her DEP position. She wants to obtain secondary employment with her boyfriend's company to install sewage systems for single family homes.

4. During her orientation, Grievant became aware she needed approval from her employer to obtain secondary employment. Grievant sought this approval, and on

November 27, 2007, then Deputy Cabinet Secretary Lisa McClung denied this request. Grievant resubmitted this request, it was reconsidered, and it was again denied. Deputy McClung believed that an appearance of impropriety or conflict existed with regard to Grievant's secondary employment request.

5. Grievant requested an exemption from the Ethics Commission and on December 5, 2007, received a response. This response stated, "there is no provision in the Ethics Act which constricts you from working for your friend's business . . . in sewer system installation, based on the fact that you do not exercise regulatory authority over any of these activities." Grievant's Exh. 3 at Level One.

6. Grievant appealed Deputy McClung's decision to the State Personnel Board. On January 17, 2008, this Board upheld Deputy McClung's decision.

7. There is overlap between DEP and HHR in the regulation and enforcement of sewage systems. Because of this overlap, DEP and HHR have worked out procedures delineating who does what. Much of the day to day activity is handled by county health departments.

8. All procedures and processes must be in accordance with the Groundwater Protection Act which is under the purview of DEP.

9. HHR's Division of Health licenses and issues permits for the types of sewage systems Grievant wishes to install, and DEP has written agreements with various county health departments to process and share required septic tank registration fees. Respondent's Exh. 1 at Level Three.

10. When a sewage disposal system fails, the county health department is routinely the agency that deals with compliance issues and brings enforcement action against the homeowner, but DEP could be called in to assist. Frequently, the landowner attempts to rectify the sewage system's failure by applying to DEP for a permit to discharge effluent into surface waters. The landowner must remit checks to both DEP and HHR with

paperwork requesting permission to discharge effluent. Grievant's Exh. 1 at Level Three. Many installers are aware that DEP routinely approves these requests, and this knowledge has resulted in some installers constructing the wrong system for the owner's land. (DEP did not indicate Grievant was one of these installers, and other witnesses praised Grievant's work.)

11. No other WWM employee has received permission to install sewage systems. One WWM employee did install sewage systems, but did not request or receive permission to engage in this secondary employment. A former employee of the Office of Air Quality did install sewage systems from 1996 to 2002, but the record is unclear if he had received permission for this employment.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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).

The case of *Swiger v. Department of Environmental Protection*, 95-DEP-569 (March 12, 1996), is instructive with both questions raised by Grievant.

I. Was DEP's action of denying Grievant's request for secondary employment arbitrary and capricious?

"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*, 198 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 above-case law demonstrates that proving an agency's action is arbitrary and capricious is difficult to achieve.

There is no policy, rule, or regulation that prohibits an agency from imposing more stringent requirements for secondary employment than that used by the Ethics Commission. Respondent may consider further criteria in deciding to grant or deny secondary employment. Respondent relies on the Division of Personnel's Rule 17.1 which states:

> Other Employment. No employee shall hold other public office or have conflicting employment while in the classified service. Determination of the conflict shall be made jointly by the appointing authority and the Board, or may be specifically delegated by the Board to the appointing authority, who shall consider whether the other employment: (1) will be in conflict with the interests of the agency; (2) will interfere with the performance of the employee's official duties; (3) will use or appear to use information obtained in connection with official duties which is not generally available to the public; or, (4) may reasonably be regarded as official action.

Additionally, the Division of Personnel's Policy on this issue states: "any secondary employment . . . **must not**: interfere with, conflict with, or have the appearance of a conflict with an employee's primary State employment. . . ." (Emphasis added).

Swiger, like Grievant, had received an exemption from the West Virginia Ethics Commission to engage in secondary employment. He wished to perform forestry management services to landowners within his geographic area of responsibility. Swiger

presented evidence that, although the Environmental Enforcement Office has authority to act under the Water Pollution Control Act, the Division of Forestry has taken the lead in handling complaints and investigations of violations under that Act. Swiger presented unrefuted evidence that virtually no forestry related water pollution violation complaints had been handled by his Office, and it was the sole responsibility of the Division of Forestry.

DEP presented other data outlining its concerns, and noted the possibility for private gain violation. The administrative law judge found that, given the concerns of Respondent, it was not arbitrary or capricious for Respondent to deny Swiger's request for secondary employment.

The same reasoning applies here. Typically, Grievant's installation of sewage systems would be regulated by HHR through the county health departments. But it is clear these agencies overlap, and DEP can become involved with enforcement issues if requested. Other inspectors with WWM could encounter Grievant's installations, and it is also possible these inspectors might be more lenient when problems arise because Grievant was a co-worker. Additionally, if one of Grievant's installations were to fail and the landowner needed to file a discharge request from DEP, then DEP would be directly involved with the failure of Grievant's secondary employment work product. Grievant has not established that DEP's failure to approve her secondary employment was arbitrary and capricious.

II. Discrimination

Grievant's argument is essentially that she has been treated differently than similarly situated employees. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

(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. Higher Educ. Policy Comm., 221 W. Va. 306 , 655 S.E.2d 52 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

In *Swiger*, the employee proved other, similarly situated employees had been given permission for the type of secondary employment he was seeking, and this grievance was granted. Here, Grievant has not met her burden of proof and established she has been discriminated against. She did not establish that any other WWM employees have been treated differently. The employee in the Office of Air Quality worked for another division and had nothing to do with the regulation of water and sewage. The employee, who did work for WWM, had not requested permission to have secondary employment, thus his secondary employment was in violation of policy.

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 her grievance by a preponderance of the evidence. *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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).

2. "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*, 198 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)).

3. Division of Personnel's Rule 17.1 states:

> Other Employment. No employee shall hold other public office or have conflicting employment while in the classified service. Determination of the conflict shall be made jointly by the appointing authority and the Board, or may be specifically delegated by the Board to the appointing authority, who shall consider whether the other employment: (1) will be in conflict with the interests of the agency; (2) will interfere with the performance of the employee's official duties; (3) will use or appear to use information obtained in connection with official duties which is not generally available to the public; or, (4) may reasonably be regarded as official action.

4. The Division of Personnel's Policy on this issue states: "any secondary employment . . . **must not**: interfere with, conflict with, or have the appearance of a conflict with an employee's primary State employment. . . ." (Emphasis added). *See Swiger v. Dep't of Envt'l Protection*, Docket No. 95-DOP-569 (Mar. 12, 1996).

5. Grievant has not met her burden of proof and demonstrated DEP's action in denying her request for secondary employment to be arbitrary and capricious.

6. Discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d).

7. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (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. Higher Educ. Policy Comm., 221 W. Va. 306 , 655 S.E.2d 52 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

8. Grievant did not meet her burden of proof as she did not establish she had been discriminated against. Grievant did not demonstrate any similarly situated, WWM employees had been treated differently.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. *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 (eff. July 7, 2008).

Date: July 20, 2009

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Janis I. Reynolds
Administrative Law Judge