THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

ISMAIL S. LATIF,
Grievant,

v. **DOCKET NO. 2008-1608-DOT**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,
Respondent.

DECISION

This grievance was filed by Grievant, Ismail S. Latif, on May 14, 2008, against his employer, the Division of Highways. The statement of grievance reads:

> Many WVDOH employees in the state are allowed to park their assigned state vehicles at their domicile or at a DOH, DMV or WVSP facility which is nearest the employee's domicile (Administrative Operating procedure: Chapter 2: Section IV). I am denied of the same benefit by the WVDOH due to discriminative reasons.[1]

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[1] Grievant raised for the first time in his post-hearing written argument the issue of race discrimination, asserting that those who are allowed to pool their state owned vehicles at a location other than the District Headquarters are white, while he is not. First, the record developed in this grievance does not reflect the race of any named individual. Second, the undersigned cannot consider completely new arguments raised for the first time post-hearing, as the Respondent was not put on notice that it needed to address this issue at the hearing. Third, the Grievance Board does not have the authority to determine liability for claims that arise under the West Virginia Human Rights Act (W. VA. CODE §§ 5-11-1, *et seq*), such as race and gender discrimination. *See Bowman v. W. Va. Educational Broadcasting Auth.*, Docket No. 96-EBA-464 (July 3, 1997); *Rodak v. W. Va. Dep't of Tax and Revenue*, Docket No. 96-T&R-536 (June 23, 1997). Nevertheless, the Grievance Board's authority to provide relief to employees for discrimination, as that term is defined, includes jurisdiction to remedy discrimination that would also violate the Human Rights Act. *See Smith v. W. Va. Bureau of Employment Programs*, Docket No. 94-BEP-099 (Dec. 18, 1996); *Vest v. Bd. of Educ.*, 193 W. Va. 222, 455 S.E.2d 781 (1995).

Grievant also raised for the first time in his written argument that DOH had discriminated against him by "taking away" his Traffic Technician, that DOH does not

As relief Grievant seeks:

> I should be allowed to park the state vehicle at my domicile or at a DOH, DMV or WVSP facility which is nearest to my domicile.
> A 5% pay increase and punitive damages compensation in order to compensate the lost benefit.[2]

A hearing was held at level one on June 3, 2008, and the grievance was denied at that level on June 24, 2008. Grievant appealed to level two on July 31, 2008, and a mediation session was held on October 17, 2008. An Order of Unsuccessful Mediation was entered on October 22, 2008, and Grievant appealed to level three on October 27, 2008. Two days of hearing were held at level three before the undersigned Administrative Law Judge on March 24 and May 27, 2009, at the Grievance Board's Westover office. Grievant appeared *pro se* and Respondent was represented by Jennifer F. Alkire, Attorney, Legal Division. This matter became mature for decision on June 22, 2009, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant believes he has been discriminated against because he is not allowed to use his assigned state owned vehicle to commute to and from work, while there are some

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provide him with enough staff, and that he had been denied a transfer or promotion to an area closer to home. These are entirely different grievances, and will not be addressed in this decision.

[2] The Grievance Board does not award punitive damages in making an employee whole. *Spangler v. Cabell County Bd. of Educ.,* Docket No. 03-06-375 (Mar. 15, 2004); *Walls v. Kanawha County Bd. of Educ.*, Docket No. 98-20-325 (Dec. 30, 1998); *Hall v. W. Va. Dep't of Transp*., Docket No. 96-DOH-433 (Sept. 12, 1997); *Snodgrass v. Kanawha County Bd. of Educ.*, Docket No. 97-20-007 (June 30, 1997); *Miker v. W. Va. Univ.*, Docket No. 06-HE-133 (July 18, 2006). *Accord, Vest v. Bd. of Educ. of County of Nicholas*, 193 W. Va. 222, 225, 227 n.11 (1995). Further, Grievant presented no evidence of the amount of any lost benefit, nor did he present any evidence to demonstrate that he is entitled to a 5% pay increase.

DOH employees who are allowed to do so, or are allowed to park their state owned vehicles at a site other than the District Headquarters which is closer to their home. DOH's Vehicle Policy provides that certain employees, including those who are primarily field based, may park their state owned vehicles at locations other than the District Headquarters. Grievant's duties are not primarily field based, and he is not similarly situated to those employees to whom he compares himself.

The following Findings of Fact are properly made from the record developed at levels one and three.

Findings of Fact

1. Grievant is employed by the Division of Highways ("DOH") as the Traffic Engineer (Highway Engineer 4) in District 7, and is assigned to the District Headquarters in Weston, Lewis County, West Virginia. Grievant is the only Traffic Engineer assigned to District 7.

2. District 7 is comprised of the counties of Lewis, Upshur, Barbour, Braxton, Webster, and Gilmer.

3. Grievant chooses to reside in Morgantown, West Virginia, which is in Monongalia County. The most direct route from Morgantown to Weston is Interstate 79. The first county in District 7 along I-79 south from Morgantown is Lewis.

4. On August 29, 2006, the Secretary of Transportion/Commissioner of Highways, Paul A. Mattox, Jr., advised DOH District Engineers/Managers, and Division Directors of a new Policy regarding where DOH owned vehicles were to be parked, or "pooled," at night. Section II of that Policy states that certain employees "will be furnished a State vehicle for commuting to and from work." Those employees are the District

Engineer/Manager, Assistant District Engineer - Construction, and the Assistant District Engineer - Maintenance. The Policy further states in Section II that:

> 4. The District Engineer/Manager may authorize the use of a State vehicle to any employee during Emergency Codes "Blue," "Yellow," or "Red." During SRIC Season, the District Engineer/Manager may authorize continuous temporary 24-hour assignment.
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> 5. Vehicles assigned to personnel (e.g. maintenance, right of way and construction personnel) who work at a project site or have predominantly field based assignments shall be pooled at the secure DOH, DMV or WVSP facility which is nearest the employee's domicile.[3]
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> 6. Vehicles assigned to personnel who have project or predominantly field based assignments and who reside outside the boundaries of their assigned districts shall pool their vehicles at a secure facility, as defined therein, closest to their domiciles, but *within* the boundaries of their assigned districts. Provided, that any employee so assigned by management for the benefit of the agency, may pool his or her vehicle as provided in Item 5 of this section.

The Commissioner retained discretion to grant exceptions to the Policy.

5. The Vehicle Policy states in Section III that:

> 10. It is the intent of this Policy to restrict the use of State vehicles to that stated. Interpretations which tend to liberalize this intent are not valid.

6. Grievant is assigned a state owned vehicle for work purposes. For a little more than one year, Grievant was working on a research project in Morgantown on Tuesdays and Fridays, and was allowed to pool his state owned vehicle at his home on Mondays and Tuesdays, for the duration of the research project.[4] Grievant reported to the

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[3] A Memorandum was issued by the Commissioner at some later point which expanded the list of approved facilities to include places such as schools and fire departments.

[4] This allowed Grievant to use the state owned vehicle in his research on Tuesdays, but not on Fridays.

District Headquarters in Weston the remainder of the week, and used his personal vehicle to drive to and from his home and back on the remaining days.

7. In May 2008, Ronald Hooten, the District 7 Manager, discovered that the research project on which Grievant had been working in Morgantown had never been funded by DOH. On May 8, 2008, Grievant was told by his supervisor, Ronald Smith, the District 7 Maintenance Engineer, that he would no longer be allowed to work on this project, and he would no longer be allowed to pool his state owned vehicle at his home.

8. Grievant's duties are primarily office (District) based. He goes out into the field to observe situations, but he is not assigned to a work site on a daily basis away from the District Headquarters, and he goes to the District Headquarters everyday. Grievant is not called out during the night to handle emergency situations, nor is he required to perform inspections or repairs on his way to or from work.

9. All Traffic Engineers currently employed by DOH pool their assigned state owned vehicles at the District Headquarters for their assigned Districts.

10. The District 7 Bridge Engineer is also required to pool his assigned state owned vehicle at the District Headquarters.

11. Teresa Mayle is a Project Engineer for DOH in District 7. She oversees field projects, and her duties are predominantly field based. She is currently assigned to a project in Harrison and Marion Counties, and travels to the job site on a regular basis to work. She is allowed to pool her assigned state owned vehicle at the approved location closest to her domicile, which is the Barbour County Headquarters.

12. Mike Miller is the Acting Construction Engineer and Area Supervisor for District 7, and his duties are primarily field based. He is allowed to pool his assigned state

owned vehicle at his residence, as is specifically provided by the Vehicle Policy.

13. Terry Matthews is a Transportation Engineering Technician in the Construction Section in District 7. He inspects guardrails throughout the District, and his predominant duties are field based. He resides in Doddridge County, and is allowed to pool his assigned state owned vehicle at the approved location in District 7 nearest his domicile, which is the Troy School in Troy, Gilmer County.[5]

14. Don Hall, Sr., is a Transportation Engineering Technician Sr. in District 4. The District 4 Manager has authorized him to park his assigned state owned vehicle at his home at night because he handles emergency calls at night.[6]

15. Farid Shoukry is a Highway Engineering Associate in District 4. The District 4 Manager has authorized him to park his assigned state owned vehicle at his home at night because he handles emergency calls at night in Morgantown. In addition, Mr. Shoukry's duties are primarily field based.

16. The Transportation Engineering Technicians Sr. in Districts 1, 3, and 8 pool their state owned vehicles at the District Headquarters.

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[5] Grievant asserted in his post-hearing written argument that Mr. Hooten lied in his testimony, and that the "North-West region does not have more work than the rest of the region in the District." The record contains no testimony to support these conclusions and they will not be further addressed.

[6] Grievant disputed the accuracy of this information because DOH did not produce any documentation of Mr. Hall's duties. Grievant carried the burden in this grievance, not Respondent. It was Grievant's burden to prove that he was being treated differently from Mr. Hall, that he was similarly situated to Mr. Hall, and that the reasons for the different treatment were not related to actual job responsibilities. DOH provided information to Grievant prior to the second day of hearing regarding the reason Mr. Hall was allowed to pool his vehicle at his home; however, Grievant did not subpoena any other records, nor did he subpoena Mr. Hall or Mr. Hall's supervisor. Further, Grievant offered no testimony himself about Mr. Hall's duties.

Discussion

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 Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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).

Grievant asserted that he has been discriminated against because some employees are allowed to pool their assigned state owned vehicles at a location other than the District Headquarters, while he is not. He argued that he is similarly situated to these employees because all of them live away from the workplace and drive a long distance to go to work. DOH responded that it is following its Policy, which allows certain employees to pool their assigned state owned vehicles at a location other than the District Headquarters, including employees who are primarily field based. Grievant is not field based and the Policy does not allow him to pool his assigned state owned vehicle at a location other than District Headquarters. DOH also argued that Grievant is not in the same classification as any of the employees to whom he compares himself, and therefore, he has not been discriminated against.

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

Grievant did not demonstrate that he was similarly situated to any other employee either in District 7, or any other District, who is allowed to pool his assigned state owned vehicle at a location other than the District Headquarters. First, Grievant is the District Traffic Engineer. None of the other District Traffic Engineers in the state is allowed to pool his assigned state owned vehicle at any location other than the District Headquarters. Those employees Grievant identified as being allowed to pool their state owned vehicles at other locations are not in Grievant's classification, and the reason they are allowed to pool their vehicles at other locations is related to their job responsibilities, which are substantially different from Grievant's.[7] Grievant's job requires him to report to the District

[7] Grievant asserted in his post-hearing written argument that Mr. Shoukry's duties are similar to his own. No testimony was presented to support such a conclusion, nor did Grievant indicate that he had any knowledge of Mr. Shoukry's daily duties and responsibilities. It was Grievant's burden to produce evidence at the hearing to support his assertions.

Headquarters each day. While he does visit sites in the field, his duties are primarily office based. When he goes to visit a work site, he can begin that trip from the District Headquarters, and return to the District Headquarters when he has completed his inspection.

Further, DOH is following its Policy on vehicle usage. Grievant's duties are primarily office based, and as such, he is to pool his assigned state owned vehicle at the District Headquarters. While Grievant seemed to contest the conclusion that he is primarily office based in his questioning of the witnesses, he presented no testimony whatsoever regarding what he actually does on a daily basis. It was Grievant's burden to demonstrate that DOH's determination that his duties are primarily office based was wrong. There is no evidence in the record from which the undersigned can draw such a conclusion. Grievant did not demonstrate that he should be allowed to pool his assigned state owned vehicle at a location other than the District Headquarters.

The following Conclusions of Law support the Decision reached.

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 Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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. 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 Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

3. Grievant is not similarly situated to any DOH employee who is allowed to pool his assigned state owned vehicle at a location other than the District Headquarters. Further, any difference in treatment is related to the actual job responsibilities of the employees.

4. Respondent has in place a Policy which specifically outlines the conditions under which a DOH employee may pool his assigned state owned vehicle at a location other than the District Headquarters. Under this Policy, Grievant must pool his assigned state owned vehicle at the District Headquarters.

Accordingly, this grievance is **DENIED**.

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: July 8 , 2009