WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SCOTT A. THOMAS,
Grievant,

v. **Docket No. 2008-1869-DOT**

WEST VIRGINIA PARKWAYS ECONOMIC DEVELOPMENT AND TOURISM AUTHORITY,
Respondent.

DECISION

Grievant Scott Thomas is employed by the Parkways Economic Development and Tourism Authority ("PEDTA") at the Chelyan Maintenance Area. As part of his employment, Grievant is required to maintain a valid commercial driver's license ("CDL"). Grievant was required to take a drug and alcohol test on June 12, 2008, and his blood alcohol concentration exceeded acceptable limits set by the West Virginia and United States Departments of Transportation. As a result of failing this test, Grievant was suspended for five working days.

Grievant works a shift of four, ten-hour days, per week. Other maintenance workers employed by the Respondent, at different maintenance areas, work shifts of five, eight-hour days, per week. As a result of the shift worked by Grievant, the five working days suspension equaled fifty hours of lost pay. A five working days suspension for a maintenance worker on the five days per week shift, would result in the loss of forty hours of pay.

On June 25, 2008, Scott Thomas filed a grievance alleging that his suspension was too long and that he was improperly denied vacation pay as a result of the length of his

suspension. As relief, Grievant requested, "shift pay for Monday [June 23, 2008] and Holiday pay for 6/20/2008." The grievance was filed at level three of the grievance procedure because it involved a suspension from employment.[1] A level three hearing was held at the Charleston office of the Public Employees Grievance Board on October 9, 2008. Grievant was present and represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. PEDTA was represented by A. David Abrams Jr., PEDTA General Counsel. At the close of the hearing, the parties agreed to submit proposed findings of fact and conclusions of law, the last of which was received at the Grievance Board on November 17, 2008. This matter became mature for decision on that date.

Synopsis

Respondent's policy sets the minimum penalty for an employee failing a drug and alcohol test as a suspension of five working days without pay. Respondent avers that Grievant was given this minimum penalty and it should be upheld. Grievant counters that his work week is made up of four days that are ten hours long, while similarly classified employees, at other work stations, work five-day work weeks with eight hour days. Grievant claims that this difference in work schedules resulted in the minimum suspension costing him ten more hours of pay than a similarly situated employee would receive for the same offense, constituting prohibited discrimination. There is no reason related to the employees' job responsibilities for penalizing Grievant more severely than others in his

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[1] W. VA. CODE § 6C-2-4(a)(4) states the following:
An employee may proceed directly to level three upon the agreement of the parties or when the grievant has been discharged, suspended without pay or demoted or reclassified resulting in a loss of compensation or benefits. Level one and level two proceedings are waived in these matters.

classification for the same offense. For reasons fully discussed below, the grievance is granted in part and denied in part.

The following findings of fact are based upon a thorough review of the record.

Findings of Fact

1. Grievant is employed by the Parkways Economic Development and Tourism Authority ("PEDTA") and is assigned to the Chelyan Maintenance Area of the West Virginia Turnpike.

2. Grievant has been continually employed by the PEDTA since 1992 with no previous suspensions.

3. In the Chelyan Maintenance Area, employees work four days per week, ten hours per day. This shift is typically referred to as a "4/10" shift. PEDTA employees in other maintenance areas on the West Virginia Turnpike, generally work five days per week, eight hours per day, and only work a 4/10 shift seasonally.

4. Grievant's duties require him to maintain a commercial driver's licence ("CDL"). PEDTA employees holding a CDL are subject to mandatory random drug and alcohol testing under a policy promulgated by the West Virginia Department of Transportation and authorized by the United States Department of Transportation.[2]

5. The drug and alcohol testing policy sets a blood alcohol concentration limit of .04. By a directive dated November 25, 1996, the Secretary of the Department of

[2] The PEDTA is a division of the West Virginia Department of Transportation and has adopted many of the employment policies of that Department including the policy related to testing employees required to hold a CDL.

Highways established the minimum penalty for a higher blood alcohol concentration as follows:

> A first offense . . . alcohol concentration of .04 and above will carry a minimum suspension of five working days. The suspension can be longer if the employee does not comply with the Policy's requirement to consult a substance abuse professional.

See Respondent Exhibit 2.

6. On June 12, 2008, as a result of "reasonable suspicsion" that Grievant might be under the influence of alcohol, he was required to take a blood alcohol test.[3] The test confirmed that Grievant's blood alcohol concentration was .045, which exceeded the allowed limit.

7. After the test, Grievant was sent back to work with his maintenance crew, working at Toll Barrier C on the Turnpike. At 12:30 p.m. Grievant was sent home by the foreman of his work section, Steve Arthur, and told he would have to take four hours of annual leave for the remainder of the day.

8. When Grievant was sent home, he was given an Employee Discipline Report, signed by the General Manager, Gregory Barr, stating that he was being suspended for five days, "[f]rom 6-13-08 to 6-20-08."

9. June 13, 2008 and June 20, 2008 were both Fridays. Because Grievant works a four-day week, he did not normally work on Fridays. June 20, 2008 was West Virginia Day, a paid holiday for PEDTA employees.

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[3] Grievant's supervisor observed that Grievant was displaying the following indicators of being under the influence of a prohibited substance: chronic eye redness, odor of alcohol, unsteady walking, as well as, thick and slurred speech.

10. On June 18, 2008, Grievant came to the Chelyan Maintenance office to pick up his pay check. At that time, he was informed by Mr. Arthur that his suspension was extended to include Monday, June 23, 2008.

11. PEDTA Director of Human Resources, Carrie Roache, testified that the period of suspension was changed because June 13, 2008 was Grievant's regular day off and June 20, 2008 was a paid Holiday. Since neither of these days was considered a working day for Grievant, they could not be considered as part of his suspension for five working days. Based upon this reasoning, Grievant was suspended from work, without pay, on June 16, 17, 18, 19, and 23. Since each of these days was a ten-hour work day, Grievant lost fifty hours of pay as a result of the suspension.

13. Any PEDTA employee, working at the other maintenance areas, on a work week of five, eight-hour days would have lost only forty hours of pay for the minimum five working days suspension.

14. PEDTA Personnel Policy III-3 requires that in order for an employee to be eligible for holiday pay, he or she must have worked the scheduled work day before the holiday and the scheduled work day after the holiday.

15. Grievant was suspended without pay on June 19, 2008 and, consequently, did not work that scheduled work day before the West Virginia Day Holiday.

Discussion

This case involves a suspension which is a disciplinary action. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving, by a preponderance of the evidence, that the action taken against an employee was appropriate. Procedural Rules of the W. Va. Public Employees Grievance Board, 156

C.S.R. 1 § 156-1-3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 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). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Grievant was given a suspension without pay for having a blood alcohol concentration of .045, which exceeded the limit allowed by state and federal policy. Grievant does not contest the administration of the drug and alcohol test or whether the test was warranted. A directive from the Director of the Department of Highways, requires that the minimum suspension for the first offense of having a blood alcohol concentration of .04 or above, is five working days. The directive states that the suspension can be for a longer period if the employee refuses to consult with a substance abuse specialist.[4] There is no evidence that Grievant refused to meet with a substance abuse specialist or that the intention of his supervisor was to give Grievant more that the minimum penalty for his first offense.

Grievant alleges that the application of the Department of Highways directive was discriminatory because he received a greater penalty than other maintenance workers would receive for the same offense, solely because he works a 4/10 shift. Grievant also alleges that Respondent unilaterally changed the dates for his suspension, causing him to lose pay for the West Virginia Day Holiday.

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[4] *See* Respondent's Exhibit 2.

Respondent did change the days of Grievant's suspension. The Employee Disciplinary Report given to Grievant by his supervisor stated the suspension would be "[f]rom 6-13-08 to 6-20-08." Grievant was informed that the dates had changed when he stopped by the office to pick up his paycheck on June 18, 2008. PEDTA Director of Human Relations, Carrie Roache, explained that the minimum penalty for failing the drug and alcohol test was five *working* days. Since Grievant worked a 4/10 shift, Fridays were not working days for him. Additionally, West Virginia Day was a paid holiday and also not a working day for Grievant. Therefore, suspension for June 13 and 20, 2008 was not in compliance with the directive for a first offense of violating the drug and alcohol policy since these were not working days for Grievant. The suspension was changed to June 16, 2008 through June 23, 2008, to include five working days.

It is well established that a government agency's determination regarding matters within its expertise is entitled to substantial weight. *Princeton Community Hosp. v. State Health Planning & Dev. Agency*, 174 W. Va. 558, 328 S.E.2d 164 (1985). *Security Nat'l Bank v. W. Va. Bancorp*, 166 W. Va. 775, 277 S.E.2d 613 (1981). In this instance, changing the days of the suspension to days Grievant was actually scheduled to work, is consistent with the language of the directive. It cannot be reasonably argued that suspending an employee on his regular day off, or a holiday, is intended by a directive setting the length of a suspension in working days. Therefore, the change of the suspension days merely corrected a mistake by Grievant's supervisor and was proper.

The suspension began on the first working day after the failed alcohol test, which was Monday, June 16, 2008. The fourth day of the suspension was June 19, 2008, the day before West Virginia Day. PEDTA Personnel Policy III-3 requires that in order for an

employee to be eligible for holiday pay, he or she must have worked the scheduled work day before the holiday and the scheduled work day after the holiday. Since Grievant was suspended on the work day immediately prior to the Holiday, he is not entitled to holiday pay for West Virginia Day, June 20, 2008.

The next issue is whether the penalty imposed on Grievant was discriminatory. "Discrimination" is defined by statute 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 Education Policy Comm., 655 S.E.2d 52 (2007) (per curium); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

The Department of Highways directive sets the minimum penalty at a suspension of five working days. For most PEDTA maintenance employees and other employees required to hold a CDL, that would normally result in a loss of forty hours of pay, because their regular work week consists of five eight-hour days.[5] For Grievant, a suspension of

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[5] PEDTA Maintenance Area employees, not in the Chelyan Area, only work a 4/10 shift seasonally. The testimony did not describe what "seasonally" means, but it was clear

five working days results in a loss of fifty hours of pay. Grievant suffers a much larger penalty than similarly-situated employees for the same offense. The first prong of the *Frymier* test is met. There is nothing different about the job responsibilities performed by Grievant and those performed by other PEDTA maintenance workers required to hold a CDL. It is undisputed that the only reason Grievant received a 25% higher penalty for the same offense is that he works a 4/10 shift while others do not. This is not a reason related to the job responsibilities of the employees. The second prong of the *Frymier* test is satisfied. Finally, there is no evidence that Grievant agreed in writing to be punished differently than similarly-situated employees. The final prong of the test is met. The suspension of Grievant for five ten-hour work days constitutes discrimination as defined in W. VA. CODE § 6C-2-2(d).

PEDTA argues that there is no discrimination under the directive because all first time offenders receive the same punishment, a suspension of five working days. While it is true that all employees receive a suspension of five working days without pay, it is equally true that not all first offenders receive an equal punishment. Clearly, employees such as Grievant, receive a much higher penalty for the same of offense, for reasons that have nothing to do with job performance or safety issues.

Interpretation of the PEDTA'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

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that for the majority of the year they work five days per week, eight hours per day.

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).

In this situation, Respondent's application of its own directive caused an unreasonable result. The criteria for the implementation of the suspension relate to the need for sober operators of heavy equipment. The rule is based upon the duties performed and the need for safety. There was no evidence that the fact that Grievant works a 4/10 shift, justified a higher penalty for a first violation of the drug and alcohol policy than what would be imposed upon employees employed for a standard work week. Respondent's interpretation and application of the directive at issue do not rely on the criteria intended to be considered for the nature of the punishment and is arbitrary and capricious.

For Grievant to receive the same punishment for the first violation of the drug and alcohol policy as other similarly-situated employees, he should have been suspended for forty hours without pay or four working-days. Grievant must be reimbursed for the additional ten hours of pay he was denied by the five working days suspension. However, for the reasons set out above, Grievant is not entitled the holiday pay for West Virginia Day. Consequently the grievance is granted in part and denied in part.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving, by a preponderance of the evidence, that the action taken against an employee was appropriate. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2008); *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 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. "It is well established that a government agency's determination regarding matters within its expertise is entitled to substantial weight." *Princeton Community Hosp. v. State Health Planning & Dev. Agency*, 174 W. Va. 558, 328 S.E.2d 164 (1985). *Security Nat'l Bank v. W. Va. Bancorp*, 166 W. Va. 775, 277 S.E.2d 613 (1981).

3. PEDTA Personnel Policy III-3 requires that in order for an employee to be eligible for holiday pay, he or she must have worked the scheduled workday before the holiday and the scheduled work day after the holiday. Grievant was suspended without pay on the workday immediately prior to the West Virginia Day, therefore, he is not entitled to holiday pay that day.

4. 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., 655 S.E.2d 52 (2007) (per curium); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

5. Grievant proved that he received a greater penalty than would have been imposed upon similarly-situated employees for the same offense and that the difference in treatment was neither related to actual job responsibilities nor agreed to in writing by Grievant. The higher penalty imposed on Grievant amounts to discrimination, as that term is defined in W. VA. CODE § 6C-2-2(d).

6. Interpretation of an agency's own policy or directive 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).

7. Respondent's interpretation and application of its own directive that resulted in Grievant receiving a greater penalty than would have been imposed upon similarly-situated employees for the same offense is arbitrary and capricious and therefore improper.

Accordingly, the grievance is Granted in part and Denied in part.

Respondent is Ordered to reimburse Grievant for ten hours of pay that he would have received for the fifth working day of his suspension had he been penalized by losing forty hours of pay instead of fifty. Respondent is also Ordered to pay Grievant the appropriate statutory interest related to the back pay awarded herein.

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: January 8, 2009

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William B. McGinley
Administrative Law Judge