WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

Terry Cook, et al.,
Grievants,

v. **Docket No. 2008-0966-CONS**

Parkways Economic Development and Tourism Authority,
Respondent.

D E C I S I O N

Grievances were filed against Parkways Economic Development and Tourism Authority (herein also referenced as "Parkways" or "Respondent") on or about December 19, 2007. The grievances claim discrimination regarding Parkways Policy IV-11, "Vehicle Use" as Grievants[1] were employees affected by a Memorandum issued by Respondent's General Manager dated April 17, 2007 regarding "COST SAVING INITIATIVES" and an amendment of the Parkways Personnel Policy and Procedure IV-11- "ASSIGNMENT AND USE OF TRANSPORTATION VEHICLES," promulgated on April 16, 2007. Collectively, these two documents formed a Vehicle Fleet Mileage Reduction Order. The stated relief sought was "Treated the Same," or "Fair Treatment," or "Fair & Equal Treatment."

A hearing was held at level one on January 8, 2008, and the grievance was denied at that level on February 15, 2008. The grievance(s) were appealed to level two and consolidated with a nearly identical grievance filed by Garry Dickens which was also denied at level one. The Consolidation Order was dated July 3, 2008. After an extended

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[1] The individual Grievants of this matter are Terry Cook, Benny R. McKinney, Paul Perdue, Greg Wriston, and Garry Dickens, who was joined subsequent to consolidation. Grievant Dickens' April 20, 2007, grievance statement alleges, "Unfair procedures and practices." The relief sought being, "A vehicle to drive to and from my work station and any cost that may occur while driving my own vehicle."

mediation, which proved unsuccessful, an Order was entered on October 8, 2008. The consolidated grievance was appealed to level three. A level three hearing was held before the undersigned Administrative Law Judge on July 7, 2009, in the Grievance Board's Charleston office. Grievants, Garry Dickens and Paul Perdue appeared in person, and by representative, Gordon Simmons, Steward, UE Local 170. Respondent appeared by Counsel, A. David Abrams, Jr., Attorney at Law. This case became mature for decision on September 14, 2009, the deadline for the submission of the parties' proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals.

Synopsis

Grievants were among the employees affected by Respondent's Fleet Mileage Reduction Order. Said order ended a prior practice that had permitted certain employees to ride part way to work in Parkways' vehicles. Further, employees' work hours commenced when they reported for their Parkways ride rather than when they later reported to their duty stations. In April 2007, Respondent abolished this practice, and all employees who previously had available some form of Parkways transportation to their duty station were required to absorb their own commuting expense and only paid for work hours after they reported to work instead of when they began their commute to work.

The changes implemented were management decisions within Parkways' discretion to make. At issue is whether the Fleet Mileage Reduction Order which revised vehicle usage policy was discriminatory in nature, was applied in a discriminatory manner or was violated. Grievants have failed to prove their claims of discrimination or any entitlement to receive benefits extended under the previous policy. This grievance is DENIED.

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

Findings of Fact

1. Terry Cook, Garry Dickens, Benny McKinney, Paul Perdue, and Greg Wriston, herein "Grievants," are or were at the time of filing this consolidated grievance employees of the West Virginia Parkways Economic Development and Tourism Authority.[2]

2. Respondent's General Manager, Gregory C. Barr, issued two (2) Memoranda suspending a portion of Parkways Personnel Policy and Procedure IV - 11 and announcing a series of changes that represented cost cutting initiatives. Together these two documents represent a "Fleet Mileage Reduction Order" issued by Parkways.

3. In conjunction with the cost cutting Memorandum issued by the General Manager on April 17, 2007 (Resp.'s Ex. 1), the General Manager also issued a Memorandum on April 16, 2007, which suspended portions of Parkways Authority Personnel Policy and Procedure IV-11, which pertained to assignment and use of transportation vehicles (Resp.'s Ex. 2). The operative language of the Memorandum suspending the subject personnel policy and procedure was: "It is my intention that the fleet mileage reduction order shall also be implemented with regard to all Parkways' vehicles that were pre-positioned and that were utilized in any way for employees to commute from any distance to their duty assignment."

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[2] The undersigned duly recognizes and notes that not all of the original Grievants, at the time of the level three hearing, were eligible or had standing to receive the relief requested, if the Grievants were to prevail. Terry Cook retired from service with Respondent in March 2008, Benny McKinney resigned from employment effective September 2, 2009 and Paul Perdue was moved from Standard Maintenance Area to Beckley in November of 2007.

4. Grievants were employees affected by Respondent's Fleet Mileage Reduction Order. The April 2007 Memorandum(s) addressed cost cutting initiatives that arose as a result of increases in expenses incurred by Respondent and its inability to increase revenue to meet those rising costs. A specific portion of the cost cutting initiatives affecting Grievants was the discontinuance of the use of Parkways owned vehicles for employees to commute to their work assignment location.[3]

5. Respondent's employees are permitted to use Parkways' vehicles while at work for official agency business.

6. Subsequent to the implementation of the policy outlined and discussed by the Fleet Mileage Reduction Order, Parkways' employees are not permitted to use Parkways' vehicles to commute to and from work. All employees who previously had available some form of Parkways transportation to their duty station were required to absorb their own commuting expense, and only paid for work hours after they reported to work instead of when they began their commute to work.

7. Subsequent to the implementation of Respondent's Fleet Mileage Reduction Order, Parkways employee, Scott Furrow, used a Parkways vehicle while at work for official business in performance of a temporary work assignment.

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[3] Previously, employees drove from their residences to the location of a pre-positioned Parkways vehicle with other employees and were driven from the location of the pre-positioned vehicle to their actual duty station. Their work hours commenced when they reported for their Parkways ride rather then when they later reported to their duty stations. In April 2007 the practice was abolished, requiring <u>all</u> employees to provide their own transportation to and from their actual duty station and requiring that they be at work at their actual duty station at their opening hours rather than clocking in at the time they commenced their commute.

8. More specifically, prior to December 19, 2007, Scott Furrow, an employee of Respondent, was temporarily assigned, or reassigned, for a short period of time on a daily basis, from his normal work duty station at Beckley West, a maintenance facility located near Beckley, West Virginia, to the Parkways Maintenance facility near Standard, West Virginia, approximately 30 miles away. Employee Furrow first reported to his normal work duty station at Beckley West Maintenance Facility. He was then directed by a superior to travel to the Section III Maintenance facility near Standard, West Virginia. This was a temporary work assignment (lasting approximately one week). Mr. Furrow was provided transportation to and from the Standard Maintenance Area from his permanent work duty station at Beckley West. Mr. Furrow was not provided transportation from his home to his regular or normal work duty station at Beckley West.

9. Subsequent to the implementation of Respondent's Fleet Mileage Reduction Order, and sometime prior to the level three hearing, Respondent assigned Doug Grubb to work temporarily as a courtesy patrol driver at Beckley Maintenance (Section II). Grubb's permanent duty station is Standard Maintenance Area some 30 miles away from the Beckley Maintenance Area. Employee Grubb lived closer to his temporary work location at Beckley Maintenance than his permanent duty station at Standard Maintenance. For a time during his temporary assignment period, employee Grubb was permitted to commute directly to his temporary work location using his own transportation.

10. Employee Grubb did not use a Parkways vehicle to commute between his residence to or from his work location.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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).

As an accommodation and for the benefit of the Parkways Authority, it previously provided pre-positioned vehicles so that a substantial number of employees could use Parkways' vehicles to travel a certain portion of the commuting distance from their homes to their permanent duty stations. In April 2007, the practice was abolished, requiring <u>all</u> employees to provide their own transportation to and from their actual duty station and requiring that they be at work at their actual duty station at their opening hours rather than clocking in at the time they commenced their commute. A question no longer an issue presented here includes whether or not the Parkways General Manager had the authority to make the decision that he did as embodied in the Fleet Mileage Reduction Order (discussed at lower level, prior to consolidation).

This question (issue) is undeniably conveyed by one or more of the underlying grievances. Not necessarily precisely expressed but an underlying issue, nevertheless.

Whether or not the Parkways General Manager had the authority to make the decision embodied in the Fleet Mileage Reduction Order. The answer to this query is that the General Manager did have the authority to issue the Fleet Mileage Reduction Order and accordingly, there is no rule, law, policy or otherwise which prohibits Respondent from enforcing the terms of the Order. Basically, the General Manager made a managerial decision to more efficiently allocate the resources of his agency, which he has a right to do. *Broughton v. West Virginia Division of Highways*, Docket No. 92-DOH-325 (Dec. 31, 1992). The General Manager testified that several factors were considered before he made the decision not to allow Parkways personnel to commute in agency vehicles. He testified that he weighed what could be a slight reduction in the level of service against the cost savings of somewhere between $65,000.00 and $100,000.00 per year.[4] It was the Respondent's expressed belief that the cost savings outweighed any slight reduction in the level of service to the public.

The decision by the General Manager to modify the agency's Personnel Policy IV-11 and eliminate the use of vehicles by Parkways personnel to commute to and from work is judged under the arbitrary and capricious standard. Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached a 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. *Bedford County Memorial Hospital v. Health and Human Services,* 769 F.2d. 1017 (4th Cir.

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[4] During lower level proceedings the General Manager testified about the financial dilemma in which the Parkways finds itself operating. The April 2007 Memorandum(s) addressed cost cutting initiatives that arose as a result of increases in expenses incurred by Respondent and its inability to increase revenue to meet those rising costs.

1985); *Yokum v. W.Va. Schools of the Deaf and Blind*, Docket No. 96-DOA-081 (Oct. 16, 1996); *McCoy and Domingues v. W.Va. Parkways Economic Development and Tourism Authority*, Docket No. 99-PEDTA-074 (July 19, 1999). 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).

Parkways has on a number of occasions been involved in cases before the Grievance Board that dealt with its right to amend, enhance and interpret its own policies and practices. The rulings have consistently been that as long as the decisions, interpretations and applications were not clearly wrong, arbitrary and capricious, or the result of abuse of discretion they are upheld. *See Settle v. West Virginia Parkways Economic Development and Tourism Authority*, Docket No. 00-PEDTA-301 (May 23, 2000); *Louie Constantino et als. v. W. Va. Parkways Economic Development and Tourism Authority*, Docket No. 99-PEDTA-247 (Jan. 24, 2001); *McCoy and Domingues v. W. Va. Parkways Economic Development and Tourism Authority*, Docket No. 99-PEDTA-074 (July 19, 1999). An administrative law judge does not have authority to second guess a state employer's employment policy, to order a state agency to make a discretionary change in its policy, or to substitute his or her management philosophy for that of the Parkways Authority. *Skaff v. Pridemore*, 200 W.Va. 700, 490 S.E.2d 787 (1997); *Bennett v. W.Va. Dept. of Health and Human Resources/Bureau of Children and Families*, Docket No. 99-HHR-517 (Apr. 26, 2000); *Settle v. W. Va. Parkways Economic Development and Tourism Authority*, Docket No. 00-PEDTA-031 (May 23, 2000).

Moreover, the Grievance Board has often decided that Parkways' employees do not get to make policy. Parkways' managers decided to provide transportation to an employee traveling on Parkways business. Grievants disagreed with this decision. *See Patterson v. W. Va. Parkways Economic Development and Tourism Authority*, Docket No. 99-PEDTA-448 (Dec. 15, 2000); *Smith v. W. Va. Parkways Economic Development and Tourism Authority*, Docket No. 00-PEDTA-133 (July 7, 2000); *Farley, et als. v. W. Va. Parkways Economic Development and Tourism Authority*, Docket No. 00-PEDTA-015 (June 22, 2000).

The Grievants of this consolidated grievance contend discrimination regarding Parkways Personnel Policy IV-11, Vehicle Use revised. Grievants allege that they are being discriminated against by Parkways by not being provided transportation to their duty stations when Parkways is providing transportation to others (e.g., Scott Furrow and Doug Grubb).[5] Grievants also claim this represents a violation of the revised Policy IV-11 which abolished the use of Parkways' vehicles to commute to employees' duty stations.

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

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[5] Grievants have highlighted two specific examples to demonstrate that subsequent to the implementation of Respondent's Fleet Mileage Reduction Order, decisions regarding the use of Parkways transportation were arbitrary and capricious. Some Grievants are of the opinion that the entire Fleet Mileage Reduction Order should be overturned. A separate and distinct relief requested by Grievant Dickens was for Respondent either to provide him transportation to commute to work or reimburse him for costs he incurred using his own vehicle to commute. Grievant Dicken's contention tended to resemble an entitlement claim. Grievant Dickens did not present credible evidence in support of an entitlement claim.

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,
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> (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).

Scott Furrow is an employee of the Respondent and his permanent work duty location is Beckley West, a Maintenance Facility some 30 miles away from the Standard Maintenance Facility. Sometime prior to the filing of the instant grievances, Respondent assigned Scott Furrow to work at the Standard Maintenance Facility on a temporary, daily basis for a period of about a week. Employee Furrow reported to his regular, normal, permanent work duty station at Beckley West. Depending on whether snow and ice conditions were present, he would either remain at work at Beckley West, or be assigned (sent) to work at Standard Maintenance. If he was assigned to Standard Maintenance, he would be provided a vehicle to travel on official business from Beckley West to the Standard Maintenance Facility.[6]

Ron Hamilton, Parkways Maintenance Engineer, and the Parkways General Manager, Greg Barr, testified that the decision made to provide transportation to Scott

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[6] Respondent provided that the purpose of the aforesaid temporary assignment of Mr. Furrow to the Standard Maintenance Area, Section III, was to help cover for necessary mechanic work during a conversion brought on by snow and ice operations which required splitting up the workforce into two twelve hour shifts.

Furrow to go from his regular work duty station to another temporary work assignment, 30 miles away, and to use Parkways transportation, did not violate the provisions of the Fleet Mileage Reduction Order. Employee Furrow was not provided transportation from his home to his regular work duty station. After he reported for work to his normal or regular work duty station, he was directed for approximately a week, on a temporary daily basis, to go to another Parkways facility to work there during that particular shift. The testimony of all parties, including Grievant Dickens, was that Parkways' practice was to provide transportation to employees who were required to travel from their work duty stations to other work assignments during a shift as part of their assigned Parkways duties.[7] After about a week, a new hire, Eric Pack, was assigned to Standard Maintenance on a permanent basis. The permanent employee was not provided transportation for any part of the commute from his home to his duty station at Standard Maintenance.

The distinction between the circumstances involving the commuting benefit that had previously been provided to the Grievants and the circumstances here where Mr. Furrow was provided transportation for official travel from his permanent, regular or normal work duty station to a temporary work location and back are clearly distinguishable.

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[7] Respondent provided that the purpose of employee Furrow's temporary assignment to Section III was to help cover for needed mechanic work during a shift conversion occasioned by snow and ice operations which resulted in a split of the work force into two twelve hour shifts. The Maintenance Department tries to keep two mechanics in each mechanic shop but during snow and ice operations the two mechanics are split, one going on day shift one going on night shift. The purpose of re-assigning Furrow on a temporary basis to Standard was to augment the depleted one man mechanic force at the Standard Maintenance location. The work arrangement with Furrow was that instead of working all winter on night shift, if it was not snowing he would report to the Beckley West location as usual and he would work at that location unless further temporarily assigned to Section III during subsequent snow and ice events.

Respondent employees are permitted to use Parkways' vehicles for official agency business. This conduct is not prohibited by past or current agency regulation. Such action does not constitute discrimination nor a violation of Parkways Personnel Policy IV-11, Vehicle Use. The facts provided do not establish an example of forbidden activity. Pursuant to Parkways Personnel Policy IV-11, Vehicle Use revised effective April 2007, employees are not permitted to use Parkways' vehicles to commute to and from their residence and the work site.

Further, in addition to the circumstances involving Scott Furrow, Grievants assert that an additional violation of the revised Policy IV-11 occurred with regard to the reassignment of Doug Grubb. Employee Grubb resided near Oak Hill, Fayette County, West Virginia and was permanently assigned to the courtesy patrol section which operated from the Standard Maintenance Area. As a result of some vacancies in the courtesy patrol ranks at Beckley Maintenance (Section II Maintenance) Grubb was temporarily assigned to operate a courtesy patrol vehicle from that location. Established facts provide that for Grubb to travel from his home to his permanent duty station, pick up a Parkways vehicle and drive to his temporarily assigned work location, would have represented a significantly higher amount of mileage than for him to commute directly to his temporary work location. It was approximately 19-20 miles from Grubb's residence to his temporary work site at Section II Beckley Maintenance. It was approximately 25 miles from his residence to his permanent duty location at Standard, West Virginia and then it was an additional 30 miles from Standard back to Beckley. The staff involved in making the decision to assign Grubb temporarily to the courtesy patrol located at Section II Maintenance at Beckley, determined that it was easier, quicker and cheaper for all concerned for Doug Grubb to commute the

shorter distance directly from his home to his temporary work location at Beckley. Employee Grubb was not provided Parkways transportation for any of the trip from his home to his temporary work location, nor was he provided transportation for any of the commute from his home to his permanent duty station.

It is well settled that State Agencies have wide discretion in the assignment of their employees. *Stoneking v. W. Va. of Corrections*, Docket No. 93-CORR-530 (Nov. 30, 1994); *Titus v. W. Va. Div. of Corrections*, Docket No. 96-CORR-528 (Nov. 22, 1994). Further, an agency has the right to transfer employees based on need. *Jarrett v. Dept. of Administration*, Docket No. 98-ADMIN-165 (Jan. 29, 1999). Parkways exercised that discretion in a permissible way. The undersigned does not find, because of the fluid nature of temporary assignment and permanent assignment, that Parkways could decide to give or withhold transportation to anyone it chose by simply redefining the permanent or temporary nature of an employee's work assignment. This contention simply is not evident pursuant to the established facts of this grievance.

The comparative examples highlighted by Grievants do not establish discriminatory behavior by Respondent. Nor do the examples indicate disparative application of the provisions of Parkways Personal Policy IV–11, as revised. With regard to both scenarios set out by Grievants to exemplify their contentions, Respondent provided legitimate and reasonable basis for its decision to provide or withhold agency transportation in each instance. Respondent articulated reasonable basis for its decisions to temporarily assign Scott Furrow to a different work location, and established that decision was neither arbitrary or capricious; it also provided a legitimate and reasonable basis for its decision to temporarily assign Doug Grubb to a different work location and not provide him

transportation to work. Grievants have failed to prove that either decision was arbitrary and capricious, or clearly wrong, or that Respondent violated the provisions of Parkways Personal Policy IV–11 (as revised).

In summary, while Grievants have been fortunate to receive the benefits of payment for travel time and the convenience of use of state vehicles for many years, the changes made do not constitute an abuse of the employer's discretion in such matters. While the changes may be unpopular with current employees, and indeed may cause future recruitment and/or retention problems for Respondent, such changes were not contrary to applicable law. Grievants' allegations are not substantiated by the evidence of this consolidated grievance. The evidence of record viewed in context leads to the conclusion that this grievance is without merit and must be denied in its entirety. The following conclusions of law support this decision.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "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).

3. Grievants have not proven, by a preponderance of the evidence, that Parkways Personal Policy IV–11, as revised, is arbitrary, capricious, unreasonable or contrary to law.

4. In order to establish either 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).

5. Grievants have failed to establish a prima facie case of discrimination and prove that the actions of Respondent in this matter constitute discrimination. Grievants have not established, by a preponderance of the evidence, that they were discriminated against or that the policy in discussion is utilized in a disparate manner.

6. The West Virginia Education and State Employees Grievance Board has previously decided that Parkways Authority employees do not get to make policy. *See Patterson v. W. Va. Parkways Economic Development and Tourism Authority,* Docket No.

99-PEDTA-448 (Dec. 15, 2000); *Smith v. W. Va. Parkways Economic Development and Tourism Authority*, Docket No. 00-PEDTA-133 (July 7, 2000); *Farley, et als. v. W. Va. Parkways Economic Development and Tourism Authority*, Docket No. 00-PEDTA015 (June 22, 2000); *Settle v. West Virginia Parkways Economic Development and Tourism Authority*, Docket No. 00-PEDTA-301 (May 23, 2000); *McCoy and Domingues v. W. Va. Parkways Economic Development and Tourism Authority, Docket* No. 99-PEDTA-074 (July 19, 1999).

7. Grievants have not established that they are currently entitled to benefits that were previously provided pursuant to antiquated agency practice and policy.

8. The evidence of record does not substantiate the allegations of Grievants and when viewed in context leads to the conclusion that this grievance is without merit and must be denied in its entirety.

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 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: October 13, 2009

Landon R. Brown
Administrative Law Judge