THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

BENJAMIN W. CLAYPOOL,
Grievant,

v. **Docket No. 2009-0807-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant Benjamin W. Claypool filed this grievance at level one on December 15, 2008, claiming that he was "being refused an upgrade when another is getting it." For relief he requested "to be made whole, including back wages and interest."

This grievance was denied at level one on February 23, 2009, following a hearing conducted by Respondent's level one designee. A level two mediation session was conducted on June 22, 2009. Appeal to level three was made on June 22, 2009, and a level three hearing was noticed to be conducted before the undersigned Administrative Law Judge on September 3, 2009, in Elkins, West Virginia. Respondent appeared by its attorney, Robert Miller. Grievant did not appear in person but appeared by his representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Thereafter, the parties agreed to submit the case on the level one record. This matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on October 5, 2009.

Synopsis

Grievant, employed as a Transportation Worker 2 Equipment Operator, claimed the Division of Highways discriminated against him in failing to grant him a temporary upgrade

to crew leader and also that he was entitled to a 5% salary increase. Evidence showed Grievant was at times upgraded to crew leader; however, on this occasion the duties performed did not require a supervisor to be present. Upgrades are also at the discretion of the supervisor. Grievant failed to establish he was the victim of discrimination. Additionally, the refusal to authorize the upgrade was not arbitrary and/or capricious. This grievance is denied.

The following finding of fact are based upon the record developed at level one:

Findings of Fact

1. Grievant is employed by the Division of Highways ("DOH") as a Transportation Worker 2 Equipment Operator ("Operator 2") at the Kanawha Head Substation in Upshur County. Grievant has more than eleven years of service with DOH.

2. Grievant, on occasion, performs crew leader duties. Grievant typically receives a 5% pay increase for performing crew leader duties.

3. In the absence of the Kanawha Head supervisor, Norman Riffle, the employee with the most seniority is usually upgraded as acting supervisor.

4. On December 3, 2008, Mr. Riffle and the next most senior employee were absent from work. On that date, Grievant was present and the most senior employee that was willing to fill out time sheets. Grievant views this date as one in which he should be considered the crew leader.

5. On December 3, 2008, the duties performed by the employees present included cleaning and servicing all the equipment and cleaning up the shop and yard. As Grievant described the day "it was a break in the weather. It was kind of post-storm. We broke down all of our equipment, cleaned it, greased it, cleaned the shop, the yard,

stockpiled the - - cleaned up the cinders and stuff that were scattered around, just general yard maintenance . . . we know ourselves how to do that." Level One Transcript, page 8.

6. The duties performed on December 3, 2008, did not require a supervisor to be present.

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 W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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). "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).

Grievant's assertion is that other employees are regularly upgraded to acting supervisor within the Kanawha Head substation without regard to the tasks performed or the number of individuals supervised, whereas he was not. Respondent counters that Grievant was not required to be upgraded to a higher classification to do the work that he

did on December 3, 2008, and that there was no other reason for him to be paid at a higher rate.

The issue raised by Grievant is an allegation of discrimination. 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,
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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).

Grievant has failed to establish by a preponderance of the evidence that he was treated differently from any other similarly situated employee. The limited record of this case makes clear that all acting crew leaders are given a 5% pay upgrade when performing supervisory work. The record also establishes that Grievant is given a 5% pay upgrade when he supervises during normal activities, which is typically road work during snow removal and ice control or running equipment with a crew during road maintenance. In this case, the clean up and equipment maintenance at the substation did not require a supervisor be present. Grievant offered at level one that other temporary crew leaders

have been given a 5% upgrade when supervising similar duties to those performed on December 3, 2008; however, there were no documents offered at level one to support this claim. The difference in treatment, if any, was related to the job responsibilities on December 3, 2008. In other words, on this occasion the duties performed did not require a supervisor to be present and a temporary upgrade was not warranted.

Grievant's complaint about the upgrade for this particular day can also be examined under the arbitrary and capricious standard since there is no evidence a policy was violated and this was a matter of discretion. "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)).

Grievant has not demonstrated that DOH's actions were arbitrary and capricious on the issue of refusing the temporary upgrade request for the duties performed on December 3, 2008. Grievant argues that the refusal to approve a temporary upgrade is the result of

discrimination or, to quote his proposals, "[t]he plurality of supposed exceptions is itself problematic. It was established by Grievant's unrebutted testimony that the rationale offered for Tanner's[1] refusal to grant Grievant an upgrade on December 3, 2008, and the rationale offered by Respondent at level I are essentially different. Regardless, neither rationale exists in any written policy or memorandum produced by Respondent. This, consequently, supports a presumption that Respondent's justification is, in fact, mere pretext . . ." Grievant's Proposals, Page 6.

The facts in this case are straight forward. The work performed on December 3, 2008, did not require a supervisor to be present to make any decisions on how duties were to be performed. Grievant said it well at level one, "we know ourselves how to do that (work)." Since the refusal of the temporary upgrade is based on Respondent's discretion, and there was no showing the denial of the upgrade for that day's duties was unreasonable, the undersigned cannot simply substitute his judgement for that of the Agency.

For the foregoing reasons, Grievant has failed to prove that he was compensated in violation of any law, rule or policy. 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 W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *Holly v. Logan*

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[1]John Tanner is employed by DOH as a county supervisor in Upshur County.

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).

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 did not demonstrate that he had been discriminated against by Respondent.

4. "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).

5. Grievant did not demonstrate that Respondent's failure to pay him at a higher upgraded pay on December 3, 2008, was a violation of policy or arbitrary and capricious.

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 (eff. July 7, 2008).

Date: January 27, 2010

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Ronald L. Reece
Administrative Law Judge