THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

MAYA NYE, et al.,
Grievants,

vs. **Docket No. 2009-1581-CONS**

DIVISION OF CULTURE
AND HISTORY,
Respondent.

DECISION

Grievants Maya J. C. Nye, Conni McMorris, Dr. Shirley Louise Burns, Ph. D., Kelly J. Ristau, and Virginia Betty Williford filed essentially identical grievances on May 23, 2009 alleging "Improper Work Assignments" and requesting "to be made whole including no work on events by non-event staff be made mandatory, and overtime must include option of pay." Subsequently, Ms. Williford withdrew as a Grievant.

A level three hearing on the Grievance was held in the Grievance Board's Charleston office on March 12, 2010, where Grievants were represented by Union Representative Gordon Simmons, and Respondent was represented by counsel, Greg Skinner, Esq. The matter became mature for decision on April 2, 2010, the deadline for filing proposed findings of fact and conclusions of law.

SYNOPSIS

Grievants were required to work temporary duties outside their normal job descriptions and work schedules in order to fill the needs of the Division in putting on the Vandalia Gathering, an annual holiday weekend festival. Two of the Grievants did not actually work their assigned tasks, and were required to use their sick leave to cover their absences. Two Grievants did work their assigned tasks, but were not permitted to work their regular work hours in addition, and get overtime therefor. Respondent's actions in

making these assignments were neither discriminatory nor arbitrary and capricious, and were within its authority for making temporary changes to an employee's job description. Grievance is therefore denied.

FINDINGS OF FACT

1. Grievants are employed in various capacities by Respondent.
2. Respondent organizes, sponsors and produces the Vandalia Gathering, an annual cultural festival held at the State Capitol Complex on each Memorial Day weekend (hereinafter, "the Festival.")
3. The Festival was held May 22 through May 24, 2009.
4. Due to the scope and timing of the Festival, many temporary positions, such as event staff, concessions, booth staffing, custodial staff and security, etc., need to be filled on a temporary basis for the duration of the Festival.
5. On May 8, 2009, Commissioner Randall Reid-Smith sent an email to all Division employees asking for volunteers to staff various positions at the Festival.
6. Employees who worked the Festival outside their normal hours or workweek would be granted flex time or rescheduled time, at the discretion of their supervisors.
7. No employee would be scheduled overtime to work at the Festival.
8. After the initial email failed to fill all the necessary positions, Commissioner Reid-Smith notified employees via another email that, if all positions were not filled by volunteers, then any vacant time and duty slots would be randomly filled.
9. Grievants did not volunteer for any of the Festival duties, and were randomly assigned to various jobs by drawing names out of a tray.
10. Employees who had pre-approved leave for the days of the Festival were not

included in the random drawing.

11. Not all employees of the Division were required to work at the Festival, only those necessary to fill the pre-planned jobs.

12. No employee was required to work in excess of 40 hours during their work week due to the Festival assignments, and no employees were paid overtime for the Festival work.

13. Grievant Burns was randomly assigned an 11-hour shift in a food service position, but reported that she was sick and did not work that day. She had a previously-scheduled family reunion that weekend.

14. Burns, whose normal work days are Monday through Friday, was required to use 11 hours of sick leave for the missed work, even though it was on what would normally be a scheduled day off for her (a Sunday).

15. Grievant Nye was randomly assigned a job on Sunday, May 24, selling T-shirts from "1:00 -6:30 or close out." She had previously informed her supervisor that she had plans for the weekend, and she also called in sick on the day she was supposed to work the Festival.

16. Nye was directed to use her accumulated family sick leave hours to cover her absence.

17. Grievants McMorris and Ristau performed their randomly-assigned Festival duties, each working eight and one-half hours.

18. In addition to using the regular employees of the Division, Respondent also hired some temporary workers for the Festival, which workers were paid about seven dollars per hour.

DISCUSSION

Grievants, who do not challenge a disciplinary action, bear the burden of proving their grievance by a preponderance of the evidence.[1] Grievants allege they were discriminated against with respect to whether they could be excused from the Festival work due to previously-made holiday plans, and also with respect to whether they should be required to use sick leave for time missed outside their regular work schedule. In order to establish a claim of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

> (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.[2]

Grievants believe they have established "an unrebutted *prima facie* case of discrimination," but they have not met the basic criterion for such a claim: they were not treated any differently than any other employee of the Division. Every employee in the Division was twice notified of the work and given the same opportunity to volunteer prior to random assignments being made. There was no evidence of any employee who called in sick that was treated differently than Grievants with regard to using their leave to cover the time. No employees were forced to work overtime, or permitted to work overtime.

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[1] *Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996).

[2] *The Board of Education of the County of Tyler v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

Employees with pre-approved leave were excluded from the random drawing of job assignments, and no Grievant presented evidence that they had requested time off for that weekend, despite having knowledge of the dates of the Festival.

Grievants did identify one person who was included in the random drawing, but then not assigned a task because he had previously-made plans for the weekend. Chris Bowyer's name was drawn, but he was excused. No evidence was presented, however, as to whether he was required to use leave or not to cover the absence. Instead, Grievant argues it should be presumed he did not have leave approved since his name was included in the pool of eligibles. This essential fact, however, was part of the Grievants' burden of proof, and the undersigned finds it is just as reasonable to assume he did have pre-approved leave, or he would not have been excused. "Where the evidence equally supports both sides, the party has not met its burden of proof."[3]

Grievants also claim Respondent's actions were arbitrary and capricious. An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case."[4] "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute [his] judgment for that of a board of education.[5]

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[3]*Leichliter v. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

[4]*State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

[5]*See generally*, *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982)." *Trimboli*, *supra*, *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

The Vandalia Gathering is a regular part of the mission of the Division, and it is reasonable for the Division to use its employees to man the Festival. While it is possible that doing so could have been accomplished through temporary employees who work at a much cheaper hourly rate, that is a management decision that has nothing to do with Grievants' terms of employment. "'A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety."[6]

One aspect related to the randomness of the work assignments that is not entirely explained by Respondent is the exclusion from the random drawing of employees who had previously approved leave. As pointed out by Grievants, few employees, even if they had plans for the weekend, would think to request leave in advance for days that fall on a holiday weekend when they would not ordinarily be working. However, this is a festival that has been held by Respondent on an annual basis for 32 years, so it would not be a surprise to any employee of the Division. Further, Commissioner Reid-Smith's first email to all employees notified them of the possibility of working the Festival was dated May 8, he sent a second email May 14, and the random drawing was on May 19. Any employee with previous plans would have had ample opportunity to request leave or other accommodation for their schedules.

Respondent has an entirely different perspective on the issues raised by the grievance. Respondent's position is that Commissioner Reid-Smith is entitled to temporarily assign his employees to new duties, as needed to further the mission of the

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[6]*Rice v. Div. of Highways*, Docket No. 96-DOH-247 (Aug. 29, 1997)." *Viski v. Preston County Bd. of Educ.,* Docket No. 99-39-271 (Nov. 30, 1999).

Division, without recourse by the employee. State employees are all hired into positions that are expressly, though somewhat generically, described by the Division of Personnel's classification specifications. However, according to the Division of Personnel's Administrative Rule, "the position description shall not be construed in any way to limit the express or implied authority of the appointing authority to prescribe or alter the duties of any position."[7] This Grievance Board has determined that an employer may change the duties of a position to meet the employer's needs, assign duties outside the class specification, as long as the duties do not change the predominate, class-defining duties such that the employee's position is then misclassified.[8]

Respondent is correct that there has been no violation of the terms of Grievants' employment by the temporary alteration of their normal work schedules to meet the needs of the agency. Commissioner Reid-Smith was within his authority to assign employees to fill required positions, and he gave all employees the same opportunities to either volunteer for a task they wished to perform, or be randomly selected for the leftover jobs.

CONCLUSIONS OF LAW

1. Since this grievance is not about discipline, Grievants must prove all of their claims by a preponderance of the evidence, which means they must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*,

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[7] 143 C.S.R. § 1(4.5)(d).

[8] *See Hall v. Div. of Nat. Res.*, Docket No. 00-DNR-053 (Apr. 28, 2000); *Hager v. Dep't of Health and Human Res.*, Docket No. 95-HHR-241 (Sep. 29, 1995); *Beer v. Div. of Highways*, Docket No. 95-DOH-161 (Feb. 27, 1996).

Docket No. 92-HHR-486 (May 17, 1993).

2. "Discrimination" means 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).

3. In order to establish a claim of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

   (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.

   The Board of Education of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

4. Grievants did not establish a *prima facie* claim of discrimination.

5. An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute [his] judgment for that of a board of education. *See generally*, *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982)." *Trimboli*, *supra*, *Blake*

v. Kanawha County Bd. of Educ., Docket No. 01-20-470 (Oct. 29, 2001).

6. Grievants did not meet their burden of proving the Commissioner's actions were arbitrary and capricious.

7. "'A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety.' *Rice v. Div. of Highways*, Docket No. 96-DOH-247 (Aug. 29, 1997)." *Viski v. Preston County Bd. of Educ.,* Docket No. 99-39-271 (Nov. 30, 1999)

8. Grievants did not meet their burden of proving any grievable management decision was made.

For the foregoing reasons, this grievance is hereby 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).

July 1, 2010

M. Paul Marteney
Administrative Law Judge