THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

KERRY DAVIS, et al.,
Grievants,

v. **Docket No. 2010-0462-CONS**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievants, Kerry Davis, Randal Singleton, Jeffrey Wagoner, Russell Helton, Rusty Farrar, Derrick Lamb, Joe Tallman, and Glenn Hollen, filed this grievance against their employer, Division of Highways ("DOH"), on October 2, 2009, challenging a change in the shift assignment procedure. For relief, Grievants request that the previous procedure for shift assignment be ordered.

This grievance was denied at level one following a hearing conducted on October 2, 2009, as more fully set out in a letter authored by Anthony J. Paletta, dated November 16, 2009. A level two mediation session was conducted on March 9, 2010. A level three hearing was conducted before the undersigned Administrative Law Judge on July 12, 2010, at the Grievance Board's Elkins location. Grievants appeared by their representative, Gordon Simmons, UE170, West Virginia Public Workers Union. Respondent appeared by its counsel, Robert Miller, DOH Legal Division. This matter became mature for consideration upon receipt of the last of the parties' findings of fact and conclusions of law on September 8, 2010.

Synopsis

Grievants assert that the past practice in the Upshur County DOH has been to allow the more senior workers to choose whether they wanted to work day or night shifts during Snow Removal/Ice Control ("SRIC") season. Grievants assert that until the last SRIC season the employees were allowed to choose day shift or night shift for the SRIC season, and the senior workers were given first choice as to which shift they would work. Grievants argue that DOH's decision to place them on an alternating two week night shifts was arbitrary, capricious and unreasonable.

Respondent counters that the policy of DOH is to not take seniority into consideration when making the rotating two week shift assignments for the SRIC season. Respondent points out that it is important to have a mixture of experienced and less experienced drivers on each shift. In addition, the decision to go to a rotating shift schedule was an attempt to provide each employee the opportunity to be offered an equal amount of overtime. Grievants have not met their burden of proof in demonstrating that the shift assignments during SRIC was arbitrary, capricious, and unreasonable.

The following findings of fact are based upon the record developed at level one and level three.

Findings of Fact

1. Grievants are all employed as transportation workers in Upshur County, District 7, by the DOH.

2. For the Snow Removal/Ice Control ("SRIC") season for November through April, 2009-2010, Upshur County employees of DOH were changed to a rotating or swing

shift for the assignment of crews between 12 hour day and night shift call-outs for winter weather.

3. Prior to that SRIC, Upshur County DOH had a long-standing practice of having a non rotating day shift and night shift and giving the most senior employees first preference in selecting which shift they would work.

4. On February 20, 2004, Fred VanKirk, then Secretary/Commissioner, issued a memo stating that seniority was not to be taken into account when making shift assignments.

4. Thomas Freeman is the Assistant Maintenance Engineer for District 7, providing technical and managerial oversight to both Barbour and Upshur Counties. He is responsible for setting alternative work schedules on either a permanent or seasonal workweek schedule.

5. In October of 2009, Upshur County employees were informed by Mr. Freeman that they would work 12 hour rotating shifts that would change every two weeks during the upcoming SRIC season.

6. The morale of the Grievants was hurt by ignoring their seniority, and the crews experienced some amount of difficulty adjusting to swing shifts and often operated on little sleep.

7. Grievants offered anecdotal evidence, such as the number of workers compensation injuries, in support of the argument that the swing shift was making them unsafe on the roads.

8. Grievants did not offer any evidence requesting that they be granted reasonable accommodations due to health issues with respect to the shift assignment.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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). "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).

Grievants contend that past practice has established that shift assignments during SRIC are made by seniority. An employee when hired starts out working a night shift and works his or her way to a day shift. Grievants further contend that this method of assigning shifts was told to them during their initial interviews. DOH counters that there are procedures that give management the right to establish shifts when necessary, and that the increased demand for DOH employees to clear and treat the public roadways during SRIC season is an example supporting management discretion in shift assignments. DOH disputes Grievants' claims concerning the initial interviews and points out that, during the

interview process, a number of questions are asked that inform the prospective employee of the right of management to establish shifts.

Mr. Freeman's decision as to who works a night shift during SRIC season must be judged by 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 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*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

Grievants assert it has been the past practice of Upshur County DOH to allow the more senior workers to choose whether they would prefer a day or night shift during SRIC season.[1] The Grievance Board addressed a similar grievance in *Bell, et al. v. DOH*, Docket No. 2008-0826-CONS (July 8, 2009); however, the instant case is distinguishable on the basis of a couple differing facts. First, Upshur County DOH management did not choose to ignore overall DOH policy and follow the past practice of allowing the more senior employees the choice of shift assignment during SRIC season. Second, unlike the

[1]A deviation from past practice represents one of a number of factors to be considered when determining if a discretionary decision by an employer is arbitrary and capricious. *See Cromley v. Mason County Bd. of Educ.*, Docket No. 94-26-537 (Apr. 27, 1995).

Grievant in *Bell*, the Grievants in the instant case did not provide any evidence documenting any adverse health effects one might suffer with respect to shift assignment.

This is not to say that the undersigned does not agree with the Administrative Law Judge's reasoning and outcome in *Bell.* To the contrary, the undersigned recognizes the inherit unfairness in failing to give the most senior employees first preference in selecting between a day shift and night shift. In any event, the undersigned is restricted to the record of this grievance and is without authority to alter the applicable policy of the Respondent. The record of this grievance makes it clear that Grievants did not argue or assert any violation of the Americans with Disabilities Act or provide supporting documentation requesting reasonable accommodations.

From the facts of this case, the undersigned cannot conclude that the decision to place Grievants on the night shift was arbitrary and capricious. DOH supervisors have the authority to establish work schedules, including assigning rotating shifts to employees independent of employee seniority. DOH management made the decision to go to a rotating shift schedule in an attempt to provide each employee the opportunity to be offered an equal amount of overtime. This decision is not unreasonable based upon the totality of the circumstances that this case presents. Grievant's anecdotal evidence is insufficient to meet their burden of proof to establish otherwise.

The following conclusions of law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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).

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. A deviation from past practice represents one of a number of factors to be considered when determining if a discretionary decision by an employer is arbitrary and capricious. *See Cromley v. Mason County Bd. of Educ.*, Docket No. 94-26-537 (Apr. 27, 1995).

4. Grievants failed to establish that their assignment to rotating shifts, which included night shift assignment, was arbitrary and capricious or otherwise unreasonable.

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: November 18, 2010

_____

Ronald L. Reece
Administrative Law Judge