WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SCOTT A. THOMAS,

Grievant,

v. **Docket No. 2009-0639-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. On October 9, 2008, he attended a level three hearing at the West Virginia Public Employees Grievance Board Charleston office. The hearing was scheduled for a grievance that Mr. Thomas had previously filed.[1] On that day, Grievant filed a Motion to Compel Compensation alleging that he was entitled to be compensated for traveling to the level three hearing in his own vehicle. He alleged that witnesses and representatives for Respondent were often allowed to travel to the hearings in PEDTA vehicles and Grievant should also have that option. Grievant also averred that Respondent's policy and state law required that he be allowed to use Respondent's vehicle or be compensated for the use of his own vehicle for traveling to the level three hearing in Charleston. Without objection from the parties, the undersigned treated the Motion to Compel Compensation as a separate grievance and it

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[1] *See Thomas v. W. Va. Parkways Economic Dev. and Tourism Auth.,* Docket No. 2008-1869-DOT (Jan. 8, 2009).

was assigned a separate docket number and set for a separate hearing at level three. Grievant was represented by Gordon J. Simmons, UE Local 170, WVPWU.[1] Respondent was represented by A. David Abrams, Jr., Esquire, General Counsel for the PEDTA.

After the first attempt to schedule a hearing resulted in a continuance, the parties noted that there was no dispute as to the basic facts and agreed that the facts submitted by the parties in their pleadings are true. They submitted the grievance for decision based upon the undisputed facts set out by the parties in their Proposed Findings of Fact and Conclusions of Law. Therefore, the record in this matter consists of all undisputed facts[2] submitted by the parties and two exhibits marked Respondent's Exhibit 1 and Respondent's Exhibit 2,[3] and a sworn affidavit of Gregory C. Barr, the PEDTA General Manager.[4] Both parties submitted proposals dated October 2, 2009, the last of which was received by the West Virginia Public Employees Grievance Board on October 6, 2009. On October 6, 2009, this grievance became mature for decision.

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[1] West Virginia Public Workers Union

[2] The undisputed facts are treated as stipulations and to the extent that there is any dispute regarding any fact, that fact is not considered proven and is not considered in the decision of the grievance.

[3] The parties jointly agreed to admit these two exhibits into the record. They are referred to as Respondent's exhibits for ease of identification and because Respondent provided the copies.

[4] The affidavit of General Manager Barr is attached to Respondent's Response to the Motion to Compel as Exhibit A. The response was stamped as received by the Grievance Board on October 21, 2008.

Synopsis

Grievant argues that employees are entitled to use PEDTA vehicles or be reimbursed for the use of their own vehicles when traveling to level two and three grievance proceedings. He asserts that the procedure is intended to be grievant friendly and the failure of Respondent to provide travel for a Grievant and his witnesses is not consistent with the legislative intent. Respondent counters that the grievance procedure statute specifically requires that each party is responsible to pay its own expenses incurred in the grievance process and travel to the site of a level two or level three proceeding is a cost that must be borne by the grievant. Grievant was unable to prove that the Respondent has an obligation to provide transportation to Grievant or the Grievant's witnesses to level two or level three proceedings.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant Scott Thomas is employed by the Parkways Economic Development and Tourism Authority ("PEDTA") and is assigned to the Chelyan Maintenance Area of the West Virginia Turnpike. He has been continually employed by the PEDTA since 1992.

2. Mr. Thomas filed a grievance against his employer contesting a suspension which was scheduled for a level three hearing in the Charleston office of the West Virginia Public Employees Grievance Board on October 9, 2008.

3. Grievant Thomas requested that he be supplied transportation to the level three hearing in a PEDTA vehicle and that request was denied.

4. PEDTA Director of Human Resources Carrie Roachè issued a memorandum dated September 8, 1999, explaining the agency's procedure for transportation of employees to level four grievance hearings. The memorandum was sent to all PEDTA employees and stated that the PEDTA would not provide transportation in Parkways Authority vehicles for grievants, grievant's representatives, or grievant's witnesses to level four hearings. Respondent's Exhibit 1.

5. Until July 1, 2007, the grievance procedure for PEDTA employees was set out in WEST VIRGINIA CODE §§ 29-6A-1 to 29-6A-12. Under the old grievance procedure, the first three levels of hearings were conducted at the agency offices and the level four hearings were conducted at the Grievance Board offices.[5] The practice of PEDTA at that time was to provide transportation to the grievant, grievant's witnesses, and grievant's representative[6] to the hearings held at the agency offices for levels one, two and three only. That practice was still in place when this grievance was filed.

6. On October 1, 2008, Director Roachè issued a second memorandum to all the Parkways employees clarifying the transportation of employees to grievance hearings. The memorandum stated that the PEDTA would not provide transportation in Parkways Authority vehicles for grievants, grievant's witnesses or grievant's representatives to level two mediation or level three hearings. Respondent's Exhibit 2.

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[5] In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C-3-1 to 6C-3-6 (2007).

[6] Travel is only provided for the grievant's representative if the representative is also an employee of the PEDTA.

7. Since July 1, 2007, the statutory provisions establishing the public employees grievance procedure have been WEST VIRGINIA CODE §§ 6C-2-1 through 6C-2-7. Under the new grievance procedure, only level one is conducted at the agency offices. Level two mediations and level three hearings are generally conducted at the offices of the West Virginia Public Employees Grievance Board.

8. Respondent's policy regarding providing transportation to grievance proceedings has remained consistent since 1999. The PEDTA has not provided transportation in Parkways vehicles for grievants or grievant's witnesses to any grievance proceeding held away from the PEDTA offices. The only change that has taken place is which proceedings are held at the agency offices pursuant to the new grievance procedure.

9. The PEDTA policy related to providing transportation to employees to grievance proceedings is substantially the same as the policy adopted and followed by the Division of Highways ("DOH"). Exhibit A, Affidavit of Gregory Barr, PEDTA General Manager.

10. A DOH memorandum detailing "State vehicle usage for grievance proceedings" was issued on March 25, 2008. That memorandum states that "State vehicles will be provided to party representatives and witnesses *called by the agency to appear on its behalf* at Level Two mediation or Level Three Hearing." (Emphasis added). Like the PEDTA policy, no provision is made for providing transportation to grievants or witnesses called on their behalf.

Discussion

As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the

W. Va. 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). 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).

Grievant's representative argues generally that the intent of the legislature in creating the statutory public employees grievance procedure was to create a grievant-friendly procedure wherein employees and employers can settle their disputes at no cost to the employee. He points to specific provisions of W. VA. CODE § 6C-2-3 which imposes costs of grievance processing upon the employer. Those provisions include the following:

> (o) All proceedings shall be scheduled during regular work hours in a convenient location accessible to all parties in accommodation to the parties' normal operations and regular work schedules.
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> (p) (1) The grievant, witnesses and employee representative shall be granted reasonable and necessary time off during working hours to attend grievance proceedings without loss of pay and without charge to annual or compensatory leave credits.
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> (p) (2) In addition to actual time spent attending grievance proceedings, the grievant and an employee representative shall be granted time off during working hours, not to exceed four hours per grievance, for the preparation of the grievance without loss of pay and without charge to annual or compensatory leave credits.
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> (p) (3) The grievant and an employee representative shall have access to the employer's equipment for purposes of preparing grievance documents subject to the reasonable rules of the employer governing the use of the equipment for nonwork purposes.

These provisions are certainly favorable to the employee and make the process more accessible because grievants and witnesses do not have to use their own time or annual leave to participate in the grievance process. To that extent, they do require the

employer to bare these specific costs of the grievance process. Grievant asserts that these provisions should be interpreted to infer that the cost of travel for Grievant and his witnesses should also be borne by Respondent. But these are not the sole statements of the legislative intent on the issue of costs incurred in the grievance procedure.

W. VA. CODE § 6C-2-6 (c) states "Any expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expenses." The West Virginia Supreme Court of Appeals has consistently held that "[w]here the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." *Syl. pt. 2, State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968). *Accord Syl. pt. 1, State v. Jarvis*, 199 W.Va. 635, 487 S.E.2d 293 (1997). This section of the grievance statute is a clear and unambiguous statement of how costs of processing grievances must generally be apportioned. It states that each party is responsible for their own costs. Interpretation of the other provisions that grant employees specified rights is not necessary in this case. There is a clear statement of legislative intent which must be applied.[7] Grievant is responsible for his expense of traveling to the level three hearing. The West Virginia Public Employees Grievance Board has supported this holding on several occasions by holding: "[i]n the absence of specific statutory authority, litigants are normally responsible for their own fees and costs." *See*

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[7] Another cardinal rule of statutory interpretation has some relevance here: *expressio unius est exclusio alterius*, (the express mention of one thing implies the exclusion of another, applies). 220 W.Va. 602, 648 S.E.2d 366 *Kessel v. Monongalia County General Hosp. Co.* (W.Va. 2007). W. VA. CODE § 6C-2-3 lists certain costs that the grievant does not bear but it does not include travel to level two and three hearings. Under this rule it must be inferred that the legislature intended to exclude travel expense from this list.

generally Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975); *Cremeans v. Bd. of Trustees*, Docket No. 96-BOT-099 (Dec. 30, 1996).

Grievant notes that Respondent may provide transportation to its agency representatives and witnesses to the level two mediations and level three hearings. He opines that Respondent's refusal to do the same for grievants is an effort to obstruct them from exercising their rights to have their disputes heard by an unbiased tribunal. No evidence was submitted regarding Respondent's reason for not providing grievants with transportation to level two mediations and level three hearings other than the fact they are not required to. Respondents are not taking overt steps to impede the attendance of grievants and their witnesses at these levels. At worst, Respondent is not assisting Grievant in prosecuting his complaint.

Grievant has failed to prove that Respondent had a legal duty to provide Grievant with transportation to the level three hearing in a PEDTA vehicle or reimburse Grievant for traveling to the hearing in his own vehicle. The Grievance is DENIED.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. 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). 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. "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." *Syl. pt. 2, State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968). *Accord Syl. pt. 1, State v. Jarvis*, 199 W.Va. 635, 487 S.E.2d 293 (1997).

3. W. VA. CODE § 6C-2-6 (c) states "Any expenses incurred relative to the grievance procedure at levels one two and three shall be borne by the party incurring the expenses." This is a clear and unambiguous statement of how costs of processing grievance must generally be apportioned. Each party is responsible for their own costs unless the statutes specifically provides otherwise. *See generally Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240 (1975); *Cremeans v. Bd. of Trustees*, Docket No. 96-BOT-099 (Dec. 30, 1996).

4. Grievant did not prove by a preponderance of the evidence that Respondent had a legal duty to provide Grievant with transportation to the level three hearing in a PEDTA vehicle or reimburse Grievant for traveling to the hearing in his own vehicle.

Accordingly, the 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: March 9, 2010

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE