WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JEREMY CANADAY, ET AL,
Grievant,

v. **Docket No. 2009-1715-CONS**

DIVISION OF HIGHWAYS,
Respondent.

D E C I S I O N

Grievants[1] filed grievances against West Virginia Department of Transportation, Division of Highways ("DOH"), Respondent in June 2009, protesting that uniforms were not provided to them. A representative statement of the grievances is as follow; Grievants seek to have uniforms provided to them by their employing state agency. Grievants, individually allege that they were erroneously denied such and are being discriminated against because Respondent is not supplying mechanics with work clothes while supplying other classifications.

Numerous requests to consolidate additional individual grievances increased and altered the exact number of Grievants. See footnote 1. Level one conferences and

[1] This is a consolidated grievance and the exact number of Grievants has fluctuated. *Jeremy Canaday and Ray Tyree v. WVDOT/DOH (filed 06/25/2009)* Docket Number – 2009-1715-CONS consolidated with *Michael E. Solacz v. WVDOT/DOH (filed 06/26/2009)* Docket Number – 2009-1700-DOT, further, other grievants were joined by the West Virginia Grievance Board on or about October 26, 2009. There are approximately 18 Grievants, who are all agency mechanics: Jeremy Canady, Aaron Wiser, Ray Tyree, Michael E. Solacz, Earl Michael Haney Jeremy D. Melton, Mike Jones, Cecil Colegrove, Gary Cummings, Larry Nicely,Toney Miller, Paul B. Jenkins, Alvin Good, Melvin Ray Pyatt, Harold G. Dyer, Rickie Lee Adkins, Theodore Salem, and Bill Holley. Additionally, at the level 3 hearing it became known that Grievant Ernest L. Morrison is classified as an Equipment Operator 3 and works in the equipment section of Respondent. It is ambigous whether the consolidation of Grievant Morrison's grievance with the instant matter was truly intentional or the result of administrative error. See pgs.10 -11. The principle focus of this decision is on workers employed by Respondent in the classification series of Transportation Worker – Mechanic.

hearings were held for the majority of the Grievants, notably on or about June 16, July 16, and August 12, 2009. The grievances were denied at that level. Grievants appealed to level two. A Mediation proceeding, in reference to the instant matter, transpired on November 17, 2009. Grievants appealed to level three. A level three hearing was held before the undersigned Administrative Law Judge on March 23, 2010, at the Grievance Board's Beckley facilities. Grievants appeared in person and by their representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by its counsel Robert Miller, DOH Legal Division. This matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on or about April 30, 2010.

Synopsis

In accordance with the Division of Highways' Uniform Policy, agency mechanics are not eligible for uniforms. Grievants are employed as Mechanics with Respondent. Grievants want to be issued uniforms and allege the failure to provide them such is arbitrary and capricious. Further, Grievants allege the practice constitutes discrimination.

It was established that Respondent made a determination that agency mechanics are not in traffic work zones for a significant amount of their regular work time to warrant the issuance of uniforms. It is not established that Respondent violated any rules, regulations, or policies in issuing uniforms to certain job classifications and not others. Respondent's determination regarding which classifications were eligible for uniforms was not arbitrary and capricious. Nor is it established that Respondent's actions constitute discrimination. 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. Grievants, employees of Respondent, were denied issuance of uniforms by the West Virginia Division of Highways. See footnote 1.

2. Heather Huffman is a Resource Management Supervisor for the Maintenance Division of the Division of Highways located in Charleston, West Virginia. She is designated as the Statewide Uniform Coordinator for Respondent.

3. On June 26, 2009, Respondent disseminated a Uniform Policy to be implemented on July 1, 2009. (Resp. Ex. 1). All modes of communication used are not in evidence, but the Policy was unequivocally disseminated on the intranet on June 26, 2009.

4. The Uniform Policy, among other conditions, designates that certain DOH employees in specific job classifications were to be supplied agency uniforms. Effective July 1, 2009, Respondent issued a uniform policy mandating that employees classified as Transportation Services Supervisor; Construction Superintendent; Transportation Workers 1, 2, 3, and 4 -Bridge, Craft Worker, Equipment Operator, Laborer and Welder; Transportation Crew Supervisor 1 and 2; and Bridge Safety Inspectors 1, 2, 3, and 4 will be supplied and required to wear agency uniforms. (See Resp. Ex. 2).

5. The Policy authorizes uniforms to DOH employees in specific job classifications among which Transportation Worker – Mechanics are not included. The classifications of TW2MECH and TW3MECH are not included as classification eligible to receive uniforms provided by Respondent. (See Resp. Ex. 2).

6. The Uniform Policy states the policy was developed "in an effort to protect our employees in maintenance related work areas" and that providing "a more visible and reflective work uniform will create a safer work environment for our employees."

7. The Uniform Policy further states that "the agency cannot afford to supply all employees with uniforms" and "the intent of this policy is to provide uniforms to those employees who spend the majority of their regularly scheduled work time in traffic related areas for their safety and protection." [2]

8. Classifications approved and required to wear uniforms work a majority of their regular scheduled work time in traffic related area. Majority of time and/or eligibility was determined by Respondent officials to be more than fifty percent of work time in traffic conditions. Classifications were selected for uniforms because the workers spend more than 51% of their work time in traffic conditions.

9. As mechanics for the county organization, Grievants are required to repair equipment away from the garage in traffic-related areas **when needed**. However, it was determined by District Engineers/Managers of Respondent that mechanics did not work a majority of their time in traffic related areas and thus should not be included as a classification which is provided agency maintained uniforms.

10. The Uniform Policy states: "Employees who do not meet all eligibility requirements necessary to obtain uniforms will be required to wear an ANSI (American National Standards Institute) approved vest while working in traffic-related areas for their safety and protection."

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[2] WVDOT is comprised of more than 6000 individuals. There are about 2500 workers in the WVDOH who wear uniforms. The weekly rental cost for a set of uniforms per individual is $10.00.

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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

The statements of grievance and relief sought filed by Grievants are similar in that they allege uniforms should be supplied to them and that it is arbitrary not to furnish them with uniforms as provided to other workers. Grievants maintain that their job assignments as mechanics require them to repair equipment away from the county garage on roadways in traffic-related areas. DOH contends that employees classified as mechanics do not perform their duties in traffic-related areas the majority of the time (i.e., more than 50%). Grievants further allege that it is discriminatory that their job classification is not included in the DOH Uniform Policy.

"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 are closely related to actions that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). Further, 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 the employer. See *generally, Harrison v. Ginsberg,* 169 W. Va. 162 286 S.E.2d 276 (1982).

DOH's Uniform Policy was developed with the assistance of key Administrative Personnel of Respondent, including Maintenance Division Director Kyle Stollings, Finance Director Fred Thomas, Human Resources Assistant Cindy Daugherty and Transportation Services Manager Heather Huffman. Ms. Huffman is Respondent's uniform coordinator.[3] She testified to the process and some of the considerations that went into establishing the DOH Uniform Policy. Specific job classifications of Respondent's Maintenance Department work force were identified, approved and are required to wear agency provided uniforms. These classifications specifically cited in the Uniform Policy work a majority of their regularly scheduled work time in traffic related areas. Grievants are to wear reflective safety vests when required to be in traffic-related areas. Resp. Ex. 3.

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[3] Ms. Huffman was responsible for overseeing various drafts of the overall policy, answering questions from the individual districts, and filling orders for the clothing.

In July of 2008 at a District Managers meeting in Clarksburg, the District Manager of District 4 presented a program for uniforms to the State Highway Engineer and Assistant Engineer Chief of Operations. There were conversations between the State Highway Engineer, the Assistant Engineer Chief of Operations, the Personnel Office, Finance, the District Managers, and actual employees. L3 Hearing Testimony, Director Stollings and Coordinator Huffman. Which classifications of workers to be included was specifically a topic of discussion. The classification(s) of Mechanic was at one time included as workers to receive uniforms. Id.

Ultimately, it was determined that in order to qualify as a worker who is entitled to a uniform, the worker should "spend the majority of their regularly scheduled work time in traffic related areas." Ms. Huffman testified that classifications were set by categories and not by individual time studies. Ms. Huffman pointed out that a worker needed to meet both requirements: majority of work time in traffic related areas and one of the five classifications to qualify for a uniform.[4] Mechanics were specifically excluded from being able to wear uniforms at a meeting that occurred at a conference in July of 2009 at Stonewall Jackson Lake State Park where the District Engineers/Managers decided that Mechanics did not work the majority of their time in traffic related areas and thus should not be included.[5]

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[4] The policy indicated that no personnel classifications other than those within the policy are eligible for agency supplied uniforms. See Section II. B.

[5] The Traffic Engineering Division did ask for several of their staff to be issued uniforms. The regulation provides that only District Personnel and Maintenance Division be included, but the Traffic Engineer Division asked that one Traffic Engineer Supervisor and four electronic technicians be granted uniforms. These limited exceptions were granted.

The exclusion of the Mechanic classification was not an act of omission. This Grievance Board will give reasonable deference to an agency's application of its own policy. *McCoy and Domingues v. W. Va. Parkways Economic Dev. and Tourism Auth.,* Docket No. 99-PEDTA-074 (July 19, 1999)*; Dyer v. Lincoln County Bd. of Educ.* Docket No. 95-22-494 (June 28, 1996)*; Edwards v. W. Va. Parkways Economic Dev. and Tourism Auth.*, Docket No. 97-PEDTA- 420 (May 7, 1998). *See generally W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993); *Princeton Community Hosp. v. State Health Planning & Dev. Agency*, 174 W. Va. 558, 328 S.E.2d 164 (1985); *Jones v. Bd. of Trustees,* Docket No. 94-MBOT-978 (Feb. 29, 1996); *Foss v. Concord College*, Docket No. 91-BOD-351 (Feb. 19, 1993). An agency's application of its internal policy is entitled to some deference by this Grievance Board, unless it is contrary to the plain meaning of the language, or is inherently unreasonable.

The Policy stated "[A]lthough DOH management realizes many employees may have occasional need for a uniform, the agency cannot afford to supply all employees with uniforms. Therefore, it is the intent of this policy to provide uniforms to those employees who spend the majority of their regular scheduled work time in traffic related areas." This rationale is not without merit. Further, Respondent acknowledges and there are recognized provisions in existence for workers, who periodically work in hazardous conditions. See Resp. Ex. 2 and 3. Employees who do not meet the eligibility requirements of the policy are provided, and required to wear, an ANSI approved vest while working in traffic-related areas for their safety and protection. See Uniform of Policy, Section III., Resp. Ex. 2. Respondent, through its agents, considered numerous options

with regard to implementing an Agency maintained Uniform Policy. Rationale lines of discernment were drawn. It is evident that economy was a factor. It is also evident that cost and maintenance were not the only factors considered. These are not arbitrary and capricious actions by a state agency.

For purposes of the Public Employees Grievance Procedure, 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) (2008). To establish a discrimination or favoritism 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)*; Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004).

Grievants did not establish that DOH's failure to provide them with uniforms is discrimination. Not every classification of employees employed by Respondent perform their assigned duties within the same conditions or frequency of event. Classifications approved and required to wear the uniforms work a significant portion of time on the roadways. As Mechanics, Grievants are not similarly situated to such employees. Nor has Respondent deemed it prudent to make an exception for a select mechanic or two.

It is recognized that as Mechanics, Grievants are called away from the garage, from time to time, to perform equipment repairs; further there is no way to predict how often; and it is conceivable that there might arise isolated weeks where an individual mechanic may exceed 50% or more of his time in the field, nevertheless, safety measures are in place short of agency provided uniforms for the entire classification. In the facts of the matter presented, Respondent established a rationale justification for its actions. Grievants have not established that Respondent's exclusion of Mechanics from the Uniform Policy was arbitrary and capricious. Respondent engaged in an effort to protect their employees by providing a more visible and reflective work uniform for those involved in maintaining West Virginia's highways and bridges. Respondents decided who should be included in that group of workers and limited it to "those employees who spend the majority of their regularly scheduled work time in traffic related areas." Resp. Ex. 2. The process used to develop and hone Respondent's Uniform Policy was not arbitrary. Respondent WVDOT/DOH has demonstrated sound justification for its actions and determinations as a state agency. Respondent established legitimate, rational justification for utilization of a Uniform Policy and the applicability to classifications which work a majority of their regularly scheduled work time in traffic related areas.

Finally, it became clear early on, to Respondent's Administrative Personnel that the focus of the Uniform Policy was going to be on highway maintenance and the Maintenance Department personnel. (L3 Hearing Testimony, Director Stolling). Grievant Morrison[6] is

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[6] The lone Grievant not employed to some degree as a Mechanic with Respondent. Grievant Morrison's distinction was not readily known till the Level 3 Hearing. It is not clear that Grievant Morrison's consolidation into the instant matter was intentional.

not covered by the DOH Uniform Policy in discussion. He works for the Equipment section. He is not a designated maintenance worker and any such work assignments are secondary duty for him. He does not spend "the majority of [his] regularly scheduled work time in traffic" and he is not one of the designated employees under Section IV Classifications to whom the policy applies. As with the case in chief, Grievant Morrison's job duties do not necessitate, nor is he eligible or deemed entitled to an agency maintained uniform.

Grievants did not prove essential elements of their various claims by a preponderance of the evidence. Grievants did not provide sufficient justification or evidence to establish Respondent violated any identified rule, regulation or statute. Respondent WVDOT/DOH has demonstrated rationale and reasonable justification of its actions and determinations. In the facts of this matter, Respondent's determinations are not arbitrary, capricious or clearly wrong. Consequently, the grievance is DENIED.

The above-discussion will be supplemented by the following Conclusions of Law.

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). 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)).

3. Grievants have not met their burden of proof and demonstrated Respondent's decision to exclude them from agency supplied uniforms was an abuse of discretion, or an arbitrary and capricious decision.

4. The Public Employees Grievance Board is authorized by statute to provide relief to employees for discrimination, favoritism, and harassment, as those terms are defined in W. VA. CODE § 6C-2-2.

5. 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);
> (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); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

6. Grievants failed to demonstrate that they were victims of discrimination or favoritism.

7. Respondent established a rational basis for its actions with regard to supplying uniforms pursuant to the agency Uniform Policy.

8. Respondent established reasonable and rational justification for denying Grievants agency uniforms.

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: December 23, 2010

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Landon R. Brown
Administrative Law Judge