# THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**VIRGIL KEATON, ET AL.,**

**Grievants,**

**v.** **Docket No. 2010-1523-CONS**

**WEST VIRGINIA DIVISION OF HIGHWAYS,**

**Respondent.**

## DECISION

Virgil Keaton ("Grievant") is employed by the Division of Highways ("DOH") and works in Roane County, West Virginia. Mr. Keaton filed a level one grievance form dated May 7, 2010, grieving his "[f]ailure to get travel time for Temporary Reassignment." As relief, Grievant Keaton sought "[t]ravel [p]ay or use of [a] state vehicle from Southern Roane Facility to the Spencer Facility." A level one hearing was conducted concerning this grievance on June 2, 2010. On the same day, Grievant Keaton's representative[1] filed level one grievance forms for three other DOH employees and a motion to consolidate their grievances with Mr. Keaton's. The new grievants were: Cliff Reichard, Larry Jett, and Herman Nichols ("Grievants"). All three of these Grievants are employed by the DOH in Roane County and their level one grievance forms made the same allegations and requested the same relief as was listed in Mr. Keaton's grievance form. By Order dated June 11, 2010, the Motion to Consolidate was granted by the undersigned, the four grievances were consolidated and given the docket number set forth in the case style

[1] Gordon Simmons, West Virginia Public Workers Union, UE Local 170.

above. A level one decision denying the consolidated grievances was issued on June 17, 2010.

Grievants appealed the level one decision and a level two mediation was held on September 17, 2010, and an Order related to the Mediation was entered on September 20, 2010. Grievants appealed to level three. On February 2, 2011, a level three hearing was conducted in the Charleston office of the West Virginia Public Employees Grievance Board. Grievants appeared in person with their representative Gordon Simmons, West Virginia Public Workers Union, UE Local 170. Respondent DOH was represented by Jason C. Workman, Esquire with the DOH Legal Department. The parties put on evidence to supplement the factual record that was made at the level one hearing. At the close of the testimony, the parties agreed to submit proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals, the latter of which was received at the West Virginia Public Employees Grievance Board on March 7, 2011. The grievance became mature for decision on that date.

**Synopsis**

Grievants claim that they were improperly transferred from the DOH Southern Roane Substation to the DOH Headquarters in Spencer. They argue that their principal work location remains at the Substation and that they are entitled to be paid mileage, or provided with an agency vehicle, for all days they are required to report directly to the Headquarters from their homes. Respondent counters that Grievants were properly reassigned to the Headquarters from the Substation when the Substation was closed. DOH argues that the principal work place for Grievants is the Headquarters in Spencer and

that Grievants are not entitled to additional compensation for traveling from home to work and back.

Grievants failed to prove that their reassignment to the Headquarters was improper and the Grievance is denied.

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 Virgil Keaton is employed by the DOH in Roane County, West Virginia. He has been employed by the DOH for thirteen years and is classified as a Transportation Crew Supervisor 1.

2. Grievant Herman Nichols is employed by the DOH in Roane County, West Virginia. Mr. Nichols is classified as a Transportation Worker 2 Equipment Operator and has been employed by the DOH for twenty-three years.

3. Larry Jett is employed by the DOH in Roane County, West Virginia. Mr. Jett is classified as a Transportation Worker 2 Equipment Operator and has been employed by the DOH for sixteen years.

4. Clifford Reichard is employed by the DOH in Roane County, West Virginia. He has been working for the DOH for fives years and is classified as a Transportation Worker 2 Equipment Operator.

5. The Roane County DOH operation is in DOH District Three which includes the following counties: Calhoun, Jackson, Pleasants, Ritchie, Roane, Wirt and Wood.

6. Until May 1, 2010, all four Grievants were assigned to work out of the Southern Roane Substation located at Left Hand, West Virginia.[2]

7. At one time there were fourteen road maintenance workers assigned to the Southern Roane Substation ("Substation"). Over the years, transportation worker positions have been reduced in the DOH through decisions to not fill vacancies which were created when workers left employment through retirement or resignation. The road maintenance workforce at this substation in early 2010 had been reduced, by attrition, to seven employees including Grievants.

8. Road patching crews generally need seven employees to operate effectively and safely. When a worker called off work for illness or annual leave, the Substation crew was short-handed and one or more employees had to be sent to the Substation from the Roane County Headquarters located in Spencer, West Virginia ("Headquarters"). This caused a delay in the work by the substation crew and required reorganizing the crews at the Headquarters.

9. The District Three managers, along with the Roane County Administrator, Gary Alvis, decided that it would be more efficient to close the Substation at Left Hand and reassign those employees to Headquarters. The ultimate goal was to develop specialized crews that would operate throughout Roane County rather than having a general crew at the Substation to serve a specific part of the county. The immediate effect was to eliminate

[2] The substation is also referred to regularly as the Left Hand Substation.

the need to send workers to the Substation from Headquarters when a Substation employee called off.[3]

10. Approximately a month before the Substation was closed, Administrator Alvis told Grievant Keaton that the Substation may be closed and the employees there would be reassigned to the Headquarters in Spencer.

11. Approximately three days before the move was to be made, the employees of the Substation were directed to report to the Headquarters in Spencer beginning on May 1, 2010.

12. While all of the Grievants applied for and received positions as transportation workers at the Substation in Left Hand, they are all employed by the Roane County section and work under the same organization number, 0344, which is the number for all Roane County DOH employees.

13. The Southern Roane Substation was the last remaining substation in any county in District Three. All substations in that district are now closed and all employees report to the county headquarters as their workplace.

14. Abrasives and chemicals used to treat the roads in the winter are stored in various locations in each county in the winter to make it possible for crews to quickly treat roads in those areas during the Snow Removal and Ice Control ("SRIC") season each year.

15. The Substation was used as a location for the storage of treatment chemicals beginning December 1, 2010 through April 1, 2011. It is anticipated that this practice will continue each SRIC season.

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[3] Level three testimony of David Brabham, Assistant Engineer in charge of Maintenance for District Three.

16. During SRIC season, Grievants were reassigned to the Substation so that they could respond more quickly to the need to clear roads in that area. During that period of time they were not required to report to the Headquarters in Spencer.

17. All Grievants live closer to Left Hand than they do to Spencer making it a longer commute to work when they are assigned to Headquarters.[4]

**Discussion**

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

Grievants argue that closing of the Substation and moving Grievants to the Headquarters constitutes a transfer, pursuant to the West Virginia Division of Personnel Legislative rule. They note that the West Virginia Division of Highways Administrative Operating Procedures ("DOH Operating Procedures") require an employee to be "given a minimum of ten calendar days advance notice in writing of transfer."[5] Since Respondent did not give Grievants a written notice of their move from the Substation, Grievants argue

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[4] While this is true for Grievants, some employees who were assigned to the Substation have a shorter commute to the Headquarters.

[5] West Virginia DOH Administrative Operating Procedures, Section II, Chapter 8, Subsection IV. B.

that the transfer is in violation of Respondent's Operating Procedures and therefore void. They further aver that Grievants are entitled to compensation for travel to the Headquarters in Spencer since it is not their assigned work station.

Respondent counters that Grievants were not transferred from the Substation to the Headquarters but rather they were reassigned within the same "organizational unit." It notes that the DOH Operating Procedures do not require that employees receive a written notice of reassignment. Respondent further notes that Grievants knew for a month that they were likely to be assigned to the Headquarters before that move occurred.

The West Virginia Division of Personnel Legislative Rule defines "transfer" as "the movement of an employee to a different subdivision or geographic location of the same or a different agency." 143 C.S.R. 1 § 3.91. The rule also provides the following:

> (a) Except as otherwise provided in subsection 10.4 of this rule, appointing authorities may transfer a permanent employee from a position in one organizational subdivision of an agency to a position in another organizational subdivision of the same or another agency at any time. . .[6]

The DOH Operating Procedures define "transfer" and "reassignment" as follows:

> A. **TRANSFER**
> The term "transfer" shall mean the movement of an employee from the jurisdiction of one organizational unit within the Division of Highways to another. For this purpose, organizational units are defined as follows: each County, each District, and each Expressway Maintenance Section.
>
> B. **REASSIGNMENT**
> The term "reassignment" shall mean the movement of an employee within the same organizational unit.

[6] Subsection 10.4 of 143 C.S.R. 1, relates to transfer during a probationary period and consequently not applicable to this grievance.

The smallest organizational unit for the purpose of transfer within the DOH Operating Procedures is the County. All of the employees assigned to the Substation at Left Hand were listed as belonging to the Roane County organizational unit. Their movement from the Substation at Left Hand to the Headquarters in Spencer, meets the definition of reassignment set out in the DOH Operating Procedures. This definition is not inconsistent with the West Virginia Division of Personnel Legislative Rule related to transfer because Grievants were not moved from one "organizational subdivision" to another. 143 C.S.R. 1 § 3.91. The Grievance Board gives reasonable deference to the agency's interpretation of its own policy. *See Dyer v. Lincoln County Bd. of Educ.* , Docket No. 95-22-494 (June 28, 1996). *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). Such interpretations must be judged by the arbitrary and capricious standard. *Dyer, Supra*

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 is 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). 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 have not demonstrated that Respondent's characterization of the move of Grievants' assignment from the Substation

to the Headquarters as a “reassignment” rather than a “transfer,” is inconsistent with DOH Operating Procedures or arbitrary and capricious. DOH complied with its Operating Procedures and the reassignment of Grievants was proper.

The Grievance Board has previously ruled that DOH employees are not entitled to compensation for traveling from home to the place of their regular assignment. *Petrucci v. Dept. of Transp.,* Docket No. 2009-0003-CONS (Apr. 29, 2009). Since Grievants have been reassigned to the Headquarters, they are not entitled to payment for mileage from their home to that location. When Grievants are reassigned to the Substation in Left Hand for SRIC, they are not entitled to payment for milage from their home to that location either. Consequently, the consolidated grievances are DENIED.

**Conclusions of Law**

1. As this grievance does not involve a disciplinary matter, Grievants bear the burden of proving their 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. The Grievance Board gives reasonable deference to the agency's interpretation of its own policy. *See Dyer v. Lincoln County Bd. of Educ.* , Docket No. 95-22-494 (June 28, 1996). *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). Such interpretations must be judged by the arbitrary and capricious standard. *Dyer, Supra*.

3. 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 is 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). 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).

4. The movement of Grievants from the Substation at Left Hand to the Headquarters in Spencer, met the definition of reassignment set out in the DOH Operating Procedures. This definition is not inconsistent with the West Virginia Division of Personnel Legislative Rule related to transfer because Grievants were not moved from one "organizational subdivision" to another. 143 C.S.R. 1 § 3.91. Grievant failed to prove that Respondent's action was in violation of its Operating Procedures or arbitrary and capricious.

5. The Grievance Board has previously ruled that DOH employees are not entitled to compensation for traveling from home to the place of their regular assignment. *Petrucci v. Dept. of Transp.,* Docket No. 2009-0003-CONS (Apr. 29, 2009). Since Grievants have been reassigned to the Headquarters they are not entitled to payment for mileage from their home to that location.

Accordingly, the consolidated grievances are 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: JUNE 30, 2011.**

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**WILLIAM B. MCGINLEY**
**ADMINISTRATIVE LAW JUDGE**