WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JASON BLEVINS,
Grievant,

v. **Docket No. 2010-0280-DOT**

DIVISION OF HIGHWAYS,
Respondent.

D E C I S I O N

Grievant Jason Blevins filed a grievance against West Virginia Department of Transportation, Division of Highways ("DOH"), Respondent on October 1, 2009, asserting he should be afforded a uniform for his personal safety pursuant to the agency's uniform policy based upon the amount of time he spends in traffic area. The relief requested was to have agency uniforms provided to Grievant by the employing state agency, like other known employees of Respondent.

Respondent is not supplying agency mechanics with work clothes while supplying other identified classifications. See *Canaday et al v. Division of Highways,* Docket No. 2009-1715-CONS (Dec 23, 2010). Grievant disagrees with this practice in theory and fact.

A level one conference was held with Grievant on October 21, 2009, and a written decision denying the grievance was issued on November 10, 2009. Grievant appealed to level two on November 25, 2009, and mediation proceedings, in reference to the instant matter, transpired on April 14, 2010. Grievant appealed to level three. A level three hearing was held before the undersigned Administrative Law Judge on August 4, 2010, at the Grievance Board's Beckley facilities. Grievant appeared in person and represented his interest. Respondent was represented by its counsel Robert Miller, DOH Legal Division.

This matter became mature for decision on September 7, 2010, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Neither party submitted proposed argument documents.

Synopsis

Grievant is employed as a Mechanic with Respondent. Grievant wants to be issued uniform apparel maintained by Respondent and contends he is or should be eligible for the benefit as an 'express-way' mechanic. Further, he alleges the failure to provide him such is detrimental to his personal safety. In accordance with the Division of Highways' Uniform Policy, agency mechanics are not provided with agency maintained uniforms. Nor has Respondent deemed it prudent to make an exception for a select mechanic or two. Job classifications were selected for uniforms, not individuals.

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, capricious or unreasonable. See *Canaday et al., v. Division of Highways,* Docket No. 2009-1715-CONS (Dec 23, 2010). This 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. Grievant is employed as a Mechanic for Respondent.

2. Individuals employed as Mechanics by Respondent were denied issuance of uniforms by the West Virginia Department of Transportation, Division of Highways.

3. 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.

4. On June 26, 2009, Respondent disseminated a Uniform Policy to be implemented on July 1, 2009. Resp. Ex. 1.

5. 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 Uniform of Policy, Section IV., Resp. Ex. 1.

6. The Policy authorizes uniforms for DOH employees in specific job classifications among which Transportation Worker – Mechanics are not included. The classifications of TW2MECH and TW3MECH are not included as classifications eligible to receive uniforms provided by Respondent.

7. 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.”

8. 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.”

9. The uniform program is to be all inclusive. Participants are supplied a designated number of uniforms and the agency maintains the care and maintenance cost, and exchanges the uniforms on predetermined days for cleaning and replacement. 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 estimated to be ($10.00) ten dollars.

10. Classifications approved and required to wear uniforms work a majority of their regularly scheduled work time in traffic related areas. Majority of time and/or eligibility was determined by Respondent officials to be more than fifty percent of work time in traffic conditions.

11. Specific job classifications were selected for uniforms, because the workers spend more than 50% of their work time in traffic conditions. Identified classifications were selected for uniforms, not individuals.

12. 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.

13. 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.”

14. Mechanics, when required to repair equipment or perform other work related activity away from the garage in traffic-related areas, are to wear designated safety equipment such as approved reflective vests.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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.*

It is clear that the Respondent devoted about one year in developing a Uniform Policy. Further it is recognized there are benefits, beyond safety issues, in having one’s employer provide and maintain a work apparel program. See Finding of Fact 9.

Nevertheless, pursuant to the provisions of the policy, Grievant is not eligible for the benefits of the program. Grievant contends that his job assignments as an 'express-way' mechanic routinely requires him to perform duties in high speed traffic-related areas.[1] In this grievance, Grievant struggled to establish that he performs a significant amount of work related activity in an area with high speed, high volume traffic (data was inconclusive). Grievant acknowledges the amount of time he spends in the various areas varies, but further contends that his assigned outdoor duties are in an environment characterized by high speed volume traffic, moving at high speeds, establishing a valid need for the same highly-conspicuous reflective clothing that Respondent supplies his coworkers.[2]

Grievant alleges uniforms should be supplied and maintained for him as provided to other workers. Grievant contends failure to do such is short sighted and irresponsible. Grievant as a layman does not rely upon words like arbitrary and capricious or discriminatory but uses general conceptual terms of fairness and safety concerns. Respondent 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%).

"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

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[1] Grievant asserts he uniquely is required to perform activity where all routes in his area of responsibility are interstate highway or limited access/divided highway with significant volume of high speed traffic.

[2] The Secretary of Transportation distributed a memorandum to all DOH employees on August 20, 2009, Gr. Ex. 3. which states that "[t]he Class 2 apparel (yellow-green vest) was determined to be the minimum requirement for all workers within the right-of way of a Federal-aid highway and recommended only **for use on low speed, low volume, secondary routes**." Emphasis added. Grievant cites this as justification for granting him an exception.

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).

Grievant's request is not truly unique. This request with slight deviation in justification was presented previously by agency mechanics. *Canaday et al v. Division of Highways,* Docket No. 2009-1715-CONS (Dec. 23, 2010). It was discussed and set forth in that decision that DOH's Uniform Policy was developed with the assistance of key Administrative Personnel of Respondent, including Transportation Services Manager Heather Huffman, who testified in the instant matter.

Accordingly, Respondent highlights there are provisions in existence for workers, who periodically work in hazardous conditions. Employees who do not meet the eligibility requirements of the policy are, for their protection, provided and, in fact, required to wear an ANSI approved vest while working in traffic-related areas. *See* Uniform Policy, Section III., Resp. Ex. 1. Respondent, through its agents, considered numerous options with

regard to implementing an Agency maintained Uniform Policy. Rational lines of discernment were drawn.

Heather Huffman, Respondent's uniform coordinator, testified to the process and some of the considerations that went into establishing the DOH Uniform Policy. Specific job classifications of Respondent's work force were identified, approved and are required to wear agency provided uniforms. 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.[3] These classifications specifically cited in the Uniform Policy work a majority of their regularly scheduled work time in traffic related areas. Respondent, through its agents, considered numerous options with regard to implementing an Agency maintained Uniform Policy. Limited exceptions were granted. Ultimately, as determined by administrative personnel of Respondent in July of 2009, Mechanics were specifically excluded from the uniform program.

Respondent provided for the safety of the categories of workers who were in traffic for most of the time while also making provisions for the safety of those categories of employees who were not in traffic most of the time. The exclusion of the Mechanic classification was not an act of omission. Grievant is to wear reflective safety vests when required to be in traffic-related areas. 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)*; Edwards*

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

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). 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.

DOH management realizes many employees may have occasional need for a uniform, however the agency does not deem it feasible to supply all employees with agency maintained uniforms. Nor has Respondent deemed it prudent to make an exception for a select mechanic or two. There are recognized provisions in existence for workers who periodically work in hazardous conditions.

It is recognized that as a mechanic, Grievant from time to time will be required to perform duties in the vicinity of traffic; 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 providing an agency maintained uniform. In the facts of the matter presented, Grievant has not established that Respondent's exclusion of him from the Uniform Policy is improper. 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. Respondent 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. 1. The process used to develop and hone Respondent's Uniform Policy was not arbitrary. Identified classifications were

selected for uniforms, not individuals. Respondent demonstrated sound justification for its actions and determinations.

Grievant did not prove essential elements of his various allegations by a preponderance of the evidence. Grievant did not provide sufficient justification or evidence to establish Respondent violated any identified rule, regulation or statute. 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, Grievant has the burden of proving his 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. Grievant has not met the applicable burden of proof and has not demonstrated Respondent's decision to exclude him from agency supplied uniforms was an abuse of discretion, or an arbitrary and capricious decision.

4. Grievant failed to demonstrate that he was a victim of irrational actions by Respondent. Respondent established a rational basis for its actions with regard to supplying uniforms pursuant to the agency's Uniform Policy. *Canaday et al v. Division of Highways,* Docket No. 2009-1715-CONS (Dec 23, 2010).

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: February 9, 2010

Landon R. Brown
Administrative Law Judge