# WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**JERRY LANE,**
**Grievant,**

**v.** **Docket No. 2009-1544-DOT**

**DEPARTMENT OF TRANSPORTATION/**
**DIVISION OF HIGHWAYS,**
**Respondent.**

## D E C I S I O N

Grievant, Jerry Lane, filed a grievance against Respondent, Department of Transportation/Division of Highways (hereinafter "DOH"), on May 19, 2009, protesting his non-selection for equipment training courses. Grievant alleges that he has been a victim of favoritism in that less tenured employees are being selected to attend training courses for equipment operation, ahead of him. Grievant requests to be 'next to certification school' and that Respondent post upgrades and future training opportunities on the bulletin board.

A level one hearing was held on June 3, 2009, and the grievance was denied at that level on June 17, 2009. Grievant appealed to level two on June 19, 2009, and a mediation session was held on October 30, 2009. Grievant appealed to level three. After a number of agreed continuances, a level three hearing was held before the undersigned Administrative Law Judge on July 21, 2010, at the Grievance Board's Beckley office. Grievant appeared in person and was represented by Gordon Simmons, UE Local 170 West Virginia Public Workers Union. Respondent DOH was represented by counsel, Robert Miller, Division of Highways' Legal Division.

This matter became mature for decision on September 24, 2010, the deadline for the submission of the parties' proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals.

## Synopsis

Grievant operates an endloader, as a Transportation Worker 2, equipment operator, employed by Respondent. Grievant claims his employer's selection of individuals to attend training courses for equipment operation is fatally flawed. Grievant alleges that he was a victim of favoritism in not being selected for equipment operator certification training. Grievant's claims were not substantiated by the evidence. Seniority is a factor, but not the sole consideration for granting employment benefits. It was not established that training selection decisions were arbitrary and capricious, nor did Grievant prove favoritism. 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. It is the responsibility of Respondent to ensure that employees who operate rolling equipment are properly trained to do so safely, efficiently, and effectively. The primary mission of the Equipment Operators Training Academy is to provide such training through a combination of classroom instruction, practical exercises and, when required, certification. WV DOH Administrative Operating Procedure, Resp. Ex. 1.

2. Grievant is employed as a Transportation Worker 2, equipment operator, in Greenbrier County, District 9, of the West Virginia Division of Highways. Grievant began working for Respondent in 2006.

3. Grievant currently operates an endloader. Grievant attended and successfully completed training on October 5, 2006 in basic operation, preventive maintenance and safety of the endloader.

4. Grievant has been a principle party involved in three accidents while operating Respondent's equipment.

A. On September 14, 2007, while operating a tractor with mower attached, Grievant cut through a private power line.

B. On November 7, 2007, Grievant backed an endloader into a DOH pickup truck on a job site causing an estimated $3,157 damage to the truck.

C. On June 16, 2008, Grievant was operating an endloader and pulled down a utility line with the bucket.

5. WV DOH Administrative Operating Procedure, Section IV, Chapter 9, "Equipment Operators Training Academy," prescribes the manner in which employees apply for and supervisors select employees to attend basic and pre-certification equipment operator courses. Resp. Ex. 1.

6. Respondent's policy on Equipment Operators Training Academy, effective June 15, 2002, provides, in relevant part, that when "there is a need for additional employees to operate equipment requiring certification and consistent with the classifications of Transportation Worker II or III, the organization supervisor will: a. post a notice to that effect on the organization's bulletin board for ten working days; and b. ensure that employees are informed of the opportunity for training and that they are given the opportunity to tell him or her of that interest. Resp. Ex. 1.

7. Respondent's policy on Equipment Operators Training Academy, provides, in relevant part, that "the organization supervisor will: a. consider all interested employees based on their work experience, general abilities, valid Commercial Drivers License (CDL)

and work history including the amount of time employed within the agency." Resp. Ex. 1. The supervisor selects employees to attend the training based upon these criteria and submits his selection to the District Engineer/Manager who reviews the choices and decides which employee(s) will be trained.

8. In 2009, Grievant put his name on posted lists requesting certification training for grader school and for backhoe school. Resp. Exs. 2 and 3.

a. A notice of training for motor grader was posted in the Greenbrier County maintenance organization during the period March 13 - March 27, 2009.

b. A notice of training for backhoe was posted in the Greenbrier County maintenance organization during the period March 13 - March 27, 2009.

9. Employees of Respondent other than Grievant were selected for March 2009 training. At the time relevant to the instant grievance, Keith Hollingshead made the recommendations for who would be selected for equipment school.

10. Keith Hollingshead was employed by Respondent at District 9 Headquarters as Greenbrier County Highway Administrator at the time this grievance was filed. He had been in that position for six years, and had been working for Respondent for thirty-one years. Administrator Hollingshead has subsequently retired.[1]

11. Mr. Hollingshead, when selecting employees to attend pre-certification training courses, considered the employee's work experience, general abilities, possession of a valid CDL and work history.

---

[1] Administrator Hollingshead testified at the level one hearing on July 3, 2009. That testimony was transcribed and readily available for consideration. Mr. Hollingshead retired from employment with Respondent prior to level three proceedings which transpired on July 21, 2010 after mutually requested continuances.

12. Crew Chief Douglas E. Lucas testified at the Level 3 hearing. He knew very little about the methods of selection for the training academy employed by Mr. Hollingshead and, in fact, did not know much about the selection process theoretically or in practicality. Crew Chief Lucas had very little to offer regarding who was or was not selected for a training class. Douglas E. Lucas had been a Crew Chief I for about two and one half years.

13. Gary Blume has been a Crew Supervisor since April 2010 and has worked for the WVDOH for seven years. He knows nothing about how the candidates for the Equipment Operators Training Academy are chosen other than the fact that a list is posted in the county office so that individuals can sign up for those jobs in which they are interested. Crew Supervisor Blume testified that he sometimes uses seniority in making up the positions of the small crews who work for him.

14. Crew leaders have little to no input regarding who is selected for training.

**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.*

Grievant grieves that he has not recently been selected to attend training courses for equipment operation. A central assertion of Grievant is that less tenured employees are being selected for equipment training ahead of him.[2] Grievant wishes to qualify for upgraded status on the operation of various heavy equipment utilized by Respondent. Grievant avers that Respondent did not follow past practice and written policy in posting training, and because Respondent did not adequately consider Grievant's tenure and previous equipment experience in making selections for equipment training, Grievant's opportunity to qualify for upgraded positions was improperly denied.

Respondent maintains that the decision as to who was selected to attend Equipment Operating Training Academy was not fatally flawed. Administrator Hollingshead testified the chosen individuals were selected on the basis of work experience, general abilities, valid Commercial Drivers License, work history, and other discernable factors; not solely on the amount of time the person has been with WVDOH.

"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.*

---

[2] It became apparent that Grievant complained of opportunities for 'training' and doesn't differentiate between basic, new and pre-certification equipment training. This simplistic view is problematic in that not all training is governed by the same posting and selection procedures, but need not be clarified to address the issues of the instant grievance.

*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 Resources*, 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). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Id.* (*citing Arlington Hosp. v. Schweiker,* 547 F. Supp. 670 (E.D. Va. 1982)). 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 a board of education. *See generally, Harrison v. Ginsberg,* 169 W. Va. 162, 286 S.E.2d 276, 283 (W. Va. 1982). *Trimboli*, *supra*.

Administrator Hollingshead testified that a worker applied for an equipment operator training course by signing his or her name to a notification that was posted for 10 days at his office headquarters. He would, subsequently, forward the names of the most qualified employees to the district headquarters. Individuals are to be chosen on the basis of work experience, general abilities, valid Commercial Drivers License, work history, and the amount of time the person has been with Respondent. *WVDOH Administrative Operating Procedures, Section IV Chapter 9, Equipment Operators Training Academy, pgs 5-7.*

Mr. Hollingshead selected Brandon Roberts and Christopher Clendenin for the postings in discussion. Both of these employees have less tenure with Respondent than Grievant. Mr. Hollingshead testified the fact that Grievant had had three accidents

involving WVDOH vehicles in the three years that Grievant had worked there influenced his choice. Resp. Exs. 7 & 8; Level one Transcript p. 16. Mr. Hollingshead also testified that he has to be sure that each worker was certified to operate at least one piece of highway equipment. The two individuals he picked were not certified to operate any piece of highway equipment. Administrator Hollingshead fowarded the names of the two employees he determined most appropriate to Steven Cole, the District Engineer at District 9. Subsequently, both were approved for and did, in fact, participate in equipment operation training course(s).

Grievant's Representative emphasizes that when asked how much weight seniority was given in selecting who was to be trained, Administrator Hollingshead testified that he gave no weight to seniority. Level I Hearing at p. 23. Grievant's seniority with Respondent is relevant, citing *WVDOH Administrative Operating Procedures,* Resp. Ex. 1. The undersigned is well aware that seniority is a factor in granting a benefit to an employee. Grievant's point is noted but this wordsmanship alone didn't satisfy the burden necessary to prevail in the circumstance of this case. Respondent considered Grievant's work history. *See* e.g., Finding of Fact 3 and 4. Grievant did not establish that Respondent's selection of individuals to attend identified equipment training was arbitrary and capricious.

It is true, as Grievant contends, that he had more seniority than the individuals selected and W. VA. CODE § 29-6-10(4) provides for an employer to consider seniority in selection decisions. However, Grievant is misconstruing the statute. Contrary to Grievant's proposition, seniority is not the primary consideration or sole factor to be evaluated. Seniority with an agency is a consideration; however, seniority is not the only criteria for awarding opportunity for advancement in the work place.

West Virginia Code § 29-6-10(4) requires an employer to consider seniority in selection decisions "if some or all of the eligible employees have substantially equal or similar qualifications[.]" In other words, seniority is a "tie breaker," not a primary consideration. In this case, the eligibility or qualifications of the candidates, as determined by Respondent's Administrative personnel, were not so similar that seniority was the definitive factor. An employer may determine that a less senior applicant is more deserving of a particular benefit, eg., training opportunity and not invalidate the selection. Grievant's seniority with Respondent is relevant, but in the facts of the present grievance, it was not definitive.

Respondent has established procedure to select workers for the Equipment Operators Training Academy. This process, regrettably it seems, is not readily understood by the majority of the workers. Respondent might do well to make the procedure more transparent. Nevertheless, the decision as to whom is selected to attend is a series of evaluations of multiple facts by agency administrators. Some factors are more quantitative than others. *See* Resp. Ex.1. One of the factors is the amount of time the person has been employed; however, it is **not** the definitive element. Another factor properly considered by Respondent is an assessment as to whom Respondent believes will most readily benefit the agency. In selecting the workers for the courses in discussion, Respondent was clearly not being arbitrary and capricious.

Additionally, Grievant claimed that favoritism in the selection process rendered it fatally flawed. "Favoritism" is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless agreed to in writing or related to actual job responsibilities." W. VA. CODE § 6C-2-

2(h). In order to establish either 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.*, 655 S.E.2d 52 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chadock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

Grievant has not met his burden of proving he was treated differently than the successful applicants. He is frustrated that he has not been selected recently for additional heavy equipment training. The fact that an employee has expressed interest in additional or specific equipment training does not mandate Respondent provide the training on the timetable most desired by the employee. It is the responsibility of Respondent to ensure that employees, who operate equipment are properly trained to do so safely, efficiently, and effectively. It is Respondent's prerogative, within the confines of applicable regulations, to determine the scheduling of such training. Grievant is not empowered to dictate when Respondent will provide him with additional educational opportunity.

Lastly, it is not established that Respondent has not properly presented its employees with opportunity for training on rolling equipment utilized by the agency. The primary mission of the Equipment Operators Training Academy is to provide such training through a combination of classroom instruction and practical exercises. Nor is it

established that Respondent does not adequately post notice on the organization's bulletin board and ensure that employees are informed of the opportunity for training.

The following conclusions of law support the decision reached.

## 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 W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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 agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its 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 view. *Bedford County Memorial Hosp. v. Health and Human Serv.,* 769 f.2d 1017 (4th Cir. 1985). 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). In this case Respondent's actions were not arbitrary and capricious.

3. Grievant did not establish that Respondent inadequately posts or fails to give employees notice of opportunity for equipment training.

4. Grievant did not establish the selection process for participation in agency equipment training courses was insufficient or fatally flawed as to invalidate the selection in discussion.

5. In order to establish either 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*., 655 S.E.2d 52 (2007); *See Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chadock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

6. Grievant did not meet his burden of proving he was the victim of favoritism.

7. Grievant failed to prove that his non-selection for identified equipment training was based on favoritism or an arbitrary and capricious decision.

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:** April 14, 2011

**Landon R. Brown**
**Administrative Law Judge**