WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

FRED A. MCCOMAS,
Grievant,
v. **Docket No. 2012-0240-PSC**

PUBLIC SERVICE COMMISSION,
Respondent.

DECISION

Grievant, Fred A McComas, is retired from employment with the Respondent, Public Service Commission ("PSC"). Grievant had been employed by the PSC as a Weight Enforcement Officer and prior to his retirement, he filed a level one grievance form, dated August 23, 2011, alleging the following:

> According to 30-29-1[1] definitions, the enforcement officers of the P.S.C. Enf. Div. are defined as "Law Enforcement Officers." Also, according to the Law Enforcement Officers Safety Act, HR 218, enacted in 2004 and revised in 2010, the officers of the P.S.C. meet the requirements set forth in said Act. However, the P.S.C. does not provide retiring officers a retired officer I.D. as is required by the Act.

As relief, Grievant seeks:

> That a retired law enforcement officer I.D. be made available to all former and future enforcement officers of the Public Service Commission Transportation Division so that they can exercise this privilege and right.

A level one hearing was held on September 15, 2011, and an Order was entered denying the grievance on October 6, 2011. Grievant filed a level two appeal dated September 30, 2011.[2] A mediation was conducted on January 25, 2012, and Grievant subsequently filed a timely appeal to level three. After a number of continuances, a

[1] This citation refers to W. VA. CODE § 30-29-1.
[2] No explanation was offered as to why Grievant's level two appeal was filed before the level one decision was issued.

level three hearing was held in the Charleston office of the West Virginia Public Employees Grievance Board on October 1, 2012. Grievant appeared *pro se,* and Respondent was represented by Belinda B. Jackson, Esquire. The parties submitted Proposed Findings of Fact and Conclusions of Law, the last of which was received at the West Virginia Public Employees Grievance Board on October 29, 2012.[3] This matter became mature for decision at that time.

Synopsis

Grievant seeks to require Respondent to provide him with an identification card from the PSC confirming that he is a retired law enforcement officer. The identification card would trigger certain rights for Grievant under federal law. Respondent believes that the issuance of the identification card is discretionary and has declined to exercise that discretion, because it feels that many of its officers have not had the same training as other law enforcement officers in the state. Grievant argues that Respondent's failure to issue the card constitutes discrimination because other law enforcement officers in the state do receive a retired officer identification card. Respondent demonstrated that it has refused to issue the identification card for all officers retiring from that Agency and, therefore, has not discriminated. Additionally, Respondent notes that there are other agencies which employ law enforcement officers and decline to issue the cards. Grievant was unable to prove that Respondent is guilty of discrimination as that term is defined in the public employees grievance statute.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

[3] Grievant submitted a rebuttal to Respondent's proposals of February 12, 2013. It disputed some factual allegations in Respondent's proposal but raised no new legal issues. Findings of Fact are made by the undersigned based upon the record made at the hearings.

Findings of Fact

1. Grievant, Fred McComas, was employed by the Public Service Commission as a Weight Enforcement Officer for seventeen years before he retired on November 15, 2011.

2. In 2006, the Legislature amended WEST VIRGINIA CODE § 30-29-1 by including "persons employed by the Public Service Commission as motor carrier inspectors and weight enforcement officers" in the definition of "law enforcement officers."[4] One effect of this amendment was that those officers were authorized to carry a firearm in the performance of their duties.

3. PSC officers hired after 2006 are required to pass a sixteen-week basic training for police officers at the State Police Academy to be certified police officers. Officers employed by the PSC prior to 2006, who had been so employed for five years, were exempt from this requirement. Grievant was one of the officers who were exempt from the basic training and did not receive that training during his employment with the PSC.

4. There are sixty-nine officers employed by the PSC. Only eighteen of those officers have been through the sixteen-week basic training for police officers.

5. Grievant has received training in the proper use and handling of firearms, arrest procedures and specific issues related to enforcement of PSC Commercial Motor Carrier regulations. He has met firearm certification requirements and has a permit to carry a concealed weapon in the State of West Virginia. Grievant declined the offer of the PSC to take the basic training for police officers required to be certified as a "police

[4] However, the statute specifies that the PSC may not be considered a law enforcement agency.

officer" because he had been through "boot camp" training in 1965.[5] Respondent's Exhibit 1.

6. Shortly before Grievant retired from the PSC, he requested that the PSC provide him with an identification card which verified that he was a retired law enforcement officer. Grievant believes that this card would enable him to carry a firearm in all fifty states pursuant to the Federal Law Enforcement Officers Safety Act ("LEOSA").

7. Respondent PSC has not adopted a policy or procedure for issuing retired law enforcement identification cards to its retired enforcement officers. Nothing in the LEOSA requires the PSC to issue these identification cards. Issuance of the cards is discretionary under the Act.[6] Respondent has not provided these cards to any of its retired law enforcement officers even though at least one other retired officer has requested it.

8. Several state, county and local agencies provide retired law enforcement identification cards to officers who retire from their employment. Included in those agencies are; the State Police, Department of Natural Resources, State Fire Marshall's Office, Kanawha County Sheriff's Office, and the City of Sophia.[7]

9. In addition to the PSC, there are other state, county and local agencies which do not give retired law enforcement identification cards to their law enforcement officers who have retired. The Capitol Police Force does not issue these cards even

[5] Grievant appears to be referring to the basic police training course, but it is undisputed that Grievant was not a certified police officer even though he did meet the statutory definition of a law enforcement officer.
[6] Grievant's Exhibit 1, A letter regarding the ACT to Grievant from Tim Richardson, Senior Legislative Liaison for the National Fraternal Order of Police.
[7] These are agencies which were listed in the testimony of a witness at the level three hearing. The list is certainly not all inclusive.

though their officers are required to complete the sixteen-week basic training for police officers.

Discussion

As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving the 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).

The Federal Law Enforcement Officer Safety Act allows retired law enforcement officers to carry concealed weapons in all fifty states under certain conditions. The Act specifically states:

> (a) Notwithstanding any other provision of the law of any State or any political subdivision thereof, an individual who is a qualified retired law enforcement officer and who is carrying the identification required by subsection (d) may carry a concealed firearm that has been shipped or transported in interstate or foreign commerce, subject to subsection (b). . .
>
> (d) The identification required by this subsection is—
> (1) a photographic identification issued by the agency from which the individual separated from service as a law enforcement officer that identifies the person as having been employed as a police officer or law enforcement officer and indicates that the individual has, not less recently than one year before the date the individual is carrying the concealed firearm, been tested or otherwise found by the agency to meet the active duty standards for qualification in firearms

> training as established by the agency to carry a firearm of the same type as the concealed firearm.[8]

Grievant argues that Respondent does not have a good reason for refusing to issue him a retired law enforcement identification card which would enable him to exercise the right to carry a concealed weapon nation-wide. Nothing in the LEOSA requires the PSC to provide these identification cards. Issuance of the cards is left to the discretion of the agencies. Discretionary action of a public agency will consistently be upheld unless they are found to be arbitrary and capricious. *See generally, Dillon v. Bd. of Educ.,* 177 W.Va. 145, 351S.E.2d 58 (1986); *Christian v. Logan County Bd. of Educ*., Docket No. 94-23-173 (Mar. 31, 1995). 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).

The Director of the PSC Transportation Enforcement Division, Gary Edgell, has been involved in law enforcement throughout his career. Before coming to the PSC, he retired from the State Police as a Captain and had served as the Superintendent of the State Police. Director Edgell testified that the PSC decided not to issue the retired

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[8] 18 USC § 926C

officer identification cards because the majority of their officers have not completed the sixteen-week training necessary to become a certified police officer in West Virginia. He notes that the weapons training given to the PSC officers was shorter and less rigorous than the training which is offered at the State Police Academy. He concluded that issuance of the cards did not benefit the agency and the agency was not comfortable issuing the cards to officers based upon their limited training.

Grievant counters that he has received extensive training in the proper handling of firearms. He notes that the PSC allows its officers to carry firearms on the job after receiving their training and opines that they should therefore be safe in handling the weapons when away from work.

Respondent's decision not to issue the identification cards to retired officers is based upon reasonable and measurable criteria. While individuals may disagree with the Agency's reasons for deciding not to issue the cards, those reasons are not arbitrary and capricious. The reasons specifically relate to the varying amount of training officers receive in handling firearms, and carrying concealed weapons is the subject of the federal statute. Consequently, Grievant was unable to meet his burden of proof on this issue.

Next, Grievant argues that Respondent's refusal to issue the identification cards constitutes discrimination. He argues that he should be entitled to exercise the rights set out in LEOSA like other law enforcement officers, and Respondent's refusal to issue the identification card results in him being treated differently that other officers with respect to the Federal Act.

Discrimination has a specific meaning in the public employees grievance procedure. For purposes of that 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); *Harris v. Dep't of Transp* ., Docket No. 2008-1594-DOT (Dec. 15, 2008).

The evidence demonstrated that Respondent treats all of its employees the same with regard to the issuance of retired officer identification cards. The PSC has not issued the cards to any employees or retirees. Grievant's evidence related to employees of other agencies. He did not prove that there were any employees of the PSC who were treated differently. Obviously, the PSC has no control over the decisions of other agencies on this issue. While Grievant's frustration with being treated differently than officers employed by other agencies is understandable, the issue in the grievance procedure is whether the agency treats its own employees the same, and in this instance it does. Grievant did not prove that Respondent was guilty of

discrimination as that term is defined in the grievance process.[9] Accordingly, the grievance is DENIED.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving the 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. Discretionary action of a public agency will generally be upheld unless they are found to be arbitrary and capricious. *See generally, Dillon v. Bd. of Educ.,* 177 W.Va. 145, 351S.E.2d 58 (1986); *Christian v. Logan County Bd. of Educ*., Docket No. 94-23-173 (Mar. 31, 1995).

3. 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).

[9] There was no uniformity among other agencies on this issue. While many do provide the retired officer identification card it is not a universal practice. *See,* Findings of Fact 8 & 9, *supra.*

4. Grievant did not prove by a preponderance of the evidence that Respondent's decision to not issue retired officer identification cards to its employees was arbitrary and capricious.

5. For purposes of the 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).

6. 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); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

7. Grievant did not demonstrate that he was being treated differently than similarly situated employees of Respondent. Consequently, Grievant did not prove that Respondent was guilty of discrimination as that term is defined in the public employees grievance procedure. W. VA.CODE § 6C-2-2(d).

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: APRIL 24, 2013.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE