THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

RONALD EFAW,

Grievant,

v. **Docket No. 2022-0623-DOT**

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant, Ronald Efaw, is employed by Respondent, Division of Highways. On February 18, 2022, Grievant filed this grievance against Respondent stating:

> Grievant was injured and on FMLA previously. Grievant's physician provided the employer documentation of what accommodation Grievant needed. Grievant was discriminated against due to his disability and request for accommodation by the employer. Employer denied Grievant's request for accommodation on or about February 1, 2022 and sent him a proposed resignation letter[.]

Grievant requests, "To be reinstated in his employment position with the accommodations requested or to be transferred to a position within the DOH and given the requested accommodations with that position and to be awarded backpay and attorney fees."

A level one conference occurred on June 29, 2022. A level one decision was issued on July 21, 2022. Grievant appealed to level two on July 26, 2022. A level two mediation occurred on September 30, 2022. Grievant appealed to level three on November 4, 2022. A level three hearing was held online before the undersigned on May 3, 2023. Grievant appeared and was represented by attorney Ambria Britton, Klie Law Offices. Respondent appeared by Catherine Hill, Human Resources, and was

represented by Jack Clark, Esq. This matter matured for decision on June 27, 2023. Each party submitted Proposed Findings of Fact and Conclusions of Law (PFFCL).

Synopsis

Grievant is employed by the Division of Highways (DOH) as a Transportation Worker 2 Equipment Operator. Grievant was tasked with flagging for road crews. After Grievant complained of hearing loss resulting in failure to hear radio signals, DOH accommodated him with standing work in the garage. When Grievant complained of hip pain, DOH sent Grievant home. DOH elicited doctor reports to further accommodate Grievant under the ADA. The reports state that Grievant can operate equipment, which is one of the duties for Grievant's position. Nevertheless, DOH determined it could not accommodate Grievant. DOH contends that it has much leeway in determining appropriate accommodations and that operating equipment is only one of Grievant's position duties. Grievant did not prove that DOH's failure to accommodate was unreasonable or discrimination. Accordingly, the grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant has been employed by Respondent, Division of Highways (DOH), as a Transportation Worker 2 Equipment Operator (TW2EQOP) since October 7, 2018. (Grievant's Exhibit 7).

2. The TW2 job posting describes the job duties as follows:

> TW2EQOP - Under general supervision, employee will operate medium sized equipment such as single or tandem axle dump trucks, asphalt distributor, rubber tire endloader, roller, trench machine, mowers, culvert cleaner, snow plow

> and spreaders. Performs related work as required such as flagging, shoveling materials, cleaning culverts, mowing, brush cutting, litter pickup, and cleaning equipment. Makes minor mechanic repairs such as changing tires, blades, or filters. May operate other related highway equipment as training permits. May be exposed to hazardous working conditions and inclement weather. Valid CDL is required.

(Grievant's 9).

3. The "Nature of Work" section from the DOH job description for a TW2 states:

> The Highway Transportation Worker 2 performs full performance level skilled work in the construction and maintenance of highways, bridges, and related buildings and structures. Position will be assigned in one of the following functional areas: Auto Body, Bridge Maintenance, Building and Trade, Equipment Operator, Mechanic, or Traffic Control. Operates motorized highway maintenance equipment such as skid steer, utility tractor, aerial bucket truck, front-end loader, tandem-axle truck, and snowplow. Makes major repairs to highways, culverts, bridge structures. Installs and removes signposts; erects traffic control signs and barricades on construction and maintenance projects. Builds forms and finishes concrete. Performs a variety of skilled and semi-skilled work at the full performance level in the mechanical or building trades in connection with the maintenance and repair of state facilities and buildings. Performs auto body repairs and overhaul of gasoline or diesel-powered engines and equipment. The selected applicant will be placed in a U.S. Department of Labor apprenticeship program. Progression through the apprenticeship program is dependent upon hours completed, proficiency in work, training completed, as well as maintaining and/or obtaining a Commercial Driver's License (CDL). Performs related worked as required.

(Respondent's Exhibit 8).

4. The "Typical Duties and Responsibilities" section from the DOH job description for a TW2 states:

> Typical Duties and Responsibilities of this classification are dependent upon the functional area assigned: …
>
> <u>Transportation Worker 2 – Equipment Operator</u>

- Drive dump, flatbed, or tandem-axle trucks.
- Operate power vegetation equipment and attachments.
- Operate highway maintenance equipment and attachments.
- Operate heavy vehicles/GVWR 26,001 or greater.
- Clean and lubricate equipment and check fluid levels.
- Makes minor mechanical repairs in the field such as changing tires, blades, or filters.
- Repair and construct asphalt paved culverts.
- Patch cement, pavement and bridge decks.
- Seal joints and cracks in paved surfaces.
- Clean equipment and workshop.
- Transport fuel to equipment.

5. The "Physical Demands" section from the DOH job description for a TW2 states:

> The work requires considerable and strenuous physical exertion, such as frequent climbing of tall ladders, bridges, or related structures. This work may involve operating machinery by hand that involves a great degree of strenuous activity. Operating heavy machinery in extreme conditions may be included in this level. Position could be required to lift up to 75 lbs. or more.

6. Grievant had a valid CDL at all times he performed his position duties. Nevertheless, Grievant was put on flagging duty and was never assigned to operate equipment even though he was qualified.

7. Sometime in 2020, Grievant reported that he could not hear radio calls necessary for flagging.

8. On November 24, 2020, Dr. Daniel Mason prepared a note for Respondent explaining Grievant's medical condition. The note stated:

> Due to Mr. Efaw's hearing loss and even while wearing his hearing aids, Mr. Efaw will have difficulty hearing in noisy places. This would include flagging in traffic and use of power

> tools, weed eaters, chainsaws, etc. His safety and that of others may be at risk.

(Grievant's Exhibit 2).

9. On December 8, 2020, Grievant and Respondent signed off on a Notice of Available Return to Work for a temporary transitional work assignment in the garage. This enabled Grievant to continue doing work consistent with his position duties from December 7,2020 until January 8,2021. (Grievant's Exhibit 3).

10. This temporary assignment entailed standing on concrete floors all day. (Grievant's testimony).

11. Grievant wanted Respondent to instead assign him equipment operating tasks. (Grievant's testimony).

12. On December 17, 2020, audiologist Melissa Rose completed a Form DOP-L3 stating that Grievant has severe high frequency hearing loss and that it is not possible to program out road noise. (Grievant's Exhibit 4).

13. On or about February 1, 2021, Aaron Hoekje, PA-C, completed Family Medical Leave Act (FMLA) paperwork stating that Grievant would need to be on leave from January 13, 2021, until February 8, 2021, after which Grievant could return to less than full duty performing seated duties such as driving equipment instead of standing on concrete all day, until August 8, 2021. (Grievant's Exhibit 5).

14. When an employee requests reasonable medical accommodation, the ADA Accommodation Committee meets to review the employee's request. The employee is asked to provide medical information about the medical condition. The Committee determines whether an accommodation exists that allows the employee to be safe and productive. All employees who request a medical accommodation are treated the same

and put through the ADA Committee process. (Testimony of Raymond Patrick, Assistant Director of the Civil Rights Compliance Division).

15. On February 12, 2021, Respondent's Civil Rights Compliance Division sent Grievant a letter stating that he may require modification of his work assignment for medical reasons. The letter informed Grievant of his right to be considered for reasonable accommodation under the ADA, the tasks to be complete before receiving this accommodation, options for use of paid leave or a medical leave of absence without pay, and that unpaid leave necessitates the submission of forms DOP-L2 and DOP-L3. (Grievant's Exhibit 6).

16. On February 22, 2021, Grievant completed a Medical Authorization form, a Medical Provider List, and a Request for Reasonable Accommodation for Respondent's ADA review team. (Respondent's Exhibit 1).

17. On June 4, 2021, Respondent's Civil Rights Compliance Division sent a letter to Dr. Mason requesting that he complete a Medical Information Request Form. On June 25, 2021, a second request was sent. (Respondent's Exhibit 2).

18. On June 17, 2021, a Medical Information Request Form was completed by PA Hoekie. Regarding Grievant's impairment, it states, "Has pain in hip limiting ability to do manual labor/ standing for long periods." Regarding job limitations, it states, "Difficulty with manual labor + standing for extended periods." As for job accommodations, it states, "Drive truck, operate equipment." (Respondent's Exhibit 3).

19. On June 29, 2021, a Medical Information Request Form was completed by Grievant's audiologist regarding Grievant's difficulty hearing even with hearing aids and requesting an accommodation "to work in quiet environments." (Respondent's Exhibit 4).

20. On August 27, 2021, PA Hoekie completed a DOP-L3 form stating Grievant could only do seated work.

21. On October 18, 2021, in connection with its review of his request for reasonable accommodation, Respondent's Civil Rights Compliance Division sent Grievant an employee application to update his qualification changes since his hire date. (Grievant's Exhibit 7).

22. On November 19, 2021, Respondent's Civil Rights Compliance Division sent Grievant a letter stating it was continuing to review his request for reasonable accommodation and asking that he update his qualifications. (Respondent's Exhibit 6).

23. On January 24, 2022, Respondent sent Grievant a letter titled "Notice of Closure" which states:

> You submitted a letter from your physician indicating a possible Request for Reasonable Accommodation, dated June 29, 2021. The letter obtained information that you suffer from a permanent medical condition and that you may need to be considered for a reasonable accommodation to enable you to perform the essential functions of your job.
>
> A reasonable accommodation is not available as a TW2EQOP based on the absence of the ability to perform the essential functions in a safe and productive manner. You indicated refusal on 12/14/2020 of a temporary return to work agreement with duties that met your restrictions such as cleaning and washing vehicles and shop cleanup. You indicated you had no other qualifications for other vacant positions indicated on the Information Request received December 1, 2021. Under these circumstances, your current request will no longer be considered for review by the Reasonable Accommodation Committee.

(Respondent's Exhibit 7).

24. On February 2, 2022, Respondent sent Grievant a letter reiterating the contents of the Notice of Closure letter stating there was no reasonable accommodation

available for Grievant in his TW2EQOP position and that he did not qualify for any other positions. It went on to state that Grievant's request for reasonable accommodation would not be considered further because he had not provided required forms since August 27, 2021. (Grievant's Exhibit 8).

25. At the time of the level three hearing, Grievant's CDL had expired. Grievant had not renewed it because Respondent was not allowing him to work and Grievant knew he could renew his CDL when needed.[1] (Grievant's testimony).

26. Respondent has not dismissed Grievant from his employment.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

Respondent asserts the grievance must be dismissed as moot because Grievant's CDL, which is necessary for his employment as a TW2EQOP, has lapsed. "Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues]." *Bragg v. Dep't of Health & Human Res*., Docket No. 03-HHR-348 (May 28,

[1]In his PFFCL, Grievant claimed that he renewed his CDL after the level three hearing. As the record closed upon the conclusion of the hearing, this claim will be disregarded.

2004); *Burkhammer v. Dep't of Health & Human Res*., Docket No. 03-HHR-073 (May 30, 2003); *Pridemore v. Dep't of Health & Human Res*., Docket No. 95-HHR-561 (Sept. 30, 1996); *Pritt, et al., v. Dep't of Health & Human Res*., Docket No. 2008-0812-CONS (May 30, 2008). When it is not possible for any actual relief to be granted, any ruling issued by the Grievance Board would merely be an advisory opinion. *Smith v. Lewis County Bd. of Educ*., Docket No. 02-21-028 (June 21, 2002), aff'd, Kanawha Cnty. Cir. Ct. Civil Action No. 02-AA-87 (Aug. 14, 2003); *Spence v. Div. of Natural Res*., Docket No. 2010-0149-CONS (Oct. 29, 2009). "This Grievance Board does not issue advisory opinions. *Dooley v. Dep't of Transp*., Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ*., Docket No. 91-35-229/239 (Nov. 27, 1991)." *Priest v. Kanawha County Bd. of Educ*., Docket No. 00-20-144 (Aug. 15, 2000). Respondent has not dismissed Grievant from his employment despite its claim that he failed to maintain the necessary qualifications for his position. As Grievant can easily renew his CDL, his claims for reinstatement into his TW2EQOP position are not moot.

Grievant claims Respondent discriminated against him in failing to provide him with reasonable accommodations. Grievant contends that Respondent refused to allow him to perform the one position duty his doctors stated he could do, which is operating equipment. Respondent counters that it has great leeway in determining appropriate accommodations. Grievant claims that DOH refuses to accommodate his disability and has never allowed him to operate equipment. Respondent contends that operating equipment is only one of many duties necessary for Grievant's position, implying that no employee operates equipment full-time. Respondent alleges that allowing Grievant to operate some equipment would nevertheless place others in harm. While Grievant's

doctor raised safety concerns about Grievant operating some power tools, the evidence does not show that this concern extended to vehicles. Nevertheless, Grievant did not effectively counter Respondent's claim that driving equipment is not a full-time duty. Respondent attempted to accommodate Grievant. Respondent had Grievant complete forms so it could determine if there were any jobs available for Grievant.

Respondent ultimately determined that reasonable accommodation was not available. Respondent has great leeway in this regard if its actions are not arbitrary and capricious. An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "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), aff'd Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

"'[T]he "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).'" Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ*., 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). "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 her judgment for that of [the employer].” *Trimboli v. Dep't of Health and Human Res*., Docket No. 93-HHR-322 (June 27, 1997), aff’d Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ*., Docket No. 01-20-470 (Oct. 29, 2001), aff’d Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), appeal refused, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

The Assistant Director of DOH’s Civil Rights Compliance Division, Raymond Patrick, testified that the ADA Accommodation Committee meets and reviews requests for medical accommodations under the ADA. The employee is asked to provide medical information about the medical condition. The Committee determines if an accommodation exists that allows the employee to be safe and productive. All employees who request medical accommodation are treated the same and are put through the ADA Committee process. Respondent determined that reasonable accommodation was not available based on Grievant’s inability to perform the essential functions of his position in a safe and productive manner.

Grievant’s hearing loss, coupled with his inability to stand for long periods of time, made it impossible for him to perform the essential functions of his position safely and productively. A TW2EQOP has essential job duties that are very physical, dangerous, and require excellent communication. Respondent determined that Grievant’s permanent disabilities prohibit him from performing nearly all the essential duties of his position. Grievant failed to prove that this determination was arbitrary and capricious.

Grievant also failed to prove discrimination. Discrimination for purposes of the grievance process has a very specific definition. "'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). Grievant failed to compare himself to any particular coworker and thus did not prove he was treated differently than any similarly situated employee.

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 her grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

2. "Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues]." *Bragg v. Dep't of Health & Human Res*., Docket No. 03-HHR-348 (May 28, 2004); *Burkhammer v. Dep't of Health & Human Res*., Docket No. 03-HHR-073 (May 30, 2003); *Pridemore v. Dep't of Health & Human Res*., Docket No. 95-HHR-561 (Sept. 30, 1996); *Pritt, et al., v. Dep't of Health & Human Res*., Docket No. 2008-0812-CONS (May 30, 2008).

3. As Grievant can easily renew his CDL, Grievant claims are not moot.

4. "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." *Trimboli v. Dep't of Health & Human Res*., 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)).

5. Grievant failed to prove by a preponderance of the evidence that Respondent's failure to accommodate him was arbitrary and capricious.

6. "'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).

7. Grievant failed to prove by a preponderance of the evidence that Respondent discriminated against him.

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the Intermediate Court of Appeals.[2] Any such appeal must be filed within thirty (30) days of receipt of this decision. W. VA. CODE

[2]On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over "[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]" W. VA. CODE § 51-11-4(b)(4). The

§ 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

DATE: August 9, 2023

Joshua S. Fraenkel
Administrative Law Judge

West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.