THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

RONALD EFAW,
Grievant,

v. **Docket No. 2024-0138-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, Ronald Efaw, was employed by Respondent, Division of Highways, from 2019 to 2020. He worked as a permanent full time Transportation Worker 2 Equipment Operator ("TW2") and was assigned to District Four. Grievant fled this action on or about October 2, 2023, directly to level three. He states in this grievance that he "was injured and on FMLA previously. Grievant's physician provided the employer documentation of what Grievant would need to do his job. Grievant was treated differently and refused to send Grievant for an IME as allowed by policy. Respondent further treated the Grievant differently by mailing him a letter informing him of his termination on or about August 28, 2023." Grievant requests to "be reinstated in his employment position with what Grievant needed regarding physician orders previously requested, for an IME be performed if needed to determine which of Grievant's needs can be provided, and to be awarded backpay and attorney fees."

A level three hearing was conducted by Zoom conferencing before the undersigned on March 7, 2024. Grievant appeared in person and by Ambria Britton, counsel, Klie Law Offices. Respondent appeared by Kathryn Hill, Human Resources, and was represented by Jack Clark, Division of Highways' Legal Division. This case became

mature for consideration upon receipt of the last of the parties' Finding of Facts and Conclusions of Law on June 7, 2024.

Synopsis

Grievant was employed by the Division of Highways as a full-time Transportation Worker 2 Equipment Operator. Grievant was assigned to flagging duties. Grievant reported that due to hearing disability, he was not able to distinguish or fully understand calls coming across radios while flagging. Grievant was then given the task of light duty. After being moved to the workshop, Grievant reported hip discomfort due to the long hours of standing on cement and the drive to get to the shop. Grievant was then placed on FMLA, and the Division of Highways' Americans with Disability Act Committee made requests of Grievant to aid in its accommodation decision. The Committee concluded that Grievant could not perform the essential functions of his job safely and productively with medical accommodation. The record established that the Division of Highway's actions were justified and within the policy provisions of the agency. Grievant failed to demonstrate that the actions of the Division of Highways were arbitrary and capricious. Grievant failed to prove that he was the victim of discrimination. This grievance is denied.

The following Findings of Fact are based on the record of this case.

Findings of Fact

1. Grievant was employed by the Division of Highways in late 2019 to early 2020. Grievant worked as a permanent full time Transportation Worker 2 Equipment Operator ("TW2") and was assigned to Division of Highways' District Four.

2. As a Transportation Worker 2 Equipment Operator an employee must be able to: Under general supervision, at the full performance level, performs skilled work in

the construction and maintenance of highways and related buildings and structures. Operates motorized highway maintenance equipment such as skid steer, utility tractor, aerial bucket truck, mud jack, front-end loader, tandem-axle truck and snowplow. Makes major repairs to highways, culverts, and bridge structures. Installs and removes signposts; erects traffic control signs; barricades on construction and maintenance projects; builds forms and finishes concrete; welds, erects steel girders and supports; performs overhaul of gasoline powered engines and/or diesel-powered equipment; performs major body repairs for automotive and maintenance equipment. 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, institutions, and buildings. May be exposed to hazardous working conditions and inclement weather. Performs related work as required.

3. Grievant was assigned to flagging duties by Respondent. Grievant reported that due to his hearing disability, he was not able to distinguish or fully understand calls coming across radios while flagging.

4. Grievant provided a note from his physician, Dr. Mason, dated November 24, 2020, stating that Grievant would have difficulty hearing in noisy places, including flagging in traffic and the use of power tools. Grievant was then given the task of light duty.

5. Respondent moved Grievant to work in the workshop. The workshop that Grievant was moved to required travel on the part of Grievant. After being moved to the workshop, Grievant reported hip discomfort due to the long hours of standing on cement and the drive to get to the shop. Due to the pain from standing on concrete floors,

Grievant's family physician provided a note that Grievant would be better suited for a seated position.

6. Grievant was then placed on FMLA. Grievant's doctor noted that Grievant's medical condition could potentially cause flare ups that would occur once a month resulting in one day of loss work. Grievant's doctor noted that Grievant would be able to perform at less than full duty.

7. Grievant received a letter from the Division of Highways that he may be considered for reasonable accommodation under the Americans with Disabilities Act (ADA). The letter noted that Grievant may be required to undergo an independent medical examination and/or functional capacity evaluation as part of the interactive process.

8. West Virginia Department of Transportation Policy 3.2: Medical Accommodation Policy provides for a Fitness for Duty Examination. This is defined as "A medical or psychological examination and evaluation by a medical practitioner to determine if an employee is able to perform his or her duties without a medical accommodation or with a revised medical accommodation."

9. Section 4.4 of this policy provides that "WVDOT may require a Fitness for Duty Examination by the employee's treating medical practitioner or by a medical practitioner of WVDOT's choosing to determine if an employee is able to perform his or her duties without a medical accommodation or with a revised medical accommodation."

10. Grievant's doctor filled out requested ADA forms informing the Division of Highways that impairments would limit Grievant's ability to perform the functions of his job. The medical information provided that Grievant could not stand for long periods of

time due to back and hip pain. Additionally, Grievant could not operate certain equipment due to his hearing loss.

11. After reviewing the information provided by Grievant, the Americans with Disability Act Committee concluded that Grievant could not perform the essential functions of his job safely and productively with a medical accommodation. Grievant was released from employment on or about August 28, 2023.

Discussion

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 Bd. 156 C.S.R. 1 § 3 (2018); *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). "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).

The central issue in this case is whether the Division of Highways committed some flaw or error in the Americans with Disabilities Act accommodation process. Respondent's decision must be analyzed according to the arbitrary and capricious standard or that the decision was clearly wrong. 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); *Burgess v. Div. of Highways*, Docket No. 2019-0576-DOT (Nov. 22, 2019).

The "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. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001). In addition, the Grievance Board has previously ruled that an employer may refuse to allow an employee to return to work at less than full duty. *Griffon v. Div. of Motor Vehicles*, Docket No. 2008-1271-DOT (Aug. 17, 2009).

In the instant case, Ray Patrick, ADA Accommodation Committee member indicated that this committee meets and reviews all employee requests for medical accommodations under the ADA. The employee is asked to provide medical information about a permanent condition, and it is the responsibility of the Committee to determine if an accommodation exists that allows the employee to be safe and productive in the

workpace. All Division of Highways employees who request medical accommodation are treated the same and put through the ADA Committee process.

The limited record of this case supports a finding that Grievant's hearing loss coupled with his inability to stand for long periods of time precluded him from being able to perform the essential functions of a Transportation Worker 2 Equipment Operator safely and productively. It does appear that the Division of Highways sought to provide an accommodation in moving Grievant to the workshop where his hearing would not be an issue. However, this work assignment alternative was not viable due to Grievant's reluctance to undergo a long commute and inability to stand on the concrete floors.

Nothing in the record indicates that Grievant was in any way treated differently in this case than a similarly situated employee. In fact, this argument seems to have been abandoned by Grievant at the level three hearing. In any event, a Transportation Worker 2 Equipment Operator has essential job duties that are physical in nature and require communication skills in potentially dangerous situations. Grievant's permanent disabilities prohibit him from performing nearly all the essential job duties of his position in a safe and productive manner. Respondent provided a logical explanation for its decision. As previously mentioned, the record did not support a finding that Grievant was treated unfairly or any differently than any other employee requesting medical accommodation under the ADA. The Division of Highways allowed Grievant to update his application on several occasions to list any other skills or qualifications that might allow him to be eligible for another position. Grievant failed to demonstrate that the Division of Highways violated its rules or acted in an arbitrary and capricious manner when making its accommodation decision.

Grievant also argues that the Division of Highways treated him differently by failing to fully engage in the interactive process in that Grievant was not given an independent medical exam or a functional capacity evaluation. Discrimination for the purpose of the grievance procedure 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).

In making this argument Grievant puts misplaced reliance on the Division of Personnel's Administrative Rule addressing an employee's request to work at less than full duty. The Division of Highways is no longer under the purview of the Division of Personnel. West Virginia Department of Transportation Policy 3.2: Medical Accommodation Policy provides for a Fitness for Duty Examination. This is defined as "A medical or psychological examination and evaluation by a medical practitioner to determine if an employee is able to perform his or her duties without a medical accommodation or with a revised medical accommodation." Section 4.4 of this policy provides that "WVDOT *may* require a Fitness for Duty Examination by the employee's treating medical practitioner or by a medical practitioner of WVDOT's choosing to determine if an employee is able to perform his or her duties without a medical accommodation or with a revised medical accommodation." (Emphasis added.) It is not required to do so. Such an examination is more a function of workers' compensation claims. Moreover, Grievant's doctor had already provided information that indicated that Grievant was not able to perform his job duties without a medical accommodation; so, a further examination was not necessary.

The Division of Highways relied on medical information provided to the ADA Committee by Grievant from his doctors. It is not customary for the Division of Highways and the ADA Committee to require a Fitness for Duty Examination. Grievant failed to compare himself to any coworker and 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 his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2018); *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). "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).

2. 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); *Burgess v. Div. of Highways*, Docket No. 2019-0576-DOT (Nov. 22, 2019).

3. The "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. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001). In addition, the Grievance Board has previously ruled that an employer may refuse to allow an employee to return to work at less than full duty. *Griffon v. Div. of Motor Vehicles*, Docket No. 2008-1271-DOT (Aug. 17, 2009).

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

5. "'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).

6. Grievant failed to prove by a preponderance of the evidence that he was the victim of discrimination.

Accordingly, this grievance is **DENIED.**

"The decision of the administrative law judge is final upon the parties and is enforceable in the circuit court situated in the judicial district in which the grievant is employed." W. VA. CODE § 6C-2-5(a) (2024). "An appeal of the decision of the administrative law judge shall be to the Intermediate Court of Appeals in accordance with § 51-11-4(b)(4) of this code and the Rules of Appellate Procedure." W. VA. CODE § 6C-2-5(b). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such an appeal and should not be named as a party to the appeal. However, the appealing party must serve a copy of the petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

Date: July 23, 2024

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Ronald L. Reece
Administrative Law Judge