

**THE WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**STEVE HAMNER,  
Grievant,**

**v.**

**Docket No. 2016-1630-DOT**

**DIVISION OF HIGHWAYS,  
Respondent.**

**DECISION**

Grievant, Steve Hamner, filed this action on May 11, 2016, against his employer, Division of Highways, asserting that he has been wrongfully denied a tier pay increase. Grievant seeks to be made whole in every way including tier increase with back pay and interest from November forward. This grievance was denied at Level One by decision dated June 27, 2016. A Level Two mediation session was conducted on August 26, 2016. The matter was placed in abeyance by the undersigned on September 29, 2016. An Order of Unsuccessful Mediation was entered on November 18, 2016. Grievant perfected his appeal to Level Three on November 30, 2016. A Level Three evidentiary hearing was conducted before the undersigned on March 17, 2017, at the Grievance Board's Westover office. Grievant appeared in person and by his representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its counsel, Jason Workman, Legal Division. This matter became mature for consideration upon receipt of the parties' fact/law proposals on May 15, 2017.

## **Synopsis**

Grievant is an equipment operator, in the Transportation Workers 3 classification. Grievant argues that Respondent's requirement that he possess a Class A-CDL to advance in their recently implemented tier program is unreasonable. Grievant failed to demonstrate by a preponderance of the evidence that Respondent acted in an arbitrary and capricious manner by including the Class A-CDL license as a component of the Transportation Worker Apprenticeship Program. Grievant also failed to demonstrate that he was the victim of discrimination.

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

## **Findings of Fact**

1. Grievant has been employed as a Transportation Worker 3 by the West Virginia Division of Highways since 2002.
2. Respondent submitted a Transportation Worker Apprenticeship Program to the West Virginia State Personnel Board during its November 2014 meeting. This plan required approval by the State Personnel Board and was approved on November 18, 2014. The program was proposed to address recruitment and retention.
3. The Transportation Worker Apprenticeship Program sets criteria for the pay structure of the Transportation Worker 1, Transportation Worker 2, Transportation Worker 3, and the Transportation Worker 4 classifications. The system is designed to prevent an overlay in pay between the classifications, a problem in the former pay structure. The program provides transportation workers an opportunity to advance through the tiers and

receive pay increases. The program works within the existing pay ranges for each respective classification.

4. Respondent made a supplemental proposal to the West Virginia State Personnel Board that made multiple changes to the Transportation Worker Apprenticeship Program. A subsequent modification to the Transportation Worker 2 classification removed the Class A-CDL requirement at the third level tier and required it at only the fourth level tier. This change was supported and approved by the Transportation Worker Apprenticeship Committee and the Division of Personnel.

5. Respondent made another proposal to the West Virginia State Personnel board that made multiple changes to the transportation worker apprenticeship program. First, there was an amendment to reclassify the Transportation Crew Supervisor 1 classification to the Transportation Worker 3 - Crew Chief classification bringing these employees into the transportation worker apprenticeship program. Specifically, it created a tier level to accommodate the newly reclassified Transportation Worker 3 - Crew Chiefs. The approved amendment modified the pay structure of the Transportation Workers to reflect the change of pay on promotion from a five percent increase to a seven percent increase to become consistent with a revised Division of Personnel Pay Plan.

6. In December 2016, the Division of Personnel approved a change to allow a Transportation Worker 3 to advance to a tier 2 without a Class A-CDL license. A Class A-CDL would be required to advance to the tier 3 level. Grievant received his CDL license and advanced to tier 2.

7. Grievant, as a Transportation Worker 3, was slotted in tier one on October 31, 2015, with the other Transportation Worker 3s. Grievant was placed in that tier

because he had a Class B-CDL and did not possess a Class A-CDL at the time of slotting. This was the requirement for tier two of the Transportation Worker 3 classification during his initial placement. Grievant filed an appeal of his initial slotting, but it was denied because he did not possess a Class A-CDL license.

8. Grievant indicated that he asked his supervisor about Class A-CDL training in November 2015. Grievant was told that there was not currently an opening, but he could attend training through a program outside of work to get training quicker. It is common for employees to receive CDL training on their own and be reimbursed by the agency. Grievant began Respondent's Class A-CDL training around October 2016.

9. Grievant acquired a Class A-CDL license on December 1, 2016. Grievant advanced to the next tier effective January 7, 2017. Employees must spend a ten-month minimum in each tier before advancing further in the process.

### **Discussion**

Concerning the issues in this grievance, the allegations do not involve discipline, and as a result, Grievant bears 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). "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 issues in this grievance involve a claim of discrimination, and whether Respondent’s decision to require employees to possess a Class A-CDL to be placed in tier two of the Transportation Worker Apprenticeship Program was arbitrary and capricious or a violation of any law, rule, or regulation. Respondent’s position is that the more employees that have the ability to haul equipment makes the organization more efficient. Specifically, it would allow the mechanic to return equipment to the shop, if the repair could not be made in the field. Grievant argued that he was aware of similarly situated employees from Webster County receiving CDL training at the district office soon after his own request for that training.

For the purpose of the grievance 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 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'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 record of this case did not support a finding that Grievant was the victim of discrimination. Grievant did not name or otherwise provide any evidence regarding any employee in his agency that received Class A-CDL training during the period he indicated that he requested in November 2015 until he began the training in October 2016. Grievant could not name a similarly situated employee in his agency that received any different treatment.

The record established that the Transportation Worker Apprenticeship Program was developed after Respondent determined the need for a program to improve the retention rate of employees. Respondent began to develop a stepwise program for each classification in the Transportation Worker Series that would benefit the employees along with the agency. The determination was made by upper management that all Transportation Workers could be required to hold a Class A-CDL. The record established that Grievant was properly placed in the appropriate tier based on the guidelines of the program in effect in October 2015. Respondent's Human Resources Director, Kathleen Dempsey, indicated that this program is still in its initial phase and Respondent has attempted to constantly assess the program to make necessary adjustments.

The Transportation Worker Apprenticeship Committee made the decision to require Transportation Workers to hold a Class A-CDL to advance to the top of the Transportation Worker Apprenticeship Program. The record reflects that the standards issued by Human Resources are applied consistently to all employees in the Transportation Worker classification. The Transportation Worker Apprenticeship Committee found value for the

requirement and a connection to the job function providing incentive for mechanics to obtain their Class A-CDL, including the mechanics at the Equipment Division. With a reduced workforce, the more employees that have the ability to haul equipment makes the organization more efficient. This argument, and the CDL requirement, cannot be viewed as unreasonable.

The following Conclusions of Law support the decision reached.

### **Conclusions of Law**

1. Concerning the issue in this grievance, the allegations do not involve discipline, and as a result, Grievant bears 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. In order to establish 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'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).

3. Grievant failed to establish a claim of discrimination.

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. 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).

5. Grievant failed to demonstrate by a preponderance of the evidence that Respondent acted in an arbitrary and capricious manner by including the Class A-CDL license as a component of the Transportation Worker Apprenticeship Program.

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 (eff. July 7, 2008).

**Date: June 15, 2017**

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**Ronald L. Reece**  
**Administrative Law Judge**