

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**JOSHUA BRANSON and ALEX CONNER,
Grievants,**

v.

Docket No. 2017-2289-CONS

**DIVISION OF HIGHWAYS
and DIVISION OF PERSONNEL,
Respondents.**

DECISION

Joshua Branson and Alex Conner, Grievants, filed this grievance against their employer the West Virginia Department of Transportation, Division of Highways ("DOH"), Respondent, protesting their pay rate for a select time period. The original grievance was filed on June 1, 2017, and the grievance statement provides:

Respondent has failed to upgrade Grievants to supervisory pay rates while supervising crews. Other employees have been upgraded when supervising crews. Grievants contend that this practice is arbitrary and capricious and contrary to law and regulation.

The relief sought reads:

Grievants seek compensation for lost wages with interest.

A level one conference was held on or about August 2, 2017. The grievance was placed in abeyance pending a possible resolution. During the abeyance, there was a review by DOH determining that the issue being challenged is the West Virginia Division of Personnel Temporary Upgrade Policy. By order dated October 6, 2017, this matter was waived to level two of the grievance process. Grievants appealed to level two on October 13, 2017. An *Order of Joinder* was entered by this Grievance Board joining the West Virginia Division of Personnel ("DOP") as an indispensable party on October 18, 2017. A level two mediation session was held on November 27, 2017. Grievants, by

counsel, appealed to level three on or about December 4, 2017. The matter was set for hearing on April 16, 2018. An *Order of Continuance* was entered for administrative reasons on January 30, 2018. A level three hearing was held before the undersigned Administrative Law Judge on June 27, 2018, at the Grievance Board's Charleston office. Grievants appeared in person and were represented by legal counsel John Everett Roush, Legal Services, American Federation of Teachers-WV, AFL-CIO. Respondent DOH appeared by Randy Hammond, Highway Administrator and was represented by legal counsel Jesseca Church, Esquire, DOH Legal Division. Respondent DOP appeared by Wendy Campbell, Assistant Director of Classification and Compensation Section and was represented by its counsel, Karen O'Sullivan Thornton, Assistant Attorney General. The parties were provided the opportunity to submit Proposed Findings of Fact and Conclusions of Law. This matter became mature for decision upon receipt of the last of the parties' proposed findings of fact and conclusions of law on or about August 6, 2018, the assigned mailing date for the submission of the parties' fact/law proposals. All parties submitted a fact/law proposal.

Synopsis

Grievants, employees of the Division of Highways, seek temporary pay upgrade for crew supervision. Both Respondents maintain that Grievants are not eligible for an upgrade but arrive at the conclusion from different rational. Grievants protest failing to receive a temporary pay upgrade when supervising inmate work crews. Grievants aver that there is no difference in duties or responsibilities between the jobs of supervising a crew of DOH employees, a crew of inmates or a mixed crew of inmates and DOH employees. Grievants assert, given the identical essential nature of the job, paying extra

compensation for one job and not the other is unreasonable, without due consideration, and is in disregard of the duty performed. Grievants are of the opinion that it is discrimination/favoritism to pay some employees the wages of a crew chief for supervising crews and not others.

Historically, DOH had an internal agency policy (practice) of providing temporary hourly upgrades to employees when they were in positions that did not have crew chief responsibilities but were assigned the crew chief responsibilities on any given day. DOH interpretation of their identified policy suggests temporary supervision of inmates does not qualify the DOH employee for crew chief pay increase. Respondent DOH may or may not have a valid WVDOH Temporary Upgrade policy. Respondent DOP maintains that Grievant's activities do not comport to the definition of supervision found in DOP's Pay Plan, thus Grievants are not eligible for a pay upgrade. Grievants failed to establish by a preponderance of the evidence entitlement to a pay increase. Grievance DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. The Division of Highways and the Division of Personnel, Respondents, are agencies of the State of West Virginia with identifiable roles and purposes.
2. Joshua Branson and Alex Conner, Grievants, are employed by Respondent DOH as Transportation Workers. A Transportation Worker performs a variety of skilled and semiskilled work at the full performance level in the operation, maintenance and repair of State facilities, highways, institutions and buildings.

3. Josh Branson (“Grievant Branson”) is employed by Respondent DOH as a Transportation Worker 3 (“TW3”) in DOH’s St. Albans garage in District 1.

4. Alex Conner (“Grievant Conner”) is employed by Respondent DOH as a Transportation Worker 2 (“TW2”) in DOH’s St. Albans garage in District 1.

5. The DOH’s District 1 St. Albans location has four distinct types of crews: a backhoe crew, a grader crew, a mower crew and an inmate crew.¹ Depending upon the type of crew, a crew chief² will accompany the crew and be “in charge” for the day. See L3 Testimony Jimmy Myers, Randy Hammond and Grievants.

6. At the time the grievance was filed, DOH’s District 1 St. Albans location had two designated permanent crew chiefs: John Martin and Dave Kent.

7. On occasions, Respondent DOH needs one of the other employees at the St. Albans facility to act as a crew chief on a temporary basis. This need may arise for a variety of reasons, including but not limited to:

- the absence of one of the employees permanently classified as supervisor/crew chief
- a vacancy in one of the crew chief positions
- one of the permanently classified crew chief attending to other duties

8. Jimmy Myers is employed by Respondent DOH as a Transportation Worker 3 (“TW3”) in DOH’s St. Albans garage in District 1. Mr. Myers testified on behalf of Grievants at the level three hearing. He testified as to Respondent DOH’s practice from

¹ Inmates from the institutions operated by the West Virginia Division of Corrections are given work-release time to perform work for the DOH with a Division of Corrections guard present for security. The inmates are from a minimal security risk population.

² While recognized as not technically correct, the terms “crew chief”, “supervisor” and “foreman” were interchangeably used by Grievants and witnesses throughout the level three hearing. To avoid confusion for the purposes of this decision, the term “crew chief” will be used to reference the instant job in discussion.

the prospective of a TW3 worker. Mr. Myers provided that if a permanently assigned crew chief was going to be absent from work that a TW3 would typically be assigned to fill in and receive an hourly upgrade and that crew chiefs were not absent from work more than any other employee would be. L3 Testimony Myers

9. Mr. Myers did not know what the distinction was when an employee received an hourly upgrade and when they did not. Mr. Myers testified that typically only once a week, or once every couple of weeks, was there a need for someone to fill in for one of the permanent crew chiefs at the DOH's District 1 St. Albans location.

10. Grievants filed this grievance on June 1, 2017, against Respondent DOH claiming that DOH had "failed to upgrade Grievants to supervisory pay rates while supervising crews." It later became evident that Grievants were claiming that they failed to receive a temporary pay upgrade when supervising inmate work crews. See Testimony of Grievant Branson, Grievant Conner, and Randy Hammond.

11. Grievant Branson sought to be paid an hourly upgrade³ for May 16, 2017, when he served as the crew chief for an inmate crew at the direction of crew chief John Martin. Grievant Branson provided no specific documentation or evidence as it relates to this date and his responsibilities other than his own testimony in which he indicates the crew, which consisted of inmates and DOH employees, was sent out that day to remove brush from sites affected by storm damage.⁴

³ "Hourly upgrade" refers to an internal DOH practice of providing an increase to an employee's hourly rate of pay whenever he/she takes on the assignment of higher level duties.

⁴ Grievant Branson testified that he believed there were two other DOH employees present with him on May 16, 2017, and the inmate crew worked to remove brush from several sites affected by storm damage. Administrator Hammond testified that when an inmate crew is assigned to pick up trash the only DOH employee that accompanies the crew is the crew chief.

12. Grievant Branson is not a permanent crew chief or the primary “go to” individual to substitute as a crew chief on a temporary basis. Grievant Conner was typically the “go to” who was assigned crew chief responsibilities when a permanently assigned crew chief was not available to accompany a crew.⁵ L3 Testimony Grievant Branson

13. The dollar amount of the salary increase being discussed is approximately two dollars an hour. Accordingly, the dollar amount in consideration for Grievant Branson is (\$16) sixteen dollars (8-hr day) or perhaps twenty-some (\$20+) dollars if Grievant Branson worked some type of extended day on May 16, 2018.

14. Grievant Conner sought to be paid an hourly upgrade for serving as a crew chief for an inmate crew. Mr. Conner testified he had received hourly upgrades in the past when serving as the crew chief for DOH, but not for inmate crews. The amount of lost wages contended by Grievant Conner is not readily clear. Grievant Conner sought an hourly upgrade for May 17, 2017, and other unspecified dates. Grievant Conner failed to provide a list of specific dates where he did not receive a temporary pay upgrade.

15. Historically, DOH has had an internal agency policy of providing temporary hourly upgrades to employees when they were in positions that did not have crew chief responsibilities, but were assigned the crew chief responsibilities on any given day. See L3 testimony Highway Administrator Hammond.

16. With reference to hourly employee pay upgrades, Respondent DOH operated pursuant to a practice that was identified as WVDOT Temporary Upgrade

⁵ Grievants testified that it was always some variation of the permanently assigned crew chiefs and/or the highways administrator who determined each morning who, if anyone other than the permanent crew chiefs, were to serve as crew chief for the day with a given crew. L3 Testimony

Policy. DOH Ex 1 Respondent DOH purportedly adopted a written “policy” that permits the temporary upgrade of employees who perform “all the essential duties of a higher classification than they currently hold”. It is represented that Respondent DOH has followed this “policy” since 2002.

17. Whether Respondent DOH had a valid Temporary Upgrade Policy in place or was just in effect, administrated a practice under the color of authority is debatable.⁶ Respondent DOP denied the authority of the DOH Temporary Upgrade Policy in a letter dated October 5, 2017, because the policy had never received approval from the State Personnel Board. DOP Ex 1

18. Randy Hammond is employed by Respondent DOH as a Highway Administrator 2 in DOH’s St. Albans garage in District 1. A DOH Highway Administrator is responsible for administering highway maintenance operations in a county in accordance with established procedures and policies. Administrator Hammond testified at the level three hearing. He has been employed by DOH for more than twenty-five years with twenty-one of those years being at the St. Albans location.

19. As the Highways Administrator 2 for the DOH’s District 1 St. Albans, Administrator Hammond provided his understanding and alleged application of WVDOH Temporary Upgrade Policy (DOH Ex 1) to relevant day-to-day operations:

- typically, two crews go out from the St. Albans location on any given day; sometimes three, but the third crew would be a mowing crew that is not ordinarily accompanied by a crew chief. Under normal circumstances only two crew chiefs are needed at the St. Albans location on any given day
- When an inmate crew is assigned to pick up trash the only DOH employee that accompanies the crew is the crew chief
- permanent crew chiefs do not miss an unusual amount of work

⁶ The undersigned is “NOT” necessarily persuaded it is beneficial for Grievants either way. Both Respondents maintain Grievants are not entitled to the pay upgrade pursuant to their individual rational/policies.

20. Administrator Hammond understood the DOH hourly upgrade policy to permit employees to receive hourly upgrades when they were assigned to fill in for a crew chief with an all DOH crew or a combined DOH/inmate crew, but never when it was an inmate only crew. Further, it was his understanding that the hourly upgrades were provided regardless of the number of days the employee filled in for a crew chief.

21. Administrator Hammond personally reviewed the time sheet for May 16, 2017. On that date, the inmate crew went out to pick up trash, not to clear debris. Other than a summer temporary employee, Grievant Branson was the only DOH employee who went out with the inmate crew that day. L3 Testimony Hammond

22. Highways Administrator Hammond explained that the practice of Respondent DOH's District 1 is to provide a temporary pay upgrade when lower classified employees act as the crew chief and supervise a crew consisting of only DOH employees or a combined crew of DOH employees and inmates. Administrator Hammond indicated the presence of DOH employees is the main factor considered for an upgrade; however, there are other distinguishing factors between an inmate crew and a DOH crew, such as, the presence of a guard and/or the use of equipment and flaggers if DOH employees are present.

23. WEST VIRGINIA CODE § 29-6-10 authorizes the Division of Personnel⁷ to establish and maintain a position classification and pay plan for all positions in the classified service. State agencies, such as the DOH utilize DOP and the applicable rules

⁷ The Division of Personnel in the context of this finding of fact encompasses the State Personnel Board, Secretary of the Department of Administration and Director of Personnel. Also see W. VA. CODE § 29-6-5 Division of Personnel functions.

and regulations that govern covered State employees. DOP is the entity in West Virginia State government charged by law with developing and managing the State's Classification/Compensation Plan.

24. Wendy Campbell is employed by Respondent Division of Personnel as the Assistant Director of Classification and Compensation Section.⁸ Assistant Director Campbell credibly testified at the instant level three hearing.

25. Respondent DOP has definitions and policies that are applicable to State agencies. There exists policy applicable to Respondent DOH which provides procedure and criteria for the implementation of operating agency personnel policy. It is Respondent DOH's responsibility to govern its activities in an appropriate manner, operating pursuant to established procedure and policy.

26. Under the DOP Pay Plan Policy (DOP-P12), an employee cannot be considered a supervisor if they are only overseeing inmates. By DOP definition, a supervisor must, among other responsibilities, initiate disciplinary action, approve leave, conduct performance evaluations and recommend salary increase for other employees. Inmates are not employees. L3 Testimony Campbell and DOP Ex 4

27. DOP's Temporary Classification Upgrades policy (DOP-P13) requires an employee, during a specified limited period of time that must be no less than thirty days, to perform work on a full-time basis that is envisioned by a job class of a higher rank as measured by salary range and an increased level of duties and responsibilities. Further,

⁸ The Division of Personnel comprises six sections through which services and information are provided to State agencies and employees, and to the public. These sections are: the Director's Office - Administration and Communications; Classification and Compensation; Employee Relations; Organization and Human Resource Development (OHRD); Personnel Transaction Review and Staffing Services.

the policy specifically acknowledges the exception of Respondent's DOH approved policy.⁹ G Ex 1 and DOP Ex 3

28. WVDOH *Administrative Operating Procedures* Section II, Chapter 12 deal with temporary upgrades is titled *Temporary Upgrade Policy*. The policy contains the following provisions:

Conditions of Temporary Assignment

Employees may be assigned by the District Engineer or Division Director to perform duties normally contained in certain classifications when it is not feasible or practical to make a permanent assignment to the position. Such occurrences may be the result of vacation schedules, the absence of employees due to illness, the temporary need for additional work crews or other unforeseen circumstances. Changes in assignments may be made only according to those classifications listed in Appendix A. Employees temporarily upgraded must meet the minimum requirements for the higher classification.

Assignment to Higher Classification

An employee who is temporarily required to perform, and in fact does fully perform the essential job functions of a higher level classification, as provided in Appendix A, will be paid the minimum rate for the higher class, or five percent above their normal rate of pay, whichever is greater. The higher rate will not apply to assignments of less than one hour. Assignments to a higher classification may not exceed 720 hours in a calendar year. The Commissioner of Highways or his designee may grant extensions to the 720 hours here legitimate justification is presented.

(DOH Ex 1)

29. Respondent DOH had an exception to DOP's Temporary Classification Upgrades policy (DOP-P13); however, DOP discovered, contrary to their original understanding, that the DOH has never had its temporary hourly upgrade policy approved

⁹ Respondent DOP declared that the exemption is invalid because the DOH policy presently cited was not properly approved through the legislative rule making process.

by the West Virginia State Personnel Board (“SPB”). DOP notified DOH that it was to cease use of the internal agency temporary hourly upgrade policy unless and until it was brought before the SPB. See DOP Ex 1 and 3 and L3 Testimony Campbell.

30. Prior to the implementation of WVOasis,¹⁰ DOP did not see DOH pay transactions. Accordingly, DOP was unaware and had no way to know or monitor the pay practices of Respondent DOH, including practices related to temporary hourly upgrades. DOP Ex 2 and L3 Testimony Campbell

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018). "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.*

Grievants filed this grievance on June 1, 2017, against Respondent DOH claiming that DOH had “failed to upgrade Grievants to supervisory pay rates while supervising

¹⁰ WVOasis is the new automated payroll system operated by or for West Virginia State government and its agencies.

crews.” Grievants further claimed that other employees have been upgraded when supervising crews. Testimony at the level three hearing revealed that Grievants were claiming they failed to receive temporary pay upgrade when supervising inmate work crews. See L3 Testimony of Grievant Branson, Grievant Conner, and Highways Administrator Randy Hammond. Grievants contend that this practice is arbitrary and capricious and contrary to law and regulation. Whether Respondent DOH had a valid Temporary Upgrade Policy in place or was just in effect administrating a practice under the color of authority is debatable.¹¹ Pursuant to DOH interpretation and alleged application of the policy, Grievants are not entitled to the pay upgrade.

Grievants are State employees who are requesting compensation for conduct they believe entitles them to a temporary pay upgrade. The undersigned is intrigued by Grievants notion that if anyone should bear the “cost” of the irregularity related to the upgrade policy, it should not be Grievants.¹² However, it is not readily clear, where the lines should be drawn in the circumstance of this matter. Pursuant to identified DOH practice (WVDOH Temporary Upgrade Policy), whenever a non-supervisor employee supervises a crew of DOH employees, he or she is paid the wages of a crew chief. The area of controversy occurs when an employee supervises a crew of non-DOH employees, such as a crew of inmates from the local correctional facility. Such employees, namely Grievants, are **not** paid the wages of a crew chief. Instead Grievants receive their normal daily wages. Grievants wish to be paid the additional pay increase, identified as approximately \$2 an hour more.

¹¹ It may or may not be of interest to note Respondent DOH’s upgrade policy has been altered since the time period of this grievance.

¹² Intrigued is not the same as convinced Grievants are entitled to a temporary pay upgrade.

WEST VIRGINIA CODE § 29-6-10 authorizes the Division of Personnel to establish and maintain a Classification/Compensation plan for positions in the classified service. State agencies, such as the DOH utilize DOP and the applicable rules and regulations that govern covered State employees. Germane State agencies adhere to approve plans in making their employees' assignments and providing compensation. Thus, it is of interest, but not necessarily dispositive, that Respondent DOP discovered and notified Respondent DOH that the DOH's internal temporary hourly upgrade policy had never been approved by the SPB and Grievants are not entitled to additional compensation under that policy. DOP Ex 1 Grievants highlight that they should not suffer because of bureaucratic confusion.

Respondent DOH's identified policy was to grant a temporary pay upgrade when a lower classified employee temporarily performed all the essential job duties of a crew chief citing DOH Ex 1. Division of Highways Administrator Randy Hammond explained that the practice in Respondent DOH's District 1 is to provide a temporary pay upgrade when lower classified employees act as the crew chief and supervise a crew consisting of only DOH employees or a combined crew of DOH employees and inmates. Administrator Hammond stated, "if you got DOH employees with you, you get upgraded; if you just got inmates you do not get upgraded." L3 Testimony Hammond Respondent DOH is of the position that a DOH employee supervising a crew consisting of only inmates with a guard who was employed by the Division of Corrections, did not meet the criteria necessary for a temporary pay upgrade. Grievants argue there is no difference in duties or responsibilities between the jobs of supervising a crew of DOH employees, a crew of inmates or a mixed crew of inmates and DOH employees.

An Administrative Law Judge is charged with assessing the credibility of the witnesses.¹³ See *Lanehart v. Logan County Bd. of Educ.*, Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp.*, Docket No. 93-HHR-050 (Feb. 4, 1994). The instant Grievants contradicted each other in testimony and provided inconsistent testimony to other witnesses. There are times the testimony of Grievants seem to be convenient recollections, to the point that there is frequent contradiction to statements made just moments prior, even in their own testimony.¹⁴ Grievants may have been nervous but it did not serve them well to be elusive and capricious. The undersigned is sympathetic to Grievants' goal but not necessarily persuaded applicable facts, rule or regulation mandate the upgrade pay.

Grievant Branson acknowledges he did not receive an upgrade when he supervised an inmate crew on May 16, 2017. Grievant Branson has previously received upgrades for acting as a DOH crew chief for crews consisting of DOH employees. Grievant Conner stated he had received some upgrades in the past when acting as the Crew Chief for crews consisting of DOH employees, but to his knowledge had not received upgrades

¹³ The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. See *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999); *Perdue, supra*.

¹⁴ E.g., Grievant Branson testified that he believed he had received hourly upgrades in the past when "supervising" inmate crews, although later in testimony he stated he had not received hourly upgrades for such work. Grievant Conner testified he had received hourly upgrades in the past when he had served as the crew chief for DOH only crews, but not inmate crews. Whereas employee Myers testified he always received hourly upgrades when he served as the crew chief regardless of the type of crew. This testimony was not dispositive of the issue but illuminated employees' confusion regarding applicable temporary upgrade pay practices.

when supervising an inmate crew only.¹⁵ Grievants testimony was less certain as to receiving an upgrade when supervising a crew of both inmates and DOH employees. Grievants testified that it was always some variation of the permanently assigned crew chiefs and/or the highways administrator who determined each morning who, if anyone other than the permanent crew chiefs, were to serve as crew chief for the day with a given crew.

Grievants do not meet the requirements of the DOP's Temporary Classification Upgrades policy.¹⁶ It is noted that under DOP Pay Plan Policy, an employee cannot be considered a supervisor if they are only overseeing inmates as *inmates are not considered employees*. Supervising an inmate crew does not meet the requirements of DOP's Temporary Classification Upgrades policy, nor Respondent's DOH identified Temporary Upgrade Policy.

Grievants assert that it is discrimination/favoritism to compensate an employee as a crew chief for supervising a crew of DOH employees and to fail to do so for an employee supervising a crew of inmates or mixed crew of inmates/DOH employees. This Grievance Board is authorized by statute to provide relief to employees for discrimination and favoritism as those terms are defined in W. VA. CODE § 6C-2-2. "Discrimination" is defined by statute as "any differences in the treatment of similarly situated employees,

¹⁵ It is specifically found that Grievant Conner testimony that he worked (30) thirty days in a row as upgraded supervisor supervising DOH crews to be unreliable and not trustworthy.

¹⁶ In addition to the minimum thirty-day requirement, to receive a temporary upgrade under the DOP Temporary Classification Upgrades policy, the employee must also be assigned to the higher-level position in an acting capacity as the result of the separation or extended leave of absence of a higher-classified employee, for a short-term project, or for an emergency situation. A supervisor must, among other duties and responsibilities, initiate disciplinary action, approve leave, conduct performance evaluations and recommend salary increases for three or more employees. Neither Grievants met the requirements of DOP policy to receive a temporary upgrade.

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). “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 (Feb. 14, 2005); *Harris v. Dep’t of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievants did not meet this burden. Grievants have not established that they were treated differently from other employees. Grievants did not establish Respondent DOH provided temporary upgrade pay to some employee when solely supervising an inmate crew.¹⁷ See L3 Testimony Myers, Grievants, and Highways Administrator Randy

¹⁷ In *Melton v. Div. Highways*, Docket No. 2016-1405-DOT (June 7, 2017) Respondent conceded that the grievant of that case was eligible to receive temporary upgrades for supervising (inmate in the incidental absence of the assigned crew leader), and agreed to pay him for four hours at the upgrade rate. The undersigned is aware of the concession made in *Melton* but does not find that isolated concession to be demonstrative to the instant case. That concession is in direct opposition to what is identified as practice and WVDOT Temporary Upgrade Policy. A “previous [error] may not be used to require an agency to perpetuate the violation. *Singleton v. Dep’t of Health and Human Res.*, Docket No. 95-HHR-490 (May 24, 1996).” *Cook v. Dep’t of Health and Human Resources*, Docket No. 00-HHR-352 (June 29, 2001).

Hammond. Grievants did not establish a *prima facie* case of discrimination or favoritism. Grievants disagree with the distinction being drawn by Respondent DOH predicated upon the composition of the crew. Grievants contend it is a difference of treatment not based upon the job responsibilities. Regrettably there is a recognized difference in the oversee of activity of non-employees and supervising agency employee.¹⁸

Grievants did not persuasively establish that Respondents were arbitrary and capricious in not providing them temporary pay upgrade. 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). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982))." See generally *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982). Grievants are not empowered with the ability to pick and choose the portions of a rule or regulation they like and disregard the conditions of eligibility for the benefit when it isn't to their liking.

¹⁸ A supervisor may make work assignments, reviews employees' work, or comply reports on section activities in addition to performing tasks similar to their employees.

Respondent DOH's policy and practice was to grant a temporary pay upgrade when a lower classified employee temporarily performed all the essential job duties of a crew chief. Overseeing a crew consisting of only inmates with a guard who is employed by the Division of Corrections, is not interpreted to meet the criteria necessary for a temporary pay upgrade pursuant to either DOP or DOH interpretation of eligible supervision conduct. In review of the forgoing the undersigned finds solus in the fact that while the practical question is interesting, the real-world ramification is minimal. The State agency in discussion (Respondent DOH) has regular employed crew chiefs, whose duties it is to supervise. With regard to the instant grievance we are discussing approximately (\$16) sixteen dollars for Grievant Branson and a prospectively similar amount per day for Grievant Conner.¹⁹ Grievants did not demonstrate that Respondents failure to pay them at a higher upgraded pay was a violation of policy or arbitrary and capricious conduct.

Grievants failed to establish an applicable policy, statute, or regulation was being violated by Respondents.

Conclusions of Law

1. The subject of this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018).

¹⁹ Myers testified that only once a week, or once every couple of weeks, was there ever even a need for someone to fill in for one of the permanent crew chiefs. Grievant Conner sought an hourly upgrade for May 17, 2017, and other unspecified dates. Grievant Conner failed to provide a list of specific dates where he did not receive a temporary pay upgrade.

"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). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

2. W. VA. CODE § 29-6-10 authorizes the W. Va. Division of Personnel to establish and maintain a position classification plan for all positions in the classified and classified exempt service. State agencies which utilize such positions, as a general rule, must adhere to that plan in making assignments to their employees.

3. The State Personnel Board and the Director of DOP have wide discretion in performing their duties although they cannot exercise their discretion in an arbitrary or capricious manner. See *Bonnett v. West Virginia Dep't of Tax and Revenue and Div. of Personnel*, Docket No. 99-T&R-118 (Aug 30, 1999), *Aff'd* Kan. Co. C. Ct. Docket No. 99-AA-151 (Mar. 1, 2001).

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 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). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington*

Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)).” See generally *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

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 (Feb. 14, 2005); *Harris v. Dep’t of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

6. Grievants did not demonstrate that there was any discrimination in the process in which they were being compensated.

7. Grievants did not meet the burden of proof necessary to demonstrate they were the victims of favoritism.

8. Grievants failed to establish that they met the requirements of the DOH’s practice (WVDOH Temporary Upgrade Policy), to be eligible for a temporary upgrade. Grievants failed to establish pursuant to DOH’s Temporary Hourly Upgrade policy they met the requirements for, or should have otherwise been eligible to receive, a temporary hourly upgrade under the policy.

9. Grievants failed to establish that they met the requirements of the DOP's Temporary Classification Upgrades policy (DOP-P13) in order to be eligible for a temporary upgrade pay.

10. Grievants have not shown by a preponderance of the evidence that they are entitled to compensation for back wages.

11. Grievants failed to establish a violation of an applicable regulation, policy, and/or rule was being violated by Respondents.

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 (2018).

Date: September 14, 2018

Landon R. Brown
Deputy Chief Administrative Law Judge