

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**ALEX CONNER and JIMMY MYERS,
Grievants,**

v.

Docket No. 2017-2292-CONS

**DIVISION OF HIGHWAYS,
Respondent.**

DISMISSAL ORDER

Alex Conner and Jimmy Myers, Grievants, filed this grievance against their employer the West Virginia Department of Transportation, Division of Highways, ("DOH") Respondent, on June 1, 2017, protesting a managerial determination of the agency. The Statement of Grievance reads, "Respondent has failed to provide permanent TW3 positions for the boom mower operators, choosing instead to temporarily upgrade employees to TW3 pay rate while these employees operate the boom mowers. Grievants contend that this practice is arbitrary and capricious and contrary to law and regulation." For Relief Sought, "Grievants seek creation of TW3 positions for operation of boom mowers through reallocation of Grievants' positions or competitive bidding."

A conference was held at level one on August 2, 2017, and the grievance was denied at that level on August 23, 2017. Grievants appealed to level two on September 6, 2017, and a mediation session was held on December 6, 2017. Grievant appealed to level three on December 12, 2017. On or about February 22, 2018, prior to the level three hearing scheduled for March 7, 2018, Respondent filed a Motion to Dismiss in this grievance on the grounds that Grievants fail to state a claim upon which relief can be granted. This Grievance Board, requested that Grievants respond to this motion on or

before March 2, 2018. Grievants are represented by legal counsel John E. Roush, American Federation of Teachers-WV, AFL-CIO. Respondent is represented by its counsel, Jesseca R. Church, Esquire, DOH Legal Division. Grievants filed a written response in opposition to the dismissal of this grievance on March 2, 2018. This matter is mature for consideration.

Synopsis

Grievants are demanding that Respondent create a permanent Transportation Worker 3 position for the exclusive operation of a piece of heavy equipment known as a boom mower. Respondent has deemed the position unnecessary. Respondent's policy decision is not recognized as arbitrary and capricious. Grievants have not identified the violation of an applicable rule, policy, statute, or regulation. This Grievance Board has little to no authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or regulation which mandates such a policy be developed or changed.

After a detailed review of the record, the undersigned Administrative Law Judge makes the following Findings of Fact based upon the documentation submitted with the Motion to Dismiss and subsequently filed Response.

Findings of Fact

1. Alex Conner and Jimmy Myers, Grievants, are employed by Respondent as Transportation Workers. Grievant Conner is classified as a Transportation Worker 2

Equipment Operator (TW2). Grievant Myers is a Transportation Worker 3 Equipment Operator (TW3).

2. Respondent is an agency of the State of West Virginia. All equipment operated by DOH is categorized in either the TW2 or TW3 classifications based on the complexity of the operations of the equipment.

3. Grievants are demanding that DOH create a permanent Transportation Worker 3 position for the exclusive operation of a piece of heavy equipment known as a boom mower.

4. Most equipment can be run by either a TW2 or TW3 operator provided they have been properly trained.

5. Respondent considers the boom mower a piece of equipment to be operated by an employee holding the TW3 classification.

6. TW2's who operate a TW3 piece of equipment receive a temporary upgrade in pay during the time of operation. If a TW2 employee is assigned to operate the boom mower, he or she is upgraded to TW3 for the time period that he or she operates the boom mower.

7. Both Grievants have received the training necessary to operate the boom mower. Grievant Alex Conner is classified as a Transportation Worker 2 Equipment Operator and receives an upgrade in pay when he runs the boom mower. Grievant Jimmy Myers is classified as a Transportation Worker 3 Equipment Operator and does not receive an upgrade for operating the boom mower.

8. The boom mower is not the only TW3 piece of equipment operated by TW2's. TW2's receive training and operate TW3 certified pieces of equipment such as the grader, backhoe, and excavator. See *WVDOT Equipment Operators Training Academy Medina Tracking Window*.

9. There is no TW3 Equipment Operator who operates any single piece of equipment all the time. In other words, the DOH does not have a permanent TW3 position for the operation of any one piece of equipment.

10. DOH Administrative Operating Procedures, Section IV, Chapter 3, Equipment Review Committee, under Rolling Equipment provides that a list of all qualified operators be maintained on various pieces of equipment including the boom mower. From the list of all qualified operators, the supervisor selects a primary operator. "When the primary operator is not operating this equipment, any qualified operator may be assigned to operate the equipment and assumes all responsibilities of the primary operator." See *DOH Administrative Operating Procedures*.

11. Respondent has not assigned a primary operator with a TW3 classification or alternate operator with a TW3 classification to the boom mower in use at the St. Albans garage. Instead, it has chosen to assign operation of the boom mower to current TW2s and TW3s assigned to the Saint Albans garage with the above-mentioned temporary upgrade where appropriate.

12. Assignment to operate the boom mower is completely at the discretion of management. There is no established rotation system for operation of the boom mower,

nor is an opportunity to operate the boom mower made available to employees by an informal bid practice.

Discussion

Respondent asserts that the Grievants fail to state a cause of action upon which relief could be granted, and therefore motions that this grievance should be dismissed. Pursuant to the Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 6.11 (2008), “[a] grievance may be dismissed, in the discretion of the administrative law judge, if no claim upon which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested.” In instances where “it is not possible for any actual relief to be granted, any ruling issued by the undersigned regarding the question raised by this grievance would merely be an advisory opinion. ‘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).” *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002).

As defined by statute, a grievance must allege “a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable to the employee.” W. VA. CODE § 6C-2-2(i). The scope of the authority of the Grievance Board is limited to that set forth in the Grievance statutes. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997).

Grievants want Respondent to create a permanent Transportation Worker 3 position for the exclusive operation of a piece of heavy equipment. In this case, Grievants demand that Respondent create a position that it has deemed unnecessary and indicates does not exist anywhere within the DOH.

Grievants obviously disagree with the DOH's policies and use of various classifications for equipment operation. Regardless, "[a] general claim of unfairness or an employee's philosophical disagreement with a policy does not, in and of itself, constitute an injury sufficient to grant standing to grieve.' Instead, there must be a showing of 'a substantial detriment to, or interference with, the employee's effective job performance or health and safety.' Absent that, a grievant's belief that his supervisor's management decisions are incorrect is not grievable." *Lusher, et al. v. Depart. of Transportation, Div. of Highways*, Docket No. 05-DOH-157 (June 15, 2015).

"It is well established that a government agency's determination regarding matters within its expertise is entitled to substantial weight. *Princeton Community Hosp. v. State Health Planning & Dev. Agency*, 174 W. Va. 558, 328 S.E.2d 164 (1985). See *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993); *Security Nat'l Bank v. W. Va. Bancorp*, 166 W. Va. 775, 277 S.E.2d 613 (1981). However, that determination cannot be arbitrary and capricious." *Carson v. W. Va. Dept. of Transp./Dept. of Highways and Dept. of Personnel*, Docket No. 03-DOH-030 (June 19, 2003).

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))." 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 his judgment for that of the authoritarian agency. See generally *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

The DOH has long established the practice that TW3 equipment can be operated by either TW2 or TW3 operators provided they have been properly trained. Further, Respondent has articulated a reasonable rationale to not create a permanent TW3 position for the operation of the boom mower. Respondent wishes to maximize its ability to serve the traveling public and deems it ill-advised and hampering to limit the operation of any DOH equipment to only one employee. DOH's policy decision is not recognized as arbitrary and capricious.

Grievants seek an order from the Grievance Board establishing new policy. Grievants requests that Respondent establish a permanent position it has deemed

counterproductive. The Grievance Board has consistently held that “[t]he undersigned has no authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or regulation which mandates such a policy be developed or changed. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997); *Olson v. Bd. of Trustees*, Docket No. 99-BOT-513 (Apr. 5, 2000); *Gary and Gillespie v. Dep’t of Health and Human Resources*, Docket No. 97-HHR-461 (June 9, 1999).” *Frame v. Dep’t of Health and Human Res.*, Docket No. 00-HHR-240/330 (April 20, 2001); *Simons v. Division of Highways*, Docket No. 2011-1053-DOT (May 25, 2011).

Based upon the above, the requested remedy is wholly unavailable to the Grievants. W. VA. CODE § 6C-2-1 *et seq.* The grievance as presented fails to provide an actionable case within the recognized authority of the Public Employees Grievance Board. This Grievance Board is not empowered to order Respondent to create a permanent TW3 position as demanded by the Grievants.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. “A grievance may be dismissed, in the discretion of the administrative law judge, if no claim on which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested.” Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 6.11 (2008).

2. As defined by statute, a grievance must allege “a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable to the employee.” W. VA. CODE § 6C-2-2(g)(1).

3. The scope of the authority of the Grievance Board is limited to that set forth in the Grievance statutes. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997).

4. “The undersigned has no authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or regulation which mandates such a policy be developed or changed. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997); *Olson v. Bd. of Trustees*, Docket No. 99-BOT-513 (Apr. 5, 2000); *Gary and Gillespie v. Dep’t of Health and Human Resources*, Docket No. 97-HHR-461 (June 9, 1999).” *Frame v. Dep’t of Health and Human Res.*, Docket No. 00-HHR-240/330 (April 20, 2001).

5. Respondent’s policy decision is not recognized as arbitrary and capricious. Furthermore, Grievants have not identified the violation of an applicable rule, policy, statute, or regulation.

6. The Grievants seek to be granted a remedy wholly unavailable as requested.

Accordingly, Respondent's Motion for dismissal is hereby **GRANTED**, and this grievance is **DISMISSED** from the docket of the West Virginia Public Employees Grievance Board.

Any party may appeal this Dismissal Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named.

However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. See *also* 156 C.S.R. 1 § 6.20 (2008).

Date: March 6, 2017

Landon R. Brown
Administrative Law Judge