

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**TIMOTHY HEATER, et al.,
Grievants,**

v.

Docket No. 2018-0571-CONS

**DIVISION OF HIGHWAYS,
Respondent.**

DISMISSAL ORDER

Grievants, Timothy Heater, Ralph Hall, Charles Reed, Phillip Higham, and Michael Carpenter, filed this action against the Division of Highways on October 12, 2017. The Statement of Grievance reads, "On 18 April 2017, we received notification that our hourly upgrade that was previously available to us would no longer be available because it would 'technically result in a demotion of title.' It also stated that the 'TW3BT will currently not be eligible for an hourly upgrade.'" Grievants' requested relief is, "To immediately make available the same hourly upgrade that other TW3 crew members have available to them. Also, to open a crew chief position in the Building Trades that other crews have."

Grievants filed another action against the Division of Highways on June 22, 2018. The Statement of Grievance reads, "On Monday 18 June 2018, we became aware of the DOH new Pay Plan Policy. The purpose stated 'To establish uniform mechanisms for setting the pay of Division Employees.' Section (F) A states, "Hourly employees classified in the TW series shall be Temporarily upgraded in pay when required to perform duties of a higher level classification with the series for at least one hour. TW3BT cannot be

upgraded because there is no crew chief in Building Trades.” Grievants’ requested relief is, “To immediately make a crew chief Position Available in the TWBT.”

These grievances were consolidated by order entered on August 14, 2018. On or about May 17, 2018, Respondent filed a Motion to Dismiss this case claiming the relief sought cannot be granted and that the matter was untimely filed. Grievants were given an opportunity to respond and provided a response on or about June 2, 2018. The undersigned placed the Motion to Dismiss in abeyance. A Level Three hearing was conducted before the undersigned on July 29, 2018, at the Westover office of the Grievance Board. Grievants appeared in person, *pro se*. Respondent appeared by its Assistant Director of Human Resources, Natasha White, and by counsel, Jesseca R. Church, Legal Division. This matter became mature for consideration upon receipt of the last of the parties’ fact/law proposals on August 31, 2018.

Synopsis

Grievants are requesting that the undersigned create a new position within the Buildings and Trades classification. Respondent has come to the conclusion that the position is unnecessary. A government agency’s determination regarding matters within its expertise is entitled to substantial weight, unless the decision can be viewed as arbitrary and capricious. Respondent’s decision cannot be viewed as arbitrary and capricious. The 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. The record of this case did not support such a conclusion. Accordingly, the record established by a preponderance of the evidence that Grievants are requesting a remedy wholly unavailable.

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

Findings of Fact

1. Grievants are all employed by the Division of Highways as Transportation Worker 3s (TW3), in District 7.
2. Grievants work within the Transportation Worker series sub-classification of Buildings and Trades.
3. In a Memorandum dated April 18, 2017, Buildings and Trades TW3s in Respondent's District 7 were no longer allowed to receive an hourly upgrade to a Building Maintenance Supervisor 1.
4. The upgrade was not allowed under the rules of the Division of Personnel and was also in violation of the Division of Highways' Temporary Upgrade Policy.
5. This upgrade was only used in District 7, it was not used in any other Division of Highways' District. Upon the discovery of the violation of policy, Respondent's Human Resources Division stopped the upgrade practice.
6. Buildings and Trades is the only sub-classification within the Transportation Worker series in which the position of Crew Chief does not exist.
7. The position of Transportation Worker 3 Crew Chief was created to fit within the requirements of the Division of Highways' Transportation Worker Apprenticeship Program. The position of Transportation Supervisor 1 was reallocated to the Transportation Worker 3 Crew, and the position of Transportation Supervisor 2 was eliminated.
8. Within Division of Highways' Buildings and Trades the positions of Transportation Supervisor 1 and 2 did not exist. Accordingly, the position of Crew Chief

was never reallocated from the Transportation Supervisor 1 position for Buildings and Trades.

9. Respondent's position is that a Transportation Supervisor and/or Crew Chief position is not necessary within Buildings and Trades based on the size of the organization and nature of the work performed.

10. Crew Chiefs typically supervise five to seven employees on the roadways, usually performing highway maintenance. Crew Chiefs provide daily work assignments to individual employees under their supervision. Crew Chiefs are responsible for the quality of work performed by the crew and may assist in creating the weekly schedules. Crew Chiefs also respond to citizens' requests and complaints when on the roadways and interacting with the public.

11. Transportation Workers 3s are lead workers and must possess certain certifications and licenses relevant to his or her position and subclassification. Grievants work in a small organization of five employees and are supervised by a Buildings and Maintenance Supervisor 2.

12. Grievants do not always work together on a single project. Mr. Freeman and Mr. Heater indicated that at least half of the time Grievants work in smaller groups of two or three employees.

13. The majority of Grievants' job duties involve maintenance of the Division of Highways' buildings and grounds. Grievants have various specialty licensures and certifications, such as, contractor's licenses, electrician, etc.

14. Respondent came to the conclusion that a Crew Chief position is not necessary for Buildings and Trades. Grievants are lead workers. They are highly trained,

specialized, and a small group. As a group, Grievants are valued professionals, they do not need constant oversight.

Discussion

Grievants are seeking an order from the undersigned creating a new position within the Buildings and Trades classification. Respondent asserts that a remedy wholly unavailable to Grievants is requested, and therefore it should be dismissed. Pursuant to the Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 156-1-6 6.11(2018), “[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).

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). Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 156-1-3 (2018).

"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 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 Resources*, 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)). "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 a board of

education. See generally, *Harrison v. Ginsberg*, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982).” *Trimboli, supra*.

The record established that the position of Transportation Worker 3 Crew Chief was created to fit within the requirements of the Division of Highways’ Transportation Worker Apprenticeship Program. Respondent has determined that a Transportation Supervisor and/or Crew Chief position is not necessary with Buildings and Trades based on the size of the organization and nature of work performed. The record established that Crew Chiefs typically supervise five to seven employees on the roadways, usually performing highway maintenance. Crew Chiefs provide daily work assignments to individual employees under their supervision.

Transportation Workers 3s are lead workers and must possess certain certifications and licenses relevant to his or her position and subclassification. Grievants work in a small organization of five employees and are supervised by a Buildings and Maintenance Supervisor 2. Grievants do not always work together on a single project. Mr. Freeman and Mr. Heater indicated that at least half of the time Grievants work in smaller groups of two or three employees. The majority of Grievants’ job duties involve maintenance of the Division of Highways’ buildings and grounds. Grievants have various specialty licensures and certifications, such as, contractor’s licenses, electrician, etc. Respondent came to the conclusion that a Crew Chief position is not necessary for Buildings and Trades. Grievants are lead workers. Grievants are highly trained, specialized, and a small group. Nothing about Respondent’s decision in this matter can be viewed as arbitrary and capricious. The 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. The record of this case did not support such a conclusion. Accordingly, Respondent has demonstrated by a preponderance of the evidence that a remedy wholly unavailable to Grievants is requested.

The following Conclusions of Law support the dismissal of this grievance.

Conclusions of Law

1. Pursuant to the Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 156-1-6 6.11(2018), “[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).

2. “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. *Skaiff 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,

19990.” *Frame v. Dep’t of Health and Human Res.*, Docket No. 00-HHR-240/330 (April 20, 2001).

3. Respondent has demonstrated by a preponderance of the evidence that a remedy wholly unavailable to Grievants is requested.

Accordingly, this grievance is **DISMISSED**.

Any party may appeal this 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 *a/so* 156 C.S.R. 1 § 6.20 (2018).

Date: September 26, 2018

Ronald L. Reece
Administrative Law Judge