

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**JIMMY MYERS, et al.,
Grievants,**

v.

Docket No. 2017-2267-CONS

**DIVISION OF HIGHWAYS,
Respondent.**

DECISION

Grievant, Jimmy Myers, Josh Branson, and Alex Conner are employed by Respondent, Division of Highways. On May 25, 2017, Grievants filed this grievance against Respondent stating, "Grievants contend that Respondent failed to properly follow the procedure for assigning overtime opportunities in violation of policy on May 5 and 22, 2017." For relief, Grievants seek "compensation for lost wages with interest and a clear explanation of overtime policy for employees and supervisors."

Following the August 2, 2017 level one conference, a level one decision was rendered on August 23, 2017, denying the grievance. Grievants appealed to level two on September 6, 2017. Following unsuccessful mediation, Grievants appealed to level three of the grievance process on December 12, 2017. A level three hearing was held on August 7, 2018, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievants were represented by counsel, John Everett Roush, AFT-WV/AFL-CIO. Grievants Branson and Connor appeared in person. Grievant Myers did not appear in person but indicated through his counsel that he wished for the hearing to proceed in his absence. Respondent was represented by counsel, Jesseca R. Church. This matter became mature for decision on September 6, 2018, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievants are employed by Respondent as transportation workers and grieve the distribution of emergency overtime at their worksite. Grievants allege discrimination or favoritism and that the assignment of overtime was arbitrary and capricious. Respondent asserts the assignment of overtime was proper under its operating procedures. Grievants failed to prove discrimination, favoritism, or that Respondent's actions were arbitrary and capricious. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievants are employed by Respondent and are stationed at the St. Albans garage in District 1. Grievant Myers and Grievant Branson are employed as Transportation Worker 3s and Grievant Conner is employed as a Transportation Worker 2.

2. John Martin serves as one of two Transportation Worker 3 Crew Chiefs in the St. Albans garage. Crew Chiefs are responsible for the direct supervision of the transportation workers, including the scheduling of overtime.

3. In the past, employees had complained that overtime assignments were not being made transparently or fairly.

4. At a meeting on May 2, 2017, conducted by District 1 management, Grievant Branson questioned the practices of assigning emergency overtime and employees were informed that there was a written procedure regarding overtime that

should be followed and that the St. Albans garage would be required to post call out sheets.

5. On May 5, 2017, right before the end of the workday around 4:00 p.m., Crew Chief Martin received a call about an oil/fuel spill. Crew Chief Martin responded to the call personally, thinking that the spill was small enough that he could clean it up by himself. However, when Crew Chief Martin arrived, he discovered that the spill was several hundred feet and that cars were sliding in the spill, creating a dangerous situation, which would require a dump truck of sand and more employees to correct. By the time Crew Chief Martin arrived at the scene, it was after 4:00 p.m.

6. When an emergency requires equipment or materials, employees must first report to the garage to gather the same before reporting to the emergency. Because the oil/fuel spill was a dangerous situation, Crew Chief Martin called the employees who lived closest to the garage to respond.

7. Crew Chief Martin called Grievant Conner, Roger Clark, Dave Workman, and Patrick Arey, who all live within five minutes of the garage. Grievant Conner and Mr. Clark refused the overtime. Mr. Workman and Mr. Arey accepted the overtime and each received four hours of overtime.

8. Grievant Branson and Grievant Myers live thirteen miles from the garage.

9. Grievant Branson and Grievant Myers and several other employees knew Crew Chief Martin was responding to an emergency, so waited in the parking lot of the garage hoping to be called for the overtime, but did not inform Crew Chief Martin that they would be waiting.

10. On May 22, 2017, Crew Chief Martin received a call after hours that a tree was down in the curve of a road, creating a dangerous situation.

11. Crew Chief Martin called Grievant Myers, Mr. Clark, and Mr. Arey. Grievant Myers refused the overtime. Mr. Clark and Mr. Arey accepted the overtime and each received four hours of overtime.

12. Overtime assignments for Respondent's employees are governed by the West Virginia Division of Highways Administrative Operating Procedures Section V, Chapter 14, Highway Operations, Scheduled Overtime Worked/Emergency, which states in relevant part as follows:

OVERTIME WORKED/EMERGENCY: This Policy has been established to provide guidance on the distribution of emergency/SRIC overtime in Maintenance Organizations and Bridge Maintenance Organizations within the Division of Highways. This Policy is directed only to situations in which overtime is not scheduled, SRIC and/or emergency purposes. For the purpose of this Policy, overtime refers to any hours of work performed on a given day, which were not scheduled in advance, and will cause an employee to accumulate hours in excess of the standard forty hour work week, regardless of the rate at which it is compensated. This Policy in no way precludes the Agency from requiring employees to work overtime as needed, or in situations which affect the public interest.

. . .

PROCEDURE: As emergency/SRIC overtime hours are worked, the supervisor shall record that the employee worked the overtime on the Overtime Worked/Emergency Chart. Because these situations can be numerous and varied, the organization's supervisor may use his/her discretion in making such assignments based on the employee's expertise, the circumstance of the emergency situation and the location of the emergency. An Overtime Worked/Emergency Chart is to be posted in each work unit location for every calendar month. The chart is to be posted whether or not overtime was worked in the unit. Periodic

reviews by appropriate members of management (supervisor, county administrator, maintenance assistant, etc.) should be performed to insure equalization of hours and policy adherence.

13. Following the May 2, 2017 meeting, the St. Albans garage kept and posted the Emergency/Call out list as required by the operating procedure. However, the St. Albans garage did not follow the legend of the form, which directs that overtime offered but not worked be marked with an "X" and that overtime refused be marked with an "R." Instead, the St. Albans garage marked "R" for "refused" and "NA" for "not available." Crew Chief Martin did not explain the difference between "refused" and "not available."

14. Although the list reflects that Mr. Workman, Mr. Clark, and Mr. Arey were offered more opportunities for emergency overtime, Grievants were offered significant opportunities for overtime, but Grievant Myers and Grievant Branson were not available or refused most of their opportunities and Mr. Connor was not available or refused all of his opportunities for overtime.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

Grievants assert that the unequal assignment of emergency overtime was discrimination or favoritism and arbitrary and capricious. Respondent asserts it had

discretion under its operating procedures to assign the emergency overtime in the way it did, and that its actions were not arbitrary and capricious.

“‘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).

“‘Favoritism’ means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee.” W. VA. CODE § 6C-2-2(h).

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).

“[T]he ‘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. Syllabus Point 3, *In re Queen*,

196 W.Va. 442, 473 S.E.2d 483 (1996).” Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). “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 [the employer].” *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); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff'd* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

Grievants failed to prove discrimination, favoritism, or that Respondent's actions were arbitrary and capricious. The distribution of emergency overtime is governed by Respondent's operating procedure, which gives the supervisor discretion in the assignment of overtime based on employee expertise, the emergency circumstance, and the location of the emergency. Crew Chief Martin did not appear to exercise that discretion in an inappropriate manner.

Although there were some possible discrepancies in Crew Chief Martin's testimony, that is not sufficient to prove Grievants' case. While Crew Chief Martin testified that Grievant Conner did not answer the phone on May 5 and Grievant Conner asserts he did answer the phone but refused, the end result is the same in that Grievant Conner had an opportunity for overtime that he did not work. Likewise, Grievant Conner testified that he told Crew Chief Martin when he called Grievant Conner at home on May 5 that he refused the overtime but that “everybody else” was still at the garage. Crew Chief Martin testified that he did not know employees had waited at the garage hoping for overtime on

May 5 and that when he left around the end of the shift he saw employees getting in their vehicles getting ready to leave. Grievant Branson specifically testified that, although he saw Crew Chief Martin getting ready to respond to the emergency before the end of shift, he did not speak to him to state that he would wait at the garage to be called. It cannot be said that it is more likely than not that Crew Chief Martin was aware Grievant Branson was at the garage after hours waiting to be called for overtime.

Although the list reflects that Mr. Workman, Mr. Clark, and Mr. Arey were offered more opportunities for emergency overtime, Grievants were offered significant opportunities for overtime, but Grievant Myers and Grievant Branson were not available or refused most of their opportunities and Grievant Connor was not available or refused all of his opportunities for overtime. Grievants did not dispute the dangerous nature of the two emergency situations at issue, and Crew Chief Martin's rationale of calling the employees who were closest and available was in compliance with Respondent's operating procedure, was not unreasonable and does not demonstrate discrimination or favoritism.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993),

aff'd, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

2. “‘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). “‘Favoritism’ means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee.” W. VA. CODE § 6C-2-2(h).

3. 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).

4. “[T]he ‘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. Syllabus Point 3, *In re Queen*,

196 W.Va. 442, 473 S.E.2d 483 (1996).” Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). “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 [the employer].” *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); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff'd* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

5. Grievants failed to prove discrimination, favoritism, or that Respondent's actions were arbitrary and capricious.

Accordingly, the 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 W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: October 16, 2018

Billie Thacker Catlett

Chief Administrative Law Judge