

# **THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**JEFF SLOAN,**  
**Grievant,**

**v.**

**Docket No. 2018-1474-CONS**

**DIVISION OF HIGHWAYS,**  
**Respondent.**

## **DECISION**

Jeff Sloan, Grievant is employed by Respondent, Division of Highways (DOH) in District 3, in Roane County, West Virginia. Mr. Sloan filed a level one grievance form dated April 6, 2018, alleging that he was “denied welding pay upgrade for three hours in the week of April 2 because noncertified employees performing welding.”<sup>1</sup> As relief Grievant seeks, “To be made whole in every way including back pay with interest & discontinuing the use of welders without certification.” On June 13, 2018, Mr. Sloan filed a second grievance alleging, “Respondent is retaliating against Grievant by refusing to assign him welding jobs.” As relief in the second grievance Grievant seeks, “back pay and assignment of welding jobs.”

A level one conference related to the first grievance held on April 17, 2018, and the grievance was held in abeyance in an attempt by the parties to effectuate a settlement. After the second grievance was filed, another conference was held relating to both grievances and a level one decision was issued on August 9, 2018, denying both grievances. Grievant appealed to level two the next day. A mediation was conducted on

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<sup>1</sup> Quoted from the level one statement as written.

December 20, 2018, and Grievant's level three appeal was received by the Grievance Board on December 22, 2018.

A level three hearing was held at the Charleston office of the West Virginia Public Employees Grievance Board on August 9, 2019, before Administrative Law Judge Carrie LeFevre. This matter became mature for decision on September 18, 2019, upon receipt of the last Proposed Findings of Facts and Conclusions of Law submitted by the parties. This action was reassigned to the undersigned for decision for administrative reasons.<sup>2</sup>

### **Synopsis**

Grievant alleges that he has been denied temporary upgrades to the TW4, Welder classification by Respondent assigning workers to welding jobs who are not certified instead of giving those upgrade opportunities to him. Grievant also alleges that Respondent has subjected him to reprisal by failing to assign him welding jobs after he filed a grievance in April 2018. Respondent argues that it is the practice of the agency to occasionally upgrade uncertified workers to perform welding on jobs which do not present a safety issue with the equipment arising from the weld. Respondent also denies limiting upgrades for Grievant following his grievance filing.

Grievant proved that Respondent violated the DOH temporary upgrade policy by upgrading uncertified welders to perform welding tasks when a certified welder was available. Grievant did not prove that he was subjected to reprisal following the filing of his grievance.

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<sup>2</sup> The undersigned has listened to the recording of hearing, and carefully reviewed all documents and exhibits which comprise the record of this case.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

### **Findings of Fact**

1. Jeff Sloan, Grievant is employed by Respondent, Division of Highways (DOH) in District 3, in Roane County, West Virginia. His position is classified as a Transportation Worker 2, Equipment Operator. ("TW2"). He is routinely assigned to drive a truck.

2. Prior to transferring to Roane County, Grievant was stationed in Jackson County where his position was classified as a Transportation Operator 4, Welder. Grievant transferred to Roane County to be closer to his home and because the Roane County Administrator at that time, Gary Ellis, told him the only certified welder employed in Roane County, James Snyder, was about to retire. That would result in Grievant being upgraded to the welder classification any time welding needed to be done at that facility.

3. Grievant has successfully completed the Department of Transportation Welder Certification Program of the Department of Highways. He has successfully renewed his welding certification every four years as required by the DOH program.

4. Grievant is now the only certified welder in the Roane County DOH organization. James Snyder returned from retirement under a special program during 2018 but is now fully retired and has not performed any welding for the DOH since October 8, 2018.

5. Welding positions with the DOH fall within the classification of Transportation Worker 4. One of the minimum qualifications for the Transportation Worker

4, Welder classification is “Completion of the Department of Transportation Welder Certification Program of the Department of Highways.”<sup>3</sup>

6. The DOH *Administrative Operating Procedures* Section II, Chapter 12, entitled *Temporary Upgrades for Hourly Employees*.<sup>4</sup> (“Upgrade policy”). The purpose subsection of this policy states:

The purpose of this policy is to provide for the payment of increased wages to employees in specific classification series who are temporarily assigned to perform all essential job duties of a higher level classification than they currently hold.

7. The Upgrade policy also limits these assignments as follows:

- 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. (*Id.* Subsection 4).
- Employees temporarily upgraded must meet the minimum requirements for the higher classification. (*Id.* Subsection 2).

8. Pursuant to the Upgrade policy, Grievant receives significantly higher pay for all times that he is welding in the TW4 classification, as compared to his regular TW2 duties.

9 Due to temporary welding assignments, Grievant was upgraded to a TW4 rate of pay for 283.5 hours during the 2018 calendar year. The other certified welder in the Roane County unit, James Snyder, was upgraded for welding 118.5 hours. (Respondent Exhibit 1, payroll report).

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<sup>3</sup> Grievant Exhibit 1, Classification Specifications for Transportation Worker 4.

<sup>4</sup> Grievant Exhibit 2.

10. Other workers who are not certified to weld by the DOH have been required or allowed to perform welding duties on DOH equipment when a certified welder was available. At least one other worker was required or allowed to weld on jobs that extended for more than one hour and received a pay upgrade during the 2018 calendar year. That worker was not certified to weld for the DOH.<sup>5</sup>

11. Keith Lynch, DOH District 3 Maintenance Assistant, testified that the practice in DOH is to assign certified welders to perform assignments for anything that pulls, pushes, or lifts, as well as bridges. Other jobs may be done by uncertified employees. Roane County Highway Administrator, Brian Fields, described the practice more generally as allowing uncertified welders to do simple welds which would not have any impact on safety. There is not a written DOH policy which establishes or supports the practice of using uncertified employees to weld on DOH equipment.

12. Grievant Sloan kept an extemporaneous record of instance in which he personally saw other workers in the Roane County unit welding on DOH equipment over a 17-month period; April 3, 2018, through July 23, 2019. (Grievant Exhibit 4). The following employees who are not certified to weld were observed welding:

- Jim Kimbro – 2 times.
- Ritchie Taylor – 1 time.
- Brian Fields – 1 time.
- Rodney Brown – 2 times.
- Chris Looney – 6 times.
- Dwayne Harrison – 1 time.

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<sup>5</sup> Testimony of Roane County Highway Administrator, Brian Fields. The other worker assigned to weld was Chris Looney, a TW 3 Mechanic who failed the test to be certified as a welder for DOH.

Grievant did not record the nature or duration of the welding jobs he observed being performed by uncertified workers.

13. Grievant submitted a record he compiled and compared the number of hours he has welded each month from 2016 through 2019. The data shows that the welding is not easily predictable from one month to the next. For example, in July 2017, Grievant welded 61.5 hours. However, in July 2016, he welded 8 hours and in July 2018, he welded 7 hours. For further illustration, in April 2016, Grievant welded 40 hours, April 2017, 4 hours April 2018, 8 hours and April 2019, 28 hours. Routinely more welding was done by Grievant in the winter months when equipment is heavily used for snow removal and ice control. Grievant welded roughly 80 hours less in 2018, than he did in 2017. However, the months of May, June, July, August were much higher in 2017 than they had been in any of the other years.

### **Discussion**

These grievances do not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See, W. VA. CODE R §156-1-3. Burden of Proof.* "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 party bearing the burden has not met its burden. *Id.*

Grievant argues that he has been denied temporary upgrades to the TW4, Welder classification by Respondent assigning workers to welding jobs who are not certified instead of giving those upgrade opportunities to him. Grievant also alleges that

Respondent has subjected him to reprisal by failing to assign him welding jobs after he filed a grievance in April 2018.

The reprisal claim will be addressed first. The West Virginia Public Employees Grievance Procedure statute specifically prohibits retaliation for participation in the grievance procedure stating, “No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her participation. Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination.” W. VA. CODE § 6C-2-3(h).

In order to establish a *prima facie* case of retaliation, a grievant must establish by a preponderance of the evidence:

- (1) that he was engaged in activity protected by the statute (e.g., filing a grievance);
- (2) that his employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;
- (3) that, thereafter, an adverse employment action was taken by the employer; and
- (4) that the adverse action was the result of retaliatory motivation or the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

*See Coddington v. W. Va. Dep't of Health & Human Res.*, Docket Nos. 93-HHR-265/266/267 (May 19, 1994); *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991). *See generally Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). Once a *prima facie* case of retaliation has been established, the inquiry shifts to determining whether the employer has shown legitimate, non-retaliatory reasons for its

actions. *Graley*, supra. See *Mace v. Pizza Hut, Inc.*, 180 W. Va. 469, 377 S.E.2d 461 (198[8]).

*Matney v. Dep't of Health & Human Res.*, Docket No. 2012-1099-DHHR (Nov. 12, 2013)."

*Lamp v. Div. of Juvenile Ser.*, Docket No 2015-0076-MAPS (Mar. 30, 2017).

Grievant clearly crossed the first two hurdles in proving reprisal. First, he participated in the grievance process which is a statutorily protected activity. See W. VA. CODE § 6C-2-3(h). Second, Grievant's supervisors and other agents of Respondent had actual knowledge of the fact that he filed a grievance related to welding upgrades.

Grievant only received eight upgrade hours in April 2018, but he had only received four hours in April the year before and he received 28 upgrade hours in April 2019. The remaining summer months in 2018 were lower than 2017 but consistent with the number of hours Grievant was upgraded in the summer of 2016. His upgrade hours in the winter months of 2018 were generally consistent with the prior years, and he completed the 2018 calendar year with 283.5 hours. By comparison, Grievant received 316.5 upgrade hours in 2016, and 352.5 hours in 2017. While the hours in 2018 are lower, the difference could easily be explained by the differing severity of the winters and the general overall condition of the DOH equipment from year to year. Grievant did not prove by a preponderance of the evidence that he suffered adverse employment consequences as a result of filing a grievance. Accordingly, the reprisal grievance is **DENIED**.

Grievant's next claim is that Respondent is violating its own policies by giving welding upgrades to employees who have not completed the DOH welding certification



program instead of giving those welding assignments and upgrades to him as the only certified welder.<sup>6</sup> Grievant's claim is supported by Respondent's policies.

The Transportation Worker 4 classification specifications set a minimum requirement of completion of the "Department of Transportation Welder Certification Program of the Division of Highways." (Grievant Exhibit 1). There are no exceptions or substitutions for that requirement in the class specs. Additionally, the *DOH Administrative Operating Procedures* at Section II, Chapter 12, sets out the *DOH Temporary Upgrade Policy*. That policy states that occurrences which may justify such upgrades may include, *inter alia*, vacation scheduled, employee illnesses, or "other unforeseen circumstances." The policy specifically requires that, "Employees temporarily upgraded must meet the minimum requirements for the higher classification." There are no exceptions to this rule in the policy. Employees who do not meet the minimum qualifications for higher classification are simply not eligible for the temporary upgrade.<sup>7</sup>

"An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs," even if those procedures are generous beyond the requirements that bind such agency. *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977); *Bailey v. W. Va. Dep't. of Transp.*, Docket No. 94-DOH-389 (Dec. 20, 1994);

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<sup>6</sup> Respondent's witnesses attempted to make a distinction between stick welding and MIG welding. They argued that Grievant was only certified in stick welding so they could assign MIG welding jobs to other workers. Grievant credibly testified that the trainer of the DOH welding program told him and others that they need not take the MIG test because that process was much easier than stick welding. More importantly, the TW 4 class specifications only require that the welder pass the DOH Welder Certification Program which, Grievant undisputedly did. No distinction is made between types of welding.

<sup>7</sup> See *Adkins v. Div. of Health & Human Res.*, 2019-0500-DHHR (Oct. 30, 2019), similarly addressing the DOP temporary upgrade policy which has virtually the same provision. W. VA. CODE ST. R. § 143-1-4.8.d.

*McNeely v. Div. of Corr. & Rehab.*, Docket No. 2019-0673-MAPS (May 30, 2019); *Layne v. Dep't of Health & Human Res.*, Docket No. 2008-0172-DHHR (Jan. 8, 2009). Accordingly, any practice of the DOH which does not comply with the stated provision of the policy is in violation of the policy and the DOH Administrative Operating Procedures. Grievant proved by a preponderance of the evidence that Respondent violated its temporary upgrade policy by upgrading workers to welding duties when those workers did not hold the minimum qualifications. Accordingly, this grievance is **GRANTED**.

The remaining issue relates to an appropriate remedy. Grievant alleges that Respondent is temporarily upgrading uncertified workers to the TW4, Welder classification. He is now the only DOH trained certified welder in the unit. Respondent's witnesses admitted that uncertified welders had been upgraded in salary to TW4 position instead of assigning those positions. As relief, Grievant seeks "To be made whole in every way including back pay with interest & discontinuing the use of welders without certification."

W. VA. CODE § 6C-2-3, in subsection c related to "Defenses and limitations" limits back pay awards as follows:

(2) Back pay. -- When it is a proper remedy, back pay may only be granted for one year prior to the filing of a grievance, unless the grievant shows, by a preponderance of the evidence, that the employer acted in bad faith in concealing the facts giving rise to the claim for back pay, in which case an eighteen-month limitation on back pay applies.

Respondent demonstrated the ability to determine which employees received temporary upgrades to the TW4, Welder classification by creating Respondent Exhibit 1, a list of all such upgrades Grievant and James Snyder received during the 2018 calendar year. It is

not unreasonable for Respondent to compile a list recording each time a worker in the Roane County unit without the required DOH welder training program certification, was paid for a temporary upgrade during the period of April 7, 2017 and April 6, 2018 (the date of the grievance). In any instance during that period where an uncertified welder received an upgrade pay where Grievant did not, Grievant shall be paid as back pay an upgrade to the TW4 classification pay grade. This remedy is necessary to make Grievant whole for Respondent's violation of the temporary upgrade policy and anticipated by Grievant's request for relief.

### **Conclusions of Law**

1. These grievances do not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "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 party bearing the burden has not met its burden. *Id.*

2. The West Virginia Public Employees Grievance Procedure statute specifically prohibits retaliation for participation in the grievance procedure stating, "No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his or her participation. Reprisal or retaliation constitutes a grievance and any person held responsible is subject to disciplinary action for insubordination." W. VA. CODE § 6C-2-3(h).

3. In order to establish a *prima facie* case of retaliation, a grievant must establish by a preponderance of the evidence:

- (1) that he was engaged in activity protected by the statute (e.g., filing a grievance);
- (2) that his employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;
- (3) that, thereafter, an adverse employment action was taken by the employer; and
- (4) that the adverse action was the result of retaliatory motivation or the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

See *Coddington v. W. Va. Dep't of Health & Human Res.*, Docket Nos. 93-HHR-265/266/267 (May 19, 1994); *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth.*, Docket No. 91-PEDTA-225 (Dec. 23, 1991). See generally *Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986).

4. Grievant did not prove by a preponderance of the evidence that he suffered adverse employment consequences as a result filing a grievance.

5. "An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs," even if those procedures are generous beyond the requirements that bind such agency. *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977); *Bailey v. W. Va. Dep't. of Transp.*, Docket No. 94-DOH-389 (Dec. 20, 1994); *McNeely v. Div. of Corr. & Rehab.*, Docket No. 2019-0673-MAPS (May 30, 2019); *Layne v. Dep't of Health & Human Res.*, Docket No. 2008-0172-DHHR (Jan. 8, 2009).

6. Any practice of the DOH which does not comply with the stated provision of the policy is in violation of the policy and the DOH Administrative Operating Procedures.

7. Grievant proved by a preponderance of the evidence that Respondent violated its temporary upgrade policy by upgrading workers to welding duties when those workers did not hold the minimum qualifications.

8. W. VA. CODE § 6C-2-3, in subsection c related to “Defenses and limitations” limits back pay awards as follows:

(2) Back pay. -- When it is a proper remedy, back pay may only be granted for one year prior to the filing of a grievance, unless the grievant shows, by a preponderance of the evidence, that the employer acted in bad faith in concealing the facts giving rise to the claim for back pay, in which case an eighteen-month limitation on back pay applies.

Accordingly, the reprisal grievance is **DENIED**, and the temporary upgrade grievance is **GRANTED**.

Respondent is **ORDERED** to compile a list recording each time a worker in the Roane County unit without the required DOH welder training program certification, was paid for a temporary upgrade during the period of April 7, 2017 and April 6, 2018 (the date of the grievance). In any instance during that period, where an uncertified welder received a upgrade pay where Grievant did not, Grievant shall be paid as back pay an upgrade to the TW4 classification pay grade.<sup>8</sup>

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

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<sup>8</sup> James Snyder was certified to weld so any upgrades he received will not be included in the list. It is understood that single welding assignments of less than one hour do not require a pay upgrade and are not included in the list.

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: October 31, 2019.**

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**WILLIAM B. MCGINLEY  
ADMINISTRATIVE LAW JUDGE**