

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JOSHUA JAMES,
Grievant,

v.

Docket No. 2019-1353-DOT

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Joshua James, Grievant, filed this grievance against his employer, West Virginia Division of Highways (“DOH”) Respondent, protesting his upgrade opportunities. The original grievance was filed on March 29, 2019, and the grievance statement asserts: “Discrimination pertaining to equipment upgrades.” For Relief Sought, Grievant requests “[e]qual treatment, to have my work judged by the crewleaders i work for. Proof of Policy – upon request for anyone at my org” [sic]. See Grievance Form dated March 29, 2019.

A conference was held at level one on April 10, 2019, and the grievance was denied at that level on May 1, 2019. Grievant appealed to level two on or about May 20, 2019. A mediation session was held on August 5, 2019. Grievant appealed to level three on August 12, 2019. On September 5, 2019, Grievant, by representative, requested this grievance matter be consolidated with grievance docket number 2020-0275-DOT.¹ The request was denied by the undersigned Administrative Law Judge by Order dated October 17, 2019. A level three hearing was held before the undersigned Administrative Law Judge on January 28, 2020, at the Grievance Board’s Charleston

¹ An argument could be made for and against consolidating these grievances, the undersigned elected to keep the adjudications separate for clarity and judicial transparency. Grievant can fully pursue allegation of retaliation in docket number 2020-0275-DOT.

office. Grievant appeared *pro se*.² Respondent was represented by its counsel Jesseca R. Church, Esquire, DOH Legal Division. At the conclusion of the level three hearing, the parties were invited to submit written proposed fact/law proposals. Both parties submitted Proposed Findings of Fact and Conclusions of Law, and this matter became mature for decision on February 27, 2020, on receipt of the last of these proposals.

Synopsis

Grievant is employed as a Transportation Worker 1 Craft Worker with the Division of Highways at Cabell County in Respondent's District 2. Grievant alleges that he has been discriminated against regarding temporary upgrades to operate certain pieces of DOH equipment. The Transportation Worker classification has undergone a variety of developments in the recent years, notably an increase in various classification wages, thus increasing workers desire for higher classification. Nevertheless, management is charged with determining the best way to utilize the assigned workforce "to better serve the organization's objectives" and the "most efficient use of resources" as long as workers are performing tasks within their classification.

Employers are empowered to reasonably manage the duties and activities of workers. Employees do not dictate their individual assignments. Grievant failed to establish by a preponderance of the evidence that Respondent's decision regarding temporary upgrades for equipment operation, to be the result of discrimination, favoritism, unlawful, unreasonable, or arbitrary and capricious reasons. This grievance is DENIED.

² "*Pro se*" is translated from Latin as "for oneself" and in this context means one who represents oneself in a hearing without a lawyer or other representative. *Black's Law Dictionary*, 8th Edition, 2004 Thompson/West, page 1258.

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

Findings of Fact

1. Grievant is employed by Respondent as a Transportation Worker 1 Craft Worker (TW1CW) for Cabell county in Respondent's District 2 and has been employed with Division of Highways since June 10, 2013.

2. Randy Adkins is a Transportation Worker 3 Craft Worker (TW3CW) for Cabell county in Respondent's District 2 and has been employed since 1995.

3. Kathleen Dempsey is the Human Resources Manager for Respondent's District 2. Ms. Dempsey oversees human resource functions in the five counties of District 2, which includes Cabell county.

4. Alan Midkiff is the Highway Administrator for Cabell county in Respondent's District 2. Mr. Midkiff oversees operations of Cabell county, including job duties and work assignments. Administrator Midkiff is Grievant's supervisor.

5. Management often rotates employees on equipment to ensure the work force is able and knowledgeable on various equipment. Craft Workers and Equipment Operators are upgraded when operating specific equipment that requires certification.

6. Grievant receives intermittent upgrades in pay while performing certain jobs determined to be at a higher classification, such as operating certain pieces of DOH equipment. See WV DOH Policy: Temporary Upgrade for Hourly Employees R Ex 3; L-3 Testimony of Grievant and Midkiff.

7. Alan Midkiff, as the Highway Administrator in Cabell County, historically allows the Crew Leaders to make the determination of who will operate equipment in the field provided those decisions are based on DOH policies and practices. See Midkiff testimony

8. According to the Department of Transportation Temporary Upgrade Policy, employees may be upgraded to perform duties normally contained in certain classifications when it is not feasible or practical to make a permanent assignment to the position. (R Ex 3) The WV DOH Administrative Operating Procedures on Equipment states that “[t]he organizational supervisor will be directly in charge of, and responsible for, assigning qualified operators to each piece of equipment.” Equipment operation assignments are a managerial decision. See R Ex 1 (page 7 of 18) and Midkiff testimony.

9. In general terms, Respondent made an operating/management determination that if there is a higher classified employee (TW2 or TW3) available to perform the functions of the job, then there is no need to upgrade a lower classified employee to that position, which would require an upgrade in pay. See Midkiff, Dempsey L3 Testimony, and R Ex 3.

10. Grievant became aware that certified Transportation Worker 1 Craft Workers would only be assigned to operate equipment if no certified Transportation Worker 2 or 3 Equipment Operator was available. See G Exs 1 and 2 at Level One; R Ex 4; L3 Testimony of Midkiff and Grievant.

11. Human Resources Manager Dempsey explained that it has always been the policy of the Division of Highways to assign the appropriately classified operator to the run DOH equipment whenever possible, and only use lower classified employees when necessary. Ms. Dempsey admitted this policy has not always been consistently enforced, but a meeting with district management addressed the need to follow all DOH policies District wide including equipment operation assignments. Dempsey Testimony

12. As a TW1CW Grievant's opportunity for a temporary upgrade for operating DOH equipment is based on the needs of the agency. If there is no need to assign Grievant to operate equipment, then he is not upgraded. See Midkiff and Dempsey L3 Testimony.

13. In 2019, Grievant was upgraded for 320.50 hours, which was significantly more than most TW1CW in Cabell county but also less than some other employee. Transportation Worker(s) Edward Keelin was only upgraded for 16 hours and Lisa Spurlock was upgraded for 37.50 hours. See Temporary Upgrade Summary, R Ex 5.

14. Randy Adkins (TW3CW) testified at the level three hearing (witness on behalf of the Grievant). This witness reportedly often works with Grievant and has witnessed Grievant operating equipment. Witness could not verify the amount of time that Grievant is assigned to operate equipment. See Adkins L3 Testimony.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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, the party bearing the burden has not met its burden. *Id.*

Grievant believes the equipment assignments and potential upgrades in Cabell county are not distributed fairly and/or properly. Grievant strongly disagrees with Respondent's so called economical business decision rational to utilize employees that are available and certified to operate equipment instead of relying on a lesser classification to be upgraded.

Grievant believes he is being "discriminated" against when it comes to equipment assignments and potential upgrades. Grievant asserted he received fewer upgraded hours in 2019 than he did in 2018. Grievant highlights that there has been an alteration in agency's practice in providing upgrade opportunities. He contends this action is improper and not the sound economic business decision Respondent claims. Grievant's belief that operating decisions by management are incorrect or fiscally debatable is not necessarily a grievable issue unless the decision(s) violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's

effective job performance or health and safety.³ *Lusher, et al. v. Depart. of Transportation, Div. of Highways*, Docket No. 05-DOH-157 (June 15, 2005).

Respondent provides that it is authorized to make workforce decisions pertaining to daily work assignments, based on the needs of the organizations and not dependent upon individual employee requests. See West Virginia Division of Highways Policy: Temporary Upgrade for Hourly Employees Issued by the Commissioner of Highways -- Policy No: DOH 3.12, Issue Date: 10/01/2002, Revised: 8/16/2018. Further, see Administrative Rule of the West Virginian Division of Personnel Section 4, e.g., Temporary Classification Upgrade. Generally speaking, an employer is charged with determining the best way to utilize the assigned workforce “to better serve the organization’s objectives” and the “most efficient use of resources” as long as workers are performing task within their classification. Employers are empowered to reasonably manage the duties and activities of workers. Employees do not dictate their individual assignments. Highway Administrator Midkiff informed Grievant that certified Transportation Worker 1 Craft Workers would only be assigned to operate equipment if no certified Transportation Worker 2 or 3 Equipment Operator was available. This decision was not beyond Respondent’s purview. Nor was the practices it limited exclusively to Grievant’s opportunity for equipment operation.

³ See *Ball v. Dep’t. of Highways*, Docket No. 96-DOH-141 (1997). “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. See *Olson v. Bd. of Trustees/Marshall Univ.*, Docket No. 99-BOT-513 (Apr. 5, 2000), citing *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997).” *Vance v. Jefferson County Bd. of Educ.*, Docket No. 02-19-030R (Nov. 20, 2002); Also see *Lusher, et al. v. Dep’t. of Transportation, Div. of Highways*, Docket No. 05-DOH-157 (June 15, 2005).

For the purpose of the grievance procedure, discrimination is defined as “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). In order to establish 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’n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep’t of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008). The record of this case did not support a finding that Grievant was the victim of discrimination. It was responsibly presented that changes regarding upgrades have occurred agency wide. Further, the treatment difference is related to actual classification responsibilities. See L3 testimony Highway Administrator Alan Midkiff and Human Resources Manager Kathleen Dempsey.

Applicable policy and day-to-day application regarding temporary upgrading is being more readily directed from district management. See findings of fact 7-12. Implemental changes to equipment upgrades were not made limited to Grievant’s assignments. It has always been the policy of the Division of Highways to assign the appropriately classified operator to the run DOH equipment whenever possible, and only use lower classified employees when necessary. However, this policy has not always

been consistently enforced. Respondent has taken steps to more readily follow DOH policies District wide including equipment operation assignments. See Midkiff, Dempsey L3 Testimony, and R Ex 3. This practice in the circumstances of this case is not recognized as discrimination.

It is noteworthy that Grievant has been upgraded in the past for certain types of work and will continue to be when conditions permit. NEVERTHELESS, the issue here is whether Respondent is in violation of any policy or being discriminatory in daily job assignments. Management can determine the best way to utilize their workforce “to better serve the organization’s objectives” and the “most efficient use of resources.” Management made a district wide alteration in craft workers operating equipment if certified operators are available. This authority is within Respondent’s purview. The Grievance Board previously held “There is no statute, rule or policy requiring that the upgrades be made by any particular method. Consequently, the method utilized is up to the supervisor’s discretion.” *Eddie Groves et al v. Div of Highways*, Docket No. 2015-1077-CONS (Aug 17, 2016). Grievant failed to prove that management’s decision regarding upgrade decisions is a violation of applicable policies and rules or to be arbitrary and capricious.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant has the burden of proving his grievance 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, a party has not met its burden of proof. *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)*. In order to establish 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’n, 655 S.E.2d 52, 221 W. Va. 306 (2007);
Harris v. Dep’t of Transp., Docket No. 2008-1594-DOT (Dec. 15, 2008).

3. Grievant failed to establish a claim of discrimination. The record of this case did not support a finding that Grievant was the victim of discrimination.

4. Equipment operation assignments are a management decision and 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 a grievance. 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 unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety. *Lusher, et al. v. Depart. of Transportation, Div. of Highways*, Docket No. 05-DOH-157 (June 15, 2005).

5. Grievant did not establish that Respondent violated any statute, regulation or policy, or that it abused its discretion, on meeting the needs of the agency by selecting certified equipment operators of a higher classification than Grievant to operate equipment.

6. Grievant did not establish that Respondent violated any statute, regulation or is improperly enforcing existing agency policy.

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: March 26, 2020

Landon R. Brown
Administrative Law Judge