

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TERRY PARSONS,
Grievant,

v.

Docket No. 2019-0815-DOT

DIVISION OF HIGHWAYS,
Respondent.

DISMISSAL ORDER

Terry Parsons, Grievant, filed a complaint against his employer, Division of Highways ("DOH"), Respondent, protesting his lack of promotion. The original grievance was filed on January 29, 2019, and the grievance statement provides, "Discrimination" [sic] with an accompanied attachment.¹ Grievant's requested relief, "Someway, somehow someplace compensated."

A conference was held at level one on March 11, 2019, where Grievant had the opportunity to present facts underlying the grievance and submit documentation and/or statements deemed to be relevant to the matter. The March 29, 2019 level one decision ruled the grievance "dismissed as untimely filed." Grievant appealed to level two on or about April 11, 2019. A mediation session was held on August 5, 2019. Grievant appealed to level three on or about August 8, 2019. Further, Respondent filed a motion to dismiss the instant grievance, alleging Grievant failed to file the grievance within the required timeframe and failed to establish a proper qualifying event. Facts and issues in dispute regarding this grievance were not readily clear pursuant to the grievance

¹ The one-page hand-written attachment accompanying Grievant's filed grievance form is not readily discernable with regard to the facts and issues in dispute. The document is incorporated as a part of Grievant's statement. Grievant was provided opportunity to clarify at the level three hearing.

statement. No decision was issued with regard to Respondent's motion(s) to dismiss prior to the level three hearing. Electronic communication(s) were sent to Grievant's union representative. Grievant was notified of Respondent's motion to dismiss and a request for clarification regarding the grievance was communicated. No written response was received by the Board's office, on behalf of Grievant, in response to requests for information.

A level three hearing was held before the undersigned Administrative Law Judge on June 5, 2020, at the Grievance Board's Charleston office. Grievant appeared in person and with representative Gary DeLuke, UE Local 170, WV Public Workers Union. Respondent appeared represented by Kathleen Dempsey, Human Resource Director and legal counsel Jesseca R. Church, 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 upon receipt of the last of the parties' fact/law proposals on or about June 26, 2020.

Synopsis

Grievant is employed by Respondent as a Transportation Worker and grieves his non-promotion to crew chief. Grievant alleges a pattern of discrimination or favoritism as the reason for his non-selection to the position. Respondent requests the dismissal of this matter and disputes any malfeasance. Grievant did not appropriately establish an incident that timely constitutes a proper grievance. Further, Grievant failed to prove discrimination, favoritism, or that Respondent's actions were in violation of any applicable

rule or regulation. Accordingly, Respondent's "Motion to Dismiss" is **Granted** and this grievance is **DISMISSED** from the docket of the Grievance Board.

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 classified as a Transportation Worker 3 Bridge Maintenance Craft Worker in District Two (D-2) and has been employed since September 18, 1995.

2. Grievant admittedly did not specifically apply for any job posting in D-2 in January 2019.

3. The instant matter was filed by Grievant on January 29, 2019.

4. Grievant, via written and oral representation, references events that have occurred over a period of years.

5. Respondent filed a motion to dismiss the instant grievance, prior to the level three hearing, alleging there was no qualifying event to establish a timeframe for filing this grievance. Grievant did not comply with mandatory filing requirements and did not establish valid reason for filing this matter outside the permitted timeframe. Respondent filed a motion to dismiss on or about August 5, 2019, and again on May 29, 2020.

6. Grievant fails to properly establish a qualifying event to institute a timeframe for filing the instant grievance.

7. The Public Employees Grievance Board is an administrative agency, established by the Legislature, to allow a public employee and his or her employer to

reach solutions to problems which arise within the scope of their employment relationship. See generally WEST VIRGINIA CODE § 6C-2-1 *et seq.* There are established and recognized constraints for filing and pursuing a grievance in accordance with West Virginia Grievance Statutes and applicable Regulations. See WEST VIRGINIA CODE § 6C-2-1 *et seq.* and Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018).

Discussion

“Grievances may be disposed of in three ways: by decision on the merits, nonappealable dismissal order, or appealable dismissal order.” W. VA. CODE ST. R. § 156-1-6.19. “Nonappealable dismissal orders may be based on grievances dismissed for the following: settlement; withdrawal; and, in accordance with Rule 6.15, a party's failure to pursue.” W. VA. CODE ST. R. § 156-1-6.19.2. “Appealable dismissal orders may be issued in grievances dismissed for all other reasons, including, but not limited to, failure to state a claim or a party's failure to abide by an appropriate order of an administrative law judge. Appeals of any cases dismissed pursuant to this provision are to be made in the same manner as appeals of decisions on the merits.” W. VA. CODE ST. R. § 156-1-6.19.3. “Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence.” W. VA. CODE ST. R. § 156-1-3 (2018).

This matter does not challenge a disciplinary action, Grievant's allegations must be proven by a preponderance of the evidence. See W. VA. CODE R §156-1-3. *Burden of Proof.* “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). 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 is of the belief that he is more deserving of the crew chief position than one or more individuals who have received the promotion. Grievant called no witnesses other than himself, and presented no documentation demonstrating his self-professed superior qualification to that of unidentified promoted employees. Grievant attempted to support his allegations by depicting in the most general of terms an incident or two that occurred within the time period of 2013-2019.² The identified incidents were not very fact specific or truly merit based comparison of co-workers' qualifications.³ Grievant tends to argue that seniority is not properly recognized by Respondent as a qualifying element for promotion. Grievant alleges Respondent implements discriminatory and/or favoritism practices when promoting transportation workers. Whether Grievant is attempting to protest an event or his perception of Respondent's promotion practice is not

² Grievant expanded or attempted to clarify information on the attached document accompanying the grievance form. Grievant's testimony lacked cohesive focus of key facts and crucial fundamental elements of a proper grievance. It is debatable whether Grievant truly grasps the applicable criteria and procedures relevant to granting a crew leader classification.

³ Grievant testified that he felt discriminated against by how he had been treated while working for Respondent. He was displeased and was of the belief that Respondent's selection of candidates and recipients of the crew leader position was discriminatory.

readily clarified by Grievant. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Trs./W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998) (citing *Harrison v. W. Va. Bd. of Drs./Bluefield State Coll.*, Docket No. 93-BOD-400 (Apr. 11, 1995)).

It is not unnoticed that Grievant failed to properly establish a qualifying event to authenticate a timeframe for the filing of the instant grievance. Respondent's dismissal motions were prudent.⁴ This grievance was filed on January 29, 2019. Grievant's grievance statement mentions job postings and vacancies occurring in District Two. Nevertheless, Grievant admittedly did not specifically apply for any job posting in D-2 in January 2019. Grievant's level three testimony references events that have occurred over a period of years. Grievant's reliance on the promotion event in January 2019 is not established by the information Grievant narrated.⁵ Grievant's standing to file the instant grievance reliant on a promotion he failed to properly apply for is dubious. Grievant specified that he had applied for a crew leader position in 2013, 2017 and 2018.

Employees are required to file a grievance within the time limits specified by applicable governing rule, regulations, and statute. W. VA. CODE § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." Applicable W. VA. CODE sets forth the time limits for filing a grievance as follows:

⁴ Request for clarification regarding the instant matter was repeatedly communicated to Grievant. Whether Grievant is attempting to protest a specific promotion or his perception of Respondent's promotion practice is not readily clarified by Grievant.

⁵ While it is recognized that Grievant may have misspoken or was confused, according to his testimony he filed the grievance prior to the final determination of the January 2019 promotion decision. See Grievant L3 testimony.

Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing

W. VA. CODE § 6C-2-4(a)(1). The time period for filing a grievance ordinarily begins to run when the employee is “unequivocally notified of the decision being challenged.” *Harvey v. W. Va. Bureau of Emp’t Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998); *Goodwin v. Div. of Highways*, Docket No. 2011-0604-DOT (March 4, 2011). If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. See *Lynch v. W. Va. Dep’t of Transp.*, Docket No. 97-DOH-060 (July 16, 1997), *aff’d*, *Circuit Court of Kanawha County*, No. 97-AA-110 (Jan. 21, 1999).

Grievant tends to provide his perception of issues, prospective activities and procedure, with limited grasp of pertinent facts.⁶ Respondent filed a motion to dismiss the instant grievance, alleging there was no qualifying event to establish a timeframe for filing this grievance. Grievant did not comply with mandatory filing requirements and did not establish a valid reason for filing outside the permitted timeframe. Grievant was provided a variety of opportunity to establish a *prima facie* case.⁷ Grievant was notified

⁶ “Ignorance of the grievance procedures does not excuse the untimely filing of a grievance.” *Palmer*, Docket No. 2017-2308-DHHR at 5 (quoting *Payne v. Div. of Juvenile Serv.*, Docket No. 2017-1436-MAPS (May 8, 2017)).

⁷ A *prima facie* case generally refers to a set of facts which, if not rebutted or contradicted by other evidence, would be sufficient to support a ruling in favor of the party establishing such facts. See Black’s Law Dictionary 1353 (4th ed. 1968).

of Respondent's motion to dismiss, and a request for clarification regarding this grievance was communicated to Grievant by this Grievance Board. No written response was received by the Board's office, on behalf of Grievant, in response to its requests for information. In an attempt to provide Grievant with all reasonable opportunities to establish a proper grievance claim, the undersigned elected not to issue a decision with regard to Respondent's motion(s) to dismiss prior to the level three hearing.

This Grievance Board is authorized by statute to provide relief to employees for discrimination, and favoritism as those terms are defined in W. VA. CODE § 6C-2-2. "Discrimination" is defined by statute 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). "Favoritism" is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee" unless agreed to in writing or related to actual job responsibilities. W. VA. CODE § 6C-2-2(h). In order to establish either 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., 655 S.E.2d 52 (2007); *See also Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chadock v. Div. of Corr.*, Docket No. 04-CORR-278 (Feb. 14, 2005).

Grievant did not establish that he was the victim of discrimination under the applicable statute. The fact that other members of Respondent's work force over the years have been promoted to crew chief while Grievant remains a Transportation Worker 3 does NOT establish a *prima facie* case of either a discrimination or favoritism. Time on the job, (i.e. seniority) is not the sole factor for a promotion to crew chief. Seniority is recognized as a consideration, but not the primary factor for the selection process.

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)).

The "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. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001)(citing *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). "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 employer].” *Trimboli v. Dep’t of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997); *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). Grievant did not establish Respondent’s promotion practices with regard to the crew chief position is arbitrary, capricious and/or clearly wrong.

Grievant did not appropriately establish a proper grievance. Grievant was repeatedly provided opportunities to establish a qualifying event for the instant grievance.⁸ Grievant’s communicated rationale for this grievance tends to relate to events that have occurred over a period of years. Grievant failed to prove discrimination, favoritism, or that Respondent’s actions were in violation of any applicable rule or regulation. Grievant did not specifically address a qualifying event within the prescribed timeframe for a grievance as set by statute and did not establish valid reasons for filing outside of the permitted timeframe. It is proper to issue an appealable dismissal order in the circumstances of this matter.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. This matter does not challenge a disciplinary action, Grievant has the burden of proving his allegations by a preponderance of the evidence. See W. VA. CODE

⁸ Including, but not limited to a level three hearing held before the undersigned Administrative Law Judge on June 5, 2020, at the Grievance Board’s Charleston office.

R §156-1-3. *Burden of Proof*. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 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. 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 of proof. *Id.*

2. An employee is required to "file a grievance within the time limits specified in this article." W. VA. CODE § 6C-2-3(a)(1). The Code further sets forth the time limits for filing a grievance as follows:

Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing

W. VA. CODE § 6C-2-4(a)(1). "Days' means working days exclusive of Saturday, Sunday, official holidays and any day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided for by statute, rule, policy or practice." W. VA. CODE § 6C-2-2(c). If proven, an untimely filing will defeat a grievance, in which case the merits of the case need not be addressed. *Lynch v. W. Va. Dep't of Transp.*, Docket No. 97-DOH-060 (July 16, 1997), *aff'd*, *Circuit Court of Kanawha County*, No. 97-AA-110 (Jan. 21, 1999).

3. In order to establish either 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., 655 S.E.2d 52 (2007); See *Bd. of Educ. v. White*, 216 W.Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.*, Docket No. 04-CORR-278 (Feb. 14, 2005).

4. Grievant did not specifically address a qualifying event within the prescribed timeframe for a grievance as set by statute and did not establish valid reasons for filing outside of the permitted timeframe.

5. Grievant did NOT establish the *prima facie* elements of either a discrimination or favoritism claim. Grievant failed to prove discrimination, favoritism, or that Respondent's actions were arbitrary and capricious.

6. "Mere allegations alone without substantiating facts are insufficient to prove a grievance." *Baker v. Bd. of Trs./W. Va. Univ. at Parkersburg*, Docket No. 97-BOT-359 (Apr. 30, 1998) (citing *Harrison v. W. Va. Bd. of Drs./Bluefield State Coll.*, Docket No. 93-BOD-400 (Apr. 11, 1995)).

7. Grievant failed to establish an actionable grievance by a preponderance of the evidence.

8. In the circumstance of the instant matter, the burden of proof is on Respondent to demonstrate that its motion to dismiss should be granted. “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 and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

9. It is established by a preponderance of the evidence that Respondent’s motion to dismiss is meritorious.

Accordingly, based on the foregoing, Respondent’s “Motion to Dismiss” is **GRANTED** and this grievance is **DISMISSED** from the docket of the Grievance Board.

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 also 156 C.S.R. 1 § 6.20 (2018).

Date: July 2, 2020

Landon R. Brown
Administrative Law Judge