WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ROBERT L. HUNTER,
Grievant,

v. **Docket No. 2019-1704-CONS**

WEST VIRGINIA DIVISION OF HIGHWAYS,
Respondent.

D E C I S I O N

Robert L. Hunter, Grievant, filed grievances against his employer West Virginia Division of Highways ("DOH "), Respondent, alleging that he was subject to discriminatory treatment and seeks to be made whole in every way, including end to discrimination. The instant grievance is consolidated. The original grievances, 2019-1653-DOT and 2019-1677-DOT, were combined pursuant to an "Order to Consolidate Pending Grievances" dated June 6, 2019, by the level one Grievance Evaluator.[1]

A conference was held at level one on July 1, 2019, and the grievance was denied at that level by a written decision dated July 23, 2019. Grievant appealed to level two on or about July 27, 2019, and mediation was held on September 30, 2019. Grievant appealed to level three on October 1, 2019. A level three hearing commenced on September 23, 2020 and resumed on March 30, 2022, before the undersigned Administrative Law Judge via Zoom video conferencing originating at the Grievance

[1] Grievant first filed a grievance on May 24, 2019, alleging that he was approached by another employee who swung a shovel at the driver's door of Grievant's truck while he was in it. Grievant requested that the other employee be disciplined appropriately (docketed as 2019-1653-DOT). This grievance was dismissed at level one and later not pursued for a variety of reasons. This issue and its resolution will not be discussed here. Further, Grievant filed a grievance on or about May 27, 2019, alleging that he was "subject to discriminatory assignments" and for relief asked, "To be made whole in every way including end to discrimination." This was originally docketed as 2019-1677-DOT.

Board's Charlston office. Grievant appeared in person and was represented by UE Field Organizer, Gary DeLuke, UE Local 170, at the September 23, 2020 hearing and then represented by Michael L. Hansen, Project Field Organizer, UE Local 170, at the March 30, 2022 hearing. Respondent was represented by Reginia L. Mayne, Division of Highways, Legal Division, at both hearings. At the conclusion of the level three hearing, the parties were invited to submit written Proposed Findings of Fact and Conclusions of Law which were submitted by both parties. This matter became mature for decision on April 28, 2022 on receipt of the last of the submitted proposals.

Synopsis

Grievant alleges that he was subject to discriminatory treatment. Grievant tended to focus and refocus allegations of wrong doings to the point of inconsequential and/or an inability to establish damages. Nevertheless, Grievant failed to meet his burden and demonstrate that Respondent's highlighted actions were unlawful or detrimental to his positioning within the recognized workforce hierarchy. Grievant failed to establish by a preponderance of the evidence that Respondent, or a responsible agent, acted in violation of any statute, policy, or rule in the implementation of the Transportation Worker Apprenticeship Program. Grievant failed to demonstrate that he was the victim of discrimination. Respondent's actions are not established to be impermissible, arbitrary and/or capricious. Accordingly, this grievance is DENIED.

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

Findings of Fact

1. Grievant was hired fulltime by Respondent in December 2012. Grievant was hired as a Transportation Worker 2 (TW2) equipment operator. Grievant is of afro-American decent.

2. In or about January 2015, Respondent DOH implemented the Transportation Worker Apprenticeship Program (TWAP), which allows employees to advance in pay on proficiency levels (training, skill development/mastery, certifications) and time in the position. See Respondent Exhibit 2. The program has experienced its share of amendments and growth adjustments through the years.[2] Among other adaptations, Respondent developed a structured tier system within the Transportation Worker classification. Id.

3. In April of 2019, Grievant advanced to Transportation Worker 3 (TW3) equipment operator. Grievant received an increase in pay due to his new classification. Prior to his upgrade to TW3, Grievant was certified to operate boom mower, rubber-tire excavator (also known as a Gradall), and rubber-tire backhoe.

4. At the time of the instant grievance filing, May 2019, Grievant worked as an equipment operator in district two at the Cabell County garage.

5. Alan Midkiff is the Highway Administrator for district 2 of Cabell County and at the time of relevant events, he has been in the position for two (2) years.

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[2] Respondent instituted an apprenticeship program which created a tier system for employees that established different levels of pay within its job classifications based upon certain criteria and requirements, such as specific licenses, certifications, hours completed, and trainings.

6. Management personnel of Respondent often rotates employees on equipment. Motivation of Management includes, but is not limited to, ensuring a wider amount of knowledge in the workforce on all the equipment.

7. The Equipment Operator Accountability Policy, Division of Highways Policy No. 4.3, provides in Section 4.4 provides that:

> It is the goal of the DOH to allow all qualified operators enough time on equipment to maintain their skills and to be able to operate the equipment safely. All qualified operators will, therefore, be allowed enough time on equipment to maintain their skills and stay qualified. Employees operating equipment requiring certification shall be allowed to operate the equipment no less than two (2) days every ninety (90) working days. However, allowing other operators to have time on a piece of equipment should not result in keeping primary operators off equipment for long periods of time. "The Equipment Operator Accountability Policy," Division of Highways Policy No. 4.3, Section 4.4.

8. Management personnel of Respondent determine which employees are best suited to operate the available equipment. While there are recognized criteria for this determination, there is also an element of discretion in the choices made day to day.

9. Certain job duties are more desirable than other, be it due to the effort to perform the duties or the amount of compensation received for performance. Being a crew leader and the operation of certain equipment is generally thought to be desirable duties for a Transportation Worker (TW). Whether Respondent fairly rotates various duties among its vast workforce is and always has been an issue of controversy.

Discussion

This grievance does 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. "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 believes he is being discriminated against in the assignment of time on the equipment and also in the crew chief position.[3] Grievant asserts he is being "discriminated" against by management since only a select few are assigned to actual equipment operation. Grievant further states he is routinely assigned to assist with patching, flagging and other duties, other than equipment operation. Grievant argues that in order to advance in the Tier Program (TWAP), it requires more hours of equipment operation, and he has not had his "fair share" of opportunities to run available equipment.

Grievant complained at the 2022 level three hearing about not being able to serve as crew chief as often as others.[4] It is not clear whether this was a new allegation or a

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[3] Grievant's allegation of discrimination has not always been especially decisive. Regrettably, this grievance commenced in 2019 and stretched out over a period of nearly two years. The span of time could have affected Grievant's focus, nevertheless, Grievant must establish specific misconduct and/or actual damages.

[4] At the beginning of the hearing, Grievant clearly stated that he was grieving the lack of time on equipment. Then on cross-examination, Grievant indicates a desire to grieve that he didn't get to serve as crew chief often enough in his opinion. If Grievant was highlighting this information as a proposed example of discrimination treatment, then that is permissible, however if Grievant intended a separate and distinct cause of action, such allegation is not proper before the undersigned.

proposed example. Theoretically, this allegation can be viewed as an identified example stemming from what Grievant identifies as "discriminatory assignments." Grievant alleges that he is the victim of discrimination.[5]

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);
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> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
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> (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); Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *See also Bd. of Educ.*

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[5] Grievant testified that he asked the crew leaders or crew chiefs if he could have more opportunities to run the large equipment, he was told that other individuals could operate the equipment faster or more knowledgeably than he could. *One* of the crew chiefs (WC) who allegedly told Grievant this was identified to be less than politically correct with regard to racial sensitivity issue(s).

v. White, 216 W.Va. 242, 605 S.E.2d 814 (2004); Harris v. Dep't of Transp., Docket No. 2008-1594-DOT (Dec. 15, 2008); *Chadock v. Div. of Corr.,* Docket No. 04-CORR-278 (Feb. 14, 2005).

Transportation workers equipment operator 2s get upgrade pay for performing duties which a TW3 does as a regular course of duties. Grievant tends to compare himself with TW2s, not TW3s as he is currently classified. TW2s and Grievant are not similarly-situated employees. Further, whether TW2s are granted more opportunity than Grievant to operate equipment is not establish as fact. Respondent's management can determine the best way to utilize the agency's workforce "to better serve the organization's objectives" and the "most efficient use of resources" as long as employees are performing tasks within their classification. However, it is also recognized that certain job duties are more desirable than others and fair rotation of various duties among the workforce is vital.

In this matter, it is not established that Grievant has suffered any detrimental consequences as a result of impermissible actions by Respondent. Interestly, the "Report of Personnel Changes Temporary Upgrade Summary," dated from 01/01/19 through the end of 2019, establishes that Grievant operated the big equipment *more often* than almost every other operator in Cabell County. See Grievant's Exhibit 1 and Respondent's Exhibit 5 (Grievant had more hours than all but two of the equipment operators). Grievant was a TW2 during part of that year and these upgrades allowed him to obtain the experience to necessary advance to the TW3 position in accordance

with the TWAP Program then in effect. Grievant received a promotion to TW3 on April 13, 2019. The instant grievance matter was filed May, 2019.

Highway Administrator Midkiff testified regarding DOH's "Operator Equipment Accountability" policy. See R Ex 2. Section 4.4 of that policy requires that anyone who is a TW-3, as the Grievant is now, must be given 16 hours of equipment time every 90 days on whatever equipment he is qualified to operate to keep their skills up to date. Respondent highlights that there is no obligation to allow anyone to run any piece of equipment any more than the qualifying amount. Management personnel of Respondent often rotates employees on equipment. Crew leaders are instructed to ensure equipment operation is rotated fairly among the qualified employees. A motivating factor of Respondent includes but is not limited to ensuring a wider amount of knowledge in the workforce on all the equipment. Grievant received far in excess of the minimal amount of time on the equipment as is required by Equipment Operator Policy No. 4.3. [6]

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.*

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[6] Grievant would be number two or three in terms of upgrade hours out of 41 equipment operators as identified on the 2019 Temporary Upgrade Summary. See Midkiff L3 testimony; G Ex 1 and R Ex 5.

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)). 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 authoritarian agency. *See generally Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982). It is a recognized goal of Respondent to allow all qualified operators enough time on equipment to maintain their skills and to be able to operate the equipment safely.

Grievant failed to identify a specific rule or regulation that Respondent violated to the detriment of Grievant. Grievant tended to identify a pervasive attitude or "good-ol-boy" kinship being perpetuated at the workplace. This allegation may or may not be factually accurate. The example of Grievant serving as crew chief drew an unusual level of scrutiny. Grievant is an African-American working in a predominately rural Caucasian workforce. Not all of Grievant's peers were receptive to his leadership. Nevertheless, Grievant failed to establish by a preponderance of the evidence that Respondent unlawfully acted to hamper, delay, or bar Grievant's progression within/through the tier aspect of the Transportation Worker Apprenticeship Program.

Grievant failed to prove that Respondent abused its discretion or acted in an arbitrary and capricious manner in the circumstance of the instant matter. Grievant may truly believe that he has not been treated fairly; however, the evidence submitted does

not by preponderance establish this assertion. Further, Grievant failed to establish loss of compensation to which he was clearly entitled.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. 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*

2. An action is arbitrary and capricious if the agency making the decision 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).

3. 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)); *Powell v. Paine*, 221 W. Va. 458, 655 S.E.2d 204 (2007).

4. 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).

5. Grievant failed to demonstrate that he was a victim of discrimination or favoritism. It is not established by a preponderance of the evidence that Respondent discriminated against Grievant.

6. “Mere allegations alone without substantiating facts are insufficient to prove a grievance.” *Baker v. Bd. of Trustees/W Va. Univ. at Parkersburg*, Docket No. 97-BOT359 (Apr. 30, 1998); *See Harrison v. W Va. Bd. of Directors/Bluefield State College*, Docket No. 93-BOD-400 (Apr. 11, 1995).

7. Grievant failed to establish by a preponderance of the evidence that Respondent violated any applicable rule or regulation requiring it to act on behalf of Grievant.

8. Grievant failed to establish by a preponderance of the evidence that the Respondent acted in an arbitrary and capricious manner or in violation of a statute, policy, or rule toward him in its implementation of the Transportation Worker Apprenticeship Program.

9. Grievant failed to establish by a preponderance of the evidence that Respondent unlawfully acted to hamper, delay or bar Grievant's progression within/ through the tier aspect of the Transportation Worker Apprenticeship Program.

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: May 23, 2022

Landon R. Brown
Administrative Law Judge