THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JOSHUA JAMES,

Grievant,

v. **Docket No. 2021-2542-CONS**

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant, Joshua James, is employed by Respondent, Division of Highways. On October 21, 2020, Grievant filed a grievance, assigned docket number 2021-1480-DOT, stating, "Continuing retaliation for having exercised statutory right to file grievances." For relief, Grievant sought "[t]o be made whole in every way including lost overtime pay, loss of wadges [sic] due to the withholding or denial of upgrades and the discontinuance of retaliation." Following the January 20, 2021 level one conference, a level one decision was rendered on February 9, 2021, denying the grievance. Grievant appealed to level two on February 9, 2021. Following unsuccessful mediation, Grievant appealed to level three of the grievance process on June 10, 2021.

On June 18, 2021, Grievant filed a grievance, assigned docket number 2021-2519-DOT, stating as follows:

> On 6-3-21, I was given a memorandum and signed a form acknowledging that [I] received said memorandum. Previously I had received a letter (dated 12-16-20) informing me I had been "determined to be the classification of TW 1 laborer". Prior to this I was classified as a TW 1 Craft Worker. Upon reviewing the memorandum [I] realized there was no longer a Craft Worker or Laborer 2 position shown on the apprenticeship program. The memorandum had instructed me to contact Mr. Estep regarding any questions. I have done as such (via email) and have not yet received any reply. All that being said I believe the apprenticeship

> program is possibly leaving out any Craft Workers who previously had the ability to advance to a TW 2, such as myself.

As relief, Grievant requested "the opportunity to advance as previous Craft Workers have done before me. I'd also like to know what requirements are needed to be met to advance." As Grievant improperly filed for default judgment in his initial filing, the grievance was transferred to level one by order entered June 28, 2021. Following the August 12, 2021 level one hearing[1], a level one decision was rendered on September 1, 2021, denying the grievance. Grievant appealed to level two on September 10, 2021. Following unsuccessful mediation, Grievant appealed to level three of the grievance process on October 22, 2021. On November 9, 2021, Respondent filed its *Motion to Dismiss* docket number 2021-2519-DOT.

On November 12, 2021, Grievant filed a third grievance, assigned docket number 2022-0388-DOT, stating, "Discriminatory and arbitrary policy regarding pay upgrades." As relief, Grievant requested "[t]o be made whole in every way including pay going forward and back pay with interest retroactively for all work out of classification." Following a December 1, 2021 level one hearing, a level one decision was rendered on December 22, 2021, denying the grievance. Grievant appealed to level two on January 3, 2022.

By order entered January 27, 2022, the undersigned denied the motion to dismiss that was pending in docket number 2021-2519-DOT and consolidated all three grievance actions. In addition, the parties filed numerous other procedural motions and

[1] The level one decision incorrectly states that the level one proceeding was a conference. The grievance proceeded by hearing and a transcript of the same was provided to the Grievance Board by Respondent on September 13, 2021.

the various actions were continued multiple times, which will not be recited here but is incorporated by reference to the record.

A level three hearing was held on May 5, 2022, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant appeared in person and was represented by Gordon Simmons. Respondent appeared by Kathleen C. Dempsey, District Two Human Resources Manager, and was represented by counsel, Jack E. Clark. This matter became mature for decision on June 21, 2022, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as a Transportation Worker 1 Laborer. Grievant alleges retaliation and protests Respondent's change in its temporary upgrade policy and in the application of the policy to him. The incidents Grievant asserts were retaliatory were not a part of the consolidated grievance. Grievant failed to prove Respondent's change in policy was improper, that Respondent's application of the policy to him was arbitrary and capricious, or that he was entitled to back pay. 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

Grievant is employed by Respondent as a Transportation Worker 1 Laborer ("TW1LAB").

When Grievant was first hired in June 2013 and, at the time of filing of the first grievance in this matter, Grievant was classified as a Transportation Worker 1 Craft Worker ("TW1CW").

Although Grievant had previously attempted to advance to a Transportation Worker 2 Craft Worker position, he had not been successful and that issue is not the subject of the present consolidated grievance.

Pay and promotion within the Transportation Worker classification series has been governed by the Transportation Worker Apprenticeship Program ("TWAP") policy since January 2015. The TWAP includes an Advisory Council, consisting of the Director of Respondent's Personnel Division and subject matter experts, that oversees and guides the program. Under the TWAP, employees advance through a tier system within their classification based on licensures, certifications, training, and apprenticing hours.

Prior to the events of this grievance, legislation was enacted to remove Respondent from the oversight of the Division of Personnel and allow Respondent to create its own classification and compensation plan subject to the approval of the State Personnel Board.

In August 2020, Respondent's proposed Classification and Compensation Career Plan ("CCCP") was approved by the State Personnel Board.

On May 1, 2021, the TWAP policy was revised in accordance with the CCCP. Grievant signed a statement acknowledging receiving the policy on June 3, 2021. Under the CCCP and revised TWAP, the Craft Worker subclassification was eliminated at the recommendation of the Advisory Council. The Craft Worker

subclassification covered a wide array of job duties and titles. The Advisory Council determined that the subclassification should be eliminated in favor of creating two subclassifications: Auto Body Repair and Traffic Control.

Incumbents in Craft Worker subclassification who did not fall into the two new subclassifications were evaluated based on whether they held a commercial driver's license ("CDL"). Those who held a CDL were classified into a Transportation Worker 2 Equipment Operator classification and those who did not hold a CDL were classified as TW1LAB. A few Transportation Worker 3 Craft Workers were permitted to remain in those classifications, which will be fully eliminated once the incumbents retire or transfer out of those positions.

Prior to the establishment of the CCCP and the revised TWAP, a TW1CW could advance to a TW2CW position without obtaining a CDL. Under the current CCCP and TWAP, a CDL is required for all TW2 positions.

Respondent decided to require a CDL for all TW2 positions to make the licensure requirements consistent among all subclassifications and to increase the flexibility of the TW2 positions.

Grievant does not hold a CDL. Although Respondent offers free on-the-job training to assist employees in obtaining a CDL, Grievant does not want to obtain a CDL.

By letter dated December 16, 2020, Grievant was notified that he had been classified as a TW1LAB.

In the initial classification placement within the CCCP, some employees who did not hold a CDL were placed into TW2 positions with the expectation that those

employees would obtain a CDL. Since that time, those placements have been reviewed for any remaining employees who did not hold a CDL. Employees were allowed additional time to obtain their CDL and any employee who failed to obtain their CDL was demoted to a TW1.

Respondent's *Temporary Upgrade for Transportation Workers* policy allows an employee in a lower classification, who is temporarily performing the duties of a higher classification, to be paid the wages of the higher classification. To receive the temporary upgrade, the employee must meet the qualifications of the higher classification.

This policy is relevant to the grievance relating to the operation of equipment. Respondent has various classes of equipment, as listed in *Exhibit A – WVDOH Class of Equipment*. Each class of equipment has requirements for its operation, including a combination of either a regular driver's license or a CDL and either basic training or certification.

There is a class of equipment that is assigned to be operated by the TW2 classification that does not require a CDL to operate by law, which includes end loaders, skid steers, rollers, and fork trucks ("disputed class").

Under the old policy, a TW1 who had become certified on a piece of equipment in the disputed class through Respondent's internal training was qualified to be temporarily upgraded to a TW2 even if they did not hold a CDL.

Grievant was certified on several pieces of equipment in the disputed class and received regular temporary upgrades to operate pieces of equipment in that class.

As of April 15, 2021, the effective date of the revised policy, Grievant was no longer eligible for temporary upgrades because he could not meet the minimum qualifications of a TW2, which requires a CDL.

Grievant has filed several grievances prior to the instant grievance, including a grievance in which Grievant successfully challenged the termination of his employment. The latest grievance filed prior to the instant action, docket number 2020-0275-DOT, had been decided twenty days before the first grievance filed in this consolidated action.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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*.

Grievant asserts that he has been subjected to retaliation and that Respondent's implementation and interpretation of its temporary upgrade policy is arbitrary and capricious. Respondent denies it has retaliated against Grievant, asserts the change in policy was within its discretion, and asserts the policy has been properly applied to Grievant.

Grievant disputes both the decision to revise the temporary upgrade policy and Respondent's specific application of the revised policy to him. Grievant argues the

revision of the policy was arbitrary and capricious. This is not the applicable standard to challenge an agency's policy; only to challenge the application of the policy to the Grievant. "The grievance board simply does not have the authority to second guess a state employer's employment policy. . . [T]he grievance board, the circuit court and this Court simply do not have the authority to substitute our management philosophy for that of the [employer]. . . ." *Skaff v. Pridemore*, 200 W. Va. 700, 709, 490 S.E.2d 787, 796 (1997) (*per curiam*). "The [Grievance Board] has no authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or regulation which mandates such a policy be developed or changed." *Jenkins v. West Virginia University*, Docket No. 2008-0158-WVU (June 2, 2009). To the extent that any prior Grievance Board decision indicated otherwise, that decision would have been overruled by the *Skaff* opinion. In this case, Respondent was clearly given the mandate by the legislature to adopt a classification and compensation system as it saw fit. The change to the policy was a result of the implementation of that classification and compensation system and was not contrary to law.

Grievant argues that Respondent's application of the temporary upgrade policy to him specifically was arbitrary and capricious. "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." *Ball v. Dep't of Transp.*, Docket No. 96-DOH-141 (July 31, 1997). "Management decisions are to be judged by the arbitrary and capricious standard." *Adams v. Reg'l Jail and Corr. Facility Auth.*, Docket No. 06-RJA-147 (Sept. 29, 2006). 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, 614, 474 S.E.2d 534, 544 (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). "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 Resources*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ*., Docket No. 01-20-470 (Oct. 29, 2001).

Grievant argues the refusal to allow him to be temporarily upgraded is unreasonable and in opposition to the stated purpose of the policy, which was to provide increased wages to employees assigned to perform the duties of a higher-level classification. Under the previous policy, Grievant was permitted to operate the disputed class of equipment and be paid at the TW2 rate. Grievant had received certifications from Respondent to operate the equipment and had frequently operated the equipment. It is understandable why Grievant would feel it was unfair to change the policy; however, Respondent has the right to review and change their policies.

The application of the policy to Grievant was not arbitrary and capricious. In accordance with the statutory mandate and the considered review of the classifications and the policy, Respondent revised their policy. Under the new policy, Grievant is no longer eligible for a temporary upgrade because he does not hold a CDL. In denying Grievant the upgrade, Respondent is simply following its clear policy. There is nothing arbitrary and capricious about that decision. Grievant just disagrees with the policy and believes Respondent should not be permitted to change its policy.

Although the parties agree that Grievant is no longer being assigned to operate the disputed equipment, Grievant asserts he was previously denied temporary upgrade pay for a day that he did operate the disputed equipment. "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)). Although credible testimony can be sufficient to prove an allegation, in this case, Grievant's testimony was too vague to prove it was more likely than not he was denied pay. Grievant was unable to provide any detail regarding the instance he alleges he was denied temporary upgrade pay for operating equipment. Grievant could not supply the date, the exact amount of time, or even the type of equipment he alleges he operated on that day. Although he testified that the timesheet regarding this day was completed but rejected, which could have provided credible evidence, he did not submit the timesheet into evidence.

In his PFFCL, Grievant appears to argue that Respondent retaliated against him for previously failing to reallocate his position to a TW2CW, for failing to provide him

with requested mower training, and for inaccuracies in his personnel file. None of these issues are the subject of the instant grievance. The instant consolidated grievance only protested the changes to and application of the temporary upgrade policy and the CCCP and TWAP. The alleged failures to reallocate Grievant's position for a TW1CW to a TW2CW occurred in 2017, 2018, and 2019. Grievant did not include these allegations in any of his grievance filings and the same would have been untimely if he had done so. The request for mower training occurred after the instant grievances were filed. The alleged inaccuracies in Grievant's personnel file were discovered through discovery in this matter. Grievant first raised this issue during the level three hearing. Although he was aware of the issue prior to the hearing, he did not move to amend the grievance to include this issue. As Respondent had no opportunity to address this issue, it would not be proper to allow Grievant to pursue it in the instant grievance.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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. "The grievance board simply does not have the authority to second guess a state employer's employment policy. . . [T]he grievance board, the circuit court and

this Court simply do not have the authority to substitute our management philosophy for that of the [employer]. . . ." *Skaff v. Pridemore*, 200 W. Va. 700, 709, 490 S.E.2d 787, 796 (1997) (*per curiam*). "The [Grievance Board] has no authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or regulation which mandates such a policy be developed or changed." *Jenkins v. West Virginia University*, Docket No. 2008-0158-WVU (June 2, 2009).

3. "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." *Ball v. Dep't of Transp.*, Docket No. 96-DOH-141 (July 31, 1997). "Management decisions are to be judged by the arbitrary and capricious standard." *Adams v. Reg'l Jail and Corr. Facility Auth.*, Docket No. 06-RJA-147 (Sept. 29, 2006).

4. 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, 614, 474 S.E.2d 534, 544 (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). "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 Resources*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ*., Docket No. 01-20-470 (Oct. 29, 2001).

5. "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)).

6. Grievant failed to prove Respondent's change in policy was improper, that Respondent's application of the policy to him was arbitrary and capricious, or that he was entitled to back pay.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Intermediate Court of Appeals.[2] Any such appeal must be filed within thirty (30) days of receipt of this decision. 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 named as a

[2] On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over "[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]" W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.

party to the appeal. However, the appealing party is required to serve a copy of the appeal petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

DATE: August 3, 2022

Billie Thacker Catlett
Chief Administrative Law Judge