LOUIE CONSTANTINO, et al.,

Grievants,

v. Docket No. 99-PEDTA-247

WEST VIRGINIA PARKWAYS ECONOMIC DEVELOPMENT AND TOURISM AUTHORITY,

Respondent.

DECISION

Louie Constantino, Mark Worrell, Hal Myers, Alisa Blankenship, Wanda Blankenship, Ballard Whitt, Troy Harvey, Jean Via, Sarah Reed, Larry Farley, Steve Fortner, Sylvia Miller, and Edurn Bailey (Grievants) filed this grievance pursuant to W. Va. Code §§ 29-6A-1, et seq., on November 5, 1998, alleging that Respondent West Virginia Parkways Economic Development and Tourism Authority (Parkways) violated its unwritten policy giving them permanent days off.

Level I decisions denying the various grievances were issued between November 12, 1998, and November 19, 1998, by Stephen Wyatt, Supervisor of Barrier A. Level II decisions denying the grievances were issued between November 25, 1998 and December 3, 1998, by Director of Toll Operations James V. Kelley (Kelley). A Level III hearing was held on the consolidated grievances on May 18, 1999. Grievants were represented at thishearing by Mr. Boyd Lilly of the West Virginia State Employees Union, and Parkways was represented by A. David Abrams, Jr., Esq. This grievance was denied at Level III by Grievance Evaluator D. L. Lake on June 3, 1999.

A Level IV hearing was held before the undersigned administrative law judge at the Grievance Board's Beckley office on January 21, 2000. At that hearing, Parkways was again represented by Mr. Abrams, and Grievants were again represented by Mr. Lilly. The parties were given until December 11, 2000, (See footnote 1) to submit proposed findings of fact and conclusions of law, Parkways did so, and this grievance became mature for decision on that

date.

The following Findings of Fact pertinent to the resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievants work at Parkways' Toll Barrier A near Ghent in Raleigh County. They are among the most senior toll employees.

2. For many years, Parkways policy decreed a “relief shift” at Barrier A. This shift was used in the past to allow the smaller number of employees then working at Barrier A days off.

3. All other toll barriers work three eight-hour shifts per day, having long ago eliminated the relief shift. 4. Parkways conducted a series of meetings at Barrier A to gather employee input concerning its shift assignment policy there.

5. By memo dated October 20, 1998, Kelley announced that, effective January 1, 1999, Parkways would change its policy to eliminate the relief shift at Barrier A.

6. The new policy had the effect of giving some less-senior employees more desirable days off than some employees with greater seniority. Some more senior employees no longer have fixed or consecutive days off.

7. Parkways allowed the most senior Barrier A employees the first pick of shift assignments under its new shift assignment policy at Barrier A.

8. Under Parkways' new shift assignment policy, Grievants do not necessarily get two consecutive days off per normal workweek.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.21 (2000); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A- 6. A preponderance of the evidence is defined as "evidence which is 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." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, 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. Grievants claim that Parkways violated its policies and broke a contract it had with them when it eliminated the relief shift at Toll Barrier A, and that they do not get two consecutive days off, as required by Parkways' policy, under the new shift assignment policy. As relief, they seek to be made whole and complete.

The credible testimony of Parkways' Director of Tolls Kelley established that the relief shift at Barrier A is a relic from the time when the turnpike was much smaller and had a smaller staff; that Barrier A was the only toll barrier still using a relief shift, which had become obsolete there; that the relief shift caused many problems; that Barrier A Supervisor Stephen Wyatt had polled Barrier A employees several times to get their input into shift policy, but that no consensus was ever reached; that he cannot design a schedule that pleases all employees; that Barrier A employees selected their preferred shifts under the new plan by seniority; and that Parkways has the authority to set shift assignment policy.

Kelley is correct that Parkways has the authority to set shift assignment policy. Parkways Personnel Policy III-1, dated March l, 1994 (Policy III-1), provides that "[m]anagement has the right to establish work schedules necessary to achieve the goals and objectives of the Parkways Authority." Parkways' interpretation of its own policy is entitled to deference by this Grievance Board, unless it contrary to the plain meaning of the language, or is inherently unreasonable. Dyer v. Lincoln County Bd. of Educ., Docket No. 95-22-494 (June 28, 1996).

The credible testimony of Grievants demonstrated that this is another grievance motivated by their feeling that employees with more seniority are being slighted in favor ofthose with less. See Settle v. W. Va. Parkways Economic Development and Tourism Auth., Docket No. 00-PEDTA-031 (May 23, 2000). The undersigned cannot help but feel sympathetic to Grievants, who credibly testified to the many years they had to work before earning fixed days off, let alone weekends, and to the disruption of their personal lives caused by the elimination of the relief shift. Under the new shift policy, Grievants do not necessarily have fixed or consecutive days off. However, as noted in Bennett v. W. Va. Dep't of Health and Human Resources/Bureau for Children and Families, Docket No. 99- HHR-517 (Apr. 26, 2000), the undersigned does not have authority to second guess a state employer's employment policy, to order a state agency to make a discretionary change in its policy, or to substitute his management philosophy for Parkways'. Skaff v. Pridemore, 200 W. Va. 700, 490 S.E.2d 787

(1997), Bennett, supra, Kincaid v. W. Va. Div. of Corrections, Docket No. 98-CORR-144 (Nov. 23, 1998).

An agency's determination of matters within its expertise is entitled to substantial weight. Princeton Community Hosp. v. State Health Planning, 174 W. Va. 558, 328 S.E.2d 164 (1985). Unless Grievants present sufficient evidence to demonstrate Parkways' shift assignment policy is clearly wrong, inappropriate, or the result of an abuse of discretion, an administrative law judge must give deference to Parkways and uphold the policy. Smith v. Parkways Economic Development and Tourism Auth., Docket No. 97-PEDTA-484 (Apr. 17,1998); (See footnote 2) **O'Connell v. Dep't of Health and Human Resources, Docket No. 95-HHR-251(Oct. 13, 1995); Farber v. Dep't of Health and Human Resources, Docket No. 95-HHR-052 (July 10, 1995). As has often been said, Parkways' employees do not get to make policy. See Patterson v. Parkways Economic Development and Tourism Auth., Docket No. 99- PEDTA-448 (Dec. 15, 2000); Smith v. Parkways Economic Development and Tourism Auth., Docket No. 00-PEDTA-133 (July 7, 2000); Farley et al. v. Parkways Economic Development and Tourism Auth., Docket No. 00-PEDTA-015 (June 22, 2000); Settle, supra; McCoy/Domingues v. Parkways Economic Development and Tourism Auth., Docket No. 99-PEDTA-074 (July 19, 1999).**

Grievants also argue that Parkways' conducting a series of meetings at Barrier A to gather employee input concerning its shift assignment policy there constituted a “vote” or contract that binds Parkways to the relief shift policy. However, a preponderance of the credible evidence of record establishes that Parkways merely sought employee input into shift assignment policy, a commendable effort. No evidence was introduced to show that Parkways ceded its policy making function to its toll employees.

However, Grievants' argument that they do not get two consecutive days per week off under the new shift assignment policy, as required by Parkways' policy, has merit. Policy III-1-1(b) states “Toll _ The normal workweek is forty (40) hours per week, observing two consecutive days off, according to shift assignment.” A letter to Parkways Board members, from Parkways General Manager William H. Gavan, dated October 13, 1998, explaining the problems caused by the relief shift at Barrier A, stated “[e]very other weekthe relief shift has Friday and Sunday off. This is against our policy that requires 2 consecutive days off per week.”

Confronted with this policy, Kelley testified that it means that two consecutive days off are provided "if at all possible," that Parkways "substantially complies" with this policy, and that the policy is not mandatory. His position, however, is contrary to the plain language of the policy. Dyer, supra. It is also significant that Policy III-1 provides that Tourist Information Center/Arts and Craft Area Workers "[d]ays off may or may not be consecutive according to particular shift assignment," indicating that Parkways made a conscious decision to bestow two consecutive days off on its toll workers.

An administrative body must abide by the procedures it properly establishes to conduct its affairs. Vitarelli v. Seaton, 359 U.S. 535, 79 S. Ct. 968, 3 L. Ed. 2d 1012 (1959), Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). This Grievance Board has held that the professional employees of university and county boards of education are entitled to rely on the policies established by their employers. Pauls v. Bd. of Directors/West Liberty State College, Docket No. 98-BOD-242 (Nov. 30, 1998); Finver v. W. Va. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-271, (Oct. 15, 1997); Kloc v. Bd. of Trustees/W. Va. Univ., Docket No. 96-BOT-507 (Aug. 20, 1997); Cromley v. Mason County Bd. of Educ., Docket No. 94-26-573 (Apr. 27, 1995). State employees are similarly entitled to rely on the policies established by their employers. Vaught v. W. Va. Div. of Corrections, Docket No. 99-CORR-070 (Sept. 7, 1999); White v. W. Va. Div. of Corrections, Docket No. 98-CORR-423 (Feb. 3, 1999). The reasoning behind this principle also applies to Parkways, which shall be required to follow its own policies by providing Grievants with two consecutive days off per normal workweek.

By eliminating the relief shift at Barrier A, Parkways exercised its right to set policy scheduling Grievants' shift assignments, and its new policy was not shown to be clearly wrong, inappropriate, or the result of an abuse of discretion. O'Connell supra. However, Parkways violated its own policies when it failed to provide Grievants with two consecutive days off per normal workweek. Therefore, this grievance will be granted in part. Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. In this non-disciplinary grievance, grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Holly v. Logan County Bd. of Educ.,

Docket No 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. Parkways Personnel Policy III-1, dated March l, 1994, provides that "[m]anagement has the right to establish work schedules necessary to achieve the goals and objectives of the Parkways Authority."

3. The undersigned does not have authority to second guess a state employer's employment policy, to order a state agency to make a discretionary change in its policy, or to substitute its management philosophy for Parkways'. Skaff v. Pridemore, 200 W. Va, 700, 490 S.E.2d 787 (1997), Bennett v. W. Va. Dep't of Health and HumanResources/Bureau for Children and Families, Docket No. 99-HHR-517 (Apr. 26, 2000), Kincaid v. W. Va. Div. of Corrections, Docket No. 98-CORR-144 (Nov. 23, 1998).

4. Parkways' decision to eliminate the relief shift at Barrier A was not shown to be clearly wrong, inappropriate, or the result of an abuse of discretion. O'Connell v. Dep't of Health and Human Resources, Docket No. 95-HHR-251 (Oct. 13, 1995).

5. Parkways' Policy III-1 requires that toll employees receive two consecutive days off per normal workweek.

6. An administrative body must abide by the procedures it properly establishes to conduct its affairs. Vitarelli v. Seaton, 359 U.S. 535, 79 S. Ct. 968, 3 L. Ed. 2d 1012 (1959), Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977).

7. Parkways new shift assignment policy at Barrier A fails to provide Grievants with two consecutive days off per normal workweek.

Accordingly, the grievance is GRANTED IN PART, and Parkways is ORDERED to provide Grievants with two consecutive days off per normal workweek.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7 (1998). Neither the West Virginia Education and State 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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ANDREW MAIER

Administrative Law Judge

Dated: January 24, 2001

Footnote: 1

The processing of this grievance at Level IV was delayed by Grievants' indecision over whether to schedule another day of the Level IV hearing.

Footnote: 2

This decision held that Parkways had the authority, under Policy III-1, to schedule employees to work four ten-hour days per week. Given that Parkways' schedule gave grievants three consecutive days off per week, they apparently did not raise the issue of having two consecutive days off per week. The undersigned administrative law judgeconcludes that Smith is readily distinguishable on its facts and is not controlling precedent here.