RANDY ADKINS and MICHAEL ADKINS,

Grievants,

v. Docket No. 01-DOH-015

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievants, Randy and Michael Adkins, each filed two separate grievances against their employer, the Division of Highways ("DOH"). Their first grievance dealt with overtime and was filed on July 10, 2000. That Statement of Grievance reads:

> **Working employees who have less time & experience than I do and not offering it to me.**
>
> **RELIEF SOUGHT: Back pay from January 01, 2000 to present for all scheduled overtime worked that was not offered to me. And monies spent for attorney fees and court costs. (See footnote 1) And (sic) vacation time lost due to this grievance. (See footnote 2)**

In the second grievance, also filed on July 10, 2000, Grievants allege discrimination in the upgrading of positions. This Statement of Grievance reads:

> **Upgrading employees who have less experience and seniority than I have to crew leader.**
>
> **RELIEF SOUGHT: Back pay for every hour worked by Jeff Midkiff, Darrell Quintrell, and David Kirk under this administration. Plus, back pay for every day that I operated a grader in the last twenty years in the same capacity that Jeff Midkiff has in the last 2 years, and he was upgraded to crew leader for spreading gravel with a truck driver on dirt roads, and spreading blacktop with a grader on roads.**

This grievance was denied at all lower levels. The grievance was denied on the grounds of timeliness at Level II. Grievants appealed to Level IV on January 16, 2001. A Level IV hearing was held on March 12, 2001. This case became mature for decision on April 17, 2001, after receipt of DOH's proposed findings of fact and conclusions of law. (See footnote 3)

Issues and Arguments

Grievants alleged the delegation of crew leaders for upgrades and the apportionment of overtime assignments are the result of discrimination and favoritism. They believe the Yawkey substation is treated differently than the other substations, and assert their supervisor, Larry Pauly, treats some employees more favorably than others, and this treatment is politically motivated. (See footnote 4) **Grievants maintain less senior employees are being upgraded into crew leader positions, and they should serve as crew leaders because of their seniority.**

Respondent agrees the overtime list was not posted as required by Policy, but notes the lists are now properly posted. However, DOH still avers Grievants were not treated differently than other employees in the area of overtime, and they were offered overtime equally. Respondent notes scheduled overtime is handled differently than emergencyovertime, and different call out methods are used. Call out for emergency overtime is left to the discretion of the supervisor, and it is not based on or controlled by a list.

On the issue of upgrading, Respondent makes several arguments. One, upgrades are not required to be done by seniority; the supervisor picks the best employee for the position. Two, frequently the schedules were incorrectly filled out, and the "Daily Work Report" shows some employees were serving as Crew Leaders when they were not. In truth, these employees were qualified Equipment Operator II's upgraded to Equipment Operator III's, so they could run a particular piece of equipment. Respondent notes Grievants are already Equipment Operator III's, and they could not be upgraded to fill this category. Respondent did not pursue the timeliness issue at Level IV.

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact. (See footnote 5)

Findings of Fact

1. Grievants are both employed as Equipment Operator III's in Lincoln County. They work out of different substations although they may be assigned to work anywhere in the county. Both Grievants have at least twenty years of seniority. 2. Prior to the filing of this grievance, the scheduled overtime was not posted in Lincoln County as required.

3. Scheduled overtime must be offered on a rotating basis starting with the most senior employee. While the type of work dictates who may be offered the scheduled overtime, employees who are qualified may perform multiple tasks.

4. Emergency overtime is assigned at the discretion of the supervisor. His decision is based on who lives closest to the problem, and who would be best qualified for the work.

5. The overtime totals for January through August 2000, were submitted into evidence and showed differences in the amount of overtime received by the workers from the Lincoln County Headquarters. There was no differentiation on this list to inform a reader what portion of the overtime was scheduled, and what portion was emergency overtime.

6. The amount of overtime received by Grievants, while not being as high as some employees, was approximately in the middle of the Equipment Operator II's and Equipment Operator III's. The following is a list of the January through August 2000 overtime hours for Equipment Operator II's and Equipment Operator III's:

Darrell Quintrell Equipment Operator II 329 hours

Mark Terry Equipment Operator II 273 hours

Robert Dingess Equipment Operator II 229 hours

George Graley Equipment Operator III 203 hours

Richard Midkiff Equipment Operator III 198 hours

Dorsell Baker Equipment Operator II 170 hours

Jeff Hughes Equipment Operator II 150 hours

Grt. M. Adkins Equipment Operator III 143 hours

Grt. R. Adkins Equipment Operator III 141 hours

Gary Hale Equipment Operator II 132 hours

Vance Wyatt Equipment Operator II 116 hours

Dwight Kirk Equipment Operator III 108 hours

Clifford Farmer Equipment Operator II 95 hours

Lloyd McCoy Equipment Operator II 89 hours

Scott Dingess Equipment Operator II 78 hours

Jeff Headley Equipment Operator II 61 hours

7. There were three other Equipment Operator II's on the overtime list, but they did not receive any overtime until June 2000. (See footnote 6)

8. Mr. Quintrell received at least half of his overtime from laying cinder blocks for a building, for buildings and grounds. This overtime was not paid from the Lincoln County budget. Mr. Wilson Braley, the District Engineer, testified he had great difficulty finding some one who was qualified and willing to work on this project. (See footnote 7) **Grievant M. Adkins worked on the footers for the building.**

9. The decision to upgrade an employee is based on the discretion of the supervisor. Seniority is not a factor, and the upgrade is based on the opinion of the supervisor as to who is the most qualified for the position, and who will do the best job. 10. Frequently, the time sheets listed the incorrect code number for the upgrade. For example, the correct upgrade would be from an Equipment Operator II to an Equipment Operator III, but the code for Crew Leader was used instead of the code for Equipment Operator III. (See footnote 8) **This upgrade occurred because the employee involved was operating equipment outside the Equipment Operator II classification.**

11. Mr. Quintrell and Mr. Midkiff were two of the employees who were listed as upgraded to a Crew Leader, when, at times, the upgrade was to function as an Equipment Operator III. Mr. Quintrell and Mr. Midkiff were also upgraded to Crew Leaders at times.

12. Grievants are Equipment Operator III's, so they could not receive the upgrade to Equipment Operator III's. (See footnote 9) **Grievants were at time upgraded to Crew Leader.**

13. Mr. Midkiff was promoted to Equipment Operator III in December 1999, and it is noted the number of times he was upgraded decreased drastically after this promotion.

14. Grievants were not upgraded into the Crew Leader position as often as some other employees, and frequently they would function in a two-man crew without either employee designated as a Crew Leader. (See footnote 10) **15. It is possible for a Crew Leader to**

supervise more than one crew at a time, and the Daily Work Reports reveal this happened frequently when Grievants were performing work to stabilize the roadway. (See footnote 11) **During these activities Grievants worked in two- man crews.**

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievances 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); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also 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).

The issues addressed by Grievants will be discussed separately.

I. Overtime

One of the disputes in this case involves application and interpretation of DOH's overtime policies, including DOH's "Scheduled Overtime Policy." Respondent agreed it was not in compliance with the scheduled overtime requirement that an overtime list be posted, but still maintained scheduled overtime was awarded on an equitable basis. This Scheduled Overtime Policy has been in effect since December of 1994. The DOH Scheduled Overtime Policy states, in pertinent part:

> **This Policy has been established to provide guidance on the scheduling and distribution of overtime in County Maintenance Organizations within the Division of Highways. This Policy is directed only to situations in which overtime is scheduled in advance of such work actually taking place. For the purpose of this Policy, overtime refers to any hours of work performed on a given day, which were scheduled in advance, and will cause an employee to accumulate hours in excess of the standard forty hour work week.**
>
> **. . .**
>
> **Overtime is to be offered within a work unit, and within the appropriate classification, to employees who are qualified to perform the necessary duties on a rotating basis, beginning with the most senior employee, and ending with the least senior. Once established, this rotation list should not be changed. The offering of overtime with each new occurrence shall pick up on the list where the last one left off. New employees will be added to the end of the list. Temporary employees will be offered overtime only if no permanent employee is**

available.

. . .

> **There may be instances where a particular project or some other circumstance dictates that the list not be consulted in the assignment of overtime hours. Because these situations can be numerous and varied, the organizational supervisor may use his/her discretion in making such assignments. In these cases, the employee who receives the overtime will be passed over when their turn next comes in the rotation.**

DOH has a duty to follow its own policy and to maintain the overtime lists accurately. It is without question that DOH violated its own policy by not posting the overtime list. This problem has been resolved, and it is imperative DOH continue to maintain and keep accurate overtime schedules.

It is quite clear the above-cited policy only applies to "scheduled" overtime. Emergency overtime is awarded as needed. The one document submitted on the issue of overtime shows Grievants are in the "middle of the pack" on the number of overtimehours they worked in 2000. The issue of Mr. Quintrell's overtime has been answered, and at least half of his time came from the "block laying" project. While other employees testified the overtime was not properly assigned or offered, two of the complaining employees were Mr. Graley and Mr. Baker who had more hours than Grievants; 203 and 170, compared to 143 and 141 for Grievants. These numbers put these two employees at numbers four and six on the overtime time list submitted into evidence. Another of Grievants' witnesses stated he believed the overtime was offered fairly. It also should be noted that even scheduled overtime will never be awarded equally, as it would depend on the job to be accomplished, and when the employee is asked to work.

Given the list submitted into evidence and the testimony of witnesses, the undersigned Administrative Law Judge is without sufficient evidence to find overtime has been awarded or offered unfairly in Lincoln County. Without additional data, Grievant's arguments on the overtime issue cannot be upheld. See Henderson v. Dep't of Transp./Div. of Highways, Docket No. 95-DOH-548 (Apr. 17, 1996).

II. Upgrade

Grievants also argue DOH is required to upgrade the most senior employees to Crew Leader. This is simply not the case. DOH's Policy indicates District Engineers and Division Directors are to assign or select the employees who will be upgraded. Grt. Ex. No. 2, at Level IV. While it is understandable Grievants believe they, as twenty-year employees, should be upgraded, DOH is not required to upgrade them and has the discretion to select the employee it believes is best suited for the position. Additionally, the facts demonstrate there was an error in the time sheets, and frequently when it appeared a less senior employee was upgraded to a Crew Leader this employee was really only upgraded to an Equipment Operator III, so he could operate a piece of needed equipment. Further proof of the clerical error is demonstrated as discussed in Finding of Fact 13, which shows a significant decrease in the number of times Mr. Midkiff was upgraded after his promotion to Equipment Operator III. It is also noted there were times these less senior employees were upgraded to Crew Leader and Grievants were not. While this action may be upsetting, it is not against policy. (See footnote 12)

III. Arbitrary and capricious

Grievants' complaints about upgrades can also be examined under the arbitrary and capricious standard since there is no evidence a policy was violated. "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 Resources, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 198 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 her judgment for that of a board of education. See generally, Harrison v. Ginsberg, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

Grievants have not demonstrated Respondent's actions were arbitrary and capricious on the issue of upgrades. Although Grievants believe the failure to upgrade them is based on political motivation or the result of favoritism or discrimination, they have not shown their beliefs to be true. See Sections I and II, infra. As frequently stated by the Grievance Board, "[m]ere allegations alone without substantiating facts are insufficient to prove a grievance." Baker v. Bd. of Directors/W. Va. Univ. at Parkersburg, Docket No. 97- BOT-359 (Apr. 30, 1998); See Harrison v. W. Va. Bd. of Directors/Bluefield State College, Docket No. 93-BOD-400 (Apr. 11, 1995). Since upgrades are based on Respondent's discretion and there was no showing the selections for upgrades were unreasonable the undersigned Administrative Law Judge cannot simply substitute her judgement for that of the Agency. Harrison, supra.

IV. Discrimination and favoritism The issues raised by Grievants were also presented as examples of discrimination and favoritism. Discrimination is defined in W. Va. Code § 29-6A-2(d), as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

This Grievance Board has determined that a grievant, seeking to establish a prima facie case (See footnote 13) of discrimination and/or favoritism under W. Va. Code §§ 29-6A-2(d) & (h), must demonstrate the following:

> **(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);**
>
> **(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;**

and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

Once a grievant establishes a prima facie case of discrimination or favoritism, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hickman, supra. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. HumanRights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

Grievants have not met their burden of proof and established a prima facie case of discrimination and/or favoritism on either issue. Much of the previous discussions in Sections I and II support this finding. Grievants presented little evidence to support their belief they had been treated differently on the issue of overtime. As previously noted, overtime will never be equal given emergency overtime versus scheduled overtime, vacations, geographical considerations, and the individuals skill of the employees. Additionally, it is inherent in the emergency overtime situation that overtime will not be equal. It will depend on the location and type of the emergency.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As these grievances do not involve a disciplinary matter, Grievants have the burden of proving their grievances 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); Howell v. W. Va. Dep't of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also 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. Grievants have failed to meet their burden of proof of the overtime issue.

3. Upgrades are at the discretions of the supervisor, and seniority is not a consideration required by the Upgrade Policy.

4. "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 Resources, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 198 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 her judgment for that of a board of education. See generally, Harrison v. Ginsberg, [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." Trimboli, supra.

5. Grievants have not demonstrated Respondent's failure to upgrade Grievants as frequently as other employees was a violation of policy or arbitrary and capricious.

6. Discrimination is defined in W. Va. Code § 29-6A-2(d), as "any differences in the treatment of employees unless such differences are related to the actual jobresponsibilities of the employees or agreed to in writing by the employees." W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

7. This Grievance Board has determined that a grievant, seeking to establish a prima facie case of discrimination and favoritism under W. Va. Code §§ 29-6A-2(d) & (h), must demonstrate the following:

> **(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);**

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

8. Once a grievant establishes a prima facie case of discrimination or favoritism, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hickman, supra. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

9. Grievants have not met their burden of proof and established a prima facie case of discrimination and/or favoritism.

Accordingly, this grievance is DENIED.

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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: August 24, 2001

Footnote: 1

Grievants were not represented by an attorney, and there are no court costs associated with a grievance. This issue will not be addressed further.

Footnote: 2

This request was not explained, and it is noted a grievant is not required to take leave time to pursue a grievance. This issue will not be addressed further.

Footnote: 3

Grievants were represented by Representative Larry Parsons, a co-worker, and Respondent DOH was represented by attorney Jennifer Francis.

Footnote: 4

Grievants did not meet their burden of proof on the political issue as the only evidence they submitted to support this argument, at all levels of the grievance procedure, was that one person's mother was the Republican Chairwoman of the county. It is noted Grievants complained about many other employees.

Footnote: 5

It should be noted that Grievants filed numerous documents called "Daily Work Reports" which list workers, their classifications and other pertinent information. These documents were not in chronological order. Some were from 1998, most were from 1999, and a few were from 2000. These documents were placed in chronological order by the undersigned Administrative Law Judge for ease of reference. Once these were placed in order, it became clear there were many duplicates, as well as quite a few Reports where the complete date could not be read.

Footnote: 6

Although not explained by the parties, the undersigned Administrative Law Judge assumed these employee did not begin their employment until that month. It is noted their overtime averaged approximately 14 hours for the three month period. These totals were less than half of Grievants' overtime for the same months.

Footnote: 7

Grievants allege Mr. Quintrell was not qualified for this work, but Mr. Braley testified Mr. Quintrell was qualified. Given this set of facts, the undersigned Administrative Law Judge finds Mr. Quintrell was qualified. Additionally, it is noted Mr. Quintrell also performed similar tasks in 1999. It is unclear from the record whether

Grievants were qualified for this type of work, and whether they volunteered for this overtime. Mr. Braley testified Grievants were not qualified for the task; Grievants said they were. Mr. Braley stated Grievants did not volunteer for the block laying overtime, and Grievant M. Adkins said he did. It appears Grievant R. Adkins did not volunteer for this assignment, but it is unclear from the record.

Footnote: 8

As there was no difference in the amount of money in this upgrade, these reports were never changed.

Footnote: 9

Grievant M. Adkins testified he had never been upgraded until after he filed this grievance. This testimony is incorrect. He was upgrades 17 time in 1999, at least seven months before this grievance was filed.

Footnote: 10

Grievants' did not call their supervisor as a witness at any point in the grievance process to ask why someone else was chosen instead of them to serve as Crew Leaders.

Footnote: 11

Grievants submitted into evidence the Maintenance Management Systems Manual, which listed the numbers assigned to various DOH activities.

Footnote: 12

Grievants submitted numerous documents to show when other employees had been upgraded and they had not. These documents, referred to in note 5, were mostly from 1999. This grievance was not filed until July 20, 2000. A few documents were from 1998 and 2000.

Footnote: 13

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).