ALLEN WOOD,

Grievant,

v. **Docket No. 03-DEP-267**

DEPARTMENT OF ENVIRONMENTAL

PROTECTION,

Respondent.

D E C I S I O N

Allen Wood ("Grievant") initiated this proceeding on March 28, 2003, alleging his employer, the Department of Environmental Protection ("DEP"), acted improperly when it removed his assigned state vehicle. The Statement of Grievance reads:

> State vehicle issued to me has been taken. This will severly [sic] hinder my ability to perform my duties, which include, meeting in the field with consultants, contractors, surveyors, drillers and other AML personnel. Many times on short notice.
>
> Relief Sought: to be re-issued a 4WD state vehicle.

The grievance was denied at Levels I and II. Grievant appealed to Level IV on September 22, 2003, and a Level IV hearing was held on January 26, 2004. Grievant represented himself, and Respondent was represented by Senior Assistant Attorney General Doren Burrell. This matter became mature for decision upon receipt of Respondent's fact/law proposals on February 19, 2004.

The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievant has been employed by DEP in the Abandoned Mine Lands Program ("AML") since September 1993. 2. At the time of his hiring, he was told DEP would "try" to get him a vehicle, and Grievant did receive a vehicle approximately six months later.

3. Grievant works in the "in-house design group," and his duties include being a Program Manager at times, as well as surveying, drafting on the computer, reviewing documents, records and

materials submitted by others, performing engineering work for design purposes; preparing plans, specifications and requisitions for the bidding process, site checking, and attending meetings in the field. (See footnote 1) Although Grievant can have emergency situations, the majority of his meetings and time away from the office can be planned in advance.

4. By Executive Order dated January 8, 2003, Governor Bob Wise ordered the fleet of state vehicles be reduced by 555 vehicles no later than March 31, 2003. Specifically, DEP was ordered to return 53 vehicles.

5. AML is completely funded by federal money, although it is administered through DEP. Grievant's assigned vehicle was funded by the federal government, but leased through the Department of Fiscal Operations Administration. When AML notifies federal grant administrators the vehicle funds are no longer needed, those funds are diverted to other aspects of the reclamation program.

6. Charles Miller, Acting Assistant Director of the Office of AML and Assistant Director of Special Reclamation, determined which vehicles would be returned to the Department of Administration pursuant to the fleet reduction order. In order to be as fair as possible, full-time assigned vehicles were only allowed for employees whose jobs areentirely field-based, or who must respond to emergency situations during non-working hours.

7. Because AML had a greater number of vehicles in its section, its loss of vehicles was greater than other sections with fewer vehicles.

8. Grievant's assigned vehicle was taken away pursuant to the fleet reduction order, because many of his duties are office-based, and his travel can usually be planned in advance. He now has access to a "pool vehicle," which he must reserve in advance. Because Grievant had been allowed to use DEP's vehicle to commute to and from his home, this change required him to purchase a vehicle of his own.

9. Use of the pool vehicle is, at times, inconvenient for Grievant and can add significant travel time to his day, depending on which direction he needs to go. Although Grievant may take the vehicle the day before, this action would require him to leave his personal vehicle on an unlocked lot, and he would not have the use of his vehicle during that evening.

10. All of the employees in the in-house design section of AML were assigned pool vehicles as a result of the fleet reduction.

11. Pursuant to DEP's policy regarding the use of assigned vehicles, dated May 7, 2001, "field based employees [50% of whose job duties occur in the field] may be assigned a state vehicle on a permanent basis for official use." (Emphasis added). By this definition Grievant, and the other people with similar job duties, are considered field based.

12. Because many of DEP employees meet this definition, DEP would not have been able to meet the directive from Governor Wise if it had allowed all employees who meet this standard to retain a vehicle. 13. The decision determining which vehicles would be taken from which employees, was made by upper level management based on job duties. Individual employees were not considered, and removal was across the board in order to be as fair as possible. Many supervisors lost their vehicles.

Issues and Arguments

Grievant asserts multiple arguments why the removal of his vehicle was wrong. First, he asserts the notice he received was too short. Second, Grievant maintains that because he is field based, DEP is required to furnish him a vehicle. Third, his Section, AML, was not treated fairly because the number of cars removed was not proportionate to the other sections under the Division of Land Restoration, and his upper level supervisors treated the other sections more favorably because they are more familiar with those sections and individuals. Fourth, the Governor's directive was not followed because it required that the removal create a cost savings, and DEP has not shown this has occurred. Fifth, it was wrong to remove his vehicle without consulting his immediate supervisor. Sixth, the removal of his vehicle created a loss of benefits.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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 and 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 preponderance standard generally requires proof that a reasonableperson would accept as sufficient that a contested fact is more likely

true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

The overall issue raised by Grievant is one of questioning a management decision, as Grievant asserts the manner in which DEP carried out the Governor's order was incorrect. As previously held by this Grievance Board, "[a] [g]rievant's belief that his supervisor's management decisions are incorrect is not a grievable event unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with his effective job performance or health and safety." Ball v. Dep't of Highways, Docket No. 96-DOH-141 (July 31, 1997). See W. Va. Code § 29-6A-2(i); Rice v. Dep't of Transp./Div. of Highways, Docket No. 96-DOH-247 (Aug. 29, 1997). This standard for assessing this issue is the arbitrary and capricious one. In general, Grievant has not shown such a violation, interference, or detriment.

Additionally, several of Grievant's arguments can be answered in short order. First, DEP is not required to furnish him a vehicle. The policy Grievant addressed says "may" furnish which indicates this action is not mandated.

Secondly, there is no requirement to give Grievant advanced notice that he will no longer have personal use of a state vehicle. DEP received notice of this reduction on January 8, 2003, and was required to comply by no later than March 31, 2003. While it is unfortunate Grievant did not know sooner, there is no evidence DEP dragged its feet in notifying Grievant. Thirdly, DEP is not required to show a cost saving, it was required to follow the Governor's Order. Respondent contends it cannot ignore a directive from the Governor of the State of West Virginia to reduce its assigned vehicles, merely because the funding was provided through a federal grant. Additionally, Respondent notes the funding for vehicles is provided to AML from the federal government, and if the money is not needed for vehicles, it is used for other purposes within the AML program. Moreover, the vehicles are leased by the state through the Department of Administration, so DEP is not authorized to hold them hostage in the name of funding for their leases. See Leo v. Dep't of Envtl. Protection, Docket No. 03-DEP-235 (Jan. 21, 2004). Accordingly, the undersigned finds that it would be clearly wrong to presume Respondent had the authority to refuse to relinquish a state-owned vehicle, merely because it was leased with federal funds.

Grievant's contention that his supervisor must be asked before his vehicle is removed is without

merit. This decision was made on a higher level, and one of the reasons was because many supervisors lost the use of a vehicle as well.

Grievant's other arguments will be addressed in a more detailed manner. Grievant has asserted the removal of his vehicle resulted in 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 2) 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).

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, 179 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).

Grievant has not met his burden of proof and established a prima facie case of discrimination or

favoritism. All similarly situated employees were treated the same, and DEP's actions pursuant to the fleet reduction order were accomplished in a non-discriminatory manner. The only employees who retained assigned vehicles were those employees whose jobs required them to be in the field on a full-time basis, such as construction personnel, or those who must respond to emergency situations, such as the realty section employees. Therefore, the return of an assigned vehicle to Grievant, whose duties are both field and office based, and who is not required to respond to emergencies, would result in discrimination against all similarly situated employees who do not have an assigned vehicle. Leo, supra. See W. Va. Code § 29-6A-3(a)(2). Respondent has related vehicle assignments to job duties, fulfilling its legal requirement not to discriminate against employees or show favoritism when such employment decisions are made. Accordingly, the undersigned does finds any discrimination or favoritism under the facts and circumstances of this case. Leo, supra.

Grievant asserts the driving of the vehicle was a benefit, and as such cannot be removed. Grievant points to no statute, policy, rule, or regulation to support this theory. A prior Grievance Board case discussed this issue and found, "[t]he advantage of driving [an Agency's] vehicle to and from work is similar to a boon[,] but it is not a benefit. . . ." Kuhn v. Kanawha County Bd. of Educ., Docket No. 02-20-336 (Jan. 31, 2003). Even if the use of a vehicle were shown to be a benefit, Grievant has not demonstrated Respondent acted improperly or arbitrarily and capriciously in taking away Grievant's vehicle to comply with the Governor's Executive Order. While it is certainly pleasant for an employee to have DEP provide transportation to and from work, DEP is not required to provide this advantage to employees.

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

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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 and 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 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 Resources, Docket No. 92-HHR-486

(May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

2. "A [g]rievant's belief that his supervisor's management decisions are incorrect is not a grievable event unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with his effective job performance or health and safety." Ball v. Dep't of Highways, Docket No. 96-DOH-141 (July 31, 1997). See W. Va. Code § 29-6A-2(i); Rice v. Dep't of Transp./Div. of Highways, Docket No. 96-DOH-247 (Aug. 29, 1997). This standard for assessing this issue is the arbitrary and capricious one.

3. "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 forthe 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, 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 arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

4. 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."

5. 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."

6. 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).

7. 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, 179 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).

8. Grievant has not met his burden of proof and established a prima facie case of discrimination or favoritism. See Leo v. Dep't of Envtl. Protection, Docket No. 03-DEP- 235 (Jan. 21, 2004).

9. Grievant has not met his burden of proof and demonstrated DEP's decision was arbitrary and capricious. Leo, supra.

10. "The advantage of driving [an Agency's] vehicle to and from work is similar to a boon[,] but it is not a benefit . . . ." Kuhn v. Kanawha County Bd. of Educ., Docket No. 02-20-336 (Jan. 31, 2003).

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, and 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: March 31, 2004

Footnote: 1 *Although not clearly specified in the record, it appears Grievant is an Engineer.*

Footnote: 2 *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).*