**PAT LUSHER, et al.,**

**Grievants,**

**v. DOCKET NO. 05-DOH-157**

**DEPARTMENT OF TRANSPORTATION/**

**DIVISION OF HIGHWAYS,**

**Respondent.**

## DECISION

Grievants (See footnote 1) filed a grievance against their employer, Respondent Division of Highways (DOH), on April 7, 2005, in which they claimed, “We have worked four tens every summer for years no matter what the budget. We feel it would help their budget and ours too due to the price of gas. One day less travel.” As relief, they wish to be able to work four ten-hour days during the summer as they have in the past.

Following denials at the previous levels, a level four hearing was held in the Grievance Board's Charleston office on June 6, 2005. Grievants were represented by Grievant Rex Angel, and Respondent was represented by counsel, Barbara Baxter. The matter became mature for decision at the close of the hearing.

## Issues and Arguments

DOH District 1's new District Engineer changed a long-standing practice of allowing employees to work four ten-hour workdays per week in the summer. Grievants want to return to the old practice.

Based on a preponderance of the evidence adduced at the hearing, I find the following material facts have been proven:

## Findings of Fact

1. Grievants are all employed by Respondent in the five counties (Boone, Clay, Kanawha, Mason, and Putnam) that make up District 1.

2. Dennis King is the District 1 District Engineer. In 2004, he was Acting District Engineer and

before that, John Dawson was the District Engineer.

3. In prior years, the District Engineer permitted most employees in the District to work an alternate schedule during the summer of four, ten-hour days. The normal DOH work schedule is Monday through Friday from 7:30 a.m. to 4:00 p.m.

4. The DOH Administrative Procedure provides that the Commissioner or his designees may establish a seasonal work schedule that is different from the normal schedule, provided it is established "to better serve the organization's objectives." The District Engineers have been designated by the Commissioner to make this decision within their respective organizations.

5. Consistent with the wishes of the current administration to improve the public perception of the Division of Highways, and for budgetary reasons, Mr. King made the decision to keep the usual five-day work schedule in District 1.

## Discussion

In non-disciplinary matters Grievants must prove all the allegations constituting their grievance by a preponderance of the evidence. (See footnote 2) In this case, grievants have actually failed to state a claim upon which relief may be granted. A grievant must show an injury-in-fact, economic or otherwise, to have what constitutes a matter cognizable under the grievance statute. (See footnote 3)

Grievants offered plenty evidence that the summer work schedule is advantageous to them and is more convenient. But a "grievance" is more than just a claim that one policy is better than the other in the eyes of the grievant. "A general claim of unfairness or an employee's philosophical disagreement with a policy does not, in and of itself, constitute an injury sufficient to grant standing to grieve." (See footnote 4) Instead, there must be a showing of "a substantial detriment to, or interference with, the employee's effective job performance or health and safety." (See footnote 5) Absent that, a grievant's belief that his supervisor's management decisions are incorrect is not grievable. (See footnote 6)

The District Engineer is the "approving authority for the scheduling of work on holidays, overtime, and any permanent workweek that differs from the normal workweek of five (5) eight (8) hour days." DOH Admin. Operating Procedures, Volume IV, Chapter9, page 3 of 37, Scheduling and Reporting to Work. *(See footnote 7)* Grievants in this case, are not stating that Respondent is violating a policy, but are asking that they be allowed to deviate from the normal, policy-imposed schedule. Although Grievants offer many valid reasons why they believe the summer work schedule is a good idea, they

offered none that would justify compelling the District Engineer to revisit his decision.

Although not stated explicitly, Grievants also argued that the district engineer's decision is discriminatory, since other districts are allowed to work the modified schedule in the summer. "'Discrimination' means 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." (See footnote 8) A grievant must establish a case of discrimination by showing: (See footnote 9)

(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.

Grievants are not similarly situated to the DOH employees in other districts, in a way that is pertinent to this grievance. As is contemplated by the DOH policy permitting different-than-normal schedules, each organizational unit is different in terms of its budget, staffing, ongoing projects, work locations and equipment needs. Consequently, eachDistrict Engineer is empowered to make management decisions about scheduling that match his perceived needs for the District.

The following Conclusions of Law support this decision:

**Conclusions of Law**

1. Since this grievance is not about discipline, Grievants must prove all of their claims by a preponderance of the evidence, which means they must provide enough evidence for the undersigned Administrative Law Judge to decide that the claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (1993). If the evidence supports both sides equally, then Grievants have not met this burden. *Id.*

2. 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. W. Va. Code § 29-6A-2(i). S*ee, Ball v. Dept. of Highways*, Docket No. 96-DOH-141 (1997). “A general claim of unfairness or an employee's philosophical disagreement with a policy does not, in and of itself, constitute an injury sufficient to grant standing to grieve. *See Olson v. Bd. of Trustees/Marshall Univ.*, Docket No. 99-BOT-513 (Apr. 5, 2000), citing *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997).” *Vance v. Jefferson County Bd. of Educ.*, Docket No. 02-19-030R (2002).

3. The District Engineer is the "approving authority for the scheduling of work on holidays, overtime, and any permanent workweek that differs from the normal workweek of five (5) eight (8) hour days." DOH Admin. Operating Procedures, Volume IV, Chapter9, page 3 of 37, Scheduling and Reporting to Work. *See Rice v. Dep't of Transp./Div. of Highways*, Docket No. 96-DOH-247 (1997).

4. A grievant must show an injury-in-fact, economic or otherwise, to have what constitutes a matter cognizable under the grievance statute. *Milbert v. Div. of Corrections/Northern Regional Jail*, Docket No. 99-CORR-516 (2000); *Dooley v. W. Va. Dep't of Transp.*, Docket No. 94-DOH-255 (1994).

5. Grievants have not met their burden of proving their claim challenges a grievable wrong.

6. “'Discrimination' means 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(d).

7. A grievant must establish a case of discrimination by showing:

(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.

*The Bd. of Educ. of the County of Tyler v. White*, 605 S.E.2d 814 (W. Va. 2004).

8. Grievants have not met their burden of proving Respondent has discriminated against them.

For the foregoing reasons, 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 EmployeesGrievance 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.

**June 15, 2005**

_____

**M. Paul Marteney**

**Administrative Law Judge**

---

Footnote: 1

*Pat Lusher, Rex Angel, Keither Baisden, Joshua J. Barker, George Bias, Douglas Clark, William Drake, Roy D. Dolin, Sharon Elkins, Stanley Elkins, Debbie Eplin, Jack Ferrell, Mark Graley, Eric Harless, John Hill, Owen Kinder, Franklin Lovejoy, Barry McCormick, Twila Milam, Gary Miller, Mark Mooney, Ricky Roe, Michael Sheppard, Jason Sigmon, Paul Snodgrass, Michael Stowers, Steven Wheatley, Robert Webb, and David White.*

---

Footnote: 2

*Unrue v. W. Va. Div. of Highways, Docket No. 95-DOH-287 (1996).*

---

Footnote: 3

*Milbert v. Division of Corrections, Docket No. 99-CORR-516 (2000).*

---

Footnote: 4

*Vance v. Jefferson County Bd. of Educ., Docket No. 02-19-030R (2002).*

---

Footnote: 5

*W. Va. Code § 29-6A-2(i).*

---

Footnote: 6

*Ball v. Dept. of Highways, Docket No. 96-DOH-141 (1997).*

---

Footnote: 7

*See Rice v. Dep't of Transp./Div. of Highways, Docket No. 96-DOH-247 (1997).*

---

Footnote: 8

*W. Va. Code § 29-6A-2(d).*

---

Footnote: 9

*The Bd. of Educ. of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004).*