THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

SAM CASSELLA,
Grievant,

v. **Docket No. 2012-0496-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, Sam Cassella, filed this grievance on November 7, 2011, against his employer, Division of Highways, claiming the following:

> On 11//7/11, Grievant informed by supervisor Larry Weaver that if Grievant attended a level 3 hearing on 11/8/11 as an employee representative, he would be terminated for job abandonment. Grievant also informed that he was being assigned to night shift to prevent his participation as a representative in future grievances.

Grievant requested to be made whole, including disciplinary action against Larry Weaver for insubordination.

This grievance was denied at level one by letter dated January 5, 2012. A level two mediation session was conducted on May 25, 2012. Grievant perfected his appeal to level three on that same date. A level three hearing was scheduled to be conducted before the undersigned Administrative Law Judge on December 4, 2012. Prior to the hearing, the parties agreed to submit the grievance on the record developed at level one and based upon the parties' proposed findings of fact and conclusions of law. The fact/law proposals were received on November 19, 2012, and the matter became mature for consideration on that date.

Synopsis

Grievant is employed as a Transportation Worker 2, Craft Worker, for Respondent. He has been employed with Respondent since December 16, 2008. Grievant charges that he was informed by his supervisor, Larry Weaver, that if he attended a level three hearing as an employee representative in hearings not involving the Respondent, he could be terminated for job abandonment. Grievant also alleges that he was being transferred to night shift to prevent his participation in future grievances. Grievant did not meet his burden of proof and establish Respondent's refusal to allow him to attend grievance hearings as an employee representative was an arbitrary and capricious action by Respondent. In addition, Grievant did not demonstrate that Respondent's decision to change his work schedule was a violation of any rule, law or policy, or was an abuse of discretion.

The following findings of fact are based upon the record developed at level one.

Findings of Fact

1. Grievant is currently classified as a Transportation Worker 2, Craft Worker, in Monongalia County, District Four, with the Division of Highways.

2. On November 1, 2011, Grievant provided a letter that notified his county supervisor, Larry Weaver, of five grievance hearings in November for which he was designated as an employee representative. The hearings were scheduled for November 8, November 18, November 22, November 28, and November 29, all set for 10:00 a.m. Grievant is a member and steward of the West Virginia Public Workers Union.

3. It is undisputed that four of the five names listed in the letter were not

employees of the Division of Highways. One of the grievances for which Grievant notified Mr. Weaver that he was to serve as an employee representative did involve a coworker.

4. Grievant was advised by Mr. Weaver that if he attended the hearings, on his scheduled work days, he could be terminated for job abandonment since he would be representing employees of other agencies, and his absence could interfere with meeting the goals of the organization.

5. Grievant was transferred to the afternoon shift due to the opportunity to receive training that he desired. A superintendent on the afternoon shift was available to provide the necessary training to Grievant in that he had expressed an interest in learning how to operate more sophisticated equipment.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant argues that the decision to change his work schedule was not appropriate. Grievant asserts his shift has been changed so he cannot appear at grievance hearings

since he will be assigned to the night shift and will be too tired to appear as an employee representative during the day. "A grievant's belief that his [her] 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." *Rice v. Div. of Highways*, Docket No. 96-DOH-247 (Aug. 29, 1997).

While Grievant argued reprisal in changing his work schedule, the record established that Grievant had expressed an interest in additional equipment training.[1] Mr. Weaver arranged for his afternoon foreman to provide the requested training to the Grievant. Mr. Weaver felt the afternoon foreman was the best suited to provide the training. Supervisors have the authority to establish work schedules according to the needs of the organization. As such, work schedules are set based upon the needs of each

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[1]W. VA. CODE § 6C-2-2(o) defines reprisal as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a prima facie case of reprisal the Grievant must establish by a preponderance of the evidence the following elements:

> (1) that he engaged in protected activity (i.e., filing a grievance);
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> (2) that he was subsequently treated in an adverse manner by the employer or an agent;
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> (3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
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> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Vance v. Jefferson County Bd. of Educ., Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995).

organization and the most efficient use of district resources. It cannot be said that this action violated some rule, regulation, or statute, or constituted a substantial detriment to, or interference with, the Grievant's effective job performance or health and safety. Grievant did not demonstrate the necessary elements to establish retaliation.

Grievant also argues that it was an arbitrary and capricious action to not allow his attendance at grievance hearings for employees of other agencies as an employee representative.[2] On November 1, 2011, Grievant provided a letter to Mr. Weaver that he would be attending five level three hearings as an employee representative. Mr. Weaver determined, for a variety of reasons, that he could not authorize the leave request. Respondent's Human Resource Director, Jeff Black, reviewed the issue prior to the level one hearing and opined that Grievant would not be a fellow employee of an employee in some other agency. He continued by testifying that Division of Highways' employees may attend grievance proceedings as representatives for employees of his agency. In addition, the record established that an employee's time away from work may not seriously affect productivity.

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[2]The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105; 556 S.E.2d 72 (2001)(*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). "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 Res.*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

W. VA. CODE § 6C-2-3(p) provides, in pertinent part, as follows:

> Attendance and preparation.-
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> (1) The grievant, witnesses and an employee representative shall be granted reasonable and necessary time off during working hours to attend grievance proceedings without loss of pay and without charge to annual or compensatory leave credits.
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> (2) In addition to actual time spent attending grievance proceedings, the grievant and an employee representative shall be granted time off during working hours, not to exceed four hours per grievance, for the preparation of the grievance without loss of pay and without charge to annual or compensatory leave credits. However, the first responsibility of any employee is the work assigned to the employee. An employee may not allow grievance preparation and representation activities to seriously affect the productivity of the employee.

W. VA. CODE § 6-2-2(n) provides as follows:

> "Representative" means any employees organization, fellow employee, attorney or other person designated by the grievant or intervenor as his or her representative and may not include a supervisor who evaluates the grievant.

The undersigned agrees with Respondent that Grievant is not acting as a fellow employee when he is representing employees of agencies other than his employer, West Virginia Division of Highways. This finding is supported by the above statutory language that "Representative" means, among other things, any fellow employee. The perplexing question is the whether or not Grievant's representation of other employees in his capacity as a steward of UE Local 170 somehow changes this finding. In other words, should Grievant be granted a blanket leave without loss of pay and without charge to annual or compensatory leave credits to attend grievance proceedings, for employees that are not fellow employees, in his capacity as a steward for his union? The undersigned believes

the answer is no in this case. This would need to be decided on a case-by-case basis, and would be in the discretion of management.

In the instant case, Grievant's potential attendance at so many hearings in a single month would have most certainly interfered with the performance of his job. This analysis is supported by the statutory language cited above that clearly indicates that "the first responsibility of any employee is the work assigned to the employee. An employee may not allow grievance preparation and representation activities to seriously affect the overall productivity of the employee." W. VA. CODE § 6C-2-3(p)(2).

Grievant more than likely should have been given the time allotted under the statute to represent an employee in a grievance proceeding when he disclosed to Mr. Weaver the five dates on November 1, 2011.[3] The record at level one is not fully developed on all of the circumstances behind why it did not happen. The only relevant evidence offered in the record was that Grievant did not attend any of the level three grievance hearings. Absent a record, it is impossible for the undersigned to make any ruling on whether or not this action was clearly wrong in light of the relevant factors.

Finally, the relief requested by Grievant concerning the discipline of Mr. Weaver is not available under the facts of this grievance. It is a well-settled rule that the Grievance Board does not have the authority to order an agency to impose discipline on an employee. Relief which entails an adverse personnel action against another employee is extraordinary, and is generally unavailable from the Grievance Board. *Stewart v. Div. of*

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[3]"To prohibit the release of employees to testify or act in a representative capacity could render the grievance procedure meaningless as a grievant would be impeded, if not prohibited, from proving the allegation(s) of the complaint." *Shoemaker v. Hampshire County Bd. of Educ.*, Docket No. 14-88-028-2 (May 19, 1988).

Corr., Docket No. 04-CORR-430 (May 31, 2005); *Jarrell v. Raleigh County Bd. of Educ.*, Docket No. 95-41-479 (July 8, 1996). Any decision concerning disciplinary action generally resides with the employer. *Dunlap v. Dep't of Envtl. Prot.,* Docket No. 2008-0808-DEP (Mar. 20, 2009).

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. Procedural Rules of the Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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. "A grievant's belief that his [her] 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." *Rice v. Div. of Highways*, Docket No. 96-DOH-247 (Aug. 29, 1997).

3. Grievant did not demonstrate that the schedule change violated some rule, regulation, or statute, or constituted a substantial detriment to, or interference with, the employee's effective job performance or health and safety. Grievant did not demonstrate the necessary elements to establish retaliation.

4. Grievant did not demonstrate that it was an arbitrary and capricious action to not allow his attendance at grievance hearings for employees of other agencies as an employee representative during his assigned work schedule.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* 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 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: December 11, 2012

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Ronald L. Reece
Administrative Law Judge