WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KIMBERLY SIMONS,
Grievant,

v. **Docket No. 2013-0083-DOT**

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS,
Respondent.

D E C I S I O N

Kimberly Simons, Grievant filed this grievance against Respondent employer the West Virginia Department of Transportation, Division of Highways ("DOH"), on July 24, 2012. Grievant's level one grievance form asserts that she was "[p]assed over for emergency callouts." The relief request was "[t]o be made whole including back pay with interest."

A hearing was held at level one on September 13, 2012, and the grievance was denied at that level on September 24, 2012. Grievant appealed to level two on or about September 29, 2012, and a mediation session was held on February 13, 2013. Grievant appealed to level three on February 20, 2013. Subsequent to the scheduling of a level three hearing for July 15, 2013, but prior to the hearing transpiring, the parties requested this grievance matter be submitted for decision on the record. Accordingly, this matter was submitted for decision to the undersigned Administrative Law Judge at the Grievance Board's Charleston office pursuant to the case file, level one hearing record and the parties' Proposed Findings of Fact and Conclusions of Law documents. At the September 13, 2012 level one hearing, Grievant had the opportunity to present underlying facts and

submit documentation or statements deemed to be relevant to the grievance. Grievant appeared in person and by her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by Robert Miller, Esquire, DOH Legal Division. This case became mature for decision on August 12, 2013, the deadline for the submission of the parties' proposed findings of fact and conclusions of law. Both parties submitted fact/law proposals.

Synopsis

There was a state of emergency declared by the Governor of the State of West Virginia on or about June 30, 2012, or July 1, 2012, as a result of severe storms with near hurricane force. Because of the damage and other ramifications generated by the line of storms, the Division of Highways, was called upon to provide emergency services. Grievant contends because she was not called out for overtime work and others with less seniority were, Respondent violated its policy on Overtime Worked/Emergency. Respondent maintains it is authorized to use discretion in selecting employees best suited for emergency work. Respondent identified a rational basis for its actions.

Grievant has the burden in this non-disciplinary grievance matter. Grievant failed to demonstrate that Respondent acted in an arbitrary and capricious manner or violated its Overtime Worked/Emergency Policy in the circumstances of this matter. Accordingly this grievance is DENIED.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is classified as a Transportation Worker 2 Equipment Operator (TW2EQOP) in the I-77, Section II Organization (Medina) in District Three (D3) with the Division of Highways (DOH). Grievant is highest ranking in seniority in the Medina Organization.

2. Jason Wyatt is classified as a TW2EQOP in Medina in D3 with the DOH.

3. Jody Browning is classified as a Transportation Crew Supervisor 1 (TRCRSV1) in Medina in D3 with the DOH.

4. Tim Somerville is classified as a TW2EQOP in Medina in D3 with the DOH.

5. Bill Reed is an Assistant Maintenance Engineer/Maintenance Assistant in D3 with the DOH. Mr. Reed has been employed by Respondent for twenty-nine (29) years.

6. A line of severe storms crossed West Virginia commencing on June 29, 2012, creating unprecedented damage in the State. Governor Tomblin issued a Code Red State of Emergency for D3 on or about June 29, 2012, June 30, 2012, or July 1, 2012.

7. Medina Headquarters was without power and telephone service on June 30, 2012, and July 1, 2012.

8. On June 30, 2012, Assistant Maintenance Engineer Reed contacted Crew Supervisor Browning to call Mr. Wyatt and Mr. Somerville out to perform backhoe work for Jackson County Maintenance.

9. Other than Crew Supervisor Browning, Mr. Wyatt, and Mr. Somerville, no other Medina employees worked on June 30, 2012 or July 1, 2012.

10. The WV DOH has Administrative Operating Procedure for overtime worked in emergency situations. *Administrative Operating Procedures*, Scheduled Overtime Worked/Emergency Policy, Section 4, Chapter 14, states, in relevant part;

> PROCEDURE: As emergency/SRIC overtime hours are worked, the supervisor shall record that the employee worked the overtime on the Overtime Worked/Emergency Chart. Because these situations can be numerous and varied, the organization's supervisor may use his/her discretion in making such assignments based on the employee's expertise, the circumstance of the emergency situation and the location of the emergency. An Overtime Worked/Emergency Chart is to be posted in each work unit location for every calendar month. The chart is to be posted whether or not overtime was worked in the unit. Periodic reviews by appropriate members of management (supervisor, county administrator, maintenance assistant, etc.) should be performed to insure equalization of hours and policy adherence.

R. Ex. 1. (eff. 9-15-2008)

11. Grievant is not qualified to operate a backhoe.

12. From January 1, 2012, through August 31, 2012, Jason Wyant worked 259.50 unscheduled overtime hours, including 92 hours as the District Herbicide Technician, Jody Browning worked 197 unscheduled overtime hours, and Grievant worked 177.25 unscheduled overtime hours.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence 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." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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). Where the evidence equally supports both sides, a party has not met its burden of proof. *Id.*

Grievant contends that she should have been called out for emergency work when severe storms hit on or about the evening hours of June 29 or early June 30, 2012, and the State of WV was placed in Code Red Emergency status. In that she is more senior in tenure than the individuals who worked the emergency overtime, Grievant is of the belief that she was unfairly deprived overtime compensation. Respondent contends the unscheduled overtime work generated by storm damage did not require the agency to follow seniority rules. Respondent provided through witness testimony that supervisors used their discretion in selecting three employees to report to work on June 30, 2012, and July 1, 2012, that included the foreman and two members of the backhoe crew, to perform specialized backhoe work assisting the Jackson County Maintenance Organization.

There are recognized administrative operating procedure established for Respondent in granting emergency overtime hours to its employee. Further, because emergency overtime situations can be numerous and varied, it is specifically recognized that a supervisor may use his/her discretion in marking such assignments based on the employee's expertise, the circumstance of the emergency situation and the location of the emergency. See R. Ex. 1, DOH Administrative Operating Procedure. Some situations dictate that the overtime list not be consulted, and supervisors may use their discretion in

these situations in making the assignments. *See Division of Highways Scheduled Overtime Policy; Adkins v. Dep't of Transp.*, Docket No. 01-DOH-625 (March 21, 2002).

Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). 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). "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 his judgment for that of [the employer]." *Blake v. Kanawha County Bd. of Educ.,* Docket No. 01-20-470 (Oct. 29, 2001).

Respondent selected three employees to report to work on June 30, 2012, and July 1, 2012, to perform specialized backhoe work. This was during a declared state of emergency. Grievant is not qualified to operate the backhoe. In the circumstances of the instant grievance, appropriate agency conduct is clear pursuant to applicable policy and regulations. Respondent has established facts that supported the action taken by DOH in the identified instance.

Further, Grievant's blanket comparison of overtime totals does not establish a violation of her seniority. Emergency overtime is awarded as dictated by the situation. It is inherent in an emergency situation that overtime might not be equal. Much is dependent on geographic considerations, type of emergency and the individual skills of the employees. Respondent maintains that overtime granted during identified periods was done so pursuant to a rational basis and was not arbitrary awarded. Grievant may truly believe she was not given a fair opportunity; however, she has not established this as fact. Grievant has not established unreasonable conduct by Respondent's agents. In this case, facts exist and applicable administrative operating procedures established guidelines that empowered Respondent to provide unscheduled overtime work to select employees without much regard to seniority.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008).

2. Generally, an agency's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985).

3. It is not established that Respondent disregarded seniority and acted in an arbitrary or capricious manner with regard to its granting of overtime to employees.

4. Grievant has not established that Respondent's actions in the circumstances of this case were in violation of applicable Overtime Worked/Emergency procedure.

5. Grievant did not meet her burden of proof in this matter.

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: October 1, 2013

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Landon R. Brown
Administrative Law Judge