THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DAVID UNDERWOOD,
Grievant,

v. **Docket No. 2012-1159-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, David Underwood, is employed by Respondent, Division of Highways. On April 18, 2012, Grievant filed this grievance against Respondent stating, "Vehicle use revoked without good cause." For relief, grievant seeks "[r]estoration of vehicle use."

Following the July 20, 2012 level one hearing, a level one decision was rendered on August 10, 1012, denying the grievance. Grievant appealed to level two on August 13, 2012. Grievant perfected the appeal to level three of the grievance process on December 14, 2012. The parties then agreed to waive a level three hearing and submit the case on the level one record. Grievant was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by counsel, Robert Miller. This matter became mature for decision on May 23, 2013, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant alleges Respondent's application of a vehicle use policy to Grievant was arbitrary and capricious. Grievant did not prove by a preponderance of the evidence the necessary facts to show the policy was incorrectly applied to him. Respondent's

application of the policy to Grievant was not arbitrary and capricious as the criteria used to make the decision were reasonable. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is employed by Respondent as a Construction Superintendent in District Three.

2. As the Construction Superintendent in District Three, Grievant is responsible for seven counties. He is responsible for paperwork and routinely inspects job sites to ensure completion of assignments. He is also occasionally required to respond to emergencies, around four to five times per year. He is stationed at the district headquarters in Parkersburg and is required to report to headquarters both morning and evening.

3. The use of Respondent's vehicles by employees is governed by Division of Highways Administrative Operating Procedures, Section IV, Chapter 2, Administration of Highways' Transportation Vehicles, which includes as an attachment the Assignment and Use of Transportation Vehicles Policy Memorandum dated August 29, 2006.[1] The purpose of the policy is to "ensure productive use of all available funds. . .by limiting the use of transportation vehicles to those circumstances in which such use serves the legitimate functions of the agency." The policy states, "Employees may be provided State vehicles to travel from their domiciles or pooling locations to

[1] Respondent also submitted Assignment and Use of Transportation Vehicles Policy dated June 29, 2012, which was admitted at the lower level as Respondent's Exhibit # 1. As this policy came into effect after this grievance was filed, the June 29, 2012 policy has not been considered.

station assignments of project/job sites as permitted in [other sections of the policy]. Use of a vehicle is at the employee's option and is provided solely for the convenience of the employee." All vehicles must be parked at an assigned location. Employees "who work at a project site or have predominantly field based assignments" are to park at a designated location nearest where the employee lives. Otherwise, the vehicle is to be parked at the employee's "official station assignment."

4. Upon his hire, Grievant was allowed the use of an agency vehicle to be stationed in Calhoun County, where Grievant resides. Grievant would drive from his home in his personal vehicle to the Calhoun County station and drive the agency vehicle to district headquarters in Parkersburg, to inspect job sites, or to occasionally respond to an emergency.

5. However, in March 2012, at a state-wide meeting, all district engineers were instructed to review the policy and ensure each district was in compliance. In reviewing the employees of District Three, Highway Engineer David Brabham, who was filling in for the ill District Engineer, determined that the vehicle use of several employees, including Grievant, was not in compliance with the above policy. To comply with policy requirements, Grievant was still allowed the use of a vehicle to travel to job sites from district headquarters, but the vehicle was to be parked at district headquarters in Parkersburg rather than the Calhoun County station.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (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 alleges that Respondent's decision to change where his State vehicle is parked is arbitrary and capricious. 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).

Grievant argued that Respondent's decision was arbitrary and capricious because Grievant works predominantly in the field and should, therefore, under the policy be allowed to park his vehicle nearest where he lives. In his Proposed Findings of Fact and Conclusions of Law, Grievant argued that Respondent has another policy regarding the assignment of uniforms that defines Construction Superintendents as spending "the majority of their regularly scheduled work time in traffic related areas." However, the uniform policy was not part of the lower level record in this case, nor did Grievant otherwise move to have the policy admitted into evidence. Grievant cited a

previous Grievance Board decision discussing the uniform policy. While a Grievance Board decision discussing the application of the vehicle policy at issue would be relevant and persuasive, citing a decision discussing another policy not at issue in an effort to meet the evidentiary burden of proof is not persuasive. The uniform policy would be evidence of whether or not Grievant spends the majority of his time in traffic. It is not law. Therefore, as evidence, this second policy was required to be submitted as part of the record so it would be available in its entirety and subject to objection and cross examination. Without the policy being admitted into evidence, there is no proof that the policy quoted in the decision was even in effect at the time of the grievance. Therefore, the uniform policy cannot be considered.

As evidence of predominantly working in the field, Grievant offered his testimony. Grievant's testimony regarding his job duties was very general. Initially Grievant testified "a lot of time of the morning I would get to a job site. Same way of the evening."[2] On cross examination Grievant stated, "I check on my crews during the day, and I check on different jobs that's [sic] in the future,"[3] but also that there is "a lot of paperwork involved" at the office.[4] Grievant only gets called out on emergencies "four or five" times a year[5]. Grievant later clarified his work is "actually in the field, the majority of it."[6] However, Grievant still did not testify specifically about the nature of his

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[2] Level One Transcript, page 11.

[3] Level One Transcript, page 17-18.

[4] Level One Transcript, page 18.

[5] Level One Transcript, page 19.

[6] Level One Transcript, page 25.

work and only states the conclusion that the majority of his work is in the field. Mr. Brabham testified he did not perform a time study and he did not track exactly how much Grievant is in the office as opposed to in the field before making his determination. He admits there is a "substantial amount of fieldwork"[7] and there are times when Grievant would spend "way more time in the field,"[8] but that "we felt that by him, you know, reporting to Parkersburg, leaving from Parkersburg, and, you know, with his job there is a substantial amount of office work, and there is a fair amount of field work, as well, we didn't feel that it was predominantly field-based, no."[9]

In the end, Grievant "feels" he works mostly in the field and Mr. Brabham "feels" Grievant does not. It is Grievant's burden to prove the facts of his case. Grievant's general opinion as to the ultimate question of the case and non-specific testimony regarding his job duties is not sufficient to prove by a preponderance of the evidence that he works predominantly in the field. Respondent's failure to do a time study prior to making a decision does not make the decision arbitrary and capricious. The policy did not require a time study, and Mr. Brabham was able to articulate reasons why the decision was made. Since Grievant had significant office duties and was required to report to and leave from headquarters, it was reasonable to conclude he was not predominantly in the field.

Grievant also alleged that there are other employees who are still allowed to park their State vehicles nearest where they live. In order to establish a claim of

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[7] Level One Transcript, page 48.

[8] Level One Transcript, page 49.

[9] Level One Transcript, page 41-42.

discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show: "(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 Board of Education of the County of Tyler v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004). Although Grievant testified there are several other "supervisors" who are allowed to park nearest where they live, none of the named persons hold the same position as Grievant, a Construction Superintendent. Grievant did not provide any more testimony about how those other "supervisors" are similarly-situated to Grievant. Mr. Brabham testified that two of the employees are specifically assigned to respond to district-wide emergencies routinely and that the other two are employed by other departments. Therefore, Grievant failed to prove he is similarly-situated to those employees.

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. W. VA. CODE ST. R. § 156-1-3 (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).

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). 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).

3. Grievant did not prove by a preponderance of the evidence that he works predominantly in the field.

4. Respondent's application of the Assignment and Use of Transportation Vehicles Policy to Grievant was not arbitrary and capricious.

Accordingly, the 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* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: October 1, 2013

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Billie Thacker Catlett
Administrative Law Judge