WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BARRY JIVIDEN,
Grievant,

v. **Docket No. 2012-0921-DOT**

DIVISION OF HIGHWAYS,
Respondent.

DECISION

Grievant, Barry Jividen, is employed by Respondent, Division of Highways ("DOH") at their Mason County facility. Mr. Jividen filed a level one grievance form dated March 6, 2012, alleging that he had been "denied return to work with light duty." As relief, Grievant sought, "To be made whole including restoration of leave time." A level one hearing was held on October 3, 2012, and a decision denying the grievance was issued on October 25, 2012. Grievant appealed to level two and a level two mediation was held on March 26, 2013. Grievant perfected is appeal to level three on March 27, 2013.

A level three hearing was held in the Charleston office of the West Virginia Public Employees Grievance Board on September 18, 2013, before Administrative Law Judge Carrie H. LeFevre. The parties submitted Proposed Findings of Fact and Conclusions of Law, the last of which was received by the West Virginia Public Employees Grievance Board on October 25, 2013; this matter became mature for decision on that date. For administrative reasons, the grievance has been reassigned to the undersigned administrative law judge to render a decision.

Synopsis

Grievant alleges that Respondent should have granted his request for light duty work after receiving a letter from his health care professional stating that Grievant could return to work under certain restrictions. Grievant also asserts that Respondent discriminated against him by allowing a worker with, what he believed to be, similar restrictions to work. Grievant failed to prove that Respondent's decision to deny his request for light duty was arbitrary and capricious. Grievant also failed to prove that he was similarly situated to the worker he cited as receiving light duty. In fact, that worker was on full duty with no restrictions. The grievance is DENIED.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievant Jividen has been employed by Respondent DOH as a Transportation Worker 2 at the DOH Mason County headquarters since December 2010.

2. While away from work, Grievant suffered a tear to the rotator cuff in his right shoulder. Grievant is right-handed. This injury caused Grievant to be off work for a period of time.

3. Prior to his injury, Grievant's main duties had been driving a pilot truck and a mowing tractor. He had also driven a large truck during snow removal and ice control ("SRIC") season.[1]

[1] SRIC typically runs from November 1 through April 1, but occasionally is extended due to unseasonal storms.

4. During all times relevant to this grievance, Chris Shaffer was serving as the temporary Highway Administrator 2 in charge of the Mason County DOH headquarters. Mr. Shaffer is normally a Highway Administrator 4, and has twenty-four years of experience working for the DOH.

5. On Thursday, March 1, 2012, Grievant dropped off a return-to-work form he had received from Neesha Smith CNP[2] at the Holzer Clinic where he had been treated. The form indicated that Grievant could return to work on Monday, March 5, 2012, with the following restrictions, "No lifting more than 3 pounds with right arm until further notice." Respondent's Exhibit 1.[3]

6. When Highway Administrator Shaffer received the form, he called Ray Patrick who is employed by the DOH in their Human Resources Department. With input from the local highway administrator, Mr. Patrick makes the determination as to whether an injured employee may come back to work on light duty. The determination is based upon whether there are productive duties the employee can safely perform given his medical restrictions.

7. Mr. Schafer and Mr. Patrick concluded that there were no positions available that Grievant could safely perform for the Mason County DOH with his restrictions, at that time. The DOH was still under SRIC which required Transportation Worker 2s to drive large snowplow trucks during snow removal. At times it was necessary for the driver to climb up on the truck with a shovel and break up chunks of salt that would not fit down into the spreader. The driver would often have to put heavy

[2] Certified Nurse Practitioner.
[3] At level three, the parties provided evidence to supplement the factual record that was developed at the level one hearing. The exhibits which were introduced at level three maintain the same numbers for identification that they were given when they were introduced at the level one hearing.

chains on the truck's tires. Additionally, workers were often called upon to remove trees and other debris from the road with chainsaws and other tools. Because the Mason County division was short by six or seven men on its crews, each worker had to be able to do a wide variety of duties and most drivers were operating alone. Mr. Shaffer and Mr. Patrick determined that Grievant would not be able to perform these duties with his restrictions. They were also concerned that if Grievant attempted to perform these duties he could reinjure his right shoulder.

8. Administrator Shaffer called Grievant at his home and advised him not to come into work on light duty because they didn't have any jobs that he could perform safely at that time.

9. Grievant brought in another return-to-work form from Holzer Clinic dated March 20, 2012. That form indicated that Grievant could return to work with the following restrictions, "no lifting of more than 5 to 10 pounds with the right arm and no overhead work. Patient will be off work for an estimated 6 to 8 weeks after surgery." Respondent's Exhibit 2.

10. Upon receipt of this form, Administrator Shaffer again contacted Ray Patrick to determine if there was any work available at the Mason County headquarters that Grievant could safely and productively perform given the restrictions set out on the form. Mr. Shaffer and Mr. Patrick were again concerned that Grievant might reinjure his shoulder in an effort to perform the tasks that were necessary for Transportation Worker 2 in Mason County at that time. Accordingly, for the same reasons discussed above, it was determined that there was no work available for Grievant at that time with his restrictions. Mr. Shaffer advised Grievant of their decision by telephone.

11. Grievant provided his employer with a form from the Holzer Clinic dated June 28, 2012, stating that he would be off work for 4 weeks to recover from his rotator cuff surgery. Respondent's Exhibit 3.

12. Near the end of July 2012, Grievant provided his employer with two more forms from the Holzer Clinic. One was dated July 26, 2012, and stated that Grievant could return to work with the following restrictions, "May drive, stand and squat. May not lift more than 10 pounds for 4 weeks." The next form was dated July 27, 2012, and stated that Grievant was released to return to work on July 30, 2012, but could not lift more than 10 pounds with his right arm for 4 weeks. Respondent's Exhibits 4 & 5.

13. Grievant and Chris Shaffer completed a Notice of Available Employment agreement to provide temporary transitional work for Grievant beginning August 2, 2012. At that time, the Mason County division had hired summer help and was at full strength. There were more jobs that Grievant could perform with the weight restriction on his right arm, such as operating a mowing tractor or driving a pilot truck.

14. Grievant brought in a return-to-work form from the Holzer Clinic dated August 22, 2012, stating that Grievant could return to full duty on August 28, 2012. Grievant has continued to work at full capacity since that date.

15. Mike Herdman had been employed by the DOH as a Transportation Worker 2 in Mason County for many years. Mr. Herdman was retired from employment with the DOH at the time of the events giving rise to this grievance. Mr. Herdman had lost his right arm approximately forty years ago. He had adapted to working with one arm and could successfully perform all the regular duties of a Transportation Worker 2

without any restrictions or assistance. Mr. Herdman was a very dedicated employee and worked at full capacity for the DOH.[4]

Discussion

As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving the grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 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). 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 Respondent's decision to deny his return to work on light duty was improper. Grievant also alleges that he was discriminated against by Respondent. Discretionary actions of a public agency are consistently upheld unless they are found to be arbitrary and capricious. *McComas v. Public Service Commission*, Docket No. 2012-0240-PSC (Apr. 24, 2013); *See generally, Dillon v. Bd. of Educ*., 177 W.Va. 145, 51S.E.2d 58 (1986); *Christian v. Logan County Bd. of Educ*., Docket No. 94-23-173 (Mar. 31, 1995). 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 is so

[4] There was hotly disputed testimony that Ray Patrick had met with the employees at the Mason County headquarters a few months prior to Grievant's injury. It was alleged that Mr. Patrick told the employees that the DOH was concerned about employees not returning to work after being injured. Mr. Patrick supposedly told employees that they should return to work as quickly as they safely could and the agency would find some work for them to perform even if it was paperwork. Whether or not this meeting took place is not relevant to the case at hand. The testimony clearly established that each instance where an employee desires to return to work for light duty is examined on a case-by-case basis depending upon the physical limitations to the employee, and the available work at the site. General statements made by Mr. Patrick or any other administrator at a general meeting would not change the need for this case-by-case examination.

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 for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996). 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)).

Administrators Shaffer and Patrick considered the work that was available at the Mason County headquarters when deciding whether to allow Grievant to return to work on light duty. Mr. Shaffer gave consideration to the type of duties that Grievant would have to perform, as well as the restriction that Grievant could lift no more than five pounds with his right arm. Mr. Shaffer and Mr. Patrick also considered the risk of Grievant reinjuring his arm in an effort to perform these tasks. Ultimately, they concluded that the work that needed to be performed during the period of Grievant's convalescence was not appropriate for Grievant given his medical restrictions. The administrators considered appropriate factors, in a reasonable way, when making the determination. Accordingly, their decision was not arbitrary or capricious.

Grievant notes that a former employee performed all the duties of a Transportation Worker 2 at the Mason County facility even though he only had one arm. Grievant alleges that he was similarly situated to this employee, and should have been allowed to perform light duties when he had medical restrictions on the use of one arm. For purposes of the grievance procedure, discrimination is defined as "any differences

in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA.CODE § 6C-2-2(d). In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (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.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

Grievant was not similarly situated to the one-armed employee. The previous employee had adapted, over a period of forty years, to performing daily life tasks with one arm. He was able to perform all of the tasks of a Transportation Worker 2 with no restrictions at all. Additionally, there was no risk that the prior employee could reinjure his missing arm. Grievant, on the other hand, had just recently injured his arm and was medically restricted in the duties that he could perform with it. More importantly, there was a significant risk that Grievant might reinjure his arm in attempting to perform his regular duties, such as, attempting to catch his balance if he slipped while climbing on an icy truck. Grievant failed to prove that he was subject to discrimination. Accordingly, the grievance is DENIED.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving the grievance by a preponderance of the evidence. Procedural

Rules of the W. Va. Public Employees Grievance Bd. 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). 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. Discretionary actions of a public agency are consistently upheld unless they are found to be arbitrary and capricious. *McComas v. Public Service Commission*, Docket No. 2012-0240-PSC (Apr. 24, 2013); *See generally, Dillon v. Bd. of Educ*., 177 W.Va. 145, 51S.E.2d 58 (1986); *Christian v. Logan County Bd. of Educ*., Docket No. 94-23-173 (Mar. 31, 1995).

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 is 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 for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996).

4. Grievant did not prove that Respondent’s decision to deny him light duty was arbitrary and capricious.

5. For purposes of the grievance procedure, discrimination is defined as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA.CODE § 6C-2-2(d).

6. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) That he or she has been treated differently from one or more similarly-situated employee(s);
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> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
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> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

7. Grievant did not prove that he was subjected to discrimination as that term is defined in W. VA.CODE § 6C-2-2(d).

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* 156 C.S.R. 1 § 6.20 (2008).

DATE: DECEMBER 5, 2013

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE