JOHN BREWSTER,

Grievant,

v.

DOCKET NO. 97-BEP-414

WEST VIRGINIA BUREAU OF

EMPLOYMENT PROGRAMS,

Respondent.

D E C I S I O N

Grievant, John Brewster, filed the following grievance on October 1, 1996, against his employer, West Virginia Bureau of Employment Programs ("Respondent"):

> Approximately, one year ago Carla Adams, Interviewer at the Welch Job Service made 20 false complaints against everyone in this office with the exception of one person, John Young. They were investigated and none prove[d] to be true. I had to seek medical attention for the stress and was forced to use my sick leave unjustly. I returned to work only to have Carla Adams do it again. She has made false statements about me to her husband and Customers of this office.
>
> She has made up lies about me embezzling funds to lies of a sexual nature. Her husband even came into this office and threatened me. I cannot and will not ever be put into this situation again. This is a hostile environment and something has to be done. There is no reconciliation in this matter. I was told to stay home and Other Paid Leave could be turned in. Today I was told that I needed to take Annual Leave or Sick Leave (with a Doctor's slip) after 3 days. I don't see how you could stop Other Paid Leave in the middle of an investigation. I am requesting all days be re-instated to me, while I was under a Doctor's care for this situation and any Annual Leave I was forced to take be returned to me. And I am also requesting that the agency dismiss her for her actions of gross misconduct.

A level two hearing was held in this matter on October 10, 1996, and a decision denying the grievance was issued by Quetta Muzzle, Grievance Evaluator, on October 11, 1996. A level three hearing was held on March 11 and July 31, 1997, and a recommended decision denying the grievance was issued by Thomas K. Rardin, Hearing Evaluator, on September 9, 1997. That

recommendation was accepted by Commissioner William F. Vieweg. Grievant appealed to level four on September 19, 1997, and a level four hearing was held on December 4, 1997 and January 21, 1998. (See footnote 1) This matter became mature for decision on February 16, 1998, the deadline for the parties' proposed findings of fact and conclusions of law.

SUMMARY OF EVIDENCE

LIII Grievant's Exhibits

Ex. 1 -

August 6, 1996 letter To Whom It May Concern from Barbara Moore.

Ex. 2 -

Seating arrangement of Welch Job Service office.

LIV Grievant's Exhibits

Ex. 1 -

Handwritten notes of Ron Wyatt from September 22, 1995 through August 7, 1996.

Ex. 2 -

Grievance documents.

Ex. 3 -

October 1, 1996 e-mail to Stephan Frantz and Ron Wyatt from Jeff Smith.

Ex. 4 -

October 1, 1996 application by John Brewster for Other Paid Leave from September 26 through September 30, 1996.

Ex. 5 -

October 21, 1996 application by John Brewster for Sick Leave from October 2 through October 9, 1996.

Ex. 6 -

October 21, 1996 application by John Brewster for Sick Leave from October 11 through October 18, 1996.

Ex. 7 -

September 25, 1996 report of Ron Wyatt regarding Welch Office Incident.

Ex. 8 -

October 1, 1996 e-mail to Jeff Smith from Stephan Frantz.

Ex. 9 -

March 10, 1997 e-mail to Jeff Smith from Steve Frantz.

Ex. 10 -

March 10, 1997 e-mail to Jeff Smith from Steve Frantz.Ex. 11 -
October 1, 1996 Request for Personnel Action.

Ex. 12 -

October 31, 1996 letter from Andrew Richardson to Carla Adams.

Ex. 13 -

November 1, 1996 memorandum from John Brewster to Quetta Muzzle.

Ex. 14 -

November 1, 1996 letter from John J. Young to Quetta Muzzle.

Ex. 15 -

October 1, 1996 e-mail to Jeff Smith from Steve Frantz.

Ex. 16 -

October 3, 1996 memorandum from Thomas K. Rardin to Andrew Richardson.

LIV Respondent's Exhibits

Ex. 1 -

Physician's Certificate for John Brewster dated October 16, 1996.

Ex. 2 -

Physician's Certificate for John Brewster dated October 30, 1995.

Ex. 3 -

Monthly Time Distribution Sheet for John Brewster for the months of September and October 1996.

Ex. 4 -

West Virginia Bureau of Employment Programs Policy and Procedures Manual, Attendance and Leave, Other Paid Leave, effective January 1, 1995.

Ex. 5 -

West Virginia Bureau of Employment Programs Policy and Procedures Manual, Workplace Security, effective May 1, 1995.

Ex. 6 -

October 4, 1996 memorandum from Andrew Richardson to Tom Rardin.

Testimony

Grievant testified in his own behalf, and presented the testimony of William Conley, Manual Horeluk, Debra Pack, Debra Moore, Joyce Young, Charles Stores, John Young, Ron Wyatt, Jeff Smith, and Steve Frantz. Respondent presented the testimony of Thomas Rardin.

ISSUE

Although the procedural history in this matter is lengthy and contentious, the issue to be decided is simple: Whether Respondent abused its discretion when it denied Grievant “Other Paid Leave” for his absence from work from October 1 through October 11, 1996.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following material facts.

1. At all times relevant herein, Grievant was employed by Respondent in its Welch Job Service

Office. 2. From September through December 1995, an internal investigation was conducted by Respondent into allegations made by Grievant's co-worker, Carla Adams, which included allegations of improper conduct by the Grievant. All of these allegations were determined to be unfounded through the course of the investigation.

3. Ms. Adams persisted in making untruthful allegations about Grievant, including allegations of sexual misconduct toward her and customers of the Welch Job Service, and allegations of embezzlement of accounts. None of these allegations were found to have merit.

4. On September 25, 1996, John Adams, Carla Adams' husband, came into the Welch Job Service Office and threatened Grievant, accusing him of making unwelcome sexual advances towards his wife while at work.

5. Grievant was placed in fear and apprehension of physical violence as a result of this incident.

6. Respondent told Grievant to stay at home until steps were taken to secure the Welch Job Service Office, and that he could take Other Personal Leave for those days off.

7. Grievant stayed home from September 26 through September 30.

8. During that time, Respondent took steps to secure the Welch Job Service office, including changing the locks, notifying the police, instructing Ms. Adams to keep her husband away from the work place, and assigning Field Supervisor Steve Frantz to the Welch office for two to three weeks to maintain order.

9. On October 1, 1996, Grievant told his immediate supervisor, Ron Wyatt, and Mr. Frantz, that he did not feel safe to come back to work as long as Carla Adams was stillworking in the office. They told him he would have to take annual or sick leave if he chose to remain home, because Respondent would not authorize any more Other Paid Leave.

10. Respondent offered Grievant the opportunity to work out of the Bluefield office while Ms. Adams remained in the Welch office. He declined the opportunity.

11. Grievant did not come back to work until October 11, 1996, when Carla Adams took leave from the office.

12. Grievant submitted requests for leave for sick leave for October 1 through October 11, 1996.

13. Ms. Adams resigned her employment with Respondent in November 1996.

DISCUSSION

Grievant alleges it was a violation of the West Virginia Division of Personnel and Respondent's policies, and an abuse of discretion, for Respondent to deny him Other Paid Leave for the time he remained at home from October 1 through October 11, 1996, after it had agreed to let him take Other Paid Leave from September 26 through September 30, 1996. Respondent denies it violated any policy, or abused its discretion, in denying Grievant Other Paid Leave for the time he chose to remain home.

The policy at issue is encompassed in the West Virginia Division of Personnel Administrative Rules, Section 15, Attendance and Leave (1995). Specifically, Section 15.11, Court Jury, and Hearing Leave, provides, in pertinent part:

> (a)
> Upon application in writing, an employee hired for permanent employment shall be granted leave with pay when, in obedience to a subpoena or direction by proper authority, he/she serves upon a jury or appears as a witness before any court or judge, any legislative committee, or any officer, board, or body authorized by law to conduct an hearing or inquiry. This section shall not apply in cases where the employee is a litigant, defendant or other principal party or has apersonal or familial interest in the case or proceeding. . . . (Emphasis added).

Respondent's Policy and Procedures Manual also has a section dealing with Other Paid Leave, which states, in pertinent part:

> Court, Jury, and Hearing Purposes - When an employee is directed by proper authority to appear as a witness for the Federal or State Government, a political subdivision thereof, or to attend court in any capacity in connection with an official state duty, he/she shall be entitled to Other Paid Leave. Expenses (mileage, lodging, etc.) in connection with this duty will be reimbursed in accordance with State travel regulations. . . .

R. Ex. 4.

Grievant argues his absence was caused at the direction of his employer in connection with an official inquiry into allegations made by Carla Adams. Respondent argues the above provisions do not apply to internal investigations, and further, there was no “official inquiry” going on during Grievant's absence.

The evidence shows there was a formal internal investigation ordered after Carla Adams' first allegations in 1995. That investigation lasted from approximately September 1995 through December 1995, resulting in a conclusion that Ms. Adams' allegations were without merit. Then, around August 1996, Ms. Adams began making allegations against Grievant again, but no investigation was commenced as a result of these allegations. The belief among her superiors, including Mr. Wyatt and Mr. Frantz, was that these allegations were also without merit. She was called into a meeting and given an opportunity to present evidence to substantiate her allegations, which resulted in no further action.

On September 25, 1996, Ms. Adams' husband came to the Welch Job Service office and threatened Grievant for allegedly making sexual advances towards Ms. Adams in the workplace. Ron Wyatt talked to Grievant after this incident, as well as to Mr. and Ms.Adams, and concluded there was nothing to Ms. Adams' allegations. No formal internal investigation resulted from this incident.

Mr. Wyatt and Mr. Frantz determined it would better for all involved for Grievant and Ms. Adams not to be in close proximity for awhile, and Mr. Wyatt told Grievant to stay home for a few days, while they took steps to secure the office. It was not within Mr. Wyatt's authority to grant Other Paid Leave, and he went to Mr. Frantz to see if he could get Other Paid Leave for Grievant. Grievant was granted Other Paid Leave from September 26 through September 30, 1996, primarily because of the concerns about the safety of the work place. After the locks were changed, police were notified, and Ms. Adams was instructed to keep her husband away from the work place, Mr. Wyatt and Mr. Frantz believed it was safe for Grievant to return to work.

In a telephone conversation on October 1, 1996, Mr. Wyatt and Mr. Frantz told Grievant he could apply for Other Paid Leave for the three previous days' absences, but he would not be able to use Other Paid Leave for any further absences from work. Grievant told them he was still apprehensive about working with Ms. Adams. They told him he could work in the Bluefield office while Ms. Adams was still in the work place, but Grievant declined that opportunity. Grievant remained off work until October 11, 1996, when Carla Adams took sick leave. When he returned on October 11, 1996, Grievant submitted applications for sick leave for that time off, which were approved.

Even stretching the meaning of the word “inquiry” in the Other Paid Leave policy to include internal administrative investigations, it is clear there was no such “inquiry” going on at the time Grievant took his leave from employment in October 1996. Clearly, Respondent was trying to do

Grievant a favor in light of the circumstances by granting himOther Paid Leave for the three days he was off while the work place was being secured. As Grievant even concedes, it was within Respondent's discretion to do so. Conversely, it was within Respondent's discretion to deny him Other Paid Leave for any further absences, after it felt it had secured the work place, and offered Grievant an opportunity to work in the Bluefield office.

Respondent did not violate the Other Paid Leave policy because Grievant's absences did not fall within the authorized Other Paid Leave absences. Further, Grievant's continued absences after he was unequivocally told he would not be granted Other Paid Leave are not covered by that policy, and it was Grievant's choice to remain home and take sick or annual leave.

It was not arbitrary and capricious or an abuse of discretion for Respondent to deny Grievant Other Paid Leave for his absences from October 1 through October 11, 1996. The arbitrary and capricious standard of review of personnel decisions requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the agency. See generally, Harrison v. Ginsberg, 286 S.E.2d 276 (W. Va. 1982). 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).

Clearly, Mr. Wyatt and Mr. Frantz took the situation in the Welch Job Service office seriously, and felt they had done everything they could do to alleviate Grievant's concernsabout his safety. It is clear Grievant wanted them to dismiss Ms. Adams, and it is unclear what steps were being taken in that regard, but in any event, Ms. Adams took sick leave on October 11, and did not return to work. She resigned in December 1996. It was ultimately Grievant's choice to remain at home, even after being offered the opportunity to work out of the Bluefield office. Grievant submitted leave requests for sick leave for that time, which were approved, and Grievant is not entitled to anything more.

CONCLUSIONS OF LAW

1. Grievant bears the burden of proving his allegations by a preponderance of the evidence. See W. Va. Code § 29-6A-6. Mowery v. W. Va. Dept. of Nat. Resources, Docket No. 96-DNR-218

(May 30, 1997).

2. The arbitrary and capricious standard of review of personnel decisions requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the agency. See generally, Harrison v. Ginsberg, 286 S.E.2d 276 (W. Va. 1982).

3. 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).

4. Grievant failed to prove the West Virginia Division of Personnel Administrative Rules, Section 15, governing Other Paid Leave, applies to internal agency investigations. 5. Grievant has failed to prove by a preponderance of the evidence that Respondent's decision to deny him Other Paid Leave for the period October 1 through 11, 1997, was arbitrary or capricious, or a violation of its own or the Division of Personnel's policies.

Accordingly, this grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision 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. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: April 24, 1998

Footnote: 1

Grievant was represented by Stephen D. Paesani, Esq., and the Bureau of Employment Programs was represented by Eugene Dickinson, Assistant Attorney General.