JOHN M. BOWMAN, SR.,

Grievant,

v. Docket No. 05-DOH-047

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

John M. Bowman, Sr., ("Grievant"), employed by the Division of Highways ("DOH") as a Project Supervisor, filed a level one grievance on November 10, 2004, in which he alleged,

I requested 10 hours off to see the doctor about my back. This was a holiday and a regular work day. The contractor worked 13 hours that day (Nov. 2, 2004) Election day.

For relief, Grievant requested ten hours of "sick pay" for the day in question.

After the grievance was denied at levels one through three, appeal to level four was made on February 14, 2005. Grievant, representing himself, and DOH counsel Barbara Baxter, agreed on June 2, 2004, to submit the grievance for decision based upon the record. The grievance became mature for decision the same day since the parties waived the opportunity to file proposed findings of fact and conclusions of law.

The following facts, derived from the lower-level record, are undisputed, and may be set forth as formal findings of fact.

Findings of Fact

1. Grievant has been employed by DOH as a Project Supervisor in District Six at all times pertinent to this grievance. 2. Grievant is required to work when DOH contractors work, regardless of whether the day is a State holiday.

3. Grievant was scheduled to work ten hours on Election Day, November 2, 2004.

4. On October 18, 2004, Grievant completed an "Application for Leave with Pay,"

requesting ten hours of sick leave for November 2, 2004. The application was approved by his immediate supervisor.

5. Grievant was compensated for eight hours of holiday pay, but was ultimately denied the ten hours of sick leave.

Discussion

Grievant argues that in addition to the eight hours of holiday pay, he is entitled to ten hours pay for the sick leave he requested. DOH asserts that Grievant was properly compensated for the paid holiday. 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 W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Howell v. W. Va.Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. 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). Two sections of the Department of Transportation Administrative Procedures are relevant in this instance. Section II "Work Schedules and Attendance", Subsection D "Overtime and Holiday Work Policies," Paragraph 4 states:

Full-time employees who are required to work holidays will be paid for the actual number of hours worked plus an additional eight hours for the holiday.

Section III "Authorized Leave Policies", Subsection A "Leave with Pay Policies," Paragraph 5(d) provides that:

Employees who work alternative schedules that require them to work on holidays will be given the time off on another day . . ., or may be paid for eight hours of holiday leave in addition to being paid for the hours actually worked.

Grievant mistakenly interprets these policies to mean that because he was scheduled to work on a holiday, he is entitled to pay for the sick leave he requested for that day. DOH Employee Relations Manager Drema Smith testified at level two that the holiday leave policies

are applied only to employees who actually work on a holiday. Because there is no policy which directly addresses this situation, it will be reviewed under the arbitrary and capricious standard.

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 isrecognized 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 her judgment for that of [the employer]." Blake v. Kanawha County Bd. of Educ., Docket No. 01-20-470 (Oct. 29, 2001).

Grievant seeks monetary compensation rather than accrued leave because he will be retiring within a short time, and wants to enhance his income for pension purposes. While this is understandable, it is doubtful that an additional ten hours pay would have a significant effect on his retirement benefits. Further, Grievant retains the ten hours sick leave, a form of compensation which may be used upon retirement to purchase health insurance. Because Grievant was paid for the holiday, and was not required to use sick leave, even though he was scheduled to work that day, he has been fully compensated. Under the circumstances of this case, it cannot be determined that DOH has acted in an arbitrary and capricious manner, and Grievant has otherwise failed to prove by a preponderance of the evidence that he was entitled to be paid for sick leave on a state holiday.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

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 W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Howell v. W. Va.Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. 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. 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. DOH's interpretation of policies which address employee compensation for holiday work is neither arbitrary and capricious, nor is it clearly wrong.

4. Grievant failed to prove by a preponderance of the evidence that he was entitled to take sick leave when he was absent from work on a state holiday.

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 29-6A-7 (1998). 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. 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

DATE: JUNE 23, 2005

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE