# THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

# GRIEVANCE BOARD

**STEPHANIE SWANSON**

**Grievant,**

**v. Docket No. 06-DMV-065**

**DIVISION OF MOTOR VEHICLES,**

**Respondent.**

## D E C I S I O N

**Grievant, Stephanie Swanson, is employed as a Customer Service Representative by the Division of Motor Vehicles ("DMV"). She filed this grievance on December 2, 2005, because she was required to use sick leave when she went home feeling sick due to conditions in the work place. The relief sought is the return of her sick leave.**

**The grievance was denied at all lower levels. Grievant appealed to Level IV on February 21, 2006, and on May 1, 2006, a Level IV hearing was held.** (See footnote 1) **Grievant represented herself, and DMV was represented by Janet James, Assistant Attorney General. This case became mature for decision on June 2, 2006, after receipt of the parties' proposed findings of fact and conclusions of law. 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 employed as a Customer Service Representative at the DMV Call Center at**

**1615 Washington Street in Charleston, West Virginia.**

**2. The employees at the Call Center have repeatedly complained about the poor working conditions in the building, including the intermittent smell of sewer gas.**

**3. On September 6, 2005, at the request of DMV, the Department of Health and Human Resources' Office of Environmental Health Services conducted an investigation to determine if the building at 1615 Washington posed any possible health threat to DMV employees.**

**4. By report dated October 5, 2005, Anthony Turner, Assistant Director of the Radiation, Toxics and Indoor Air Division, found the building had multiple problems and posed risks to the employees housed there.**

**5. Mr. Turner found the indoor carbon dioxide levels he collected all exceeded 1000 parts per million ("ppm"), and noted normal indoor carbon dioxide concentrations are between 300 ppm to 350 ppm. At the time of the assessment, the outside reading of carbon dioxide levels were 390 ppm. If carbon dioxide levels exceed 1000 ppm, and the only source is exhaled air, inadequate ventilation is the usual cause. Mr. Turner noted that inadequate ventilation can cause widespread complaints from the inhabitants of the building. While the carbon dioxide level in Grievant's building did not represent a health hazard in itself, it suggests the concentration of other contaminants normally present in the office environment may also be elevated. The elevation of these other contaminantsfrequently contributes to health complaints, such as headaches, fatigue, and eye and throat irritation.**

**6. Mr. Turner also found that while the relative humidity readings were in the acceptable range, these levels were not well regulated within the building. He noted low relative humidity could result in dryness of skin and nasal and throat passages, and high relative humidity could foster the growth of mold and mildew. Mr. Turner detected a moldy odor when he entered the building and found mold growing on a wall, wet ceiling tiles stacked in a storeroom, ceiling tiles missing or stained from past and present moisture, a wall bulging from excess moisture, evidence on past and present water leaks, the rear parking lot allowed water to drain into the building, second floor toilets leaking onto the first floor, and that during the flood of August 29, 2005, water had run down the inside walls of both the front and rear of the building.**

**7. Additionally, Mr. Turner found floor tiles were loose, chipped, and missing, and there**

**was a possibility that either the tiles or the mastic contained asbestos. Further, files and excess equipment were stockpiled on floors, in hallways, and other areas, preventing janitorial access to clean the offices properly.**

**8. Mr. Turner made multiple recommendations including: 1) review of the HVAC systems to insure sufficient fresh air; 2) free return grills from obstruction; 3) sample floor tiles; 4) divert surface water; 5) prevent moisture that causes mold; 6) correct water leaks within 24 hours; 7) remove and replace materials that cannot be throughly dried, i.e., sheet rock, insulation and carpeting; and 8) increase routine housing keeping and maintenance.**

**9. The day of Mr. Turner's investigation, the intermittent problem of sewer gas was not present. 10. On November 22, 2005, Grievant came to work and her area of the building smelled strongly of sewer gas. This odor made her nauseated and caused her to choke. Around 2:00 p.m. she asked to go home, but was told she must use sick leave. Grievant did not believe this was correct, but did apply for and take sick leave.**

**11. On November 23, 2005, Grievant again came to work, again her area was filled with the stench of sewer gas, and again this odor made her sick. She again was told if she left she had to take sick leave and she did, but she was upset, as she did not think this requirement was appropriate.**

**12. Grievant did not go to a doctor for this problem, as she felt better once she was away from the smell.**

**13. Several other employees were sickened by the smell, and they also were required to take sick leave when they went home.**

**14. Other employees stayed even though they did not feel well because they did not think it was right to be forced to take sick leave when their problems were caused by the work place.**

**15. Director Peter Lake came to the building and agreed there was an acrid odor, and it was "not what I'd like it to be," but it was not "unbearable." He returned to the Capitol. Director Lake also testified no one ever told him the building had any health hazards.**

**16. Sewer gas is defined as "gases produced in sewers by decomposing sewage and other decomposing organic matter." It "is a mixture of gases formed during the decomposition of household or industrial wastes. These include hydrogen sulfide,ammonia and methane**

**(which are highly toxic), as well as carbon dioxide, sulfur dioxide and nitrogen oxide."** **(See footnote 2)**

**17. "Exposure to low levels of [hydrogen sulfide] can irritate the eyes, cause a cough or sore throat, shortness of breath and fluid accumulation in the lungs. Prolonged low-level exposure may cause fatigue, loss of appetite, headaches, irritability, poor memory and dizziness. . . . At very high concentrations, hydrogen sulfide can cause loss of consciousness and death." Id.**

**18. "The other toxic component of sewer gas is methane, which interferes with the oxygen-carrying capacity of blood and can cause suffocation and death when you inhale high concentrations. Exposure to low levels causes headache, nausea and drowsiness." Id.**

**19. DMV has made some attempts to correct problems within the building, but did not specify what these were.**

**20. The Division of Personnel's Policy on "Emergency Situation/Inclement Weather" states "employees may be released from work without loss of pay or charged to annual leave by Executive Declaration by the Governor . . . as a result of emergency situations and/or inclement weather." Respondent. No. 1 at Level IV.**

## Issues and Arguments

**The issue presented by this grievance is clear. The question is whether an employee should be forced to take sick leave when their illness or sickness is caused by the condition of the building in which they work. Grievant asserts she should not have touse her sick leave, and Respondent argues Grievant must use her sick leave and can only be excused if the governor calls a state of emergency.**

## Discussion

**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 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).

DMV argued Grievant did not seek medical care in this situation, so she has no proof the sewer gas made her ill. Just because Grievant did not go to the doctor does not mean Grievant did not feel sick, she did not need to leave the building filled with sewer gas, or she should have gone to the doctor. Away from the building she felt some relief. Further, a state employee is not required to submit a doctor's slip until they are absent for greater than three days. Division of Personnel Administrative Rule 143 C.S.R. 1 § 14.4 (g) 2.

Grievant does not hold a position that would be expected or required to be exposed to difficult working situations, noxious gases, or other dangerous situations. There are such positions within the State, and these employees are frequently compensated for thesituations in which they are placed. Those issues would not apply here. Grievant works in the call center as Customer Service Representative, and it is not an expectation of her position to work in a situation that is hazardous.

DMV's argument that the Division of Personnel's Policy on "Emergency Situation/Inclement Weather" applies here, and Grievant could only be excused from work if the governor issues a declaration is without merit here. There are many times when a director or administrator closes a building or an area for good reasons, and no declaration is issued. Examples of this type of closure would be flooding and electrical failure.

Sick Leave is defined as "[a]n earned employee benefit of paid time off as specified by this rule for illnesses, injuries and other circumstances." Division of Personnel Administrative Rule 143 C.S.R. 1 § 389. Division of Personnel Rules do not address the issue of what to do when the employee's illness caused by the building in which they work. W. Va. Code § 29-6A-5(b) states an administrative law judge may:

> provide relief as is determined fair and equitable in accordance with the provisions of this article, and take any other action to provide for the effective resolution of grievances not inconsistent with any rules of the board or the provisions of this article: Provided, That in all cases the hearing examiner has the authority to provide appropriate remedies including, but not limited to, making the employee whole. provide relief as is determined fair and equitable in accordance with the provisions of this article, and take any other action to provide for the effective resolution of grievances not inconsistent with any rules

**of the board or the provisions of this article: Provided, That in all cases the hearing examiner has the authority to provide appropriate remedies including, but not limited to, making the employee whole.**

**The undersigned Administrative Law Judge finds it is inappropriate for an employer to require an employee to use an earned benefit/sick leave to remove herself from a work situation that makes her ill and is potentially dangerous. Grievant had no part in the state of affairs in which she found herself. It is noted many state employees closely guard theirsick leave to pay for medical insurance upon retirement. If employees are required to use their sick leave when they want to work, but cannot because the employer has failed to fix a known problem, the employee should not be penalized. See Guerin v. Mineral County Bd. of Educ., Docket Nos. 92-28-422/459 (Jan. 31, 1996).**

**The above-discussion will be supplemented by the following 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). "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. Sick Leave is defied as "[a]n earned employee benefit of paid time off as specified by this rule for illnesses, injuries and other circumstances." Division of Personnel Administrative Rule 143 C.S.R. 1 § 389.**

**3. Division of Personnel's Policy on "Emergency Situation/Inclement Weather" is not applicable to Grievant's situation. 4. Grievant has met her burden of proof and established she should not have been required to take sick leave with this set of facts. See Guerin v. Mineral County Bd. of Educ., Docket Nos. 92-28-422/450 (Jan. 1, 1996).**

**5. Pursuant to W. Va. Code § 29-6A-5(b) an administrative law judge may "provide relief as is determined [to be] fair and equitable. . . ."**

**Accordingly, this grievance is GRANTED. DMV is Ordered to credit Grievant's sick leave with the leave she was required to take on November 22 and 23, 2005. Additionally, DMV is directed to evaluate the sewer gas problem and, resolve this issue to insure the health and safety needs of its employees are met.**

**Any party, or the West Virginia Division of Personnel, 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.**

**JANIS I. REYNOLDS**

**SENIOR ADMINISTRATIVE LAW JUDGE**

**Date: July 31, 2006**

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***Footnote: 1***

***Grievant agreed to an extension for the issuance of the Level III Decision at the request of the Grievance Evaluator because the Commissioner was looking into the problems with the building and possible resolutions of the issues. The Grievance Evaluator appeared to agreed there were problems with the building, and he hoped to give Grievant an in-depth answer to these issues. Level III Trans. at 19 & 20. The Level III hearing was held on January 12, 2006, and the Level III Decision issued on February 13, 2006 was basically two pages long, incorrectly identified the dates Grievant was absent, and denied the grievance because the governor had not called a state of emergency, and DMV had not violated any rules or statues. The Decision did not speak to any of the issues raised by Grievant about the conditions in the building.***

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***Footnote: 2***

***Sewer gas, http://en.wikipedia.org/w/index.php?title=Sewer_gas&oldid=64868107 (last visited July 31, 2006).***