THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

TERRANCE PALMER,

Grievant,

v. **DOCKET NO. 06-DOH-340**

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

DECISION

Grievant, Terrance Palmer, filed this grievance on June 12, 2006, stating, “I feel that the warning I received on 6/2/06 for being 2 minutes late on 4/13/06 and docked 15 minutes is unjust. It is a violation of DOP 14.6 and US Dept. of Labor 29 CFR 785.48.” His stated relief sought is, “Request the docked 15 minutes be restored with full wages and benefits, the warning be removed from my personnel file and to be made whole in any other way.”

A level four hearing was held in the Grievance Board's Charleston office on December 8, 2006. Grievant was represented by Pat Ramey of American Federation of State, County and Municipal Employees, and Respondent was represented by Barbara Baxter, Esq. The matter became mature for decision on January 10, 2007, the deadline for filing of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant asserts Respondent violated Department of Transportation (“DOT”) Administrative Procedures, Volume III, Chapter 10 §§ 3 and 4. Grievant also alleges Respondent failed to use progressive discipline to remedy the issue of tardiness. Grievant avers that he was disciplined for being late, while others were not. Respondent argues Grievant was not treated differently than other employees. Respondent also asserts it did not violate any regulations concerning discipline.

Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievant is employed by Respondent as a Transportation Worker 2, Craftworker.

2. Grievant is required to report for work at 7:30 a.m.

3. On April 13, 2006, Grievant reported to work at 7:32 a.m., two minutes late. After clocking into work, Grievant did not begin working, but instead went to the employee break room.

4. Respondent requires that when an employee is late for work and does not request annual or sick leave, his/her work hours are docked for that day in one-quarter hour increments. 5. Even though Grievant was aware of the procedure, he did not request sick or annual leave on April 13, 2006.

6. Grievant's lateness was not discovered by Respondent until the following day when the employee charged with reporting work hours for attendance viewed the time cards from the day before.

7. Grievant's pay was docked one-quarter hour for the work day of April 13, 2006, and he received a written warning of disciplinary action for unauthorized leave.

8. Employee lateness creates problems in accomplishing necessary work.

9. Another employee was also late for work on April 13, 2006.

10. That employee was docked one-quarter hour and given notice of unauthorized leave for being late on April 13, 2006, and failing to take leave.

11. Employees must sign their record of hours before receiving their paychecks. This provides notice to each employee of the exact amount of time Respondent has calculated the employee has worked within the time period. Employees are responsible for reviewing the records to ensure they are correct.

12. Grievant's supervisor does not monitor the time clock daily to determine who is late, as it is not logistically feasible, given the time clock's physical location. Instead, the employees have been told if they arrive late, they are to take sick or annual leave. Failure to do this, will result in their pay being docked one-quarter of an hour.

13. On June 7, 2006, Grievant received a written warning of disciplinary action for unauthorized leave for reporting to work late on April 13, 2006. The written warning was issued in

June because it took time for the paperwork to be processed.

14. Grievant has been tardy for work in the past, but has always requested sick or annual leave.

Discussion

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. *W. Va. Code* § 29-6A-6; *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 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). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

Grievant asserts Respondent's actions were arbitrary and capricious. 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 was 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)." *Trimboli v. Dep't of Health and Human Resources*, Docket No. 93-HHR-322 (June 27, 1997). 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)). "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]. *See generally*,*Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982)." *Trimboli*, *supra*, *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

DOT Administrative Procedure, Volume III, Chapter 10 § IV states:

(1) If an employee is tardy for work and has failed to notify the immediate supervisor in advance,

he/she may be placed in unauthorized leave status.

(2) If this action is taken and the tardiness is less than 1/4 hour (or not on the quarter hour: e.g. beginning of shift is 7:30 and employee comes in at 8:05), the employee is not to be allowed to begin work until such time as the total unauthorized leave can be counted in 1/4 hour increments.

(3) The immediate supervisor is to instruct the employee (in the presence of one witness) that he or she may either leave the work premises or sit in the supervisor's office for the period of time needed to complete the 1/4 hour in question and cannot be placed in unauthorized leave status.

West Virginia Division of Personnel Administrative Rule, 143 CSR 1 states:
14.6 Unauthorized Leave - When an employee is absent from work without authroization for sick or annual leave, the appointing authority shall dock the employee's pay in the next pay period for an equal amount of time paid during which no work was performed. The appointing authority shall notify the employee in writing that his or her pay is being docked and that the unauthorized leave is misconduct for which discipline is being imposed. The appointing authority shall use unauthorized leave on in cases when the employee fails to obtain the appropriate approval, according to agency policy, for the absence. The appointing authority shall transmit notice of the action in writing to the Director of Personnel.

Respondent's actions were not arbitrary and capricious. Clearly, Grievant clocked in two minutes late and did not request annual or sick leave. There was evidence presented at the Level IV hearing that Grievant did not begin work upon clocking into work.

Grievant asserts Respondent did not follow these procedures when docking his pay and issuing his written warning. It is well established that "[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723, 238S.E.2d 220 (1977); *Bailey v. W. Va. Dep't. of Transp., Div. of Highways*, Docket No. 94-DOH-389 (Dec. 20, 1994); *Parsons v. Dep't. of Transp*., Docket No. 97-DOH-289 (Oct. 30, 1997).

Grievant argues Respondent failed to follow the administrative policies because Grievant's immediate supervisor, Mike King, did not immediately inform Grievant he was to leave the premises or sit in Mr. King's office for the time needed to complete the 1/4 hour in question. Respondent was not able to comply with that requirement because Grievant's tardiness was not discovered until the

following day. However, Mr. King testified Grievant did not immediately begin work, but instead went into the employee break room.

Grievant also asserts Respondent violated its policy because Grievant argues he was not notified his pay was docked until June 7, 2006, when he received the written warning. Grievant was notified of the change in pay when he received his paycheck and signed the record of hours. However, Mr. King should have discussed the issue with Grievant and explained that a written warning would be issued.

"An error which is not prejudicial to the complaining party is harmless and does not require reversal of the final judgment." *Syl. Pt. 5, Miller v. Bd. of Educ. of Boone County*, 190 W. Va. 153, 437 S.E.2d 772 (1980); *Syl. Pt. 2, Robertson v. Truby*, 170 W. Va. 62, 289 S.E.2d 736 (1982). While Respondent should have been more proactive in informing Grievant of the decision to dock his pay, it is clear Grievant knew he was late and had been previously instructed as to the consequences. Because Grievant was aware of the requirements, he was not prejudiced by Respondent's omissions. Respondent has met its burden of proving Grievant was tardy and did not request annual or sick leave, and was therefore on unauthorized leave on April 13, 2006.

Discrimination alleged to counter disciplinary action is an affirmative defense. Where a defense is raised by a grievant in a discipline-based claim, it is his burden to establish the validity of that defense. *Young v. W. Va. Dep't. of Health and Human Res.*, Docket No. 90-HHR-541 (Mar. 29, 1991).

"Discrimination means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." *W. Va. Code* § 29-6A-2(d). In order to establish a claim of 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 Bd. of Educ. 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).

Grievant asserts that other employees were tardy both prior to and after April 13, 2006. Therefore, he believes he was singled out when his pay was docked. Respondent counters by arguing employees who were late and were caught were dealt with accordingly. Respondent did not discriminate against Grievant. When Grievant's tardiness was discovered, so was the tardiness of a co-worker. Grievant's co-worker was docked pay, just like Grievant. Simply because Respondent sporadically reviews time cards to verify an employee's hours worked, does not mean Grievant was the victim of discrimination.

Grievant has also argued Respondent violated the Fair Labor Standards Act §29 CFR 785.48 which states:

(a) Difference between clock records and actual hours worked. Time clocks are not required. In those cases where time clocks are used, employees who voluntarily come in before their regular starting time or remain after their closing time, do not have to be paid for such periods provided, of course, that they do not engage in any work. Their early or late clock punching may be disregarded. Minor differences between the clock records and actual hours worked cannot ordinarily be avoided, but major discrepancies should be discouraged since they raise a doubt as to the accuracy of the records of the hours actually worked.

(b) “Rounding” practices. It has been found that in some industries, particularly where time clocks are used, there has been the stopping time to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour. Presumably, this arrangement averages out so that the employees are fully compensated for all the time they actually work. For enforcement purposes this practice of computing working time will be accepted, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.

Grievant asserts Respondent should adhere to this provision. Specifically, Grievant wants

Respondent to avoid minor differences between clock records and actual hours worked. This is not a minor discrepancy. Grievant was late for work, clocked in late for work, and proceeded to the employee break room. When Grievant's time card was reviewed, his tardiness was realized, and Respondent took the necessary steps to discipline him. Respondent did not violate this provision.

The following conclusions of law support this discussion:

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. *W. Va. Code* § 29-6A-6; *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 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). Where the evidence equally supports both sides, the employer has not met its burden. *Id.*

2. 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 was 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)." *Trimboli v. Dep't of Health and Human Resources*, Docket No. 93-HHR-322 (June 27, 1997).

3. 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)). "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]. *See generally*, *Harrison v. Ginsberg*,169 W. Va. 162, 286 S.E.2d 276, 283 (1982)." *Trimboli*, *supra*, *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

4. “An error which is not prejudicial to the complaining party is harmless and does not require

reversal of the final judgment." *Syl. Pt. 5, Miller v. Bd. of Educ. of Boone County*, 190 W. Va. 153, 437 S.E.2d 772 (1980); *Syl. Pt. 2, Robertson v. Truby*, 170 W. Va. 62, 289 S.E.2d 736 (1982).

5. Respondent has met its burden of proving Grievant was tardy and did not request annual or sick leave, and was therefore on unauthorized leave on April 13, 2006.

6. While Respondent did not comply with all the requirements of its policy, Grievant was not prejudiced by Respondent's omissions.

7. Where a defense is raised by a grievant in a discipline-based claim, it is his burden to establish the validity of that defense. *Young v. W. Va. Dept. of Health and Human Res.*, Docket No. 90-HHR-541 (Mar. 29, 1991).

8. "Discrimination means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." *W. Va. Code* § 29-6A-2(d).

9. In order to establish a claim of 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 Bd. of Educ. 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).

10. Grievant did not meet his burden of proving he was treated differently than similarly situated employees.

For the foregoing reasons, this grievance is hereby **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, and 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: March 19, 2007

_____

Wendy A. Campbell

Administrative Law Judge