THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LINDA ANN HYPES,

Grievant,

v. **DOCKET NO. 2008-1648-DOT**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

DECISION

Linda Ann Hypes ("Grievant") challenges the decision, by Respondent Department of Transportation/Division of Highways ("DOH"), denying her overtime pay for annual leave. The May 19, 2008, statement of grievance provides, in part, that:

> I was denied 8 hours annu[al] leave on Thur May-15-08 & Friday May-16-08 while other [e]mployee's was [sic] off on sick or annu[al] leave on Mon. [,] Tues[.,] Wed.[,] Thur. and worked Friday for a total of 50 hours for the week[.]

As relief, the Grievant seeks "eight hours of annual leave for May 15[,2008] and May 16[, 2008] and credit for my [Grievant's] sick leave."

On July 2, 2008, this grievance was denied at Level One. A Level Two mediation, held on September 18, 2008, was unsuccessful. A Level Three hearing was held before the undersigned in Beckley, West Virginia, on January 12, 2009. Grievant appeared pro se. Respondent appeared by and through its counsel, Barbara L. Baxter, Esquire. This matter became mature for decision on February 12, 2009, the deadline for submitting proposed findings of fact and conclusions of law. The Respondent has submitted proposed findings of fact and conclusions of law.

Synopsis

During the period of time at issue, Grievant's "work group" was working a mandatory fifty-hour workweek. Grievant was not permitted to take annual leave after her initial forty hours, so as to receive overtime pay for leave. Grievant generally alleges that the DOH overtime policy is arbitrary and capricious. She further claims she was discriminated against. She claims that other DOH employees have been permitted to use sick and annual to receive overtime pay.

Respondent DOH argues that it violated no law or rule when it refused to pay Grievant overtime for time she did not work. DOH recognizes that errors have occurred in the past and claims that these errors were promptly corrected.

DOH policy does not permit an employee to use sick or annual leave at the end of a workweek to receive overtime pay. Grievant has cited no law or rule that the policy violates. Grievant has not established, by a preponderance of the evidence, that the DOH policy is arbitrary and capricious. Nor has she established that she was discriminated against. This grievance is **DENIED**.

Based upon a detailed review of the record, the undersigned makes the following findings of fact:

Findings of Fact

1. Grievant is employed by the DOH as a Transportation Worker II, Craft Worker, at the substation in Lookout, Fayette County, West Virginia.

2. The DOH, by written policy, follows a standard forty-hour workweek from 7:30 a.m. to 4:00 p.m., Monday through Friday, with a half-hour unpaid lunch. Level Three,

Grievant's Exhibit 6.

3. The Grievant's "work group" was working a temporarily altered schedule of five ten-hour days, Monday through Friday, for the workweek of May 11, 2008, through May 16, 2008.

4. On May 5, 2008, the Grievant filled out forms attempting to take annual leave for Thursday, May 15, 2008, and Friday, May 16, 2008. She requested eight hours of annual leave for each day.

5. The Grievant needed May 15, 2008, and May 16, 2008, off to have dental work completed. She would be without her dentures on these days.

6. For the workweek of May 11, 2008, through May 16, 2008, the Grievant worked a total of 28 hours on Monday, Tuesday and Wednesday. She requested eight hours of annual leave for Thursday and eight hours of annual leave for Friday, for a total of forty-four hours. Grievant's request for annual leave was denied; however, she was permitted to take sick leave (without overtime pay).[1]

7. The Division of Highway's overtime policy provides that once an employee has completed forty hours of work, the employee may not be awarded paid leave. An employee is permitted to use sick or annual leave during the initial forty hours of work. Jeff Black, DOH Director of Human Resources, explained that the reason for this policy is because it would be administratively burdensome and difficult for the DOH to retroactively look back at the end of the week to adjust for leave when a "work group" is working a

[1] It is unclear from the record how many hours of sick leave the Grievant was permitted to take.

temporary fifty-hour workweek.[2]

8. Recently, DOH has become aware that its overtime policy was not being strictly followed in all organizations. *See* Level Three Testimony, Jeff Black.

9. Other employees were erroneously paid for overtime not worked at the end of a workweek. However, upon finding out about the error, Steve Cole, District Manager/Engineer for DOH District 9, corrected the mistakes and made deductions to other employees' wages.

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. Public Employees Grievance Bd., 156 C.S.R. 1 § 4.21 (2008). "The generally accepted meaning of preponderance of the evidence is 'more likely than not.'" *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004).

The Grievant must establish, by a preponderance of the evidence, that the DOH policy, or application thereof, is 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." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997)(citation omitted). "Arbitrary and capricious actions have been found to be closely

---

[2] The "old" policy apparently required the DOH to look back and count only the number of hours actually worked during the initial forty hours, for the purpose of calculating overtime payment at the end of the workweek. *See* Level Three, Grievant's Exhibit 6.

related to ones that are unreasonable." *State ex rel. Eads v. Duncil*, 198 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)).

In this grievance, there are three issues to be determined: (1) whether the denial of annual leave was arbitrary and capricious, (2) whether DOH's overtime policy is arbitrary and capricious and (3) whether Grievant was discriminated against.

First, the Grievant maintains that the DOH's decision refusing her request to take annual leave, but permitting her sick leave was arbitrary and capricious. Under DOH policy, annual leave must be approved and may not interfere with the operation of the agency. *See* Level Three, Respondent's Exhibit 2, Grievant's Exhibits 4 and 6. *See also* 143 C.S.R. 1 § 3.6 (recognizing that annual leave requires prior approval). The facts in this case provide that the Grievant was requesting time off to have dental-type work performed. The precise nature of the work is not in the record; however, it was related to the Grievant's dentures.[3] *See* Level Three, Grievant's Testimony. The facts also indicate that the Grievant's "work group" was working a temporary fifty-hour workweek. *Id*. In light of the evidence and the policy, it cannot be said that the DOH's denial of the Grievant's annual leave was arbitrary and capricious. She was permitted to take sick leave.

---

[3] Grievant has not demonstrated or surmised that this was a non-medical procedure. *See* Level Three, Respondent's Exhibit 2; Grievant's Exhibit 6 (recognizing that sick leave is appropriate for routine dental appointments); 143 C.S.R. 1 § 14.4 (recognizing dental procedures as a permissible reason for sick leave).

The next issue is whether the Grievant is entitled to overtime payment for work not performed. DOH policy, effective from August 15, 2003, to August 14, 2008, provides that:

> [l]eave with pay is not permitted after an employee has already accumulated 40 hours work time and/or paid leave within a workweek. If an employee performs work after the accumulation of 40 hours of work time and/or paid leave, any leave hours attributable to the first forty hours are still paid.

See Level Three, Grievant's Exhibit 5. DOH policy does not permit any employee to use sick leave or annual leave at the end of a workweek in a manner that would permit the employee to receive overtime payment for hours not actually worked. *See* Level Three, Respondent's Exhibits 1 and 2, Grievant's Exhibits 5 and 6. The evidence suggests that an employee could use sick or annual leave prior to obtaining forty hours for a particular workweek. However, once an employee accrued forty hours in a workweek, overtime payment may not be received for hours not worked.

The Division of Personnel rules do not specifically address mandatory work weeks and leave time. However, they do generally provide that overtime pay must be in accordance with wage and hour law. 143 C.S.R. 1 § 14.7. The DOH policy is congruent with wage and hour law because wage and hour law does not require that an employee be compensated overtime pay for hours not worked. WEST VIRGINIA CODE § 21-5C-3(a) provides that "no employer shall employ any of his employees for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate of not less than one and one-half times the regular rate at which he is employed." However, WEST VIRGINIA CODE § 21-5C-3(b)(2) specifically excludes "[p]ayments made for occasional periods when no work is performed due to

vacation, holiday, [and] illness ... . " from the overtime payment requirement. *See also* 29 U.S.C. § 207(e)(recognizing that annual leave and sick leave are not treated as hours worked for the purpose of the Fair Labor Standards Act). Based upon wage and hour law, the DOH policy is more favorable to the employees than required by law. The policy permits the employee to count leave time as hours worked, so long as the leave occurs within the initial forty hours.

In this matter, the Grievant did not actually work the hours for which she now seeks overtime payment. Grievant is not entitled to overtime payment. In similar decisions, the Grievance Board has consistently held that "[a]n employer may not require an employee to use more than 40 hours of leave for any workweek, and may not grant an employee paid time off from work at the overtime rate." *Nottingham v. Div. of Corrections/Mt. Olive Correctional Complex*, Docket No. 02-CORR- 141 (Sept. 27, 2002); *Sergent v. Regional Jail and Correctional Facility Author./South Central Regional Jail*, Docket No. 03-RJA-188 (Dec. 30, 2003). The DOH overtime policy is not arbitrary and capricious and is based upon a reasonable rationale. *See* Finding of Fact No. 7, *supra*.

Grievant has not presented any law, rule or policy indicating her entitlement to *overtime* payment for hours spent on sick[4] or annual leave. Grievant has not established,

---

[4] It is unclear whether the Grievant was required to use sick leave to take time off beyond the initial forty-hour workweek. Generally, sick leave is "[a]n *earned employee benefit of paid time* off ... for illnesses, injuries and other circumstances." 143 C.S.R. 1 § 3.86 (emphasis added). In light of the DOP's definition of sick days, it appears that Grievant has a vested right in payment for this benefit at the regular rate of pay. *See generally State ex rel. Crosier v. Callaghan*, 160 W. Va. 353, 236 S.E.2d 321 (1977)(recognizing a state employee's interest in sick days). However, contrast 143 C.S.R. 1 § 5.4 (c) and (d)(discussing standard rates of pay and additional compensation). Because this issue is not addressed by any party and the factual record is unclear, it is not

by a preponderance of the evidence, that it is more likely than not the Respondent's initial denial of annual leave, or its refusal to pay her overtime for sick leave, was arbitrary and capricious.

The third and final determination in this grievance is whether the Grievant was discriminated against. The Grievant maintains that she was discriminated against because some DOH employees received overtime payment for sick and annual leave. "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 either a discrimination or favoritism claim under the grievance statute, Grievant must prove, by a preponderance of the evidence:

> (a) that 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.

See Frymier v. Higher Education Policy Comm., 221 W.Va. 306, 655 S.E.2d 52 (2007);[5] *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005). The Grievant has not established that she was treated differently than any other employee on May 15, 2008, or

---

passed upon.

[5] Although this case addressed discrimination and favoritism as defined by the previous incarnations of the grievance statute, the prior definitions are virtually identical to those contained in the current statute.

May 16, 2008. The DOH policy applies uniformly to all employees and there is no indication that Grievant was singled out. All employees were permitted to receive paid sick and annual leave during a fifty-hour workweek, so long as the leave is taken prior to the employee attaining forty hours of work. No employee was permitted to receive overtime payment for leave hours at the end of a workweek. There is no indication that the policy is discriminatory on its face or was applied in a discriminatory manner.

Though no direct witness testified to the facts, Grievant suggests that other employees were given overtime payment for sick or annual leave at the end of a workweek. *See* Level Three, Grievant's Exhibit 1.[6] In response, the DOH recognizes that errors have occurred in the past and maintains that it corrected any overtime payment received by other employees. *See* Level Three, Testimony of Steve Cole. Grievant has not rebutted this assertion. The mere fact that a mistake occurred does not create an entitlement to erroneous payment. *Ritchie v Dep't of Health and Human Res.*, Docket No. 96- HHR-181 (May 30, 1997); *Decapio/Beauty v. Div. of Highways*, Docket No. 03-DOH-357 (Mar. 11, 2004); *White v. Div. Of Highways*, Docket No. 00-DOH-313D (Jan. 16, 2001). Nor does a mistake that has been corrected create a *prima facie* case of discrimination. There is no evidence to suggest that the policy was applied inconsistently. Grievant has not met her burden of proving discrimination.

In summation, Grievant was given a full and fair opportunity to call witnesses and

---

[6] It is noted that Grievant's Exhibit 6 is a Level Two decision of a different employee where the employee was denied overtime payment for annual leave at the end of a workweek. This decision, presented by the Grievant, does not support her assertion that she is being discriminated against. It evinces just the opposite.

present evidence. Nevertheless, she has not established, by a preponderance of the evidence, that the DOH policy, or the application thereof, was arbitrary and capricious. She has not established, by a preponderance of the evidence, that she was discriminated against. This Grievance must be denied.

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. Public Employees Grievance Bd., 156 C.S.R. 1 § 4.21 (2008).

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

3. The Grievant has not established, by a preponderance of the evidence, that the Respondent's overtime policy is arbitrary and capricious. Nor is there any indication that the Respondent's policy violates any law or rule.

4. In order to establish either a discrimination or favoritism claim under the grievance statute, Grievant must prove, by a preponderance of the evidence:

> (a) that 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.

See Frymier v. Higher Education Policy Comm., 221 W.Va. 306, 655 S.E.2d 52 (2007); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

5. Grievant has not established, by a preponderance of the evidence, that she was discriminated against.

Accordingly, this 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 Order. *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 WEST VIRGINIA 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 (eff. July 7, 2008).

Date: March 5, 2009.

_____

Mark Barney
Administrative Law Judge