THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

PAMELA SCHWARZ,
Grievant,

v. **Docket No. 2009-0953-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR CHILDREN AND FAMILIES,
Respondent.

DECISION

This matter comes on for decision following a level three hearing held in the Grievance Board's Charleston office on May 4, 2010. The grievance was filed on February 5, 2009, alleging "[o]n January 28, 29 Mason County DHHR could not operate due to power failure, employees made to take annual leave." As relief, Grievant seeks "[r]estoration of all lost leave time with interest and to otherwise be made whole."

The grievance was denied at level one by the Respondent's designee because no annual leave deduction had occurred when the level one conference was conducted on March 17, 2009. A level two mediation was conducted on August 24, 2009. Appeal to level three was perfected on that same date. Grievant appeared in person and was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by Jennifer K. Akers, Assistant Attorney General. The matter became mature for decision on June 7, 2010, upon receipt of the last of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant is employed by Respondent as an Economic Service Worker and works in the Bureau for Children and Families office location in Point Pleasant, Mason County, West Virginia. On January 28 and 29, 2009, the Mason County office experienced a power outage. Grievant reported to work on January 28, 2009, as scheduled. Since Grievant reported to work on the first day of the power outage, she was sent home and was "on-call" for work during normal work hours to respond to calls or return to the worksite if directed.

Respondent's policy allows employees sent home from offices which are closed to be on-call and not required to use annual leave. Grievant demonstrated by a preponderance of the evidence that she should not have been made to use six hours of annual leave on January 28. Grievant failed to report to work on January 29, 2009, after an alternative worksite was located, and was appropriately required to use eight hours annual leave for this absence. This grievance is granted, in part, and denied, in part.

The following Findings of Fact are based on the record developed at level three.

Findings of Fact

1. Grievant is employed as an Economic Service Worker in the Mason County office of Respondent's Bureau for Children and Families.

2. Grievant's normal workweek is 8:30 a.m. to 4:30 p.m., Monday through Friday.

3. On January 28, 2009, an ice storm caused a town-wide power outage in Point Pleasant, the location of Respondent's Mason County office. Grievant reported to work on that morning and was told that she could leave, but she would remain on-call should

power be restored. Grievant lives about a half-hour drive from her office.

4. At 10:27 a.m. on that day Grievant's supervisor, Peggy Gillespie, called Grievant and left a message on Grievant's cellular phone that power was restored and she should return to work.

5. Grievant did not receive Ms. Gillespie's phone message until approximately 2:00 p.m. when she was provided with a voice mail alert. Grievant indicated that her cellular phone normally rings through at her home; however, she thought the delay in receiving the message may have been attributed to the power outage caused by the ice storm.

6. The electricity in the Point Pleasant office went out again at 2:00 p.m. and employees at the office were sent home for the remainder of the day. At about the same time, Grievant was informed by a friend working at the Job Service office located across the street from Respondent's Mason County office that it was again closed.

7. On January 29, 2009, the office was again without power. Ms. Gillespie called Grievant on her cell phone at 7:54 a.m. She informed Grievant that there was no power at the office, and that supervisors were currently looking for an alternative worksite.

8. Ms. Gillespie called Grievant again at 9:08 a.m. and informed her that an alternative worksite had been located at Pleasant Valley Hospital and employees were expected to come to work at that location.

9. Grievant did not report to work on January 29, 2009.

10. The on-call employees received their regular salary and were not required to use annual leave for January 28, 2009. Grievant was made to use six hours of annual

leave on January 28, 2009, and was required to use eight hours of annual leave on January 29, 2009.

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 Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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).

Grievant argues that she was released from work on both January 28 and 29, 2009, by her supervisor, that she remained on-call as required by Respondent's policy, and that she did not receive a timely directive on January 28 or a clear directive on January 29 respecting return to work. Respondent argues that the inclement weather policy applies and that employees may use annual leave when weather conditions prevent them from traveling to work. The undersigned agrees that annual leave use by Grievant on January 29 was necessary; however, the inclement weather policy did not apply to Grievant's situation on January 28.

West Virginia Division of Personnel's Emergency Situations/Inclement Weather Policy states that: a) absences due to emergency situations or inclement weather

conditions which make traveling to and from work hazardous may be charged to accrued annual leave; and b) employees may be released from work without loss of pay or charge to annual leave by Executive Declaration or by the Governor's designee as a result of emergency situations and/or inclement weather conditions. The record of this grievance does not establish that an Executive Declaration of the Governor had been made on either day in question.

Respondent's Policy 2103 provides that "employees who are sent away from the worksite due to office closure[1] are placed on-call[2] and may be required to respond to calls and/or return to the worksite during the course of the workday." Additionally, "if employees are released from work due to an officially declared weather or other emergency, and if the employee reported to work on the day of release, the absence subsequent to the office closure shall be recorded as work time with no charge to leave."

Respondent's policy allows designated office closing based upon unique circumstances, and this past winter in the state produced many storms providing unique circumstances. The record is clear that Grievant reported to work as scheduled on January 28 and was released to go home and be on-call. Unfortunately for Grievant she failed to remain available during her normal work hours to respond to a call to return to the worksite based, presumptively, upon her reliance on the use of a cellular phone. In any

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[1]Office closure is defined as "cessation of business conducted by the Department due to an emergency situation for a part or whole day and affecting all or part of the staff and services."

[2]On-call is defined as "a period of time, for inclement weather or office closure purposes, that employees are required to remain available during their normal work hours so that they can respond to calls or return to the worksite when directed."

event, requesting Grievant use six hours of annual seems to be excessive in light of the unique circumstances of this case. If Grievant had responded to the call at 10:30 a.m. to return to work, she would have returned to work approximately 11:00 - 11:30 a.m. Accordingly, she would have worked until 2:00 p.m. when, once again, the office experienced a power outage. Given this time frame, asking that Grievant use two hours of annual leave for January 28 is more in line with Respondent's policy, Respondent's treatment of other employees on that date, and provides fair and equitable relief for Grievant.[3]

Grievant did not report to work on January 29, 2009, after being told that an alternative worksite was being established. The difference in the two situations is easily defined. Grievant has established that Respondent's request that she use six hours of annual leave for January 28th runs contrary to Policy Memorandum 2103, and Respondent's application of the policy was arbitrary and capricious.[4] [5] In Grievant's case, the office was open on January 29th but she could not, or did not wish to, travel to the

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[3]*See Gray v. Div. of Corr.,* Docket No. 02-CORR-029 (Mar. 28, 2002).

[4]"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 Res.*, 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).

[5]"An 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, 238 S.E.2d 220 (1977)." *Morris v. Kanawha County Bd. of Educ.*, Docket No. 99-20-200 (July 27, 1999).

alternative worksite. Since Grievant cannot rely upon the Respondent's policy of being on-call, she was correctly asked to use eight hours annual leave for January 29th because Grievant was not available for work.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. 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 Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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. "An 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, 238 S.E.2d 220 (1977)." *Morris v. Kanawha County Bd. of Educ.*, Docket No. 99-20-200 (July 27, 1999).

3. "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 Res.*, 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).

4. Grievant met her burden of proving Respondent's request that Grievant use six hours of annual leave for her time on January 28, 2009, was a misapplication of its policy, and such action was proven to be arbitrary and capricious. Respondent should have charged no more than two hours of annual leave for that date.

5. Grievant failed to meet her burden of proving Respondent's request that Grievant use eight hours of annual leave for her time on January 29, 2009, was a misapplication of policy, or an arbitrary and capricious act.

For the foregoing reasons, this grievance is **GRANTED**, in part, and **DENIED**, in part. Respondent is ORDERED to return four hours of leave to Grievant's annual leave balance. Respondent correctly charged Grievant eight hours of annual leave on January 29, 2009, and that request for relief 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 Decision. *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 W. Va. 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 (2008).

Date: September 14, 2010

Ronald L. Reece
Administrative Law Judge