WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

LINDA ANN HYPES
Grievant,

v. **Docket No. 2010-0828-CONS**

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION/DIVISION OF HIGHWAYS,
Respondent.

D E C I S I O N

Grievant, Linda Ann Hypes, filed this consolidated grievance challenging the actions of her employer, the Department of Transportation/Division of Highways ("DOH"), Respondent. Grievant filed two grievances. The first grievance challenged a written reprimand given to Grievant for refusing to complete a leave slip for one hour of time taken on September 24, 2009. The second grievance was filed subsequent to Respondent's decision not to authorize an hour of sick leave Grievant claimed on Veteran's Day, November 11, 2009. These grievances were consolidated by the West Virginia Public Employees Grievance Board in a memorandum dated January 20, 2010. The November 19, 2009 statement of grievances, previously Docket No. 2010-0695-DOT, states:

> "I was given on 11/5/09 disciplinary action/a written reprimand for not signing for 1 hr. of time on 9/24/09 7:00 a.m. – 8:00 a.m. when I would end the week of 9/24/09 with 49 hrs. Other employees end with 40 hrs."

Grievant requested the following remedy:

> "Written Reprimand removed from my file and written formal apology from Mr. Beals and Mr. Rowan."

The grievance statement filed on or about November 30, 2009, previously Docket No. 2010-0724-DOT, provides:

> "After a Written Reprimand for not signing for 1 hr. on a 10 hr. workday on 9/24/09, I became sick after working 9 hr[s] on a 10 hr. workday and signed for 1 hr. sick leave on 11/11/09 and was refuse[d] the hour or an explanation of why a 10 hr. workday is a 10 hour workday (sic)."

Grievant requested the following remedy:

> "Explanation and written reprimand removed from my file and written apology."

A level one conference was held with Grievant on December 4, 2009 and a decision denying the grievance was issued on December 28, 2009. Grievant appealed to level two. A mediation session was held on February 11, 2010. Grievant appealed to level three. A level three hearing was held before the undersigned Administrative Law Judge on February 4, 2011, in the Grievance Board's facilities in Beckley, West Virginia. Grievant appeared *pro se*. Respondent was represented by its counsel, Barbara L. Baxter, Legal Division. This matter became mature for decision on March 7, 2011, the deadline for submitting proposed findings of fact and conclusions of law. Both parties submitted a form of fact/law proposals.

Synopsis

Grievant was not permitted to use/swap leave time used prior to her initial forty work-hours, for hours of overtime hours worked later in the week. Further, Grievant was not permitted to use sick leave as an hour worked to receive holiday pay. Grievant generally alleges that Respondent's time accounting policies are arbitrary and capricious. Administrators with Respondent repeatedly explained how state policy and federal law applied to the instances grieved. Grievant received a written reprimand for not signing a

one hour leave slip, regardless of the fact that she ended the work week with a total of forty-nine work hours.

Respondent established a factual, rational and lawful justification for the disciplinary action taken in this matter. Respondent established by a preponderance of the evidence that requiring Grievant to use an hour leave for time not worked prior to working forty hours and refusing to sanction the use of sick leave for holiday hours worked was rational and lawful. This Grievance is DENIED.

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 by the Division of Highways as a Transportation Worker II, Craft Worker, at the substation in Lookout, Fayette County, West Virginia. Grievant has been employed by the DOH since July 15, 1987.

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. A temporarily altered schedule was implemented from approximately the first of September until mid-November in the year 2009. The Fayette County Maintenance Headquarters, including the substations, were scheduled to work five-10 hour days per week.

3. Grievant worked the week beginning September 21, 2009 and she had not yet completed forty working hours on the morning of September 24, 2009.

4. On Thursday, September 24, 2009, Grievant called the crew supervisor and stated she would be late reporting for work and arrived one (1) hour late. Grievant was not at work the first hour of the day, from 7 to 8 a.m.

5. On Friday, September 25th, Grievant's time for Thursday was entered as nine (9) hours worked and one (1) hour sick leave.

6. On Monday, September 28th, Grievant was asked by the crew supervisor to sign an Application for Leave with Pay form (DOP-L1) for the one (1) hour of leave on the morning of September 24, 2009 and Grievant refused, stating that she had over 40 hours of pay for that work week (49 hours) therefore she did not need to use her leave time.[1]

7. A state employee is permitted to use sick or annual leave during the initial forty hours of work. *See* Division of Personnel (DOP) Administrative Rules, 143 C.S.R. 1 § 14. 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. WV Department of Transportation Administrative Procedures, Volume III, Chapter 10, Attendance, Leave and Overtime, Resp. Ex. 1.

8. DOP Administrative Rule applicable to official holidays and agency work schedules state as follows:

a Section 14.1(b) Official Holidays, states "The total amount of paid time off for holidays shall not exceed eight hours per full day holiday."

b Section 14.2 Agency Work Schedules, states "Each appointing authority shall establish the work schedule for the employees of his or her agency. The work schedule shall specify the number of hours of actual attendance on duty for full-time employees during a workweek, the day and time that the workweek begins and ends. The work schedule may include any work shifts the appointing authority determines to be appropriate for the efficient operation of the agency, including work shifts comprising work days of more than eight hours and/or work weeks of less than five days

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[1] Grievant believed that because she was scheduled to work a forty-hour week and then work ten hours of overtime, she should be allowed to "swap" the one hour of leave needed on Thursday morning for an hour of overtime that she was scheduled to work on Friday of that week.

9. The current Acting District Manager for D-9, Donald Beals, previously served as the Fayette County Highway Administrator. During the period of time relevant to this grievance, Mr. Beals was the Fayette County Highway Administrator, whose duties also included personnel issues.

10. WV Division of Highways Administrative Operating Procedures, Section II, Chapter 6, Disciplinary Action, provides guidelines for managers and supervisors in exercising their responsibilities in recommending and administering disciplinary action.

11. As the Fayette County Highway Administrator, Mr. Beals talked with Grievant and counseled her as to how Highways Administrative Operating Procedures applied to the instance of leave in discussion.

12. Administrator Beals met with Grievant on Thursday, October 1st, and explained that although her scheduled work week was for five – 10 hour days, she had only worked 30 hours at the time of her absence and that she was required to complete a leave request form for the one hour of sick leave.

13. Grievant refused to complete the leave slip and Mr. Beals advised Grievant that the one hour absence would be considered unauthorized leave. Grievant was also supplied a copy of Administrative Operating Procedures on Attendance, Leave and Overtime.

14. Grievant continued to refuse to sign a leave slip for the hour she took on September 24, 2009 and Respondent issued Grievant a written reprimand. Resp. Ex. 4.

15. On October 21, 2009, the Grievant was given a Notice of Disciplinary Action Form (RL-544) documenting the one hour of unauthorized leave. Among other information it was documented that Grievant's "absence is considered unauthorized leave and her

refusal to sign and submit the required DOP-L1 Form is considered failure to comply with minor instructions." Resp. Ex. 4.

16. On October 22, 2009, the Acting D-9 District Manager/Engineer Matthew Rowan, met with Grievant after she received the written reprimand.

17. Administrator Rowan further attempted to explain to Grievant that she had to take the hour of leave prior to having completed a forty-hour workweek.

18. Respondent took steps to insure that the policy in discussion was being uniformly enforced. Any and all employees identified as needing to complete a leave slip if they were absent prior to accumulating 40 hours of work or paid leave was contacted and asked to complete the appropriate form.

19. Grievant is the only employee identified or known to refuse to submit the requested leave slips to account for absences prior to accumulating 40 hours of work. Grievant was reprimanded for unauthorized leave.

20. Wednesday, November 11, 2009, was a State holiday (Veteran's Day) and Grievant was scheduled to work a ten-hour shift.

21. Grievant worked for nine hours. She left after nine hours of work were completed. Grievant turned in a leave slip for sick leave for the tenth hour of the Veteran's Day workday.

22. Respondent refused to grant Grievant's request for leave for the tenth hour of the Veteran's Day workday. Grievant's leave request was not approved.

23. The WV Department of Transportation Administrative Procedures, Volume III, Chapter 10, Attendance, Leave and Overtime, addresses agency work schedules and leave policies. District Manager/Engineer Rowan explained to Grievant that she was not

allowed to take any leave time for hours that she did not work on a state holiday.

24. WVDOT Administrative Procedures provide that 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, Volume III, Chapter 10, Attendance, Leave and Overtime. *Also see* Section II.D.4.

25. A relevant section in Chapter 10 of the procedure, Section IV.A., *Leave with Pay Policies*, provides that all types of leave with pay (except Holiday Leave) require employees to "complete and submit Form DOP-L1 to document the request and the approval or disapproval'. This section also states that "Violations of these leave with pay policies may subject the employee to penalties described under Section IV of this chapter including disciplinary action up to a including dismissal." Furthermore, "Leave with pay is not permitted after an employee has already accumulated 40 hours of work time and/or paid leave within a work week. If an employee performs work after the accumulation of 40 hours or work time and/or paid leave, any leave hours attributable to the first 40 hours are still paid."

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. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than

not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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, a party has not met its burden of proof. *Id.*

Respondent maintains that Grievant's attempt to use overtime hours for one hour of leave on September 24, 2009, is contrary to WVDOT and WVDOH Administrative Procedures. Grievant's absence is considered unauthorized leave in that she has refused to sign and submit the required DOP-L1 Form to properly account for this time. Grievant contends the Written Reprimand given to her was unwarranted and should be removed from her file. Grievant alleges that Respondent acted improperly in placing her on unauthorized leave on September 24, 2009 for one hour and in refusing her sick leave for one hour on November 11, 2009. With regard to refusing to authorize Grievant's usage of sick leave, it is Grievant's burden to establish, by a preponderance of the evidence, that Respondent's policy, or application thereof, is arbitrary and capricious. Said issue is not a disciplinary matter. In non-disciplinary matters a grievant must prove the allegations constituting her grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008).

There is relatively no factual dispute at issue. Grievant admitted that she took one hour off from work, between the hours of 7 and 8 a.m. on September 24, 2009. Further, Grievant admitted that she refused to fill out an Application for Leave with Pay form (DOP-L1) requesting leave for that hour. Grievant disagrees with any determination or policy

which does not allow her to "swap" an hour on the morning of September 24, 2009 for an overtime hour that she later worked.

It has become readily apparent that Grievant does not agree with Respondent's accounting system.[2] This is regrettable. An employee is not empowered to dictate her employer's operating systems. Nor do employees generally have the option to disregard their employer's rules, procedures and workplace directives.

> [I]t is not the role of this Grievance Board to change agency policies, and that is what Grievants are seeking. The undersigned has no authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or regulation which mandates such a policy be developed or changed. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997); *Olson v. Bd. of Trustees*, Docket No. 99-BOT-513 (Apr. 5, 2000); *Gary and Gillespie v. Dep't of Health and Human Resources,* Docket No. 97-HHR-461 (June 9, 1999).
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>> While this grievance procedure provides state employees with a mechanism to pursue complaints regarding a variety of terms and conditions of employment, it does not empower this Grievance Board with authority to simply substitute its judgment for that of agency management in the day-to-day supervision of its workforce. *See Skaff, supra*.
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> *Board, et al., v. W. Va. Dep't of Health and Human Resources,* Docket No. 99-HHR-329 (Feb. 2, 2000).

Frame v. Dep't of Health and Human Res., Docket No. 00-HHR-240/330 (April 20, 2001). "An employee's belief that management's decisions are incorrect or the result of incompetence, absent a threat to the employee's health and safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. *Vickers v. Bd. of*

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[2] Initially, it was contemplated that Grievant didn't understand the process, effort was made to explain the process. Grievant is aware of the mathematics, but objects to the real time application of the accounting process. This is not the first time Grievant has had difficulty with this or similar work hour pay issue(s). *See Hypes v. W.Va. DOT/DOH, Docket No.* 2008-1648-DOT (Mar. 5, 2009). Basically, Grievant understands but refuses to accept the mathematics and application of relevant policy and procedure.

Directors/W. Va. State College, Docket No. 97-BOD-122B (Aug. 7, 1998). *See Parker v. W. Va. Dep't of Health and Human Resources*, Docket No. 97-HHR-042B (Sept. 30, 1997)." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003).

Grievant refused to account for the hour that she had missed from her regularly scheduled work before she had completed forty hours of work that week. She was required by policy to "complete and submit Form DOP-L1 to document the request." DOT Admin. Proc., Vol. III, Chapter 10, p. 15. The Administrative Operating Procedures of the Department of Transportation consider that time to be unauthorized leave. DOT Admin. Oper. Proc., Vol. III, Chapter 10, p.34-35. The hour in discussion was considered unauthorized because she would not complete the form to request leave for that hour.

Grievant's actions violate policy. Respondent duly issued a written reprimand to Grievant. Grievant has her own agenda.[3] Both Administrators Beals and Rowan spoke with Grievant and explained to her agency policy that requires that she account for every hour of her time during the first forty hours of her workweek. It was and has been explained to Grievant, *ad nauseam*, that she must take leave for any time that she does not work during that initial forty hour workweek. Grievant is aware of the principles being explained, but refuses to accept the validity of the practice. Grievant has filed other grievances, objecting to similar work-hour pay issue(s). *See Hypes v. W.Va. DOT/DOH,* Docket No. 2008-1648-DOT (Mar. 5, 2009).

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[3] Grievant was advised previously, 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. Further, 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. *Hypes v. W.Va. DOT/DOH,* Docket No. 2008-1648-DOT (Mar. 5, 2009).

Additionally, Mr. Beals and Mr. Rowan discussed with Grievant the policy that prohibited her from taking leave on a holiday for the tenth hour following the nine hours that Grievant worked on Veteran's Day, November 11, 2009. This issue is not a disciplinary matter. Administrative Operating Procedures state that employees may be required to work on official holidays. DOT Admin. Oper. Proc., Vol. III, Chapter 10, p. 9. The policy requires that employees working on official holidays such as Veteran's Day "will be paid *for the actual number of hours worked* plus an additional eight hours for the holiday. *Id*.; p. 21(emphasis added). Grievant did not work the tenth hour that she was trying to claim on Veteran's Day. Only actual work time on holidays can be paid, therefore, the one hour of leave requested by the Grievant was denied. Respondent is not required to approve Grievant's request for time not worked during that tenth hour on Veteran's Day.

It is not clear whether Grievant is challenging the policy or the application of the policy to her situation. It is believed, to some degree, Grievant is attempting both. Nevertheless, Grievant has failed to establish sufficient facts or evidence to prevail under either theory. Grievant has not demonstrated that the policy was unlawful or that the application of the policy was improper.

In the circumstances of the instant grievances, appropriate agency conduct is clear pursuant to applicable policy and regulations. Further, Respondent has established the facts that supported the action taken by DOH in the identified instances. Respondent has proven by a preponderance of the evidence that the action taken by the agency had a rational basis and was not 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 Cty 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). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Id.,* 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 his judgment for that of a board of education. See generally, *Harrison v. Ginsberg,* [169 W.Va. 162], 286 S.E.2d 276, 283 (W.Va. 1982);" *Trimboli, supra.*

In this case, the Department of Transportation Administrative Operating Procedures established guidelines that Respondent followed with regard to Grievant's use of leave in the one instance and request for leave in the latter instance. *Also see* DOP Administrative Rules. Respondent has demonstrated that the facts justify Grievant being assessed one hour of leave for September 24, 2009 and that she not be allowed to claim leave for an unworked tenth hour on November 11, Veteran's Day, 2009.

The following conclusions of law are appropriate in this matter:

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. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008).

2. Respondent established by a preponderance of the evidence that it lawfully enforced applicable policy relevant to hours worked before and after a forty hour work week.

3. Respondent established a factual, rational and lawful justification for the disciplinary action taken in the fact pattern of this matter.

4. 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 is 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). 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. Respondent established by a preponderance of the evidence that requiring Grievant to use an hour leave for time not worked prior to working forty hours and refusing to approve leave for an unworked holiday time is rational and lawful. Respondent's actions are not arbitrary and capricious conduct.

6. Grievant failed to demonstrate that policies determined applicable were unlawful or that the application of said policies was arbitrary, capricious or contrary to law.

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 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: October 20, 2011

Landon R. Brown
Administrative Law Judge