THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DEBORAH HARLESS and
MISCHELLE ARNOLD,[1]
Grievants,

v. **Docket No. 2010-0903-CONS**

WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES
BUREAU FOR CHILDREN AND FAMILIES,
Respondents.

DECISION

Deborah Harless and Mischelle Arnold ("Grievants") are employed by the Department of Health and Human Resources ("DHHR") in the Bureau for Children and Families. They both work as Income Maintenance Workers in the Respondent's Logan West Virginia office. On January 12, 2010, Ms. Harless and Ms. Arnold filed level one grievance forms which made very similar statements of grievances. Both Grievants claimed that they were required to utilize annual leave for a day they missed work due to inclement weather during a state of emergency. Each Grievant seeks to have her annual leave restored and for emergency annual leave to be charged for their absences instead.

A level one hearing was conducted and recorded on March 2, 2010. A copy of the transcript from that hearing was made a part of the record in this grievance. A level one decision denying the grievance was entered on March 5, 2010. Grievants appealed to level two and mediation was held on June 30, 2010. An Order regarding the mediation was entered the next day and the Grievants appealed to level three.

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[1] There were originally three grievants involved in this consolidated action. One grievant withdrew on November 5, 2010.

Respondent DHHR filed a Motion to Dismiss the grievance dated October 18, 2010. Essentially, the movant argued that there was no material issue of fact and that Respondent should prevail upon the law. A telephonic hearing was conducted pursuant to the Motion to Dismiss on October 29, 2010. Grievant Deborah Harless participated in the conference and was represented by Gordon Simmons, UE Local 170, WVPWU.[2] Respondent DHHR was represented in the hearing by Heather L. Laick, Assistant Attorney General. At the hearing, the parties agreed to submit the grievance for decision at level three based upon the record created at level one, and the findings of fact and conclusions of law submitted by the parties. Each party was given until November 10, 2010, to submit exhibits related to the Proclamation of a State of Emergency issued by Governor Manchin on December 19, 2009.[3] Any ruling on the Motion to Dismiss was held in abeyance pending receipt of the fact/law proposals. Both parties submitted proposals and they both were received at the West Virginia Public Employees Grievance Board on November 29, 2010. The grievance became mature for decision on that date.

Synopsis

Grievants were required to use annual leave for missing work due to inclement weather. Grievants argue that the office was substantially closed on the day they missed work and the Governor's proclamation of a state of emergency should be construed to

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[2] West Virginia Public Workers Union.

[3] Both parties submitted exhibits. Respondent provided copies of the actual proclamations issued by the Governor on December 19 and 21, 2009. Those documents were admitted into the record as Respondent's Exhibits 1 and 2. Grievant submitted two news stories from separate outlets noting the Governor's proclamation issued on December 19, 2009. Those documents were admitted into the record as Grievants' Exhibits 1 and 2.

cover the day they missed. They seek to have their day of annual leave restored. Respondent proved that the office was open on the day Grievants did not report to work and that the Governor did not proclaim a state of emergency until the next day. Consequently, the Grievance is denied.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievants, Deborah Harless and Mischelle Arnold, are both employed by the DHHR as Income Maintenance Workers in the Bureau of Children and Families. They are both assigned to the DHHR office located in Logan, West Virginia.

2. The State of West Virginia experienced a severe winter storm beginning Friday, December 18, 2009 and continuing through that weekend. The snowfall made travel hazardous throughout much of the State. *See* Respondent's Exhibit 1.

3. On Saturday, December 19, 2009, Governor Manchin issued a proclamation noting that the storm had begun the previous day, and declaring a state of emergency commencing December 19, 2009. Respondent's Exhibit 2.

4. On December 22, 2009, Governor Manchin issued a second proclamation rescinding the state of emergency for 26 counties but continuing it for the remaining 29 counties, including Logan County.

5. On Friday, December 18, 2009[4], both Grievants were unable to come to work due to the heavy snow. They were both charged a day of annual leave for that day.

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[4] There was confusion among the witnesses testifying at the level one hearing as to the date that the Grievants were unable to come to work. The day was a Friday and the undersigned takes notice of the fact that Friday was December 18, 2009.

6. On the morning of Friday, December 18, one of the employees who made it to the Logan office called James Kimbler, DHHR Regional Director, to report that there were employees in the office and the office was open. There was no order from Mr. Kimbler or any other official for the Logan office to be closed.

7. Whenever possible the DHHR Community Services Manager for the Logan office, Darlene Ables, keeps the office open because they provide Child and Adult Protective Services as well as other emergency service to their service area. On December 18, 2009, some clients reported to the office for services.

Discussion

First, Respondent's Motion to Dismiss must be addressed. Respondent asserted in its Motion to Dismiss that there is no issue of disputed fact in the case. Respondent argues that the law is clear and Grievants were properly charged annual leave for the day they were unable to report to work due to the weather. Based upon these assertions, Respondent moved that the grievances be dismissed. Respondent's pleading is more of a motion for summary judgment than a motion to dismiss. Pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, a motion for summary judgment will be granted if the moving party can "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W. Va. R. Civ. P. 56 (c). However, the Rules of Civil Procedure do not apply to the Public Employees Grievance procedure. One must look to the statutes and policies controlling that procedure to find authority to dismiss a grievance upon these grounds.

The West Virginia Public Employees Grievance Board Procedural Rules contain a rule authorizing Administrative Law Judges ("ALJ") to dismiss a grievance if no claim on which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested. 156 C.S.R. 1 § 6.11; *See Perris v. Division of Highways*, Docket No. 2009-1600-DOT (Feb. 23, 2010); *Posey v. W. Va. Univ.*, Docket No. 2009-0745-WVU (Apr. 10, 2009); *Bohn v. Harrison County Bd. of Educ.*, Docket No. 2010-0675-HarED (Jan. 27, 2010). This authorization is more similar to W. Va. R. Civ. P. 12(b)(6)[5] than a motion for summary judgment under Rule 56. The Grievance Board has also dismissed grievances for lack of jurisdiction or standing. *See McCoy v. Marshall University*, Docket No. 2010-1343-MU (June 11, 2010), *Clutter v. Department of Agriculture*, Docket No. 2009-1372-AGR (May 28, 2009). *Ratcliff v. Dept. of Envtl. Prot.*, Docket No. 2009-0671-DEP (Aug. 17, 2010); *Reed v. Dept. of Health & Human Ser.*, Docket No. 2011-0440-DHHR (Jan. 19, 2011); *Gill v. Div. of Natural Res.*, Docket No. 2009-1598-CONS (May 22, 2009).The authorization for these actions is based upon the definitions and grants of authority found in W. VA. CODE §§ 6C-2-1et seq. These statutes are also the source of authority for dismissing grievances that are not filed within the mandatory, statutory time period. *See David v. W. Va. Univ. Inst. of Tech.*, Docket No. 2008-1899-CONS (Apr. 2, 2009); *Messenger v. Div. of Highways*, Docket No. 2008-1556-CONS. Additionally, 156 C.S.R. 1 § 6.21 states "[t]he [Grievance] Board will, under no circumstances, issue an advisory opinion." This provision is often cited by ALJs as authority for dismissing grievances as

[5] W. Va. R. Civ. P. 12(b)(6) states that an answer to a civil complaint may assert that the complaint fails "to state a claim upon which relief can be granted."

moot where there is no real issue in controversy. *See Mitias v. Public Ser. Comm.*, Docket No. 05-PSC-107R (Sept. 22, 2010); *Bragg v. Dep't of Health & Human Res.*, Docket No. 03-HHR-348 (May 28, 2004).

No statutory or regulatory authority was offered by Respondent, nor found by the undersigned, for a Grievance Board ALJ to grant summary judgment, or to dismiss a public employee's grievance, based upon a W Va. R. Civ. P. Rule 56 style motion. Therefore, Respondent's motion to dismiss is denied.

With regard to the merits of the consolidated grievances, as these grievances do not involve disciplinary matters, Grievants bear the burden of proving their grievances by a preponderance of the evidence. Procedural Rules of the W. Va. 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). 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).

The West Virginia Division of Personnel ("DOP") Policy entitled *Emergency Situations/Inclement Weather* contains the following provisions:

> A. Absences due to emergency situations and/or inclement weather conditions which make traveling to and from work hazardous may be charged to accrued annual leave. Agencies are encouraged to grant such leave in this situation.
>
> B. Employees may be released from work without loss of pay or charge to annual leave by Executive Declaration of the Governor or by the Governor's designee as a result of emergency situations and/or inclement weather conditions.

Respondent DHHR also has a policy for reporting to work in inclement weather situations. That policy is *DHHR Policy Memorandum 2103* ("Policy 2103") related to inclement weather and office closures. Under the heading "Absent an Entire Day" Policy 2103 states in part:

> If conditions are too hazardous to attempt coming to work, the employee must contact their immediate supervisor within 45 minutes of the beginning of their workday to request approval for accrued leave. . . Because the employee was not available for work, the employee's entire absence must be charged to accrued annual leave or other leave due, excluding sick leave, or the employee must request a personal leave of absence.

These policies were addressed recently in *Schwarz v. Dept. of Health & Human Res./Bureau for Children and Families*, Docket No. 2009-0953-DHHR (Sept. 14, 2010). In that case the DHHR office was closed one day due to a severe winter storm. However, the office was opened the next day at an alternative location. Ms. Schwarz was unable to reach work at the alternative location because of the weather conditions but no Emergency Proclamation had been issued. The ALJ held that the foregoing policies allowed DHHR to charge Ms. Schwarz with a day of personal leave for her absence. *Schwarz supra.*

The present case is similar in many respects. On Friday, December 18, 2009, the DHHR office in Logan was open for business and served a small number of clients. The weather was severe and several employees were unable to come to work but the office operated with the employees who were available. There was no Proclamation for a state of emergency issued on December 18, 2009. The Governor issued a Proclamation the next day. All employees who missed work due to the inclement weather, including Grievants were required to take annual leave to cover their absence. As in *Schwarz supra,* requiring the absent employees to utilize annual leave is consistent with DOP and DHHR

policy.

Grievants point out that the Governor noted in his Proclamation that the severe storm began on December 18, 2009. While this is true no, Proclamation was issued or in effect until December 19, 2009, and the DOP Policy provisions related to such a Proclamation are not applicable to the facts in this Grievance. Grievants also argue that the DHHR office in Logan is not a 24-hour emergency facility and could have been closed due to the inability of several staff members being able to get to work. While it is true that the office could have been closed, that decision is discretionary with Respondent DHHR. Given their charge to protect fragile populations of the State, the decision to keep the office open with a skeleton crew was not arbitrary or 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 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). 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)). Furthermore, “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). It was not arbitrary and capricious for Respondent DHHR to comply with the provisions of Policy 2103 and the DOP policy related to inclement weather by requiring the Grievants to utilize a day of annual leave to cover their absence on December 18, 2009. Accordingly, the consolidated grievances are denied.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants bear the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. 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).

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 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).

3. "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).

4. Grievants failed to prove that it was arbitrary and capricious for Respondent

DHHR to comply with the provisions of Policy 2103 and the DOP policy related to inclement weather by requiring the Grievants to utilize a day of annual leave to cover their absence on December 18, 2009.

Accordingly, the consolidated grievances are 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: APRIL 19, 2011.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE