

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KENNETH LEE REXRODE,

Grievant,

v.

Docket No. 2022-0664-DHS

**DEPARTMENT OF HOMELAND SECURITY/
HUTTONSVILLE CORRECTIONAL CENTER AND JAIL**

Respondent.

DECISION

Grievant, Kenneth Rexrode, was employed by Respondent, the Department of Homeland Security, at Huttonsville Correctional Center and Jail. On March 9, 2022, Grievant filed this grievance against Respondent, stating, "Want to get paid for Annual Leave I lost due to be[ing] on Workers Compensation."

A level one hearing occurred on March 30, 2022, and a decision was issued on April 11, 2022. Grievant appealed to level two on April 22, 2022. A level two mediation occurred June 28, 2022, and a decision was issued the next day. Grievant appealed to level three on July 5, 2022. A level three hearing occurred online before the undersigned on September 23, 2022. Grievant appeared personally and by James Fox, Esq. Respondent was represented by Jodi Tyler, Assistant Attorney General. This matter matured for decision on October 21, 2022. Each party submitted Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant went on Workers' Compensation Temporary Total Disability (TTD) in 2020, after being injured on the job with Respondent. Grievant remained on TTD through

2022, resulting in the loss of annual leave exceeding carry-forward limits. Grievant asserts that carry-forward limits do not apply to employees receiving TTD benefits. Respondent counters that no such exception exists under policy and that the grievance was untimely. Grievant seeks reinstatement of 188 hours of annual leave, 20 hours for 2020 and 168 hours for 2021. The record is silent as to when Respondent made its carry-forward decision accessible to Grievant. Thus, Respondent did not prove the grievance was untimely. Regardless, Grievant failed to prove that Respondent's interpretation of policy was unreasonable. Accordingly, this grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant, Kenneth Rexrode, is employed by Respondent, the Department of Homeland Security, as a building maintenance supervisor at Huttonsville Correctional Center and Jail.
2. On November 18, 2020, Grievant was injured while working for Respondent.
3. Under West Virginia Division of Personnel's (DOP) Workers' Compensation Temporary Total Disability Rule, those injured in the course of their employment with the State have two options: they can either use their accumulated sick leave or opt for Workers' Compensation Temporary Total Disability (TTD) benefits. W. VA. CODE ST. R. § 143-3-3.1.a (2012).
4. Grievant applied for and went on TTD in 2020 and is still receiving these benefits.

5. During the period in question, Grievant was employed with the State between 10 and 14 years.

6. DOP's Administrative Rule allows State employees with 10 through 14 years of service to carry forward 280 hours of annual leave from one year to the next. W. VA. CODE ST. R. § 143-1-14.3.a. (2016).

7. DOP's Administrative Rule also provides:

Annual leave cannot be accrued for hours not paid nor for hours worked beyond the normal workweek which shall not exceed 40 hours. **Provided, however**, employees on unpaid leave who are receiving workers' compensation temporary total disability benefits continue to accrue annual leave while receiving such benefits. [emphasis added]

W. VA. CODE ST. R. § 143-1-14.3.a. (2016).

8. DOP's Workers' Compensation Temporary Total Disability Rule provides as follows (under "Leave"):

An employee electing to receive temporary total disability benefits due to receiving a personal injury in the course of and resulting from his or her covered employment with the State or its political subdivisions shall apply for a medical leave of absence without pay and, for purposes of leave, **continues to accrue and carry forward from one calendar year to another annual leave** and service credit for accrual of annual leave **in accordance with the provisions of the Division of Personnel Administrative Rule 143CSR1**, but does not accrue sick leave or holiday pay for the period the temporary total disability benefits are paid. [emphasis added]

W. VA. CODE ST. R. § 143-3-4.2 (2012).

9. Further, DOP's Workers' Compensation Temporary Total Disability Rule provides as follows (under "Interim Payment of Sick Leave"):

Upon receipt of the initial temporary total disability payment the employee shall pay or assign to his or her employer the net value of the sick leave, or sick and annual leave paid, after

which his or her sick leave and annual leave, if used, shall be restored to his or her current leave balance(s). **The maximum number of hours of annual leave that may be carried forward from one calendar year to another, as provided in the Administrative Rule of the Division of Personnel 143 CSR1, shall apply.** [emphasis added]

W. VA. CODE ST. R. § 143-3-3.1.b.2 (2012).

10. DOP has determined that annual leave carry-forward limits apply to employees on TTD. (DOP Deputy Director Joseph Thomas' testimony)

11. WVDCR Policy Directive 129.08 states, "Monitoring of annual leave and the carryover rate is the employee's responsibility." (Respondent's Exhibit 2)

12. No evidence was presented concerning the date Respondent either informed or made reasonably accessible to Grievant its decision to apply to Grievant the carry-forward annual leave limits for 2020 and 2021.¹

13. In January or February of 2022, Grievant learned that Respondent had applied DOP's Administrative Rule carry-forward limits to reduce his current accumulated annual leave to 280 hours. (Grievant's testimony)

14. Grievant contends that he accumulated 168 hours of annual leave in 2021, that his total accrued annual leave at the end of 2021 should have been 468 hours with the carry-forward leave from 2020, and that he lost 188 hours when only 280 of the 468 hours carried forward into 2022.²

15. Grievant implies that of these 188 lost or desired hours, 20 accrued in 2020.

¹The only evidence in this regard is Grievant's testimony that he learned of Respondent's decision sometime in January or February of 2022.

²No evidence was presented concerning the actual, rather than desired, hours of annual leave Grievant possessed on December 31, 2021.

16. Grievant filed the instant grievance on March 9, 2022.³

Discussion

Respondent asserts that Grievant untimely filed this grievance. “[When an] employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. ... *Sayre v. Mason County Health Dep’t*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff’d*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See *Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).” *Higginbotham v. Dep’t of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997). “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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

An employee is required to “file a grievance within the time limits specified in this article.” W. VA. CODE § 6C-2-3(A)(1). The time limits for filing a grievance are as follows:

Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a

³This is the date Grievant mailed the grievance to the Grievance Board. The “Date filed” line of the grievance, above “Grievant’s signature” line, reads “March 15, 2022.” This is the date Grievant submitted his signature telephonically to the Grievance Board. When the Grievance Board received the grievance on March 10, 2022, it was unsigned and undated. (Level one grievance filing).

continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing.

W. VA. CODE § 6C-2-4(a)(1).

“‘Days’ means working days exclusive of Saturday, Sunday, official holidays and any day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided for by statute, rule, policy or practice.” W. VA. CODE § 6C-2-2(c). “[I]n computing the time period in which an act is to be done, the day on which the appeal was submitted is excluded. See W. VA. CODE § 2-2-3; *Brand v. Swindler*, 68 W. Va. 571, 60 S.E. 362 (1911). ... *Williamson v. W. Va. Dep’t of Tax and Revenue*, Docket No. 98-T&R-275D (Sept. 30, 1998).” *Mehra v. W. Va. Univ. Potomac State College*, Docket No. 2015-1080-PSCWVU (Sept. 2, 2015).

The time period for filing a grievance ordinarily begins to run when the employee is “unequivocally notified of the decision being challenged.” *Harvey v. W. Va. Bureau of Employment Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Goodwin v. Div. of Highways*, Docket No. 2011-0604-DOT (Mar. 4, 2011); *Straley v. Putnam Cnty. Bd. of Educ.*, Docket No. 2017-0314-PutED (July 28, 2014), *aff’d*, Kanawha Cnty. Cir. Ct. Civil Action No. 14-AA-91 (Nov. 16, 2015), *aff’d*, W.Va. Sup. Ct. App. Docket No. 15-1207 (Nov. 16, 2016). “[A] grievant may not fail to reasonably investigate a grievable event and then, at a later time, claim that he or she did not know the underlying circumstances of the grievable event.” *Bailey v. McDowell Cnty. Bd. of Educ.*, Docket No. 07-33-399 (Nov. 24, 2008). See also *Goodwin v. Monongalia County Bd. of Educ.*, Docket No. 00-30-163 (Sept. 25, 2000), *aff’d*, Kanawha Cnty. Cir. Ct. Civil Action No. 00-AA-168 (Aug. 12, 2003), appeal refused, W.Va. Sup. Ct. App. Docket No. 032841 (Apr. 1, 2004).

No evidence was given of the date Respondent either informed or made reasonably accessible to Grievant its decision to apply the carry-forward annual leave limits for 2020 and 2021. The only evidence that even hints at this is Grievant's testimony that he learned of this decision sometime in January or February of 2022. Thus, Grievant could reasonably have learned of Respondent's decision as late as February 28, 2022. Grievant filed this grievance on March 9, 2022, well within the requisite 15 days. Even assuming a filing date of March 15, 2022, which is when Grievant telephonically signed the grievance, the grievance is still timely, as four weekend days and the day of filing must be excluded under a timeliness calculation. As such, Respondent failed to prove by a preponderance of evidence that the grievance was untimely.

As Grievant's claim does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). Grievant went on Workers' Compensation Temporary Total Disability (TTD) sometime in late 2020 and continues to receive TTD benefits. Grievant claims that Respondent improperly negated 188 hours of his annual leave for 2020 and 2021. Respondent counters that it properly applied the carry-forward limits under DOP's Administrative Rule. Grievant asserts that DOP's carry-forward limits do not apply to employees receiving TTD benefits. In support thereof, Grievant cites DOP's Administrative Rule and DOP's Workers' Compensation Temporary Total Disability Rule. Respondent contends that these policies do not support Grievant's position and that its interpretation is reasonable.

DOP Deputy Director Joseph Thomas testified that DOP applies the annual leave carry-forward limits to employees on TTD. This is supported by DOP's Administrative

Rule and DOP's Workers' Compensation Temporary Total Disability Rule. DOP's Workers' Compensation Temporary Total Disability Rule states (under "Leave"):

An employee electing to receive temporary total disability benefits due to receiving a personal injury in the course of and resulting from his or her covered employment with the State or its political subdivisions shall apply for a medical leave of absence without pay and, for purposes of leave, **continues to accrue and carry forward from one calendar year to another annual leave** and service credit for accrual of annual leave **in accordance with the provisions of the Division of Personnel Administrative Rule 143CSR1**, but does not accrue sick leave or holiday pay for the period the temporary total disability benefits are paid. [emphasis added]

W. VA. CODE ST. R. § 143-3-4.2 (2012).

In referencing this rule to support his contention that an employee receiving TTD benefits "continues to accrue and carry forward from one calendar year to another annual leave," Grievant conveniently leaves out that this is to occur "in accordance with the provisions of the Division of Personnel Administrative Rule" DOP's Administrative rule limits employees with Grievant's years of service to carrying forward 280 hours of annual leave from one year to the next. W. VA. CODE ST. R. § 143-1-14.3.a. (2016).

Grievant then cites the Administrative Rule to show that it provides an exception for employees on TTD in stating, "employees on unpaid leave who are receiving workers' compensation temporary total disability benefits continue to accrue annual leave while receiving such benefits." However, this quote is not only incomplete but also taken out of context. The context of the complete quote is in clarification of the primary point that there are limits to the amount of annual leave employees can carry forward. The actual citation goes on to state:

Annual leave cannot be accrued for hours not paid nor for hours worked beyond the normal workweek which shall not

exceed 40 hours. **Provided, however**, employees on unpaid leave who are receiving workers' compensation temporary total disability benefits continue to accrue annual leave while receiving such benefits. [emphasis added]

W. VA. CODE ST. R. § 143-1-14.3.a. (2016).

Clearly, the language quoted by Grievant refers to the sentence preceding it. This preceding sentence creates an exception to accrual of annual leave in stating that annual leave does not accrue for the hours an employee is not paid nor for time worked in excess of 40 hours. Grievant's citation simply clarifies that this exception does not apply to employees on TTD. The clarifying nature of Grievant's citation can be seen in the missing prelude, "Provided, however," This reveals that the general rule of accrual and carry-forward limits do apply to those on TTD, meaning Grievant's interpretation is erroneous.

Further, DOP's Workers' Compensation Temporary Total Disability Rule (under "Interim Payment of Sick Leave") provides:

Upon receipt of the initial temporary total disability payment the employee shall pay or assign to his or her employer the net value of the sick leave, or sick and annual leave paid, after which his or her sick leave and annual leave, if used, shall be restored to his or her current leave balance(s). **The maximum number of hours of annual leave that may be carried forward from one calendar year to another, as provided in the Administrative Rule of the Division of Personnel 143 CSR1, shall apply.** [emphasis added]

W. VA. CODE ST. R. § 143-3-3.1.b.2 (2012).

Even though this paragraph finds itself in a section dealing primarily with the interim payment of sick leave, it illustrates that DOP also intends that its rules apply annual leave carry-forward limits to employees receiving TTD benefits. This is made clear through the inclusion of an important caveat to the mandated restoration of used sick or annual leave after an employee receives an initial TTD payment. The caveat is that the

maximum hours of annual leave that can be carried forward remain as set forth in the Administrative Rule. This is the same Administrative Rule referenced and made applicable to employees receiving TTD benefits in the "Leave" section of DOP's Workers' Compensation Temporary Total Disability Rule. It is thus clear that DOP intended that the carry-forward limits apply to employees on TTD beyond the initial TTD payment.

DOP has wide discretion in performing its duties but cannot exercise its discretion in an arbitrary or capricious manner. See *Bonnett v. West Virginia Dep't of Tax and Revenue and Div. of Personnel*, Docket No. 99-T&R-118 (Aug 30, 1999), Aff'd Kan. Co. Ct. Docket No. 99-AA-151 (Mar. 1, 2001). Likewise, Respondent has discretion in the application of these policies. It is well established that a government agency's determination regarding matters within its expertise is entitled to substantial weight. *Princeton Community Hosp. v. State Health Planning & Dev. Agency*, 174 W. Va. 558, 328 S.E.2d 164 (1985). See *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993); *Security Nat'l Bank v. W. Va. Bancorp*, 166 W. Va. 775, 277 S.E.2d 613 (1981).

The role of the Grievance Board is to review the information provided and assess whether the actions taken were arbitrary and capricious or an abuse of discretion. See *Kyle v. W. Va. State Bd. of Rehab.*, Docket No. VR-88-006 (Mar. 28, 1989). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604 at 614, 474 S.E.2d 534 at 544 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

“[T]he “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Syllabus Point 3, *In re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996).” Syl. Pt. 1, *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (*per curiam*). “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].” *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001), *aff'd* Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), appeal refused, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

Respondent's interpretation of DOP's Administrative Rule and DOP's Workers' Compensation Temporary Total Disability Rule is undoubtedly reasonable and is in no way arbitrary and capricious. Grievant did not prove by a preponderance of the evidence that employees receiving TTD benefits are exempt from annual leave carry-forward limits.

Accordingly, the grievance is DENIED. The following Conclusions of Law support the decision reached.

Conclusions of Law

1. “[When an] employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. ... *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June

17, 1996). *See Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).” *Higginbotham v. Dep’t of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997). “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. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff’d*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id.*

2. Respondent did not prove by a preponderance of evidence that Grievant untimely filed this grievance.

3. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018).

4. DOP has wide discretion in performing its duties but cannot exercise its discretion in an arbitrary or capricious manner. *See Bonnett v. West Virginia Dep’t of Tax and Revenue and Div. of Personnel*, Docket No. 99-T&R-118 (Aug 30, 1999), *Aff’d* Kan. Co. C. Ct. Docket No. 99-AA-151 (Mar. 1, 2001). It is well established that a government agency's determination regarding matters within its expertise is entitled to substantial weight. *Princeton Community Hosp. v. State Health Planning & Dev. Agency*, 174 W. Va. 558, 328 S.E.2d 164 (1985). *See W. Va. Dep’t of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993); *Security Nat’l Bank v. W. Va. Bancorp*, 166 W. Va. 775, 277 S.E.2d 613 (1981).

5. The role of the Grievance Board is to review the information provided and assess whether the actions taken were arbitrary and capricious or an abuse of discretion. *See Kyle v. W. Va. State Bd. of Rehab.*, Docket No. VR-88-006 (Mar. 28, 1989).

6. An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604 at 614, 474 S.E.2d 534 at 544 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

7. Grievant did not prove by a preponderance of the evidence that employees receiving TTD benefits are exempt from annual leave carry-forward limits or that Respondent's interpretation of DOP's Administrative Rule and DOP's Workers' Compensation Temporary Total Disability Rule is arbitrary and capricious.

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Intermediate Court of Appeals.⁴ Any such appeal must be filed within thirty (30) days of receipt of this decision. 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 named as a party to the appeal. However, the appealing party is required to serve a copy of the appeal

⁴On April 8, 2021, Senate Bill 275 was enacted creating the Intermediate Court of Appeals. The act conferred jurisdiction to the Intermediate Court of Appeals over "[f]inal judgments, orders, or decisions of an agency or an administrative law judge entered after June 30, 2022, heretofore appealable to the Circuit Court of Kanawha County pursuant to §29A-5-4 or any other provision of this code[.]" W. VA. CODE § 51-11-4(b)(4). The West Virginia Public Employees Grievance Procedure provides that an appeal of a Grievance Board decision be made to the Circuit Court of Kanawha County. W. VA. CODE § 6C-2-5. Although Senate Bill 275 did not specifically amend West Virginia Code § 6C-2-5, it appears an appeal of a decision of the Public Employees Grievance Board now lies with the Intermediate Court of Appeals.

petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b).

DATE: November 16, 2022

Joshua S. Fraenkel
Administrative Law Judge