THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

GORDON SIMMONS,
Grievant,

v. **Docket No. 2024-0557-DOA**

PUBLIC DEFENDER SERVICES,
Respondent.

DECISION

Grievant, Gordon Simmons, is employed by Respondent, Public Defender Services. On February 20, 2024, Grievant filed this grievance against Respondent stating, "On February 15, 2024, Respondent obstructed Grievant's right to hold the office of acting chief steward in the West Virginia Public Workers Union in retaliation for Grievant's exercise of his rights." For relief, Grievant seeks "[t]o be made whole in every way including an end to the retaliatory obstruction of Grievant's union activities."

The grievance was filed directly to level three by agreement of the parties. A level three hearing was held on June 28, 2024, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant appeared in person and represented himself. Respondent appeared by Executive Director Dana F. Eddy and was represented by counsel, Mark S. Weiler, Assistant Attorney General. This matter became mature for decision on August 22, 2024, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as the sole investigator in its Habeas Corpus Division. Respondent prohibited Grievant from representing grievants in the grievance process in his capacity as the chief steward of a union. Grievant failed to prove that

Respondent's prohibition was in retaliation for filing a notice of intent to file a lawsuit against a state agency or that the prohibition was otherwise arbitrary and capricious. Accordingly, the 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 is employed by Respondent as the sole Investigator in Respondent's Habeas Corpus Division, a classified-exempt position that is at will.

2. Grievant was previously employed by the national office of the United Electrical, Radio and Machine Workers of America union ("UE"), from which he retired on November 1, 2019.

3. As an employee of the union, for many years Grievant appeared as the representative for grievants at all levels of the grievance process.

4. Grievant continued to represent grievants in the grievance process after he was hired by Respondent, taking approved leave to attend proceedings.

5. In 2023, the *West Virginia Public Employees Grievance Procedure,* W.VA. CODE § 6C-2-1 *et seq*., was amended to limit the number of grievances for which a public employee may serve as a representative to five in one year.

6. Thereafter, Assistant Attorneys General for multiple state agencies filed motions demanding the removal of Grievant as representative in multiple individual grievances, asserting he was representing as many as twenty-one grievants.

7. After learning of the concerns of the other state agencies regarding Grievant's representation of grievants and being told that other agencies were also contemplating filing a writ to limit Grievant's representation, Executive Director Dana F. Eddy and Deputy Director Donald L. Stennett met with Grievant on November 17, 2023, to discuss the issue.

8. During the meeting, Grievant informed Director Eddy and Deputy Director Stennett that he had been temporarily appointed as the acting chief steward of the West Virginia Public Workers Union, formerly the local chapter of UE, following the resignation of the former chief steward.

9. Employees of the Department of Administration must seek and obtain approval for any secondary employment or volunteer activity prior to beginning the activity to avoid any appearance of a conflict between an employees work and the secondary employment/volunteer activity.

10. Following the meeting, Director Eddy directed Grievant to complete the Division of Personnel's form DOP-OE1 *Request for Determination Regarding Other Employment and Certain Volunteer Activity*, which Grievant completed and submitted on the same day, November 17, 2023. Grievant described his volunteer activity as follows: "Voluntary coordination of organizing and representational activities."

11. Grievant had also previously been directed to complete the form for his secondary employment with Marshall University, which was approved.

12. In December 2023 and January 2024, the Grievance Board issued orders finding that Grievant had actively participated in as many as sixteen grievances. The

Grievance Board ordered Grievant to name the five grievants he wished to continue to represent and to withdraw from the remainder.

13. Grievant failed to respond to the orders to name which grievants he would continue to represent.

14. As Grievant failed to obey the orders of the Grievance Board, in January and February 2024, the Grievance Board issued orders removing Grievant as representative in the grievances in which the motions had been filed.

15. Thereafter, the union, with Grievant named as plaintiff, filed a pre-suit notice for a complaint contesting the legality of the restriction of state employees serving as representatives in the grievance procedure.

16. Prior to receiving a copy of the pre-suit notice, Director Eddy thought Grievant was representing grievants only in a personal capacity as a fellow state employee and mistakenly believed he did not have the authority to regulate that activity.

17. Upon review of the notice, it became apparent to Director Eddy that Grievant was representing grievants as a volunteer officer of the union.

18. Therefore, on February 14, 2024, Director Eddy again met with Grievant regarding his representation of grievants in the grievance process and the pre-suit notice.

19. On February 15, 2024, Director Eddy completed the immediate supervisor portion of the *Request for Determination Regarding Other Employment and Certain Volunteer Activity*. Director Eddy marked that Grievant's activity was a "potential conflict" stating, "Interference with agency's operations as recusal necessitated in two cases; continuing possibility of inability to perform duties; creates administrative burdens hampering agency's operations." On the same date, Director Eddy completed the "final

decision" portion of the form denying the request for volunteer activity due to conflict. Under "conflict; limitations; restrictions" section, Director Eddy stated as follows:

> Applicant is performing actual functions of union and is not limiting association to membership or governance. Actual representation of grievants has created conflicts in two cases preventing his performance of duties and this is potentially an ongoing issue. The burden on habeas staff and on administrative staff to monitor applicants' secondary activity interferes and will interfere with operations; finally, the adversity with other state agencies hinders the agency's efforts requiring inter-agency collaboration.

20. Due to the filing of the instant grievance, Director Eddy did not enforce his denial of volunteer activity and Grievant has continued to represent grievants in the grievance process.

21. Grievant's work is subject to the Rules of Professional Conduct relating to nonlawyer assistants as he works under the direction of attorneys.

22. The Rules of Professional Conduct prohibit conflicts of interest.

Discussion

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). "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*.

Grievant argues that Respondent obstructed his right to hold union office in

retaliation for filing a notice of intent to take legal action against the State of West Virginia.[1] Grievant further argues that the obstruction of union activities was arbitrary and capricious. Respondent asserts that it did not prohibit Grievant from holding the office of chief steward but only prohibited the representation of grievants as chief steward. Respondent asserts that prohibition was not retaliatory but was a reasonable management decision. Respondent asserts Grievant failed to prove any violation or misapplication of statute, policy, rule, regulation, or agreement.

"In proving an allegation of retaliatory discharge, three phases of evidentiary investigation must be addressed. First, the employee claiming retaliation must establish a *prima facie* case." *Freeman v. Fayette Cty. Bd. of Educ.*, 215 W. Va. 272, 277, 599 S.E.2d 695, 700 (2004).

> [T]he burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation), (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.

Id., Syl. Pt. 6, 215 W. Va. at 275, 599 S.E.2d at 698 (citing Syl. Pt. 4, *Frank's Shoe Store v. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); Syl. Pt. 1, *Brammer v. Human Rights Comm'n*, 183 W. Va. 108, 394 S.E.2d 340 (1990); Syl. Pt. 10, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)). The Grievance Board has applied the same standard to the review of other adverse employment actions. *Coddington v. Dep't of Health & Human Res.*, Docket Nos. 93-HHR-265-67 (May 19, 1994); *Frost v.*

[1] Neither party provided a copy of the pre-suit notice as an exhibit.

Bluefield State College, Docket No. 2011-0895-BSC (Jan. 29, 2014), *aff'd* W.Va. Sup. Ct. App. No. 14-0841 (June 12, 2015) (memorandum decision).

"An employer may rebut the presumption of retaliatory action by offering 'credible evidence of legitimate nondiscriminatory reasons for its actions . . . .' *Mace v. Pizza Hut, Inc.*, 180 W.Va. 469, 377 S.E.2d 461, 464 (1988); *see also Shepherdstown Volunteer Fire Department v. State ex rel. West Virginia Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983). Should the employer succeed in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for discharge were merely a pretext for unlawful discrimination. *Mace*, 377 S.E.2d 461 at 464." *W. Va. Dep't of Nat. Res. v. Myers*, 191 W. Va. 72, 76, 443 S.E.2d 229, 233 (1994); *Conner v. Barbour Cty. Bd. of Educ.*, 200 W. Va. 405, 409, 489 S.E.2d 787 (1997).

Article III section 17 of the West Virginia Constitution provides the right to seek remedy in the courts of the State. West Virgina Code § 55-17-3 requires the filing of a pre-suit notice prior to filing suit against a governmental agency, which is the document at issue in this case. Therefore, Grievant proved that he was engaged in a protected activity. Director Eddy was aware of the pre-suit notice, which was the subject of his meeting with Grievant on February 14, 2024. Retaliatory motivation can be inferred because Grievant's request for voluntary activity was denied the day after the meeting regarding the pre-suit notice.

The burden then shifts to Respondent to rebut the presumption of retaliatory action by offering "credible evidence of legitimate nondiscriminatory reasons for its actions." After reviewing the pre-suit notice and meeting with Grievant, Director Eddy had multiple

concerns regarding Grievant's unlimited representation of grievants before the Grievance Board as a volunteer officer of the union. Director Eddy had become aware of conflicts in two habeas cases created by Grievant's prior representation of a Child Protective Service ("CPS") worker in a grievance. Director Eddy was concerned about the potential for more conflicts involving Grievant's representation, particularly of Department of Health and Human Resources and Division of Corrections employees. The conflict potential would place an administrative burden to track conflicts and to screen off Grievant in conflicted cases and would prevent Grievant from performing his duties in such cases.

Director Eddy was concerned that Grievant's representation activity was putting the agency in an adversarial position with agencies from which the Public Defender Services required cooperation. Further, frequent leave usage by Grievant for representational actives would impact the work of the division as Grievant was the only investigator. Grievant's representation of state employees such as CPS workers, could also give an appearance of impropriety disloyalty to the habeas petitioners Respondent represents. This could lead to second habeas petitions based on the ineffective assistance of counsel from Respondent for perceived conflict or impropriety. Therefore, Respondent proved it had legitimate, nondiscriminatory reasons for its actions

Grievant argues that the reasons given are pretextual because the prohibition following from the pre-suit notice proves ill intent and because the issues raised by Director Eddy are speculative. Director Eddy testified that, until he received a copy of the pre-suit notice, he was unaware that Grievant was representing grievants in his role as chief steward. Prior to that time, Director Eddy believed Grievant was representing grievants only as a fellow state employee and Director Eddy mistakenly believed he did

not have the authority to curtail that activity.[2] Further, no new action occurred to trigger a response from Director Eddy until the pre-suit notice. The issue was under review by the Grievance Board on the motions to disqualify from November 2023, until the final orders were issued in late January and early February 2024. As Grievant was not representing grievants at that time, the issue did not arise again until Director Eddy received a copy of the pre-suit notice, which notified Director Eddy that, not only did Grievant intend to continue to represent grievants, but that he was seeking to be permitted to represent an unlimited number of grievants. So, although it is understandable that the timing would raise Grievant's suspicions, the timing is reasonably explained by the sequence of events.

The application of a limitation on secondary employment is necessarily speculative in nature and that is not unreasonable. The purpose of reviewing and limiting secondary employment and volunteer activity is to avoid conflict, interference with duties, or the appearance of impropriety before such issues occur.[3] Although the pre-suit notice was

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[2] To be clear, West Virginia Code § 6C-2-3(p)(2) grants an employer the right to limit an employee's leave from work for representation activities to five grievances per year or when the representation activities interfere with an employee's productivity. In this case, Director Eddy was initially unaware of the extent of Grievant's representation activities because Grievant did not disclose those activities and, instead, was using annual leave.

[3] The DOP form is completed per the DOP's administrative rule, which provides:

> §143-1-17. Employees shall not hold other public office, secondary employment or participate in voluntary activity conflicting with their employment in the classified service. Determination of the conflict shall be made jointly by the appointing authority and the Board, or may be specifically delegated by the Board to the appointing authority, who shall consider whether the other employment or volunteer activity: (1) will be in conflict with the interests of the agency; (2) will interfere with the performance of the employee's official duties; (3) will use or appear to use information obtained in

not entered into evidence, it appears from testimony that the pre-suit notice was to challenge the constitutionality of the limitation on representation before the Grievance Board, thereby allowing Grievant to represent an unlimited number of grievants. Director Eddy was understandably concerned by this. Further, Director Eddy's concern about conflicts or an appearance of impropriety is not overblown or "bogus" as Grievant asserted. As a non-lawyer assistant of the Habeas Corpus Division's attorneys, Grievant's behavior must conform to the Rules of Professional Conduct for attorneys. Any lawyer managing or supervising Grievant is responsible for Grievant's conduct under the Rules and is required to make reasonable efforts to ensure Grievant's conduct conforms to the Rules. *See* Rule 5.3. Therefore, Grievant failed to prove that Respondent's reasons for prohibiting his volunteer employment were a pretext.

Grievant further argues that the prohibition was otherwise arbitrary and capricious. 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, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "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

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> connection with official duties which is not generally available to the public; or, (4) may reasonably be regarded as official action.

Although Grievant was not subject to the administrative rule because, as a classified-exempt employee, he was not in the classified service, it is not unreasonable for an employer to use the procedures of the administrative rule to review this issue for exempt employees.

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), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

"'[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).

Preliminarily, there was miscommunication between the parties regarding the nature of the prohibition that was clarified during the level three hearing. In denying the request for volunteer activity, Director Eddy explained that the conflict was specifically regarding the representation of grievants, but he did not state that Grievant could volunteer as chief steward if he refrained from representing grievants. During the hearing, Director Eddy testified that he was not seeking to prohibit Grievant from performing the non-representational activities of the chief steward position. Director Eddy testified that

he was only prohibiting Grievant's representation of grievants as a chief steward activity. Therefore, this decision only reviews the remaining prohibition of Grievant's representational activity, as he is not prohibited from otherwise holding the office of chief steward.

Grievant asserts Respondent obstructed his union activity, but the right to participate in a union is separate from the ability to represent grievants in the grievance procedure. The grievance procedure is an administrative process created by statute and the ability to represent grievants in that procedure is likewise granted and restricted by statute. Although a representative who is a public employee is entitled to "reasonable and necessary time off," the statute makes clear that "the first responsibility of any employee is the work assigned to the employee. An employee may not allow grievance preparation and representation activities to seriously affect the overall productivity of the employee as determined by the employer." W. VA. CODE § 6C-2-3(p).

The 2023 amendment to this section only added the bright line rule that a public employee may be the representative in no more than five grievances per year. Although the statute requires employers to allow representatives time off for grievance activities, employers have always had the authority to limit representation activities that are not "reasonable and necessary" or that "seriously affect the overall productivity of the employee *as determined by the employer.*" (emphasis added).

Whether reviewing this issue as a matter of secondary employment/volunteer activity or under the limitations of the statute, Director Eddy's decision was reasonable. He articulated multiple reasons why Grievant's representational activity was negatively impacting the agency and Grievant's work. It is clear that Director Eddy's determination

was made only after significant consideration of the issue and was a decision he described as “very difficult” due to his respect for Grievant’s advocacy and Director Eddy’s personal and professional support of union activity

To expound on the reasons for Director Eddy’s decision as already discussed above in the retaliation analysis, Director Eddy explained that the impact of Grievant’s representation is greater in this instance due to the nature of the agency’s work and the small size of the division. Respondent has an ethical duty to its clients and a duty to investigate. Grievant’s work is time-sensitive and of great import. Grievant is out in the field gathering evidence, and, as witnesses tend to be transient, that need is often immediate. Grievant is also required to urgently serve subpoenas. There is only one other full-time staff employee in the division, a paralegal, so coverage is burdensome and difficult. Further, the administrative burden in not insignificant as each case in which Grievant represented a grievant would require a thorough conflict check and when a conflict is present, as has already occurred in two cases, screening Grievant from the case also places a burden on the agency. In the worst case, if a conflict is not caught in time the case could be compromised, forcing Respondent’s withdraw from the case. All these concerns are reasonable and based in fact.

Director Eddy’s decision is entitled to deference provided it is supported by substantial evidence or by a rational basis. Director Eddy had a rational basis for his decision and Grievant downplays the seriousness of the Rules of Professional Conduct and the duty to serve the best interests of an attorney’s client. Although it is true, as Grievant asserts, that it would be possible for Director Eddy to allow Grievant to represent grievants employed by other agencies less likely to create a conflict, Direct Eddy’s

complete prohibition it not unreasonable. To find his decision unreasonable simply because there were other options would be an improper substitution of judgment in the circumstances of this case.

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 his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "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. "In proving an allegation of retaliatory discharge, three phases of evidentiary investigation must be addressed. First, the employee claiming retaliation must establish a *prima facie* case." *Freeman v. Fayette Cty. Bd. of Educ.*, 215 W. Va. 272, 277, 599 S.E.2d 695, 700 (2004).

> [T]he burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation), (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.

Id., Syl. Pt. 6, 215 W. Va. at 275, 599 S.E.2d at 698 (citing Syl. Pt. 4, *Frank's Shoe Store v. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986); Syl. Pt. 1, *Brammer v. Human Rights Comm'n*, 183 W. Va. 108, 394 S.E.2d 340 (1990); Syl. Pt. 10, *Hanlon v.*

Chambers, 195 W. Va. 99, 464 S.E.2d 741 (1995)). The Grievance Board has applied the same standard to the review of other adverse employment actions. *Coddington v. Dep't of Health & Human Res.*, Docket Nos. 93-HHR-265-67 (May 19, 1994); *Frost v. Bluefield State College*, Docket No. 2011-0895-BSC (Jan. 29, 2014), *aff'd* W.Va. Sup. Ct. App. No. 14-0841 (June 12, 2015) (memorandum decision).

3. "An employer may rebut the presumption of retaliatory action by offering 'credible evidence of legitimate nondiscriminatory reasons for its actions . . . .' *Mace v. Pizza Hut, Inc.*, 180 W.Va. 469, 377 S.E.2d 461, 464 (1988); *see also Shepherdstown Volunteer Fire Department v. State ex rel. West Virginia Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983). Should the employer succeed in rebutting the presumption, the employee then has the opportunity to prove by a preponderance of the evidence that the reasons offered by the employer for discharge were merely a pretext for unlawful discrimination. *Mace*, 377 S.E.2d 461 at 464." *W. Va. Dep't of Nat. Res. v. Myers*, 191 W. Va. 72, 76, 443 S.E.2d 229, 233 (1994); *Conner v. Barbour Cty. Bd. of Educ.*, 200 W. Va. 405, 409, 489 S.E.2d 787 (1997).

4. Although Grievant made a *prima facie* case of retaliation, Respondent rebutted the presumption by providing legitimate nondiscriminatory reasons for its action and Grievant failed to prove that those reasons were pretextual.

5. 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, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). "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), *aff'd* Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

6. "'[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).

7. Although a public employee representative is entitled to "reasonable and necessary time off," the statute makes clear that "the first responsibility of any employee is the work assigned to the employee. An employee may not allow grievance preparation and representation activities to seriously affect the overall productivity of the employee as determined by the employer." W. VA. CODE § 6C-2-3(p).

8. Grievant failed to prove that Respondent's decision to prohibit his representation of grievants in the grievance process was arbitrary and capricious given the nature of his employment.

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

DATE: October 4, 2024

Billie Thacker Catlett
Chief Administrative Law Judge

[4] On 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.