

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

WILLIAM C. HOFFMAN,

Grievant,

v.

Docket No. 2016-1085-DHHR

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
BUREAU FOR PUBLIC HEALTH and EDUCATION
REIMBURSEMENT AND LEAVE PROGRAM,**

Respondents.¹

DECISION

Grievant, William C. Hoffman, filed a level one grievance against his employer, Respondent, Department of Health and Human Resources (“DHHR”)/ Bureau for Public Health (“BPH”), dated January 11, 2016, stating as follows: “[t]he Employee Education Expense Reimbursement/Subsidized Education Leave Program process and procedures have been too narrowly applied, in order to deny me reimbursement for a course recently completed, causing undue economic hardship.” As relief sought, Grievant states as

¹ Both the DHHR-Bureau for Public Health and DHHR’s EER/L Program are listed as Respondents in this matter. At level one, the grievance evaluator joined the EER/L Program as a party because it made the decisions regarding reimbursement, not BPH. Grievant does not work for the EER/L Program, but such is a program through his employer, DHHR. The undersigned inquired of counsel for Respondents at the level three hearing if he was representing both listed Respondents, and he answered in the affirmative. It is noted that in his proposed Findings of Fact and Conclusions of Law, counsel for Respondents does not acknowledge there being more than one named Respondent. Instead he refers only the “Respondent” and lists DHHR, BPH, and the EER/L Program as one entity, with their names separated by forward slash marks. The undersigned recognizes that there are two Respondents, as reflected in the correct style of the case, and in the level one decision. Further, at the commencement of the level three hearing, the undersigned noted that Ms. Leighton-Clark was appearing as the agency representative at the level three hearing, and asked if BPH would be appearing. Counsel for Respondents answered no. Ms. Leighton-Clark was the only agency representative from DHHR present during the level three hearing.

follows: “[t]he relief sought is to be reimbursed for educational expenses (\$1,800.00) as offered by the EER/L program.” At level one, the grievance evaluator joined DHHR’s Education Expense Reimbursement and Leave Program (“EER/L”) as a party to this action.

A level one conference was conducted on January 28, 2016. The grievance was denied by decision dated February 18, 2016. Grievant appealed to level two on February 29, 2016. A level two mediation was conducted on April 12, 2016. On April 18, 2016, Grievant perfected his appeal to level three. A level three hearing was held on July 29, 2016, before the undersigned administrative law judge at the Grievance Board’s Charleston, West Virginia, office. Grievant appeared in person, *pro se*. Respondents appeared by counsel, Harry C. Bruner, Jr., Esquire, Assistant Attorney General. This matter became mature for decision on September 2, 2016, upon receipt of the last of the parties’ proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent DHHR as an Epidemiologist in the Bureau of Public Health. Grievant applied for reimbursement through DHHR’s Education Expense Reimbursement Program for the cost of a college course he planned to take. Grievant made the initial application, which was approved. However, Grievant dropped the course that had been listed on his approved application, and added a new course without informing the EER/L Program. When he submitted his final paperwork to seek reimbursement of the cost of the class, his application was denied because Respondent EER/L concluded that Grievant failed to comply with its policies for seeking reimbursement. The main problem was that Grievant took a class that the program had

not approved. Grievant argues that he was wrongly denied his reimbursement in that the policy was applied too narrowly. Respondents assert that they properly denied the request for reimbursement. Grievant failed to prove his claims by a preponderance of the evidence. Therefore, 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 is employed by Respondent DHHR as an Epidemiologist III at the Bureau for Public Health.

2. Respondent DHHR offers a tuition reimbursement program to its employees called the Education Expense Reimbursement and Leave Program (“EER/L”). Through this program, employees may apply for reimbursement of the costs of taking educational courses related to their work performance.

3. To receive tuition reimbursement through the Respondent EER/L program, employees must make application by completing certain forms, and the same must be approved by those who administer the program which is within the DHHR’s Office of Human Resources Management. At all times relevant herein, there were only two employees administering the program: Linda Leighton-Clark, Director of Employee Development, and Careasa Nichols, EER/L Program Specialist.

4. Grievant has participated in the EER/L Program offered by his employer. Grievant applied for and received educational reimbursements for courses he completed during the fall of 2014 and spring of 2015. Grievant then applied for educational reimbursement for a class he planned to take in the fall of 2015.

5. In making his application for educational reimbursement, Grievant first submitted a completed A1 Form to OHRM, which was received by OHRM on July 27, 2015, listing the class for which he sought reimbursement as “BIOS 611 Data Management and Reporting.” On this form, Grievant indicated that the class was to start on July 17, 2015, and end on December 8, 2015. Grievant also lists on the form that he is seeking \$1,800.00 in reimbursement for this class. The EER/L Program staff accepted, or approved, this application on or about August 5, 2015.²

6. Before the class started, but after the submission of his A1 Form to EER/L Program, Grievant received a call from his advisor informing him that the BIOS 611 class was not the class he should be taking. The advisor informed him that the correct class was Applied Biostatistics I BIOS 601. Thereafter, Grievant dropped the BIOS 611 class, and added Applied Biostatistics I BIOS 601. Grievant proceeded to take the BIOS 601 class; however, at that time Grievant did not inform the EER/L Program of this change in his approved class.³

7. At the end of the fall 2015 semester, Grievant submitted his completed A2 Form to the EER/L Program seeking reimbursement for taking the class. On this form, Grievant indicated that he completed the course titled “Applied Biostatistics I 601 BIOS.” Grievant’s signature is dated December 16, 2015. The EER/L Program received the completed A2 Form on December 21, 2015.⁴

² It is noted that while the application stated that the class began on July 17, 2015, it apparently did not.

³ See, testimony of William Hoffman, Grievant.

⁴ See, Respondents’ Exhibit 2, packet including 2015 Education Expense Reimbursement Checklist and completed A1 and A2 Forms; Grievant’s Exhibit 1 2015 Education Expense Reimbursement Checklist.

8. On or about December 29, 2015, Careasa Nichols emailed Grievant seeking information from Grievant about the A2 he submitted. In particular, Ms. Nichols informed Grievant that she needed something documenting the grade he received in the course, and she questioned why the names of the course he took did not correspond on his A1 and A2 forms. In the course of the email exchange, Grievant provided her the documentation she requested, and explained to her that he had dropped the BIOS 611 course and had added the BIOS 601 course.⁵

9. By email dated December 30, 2015, Careasa Nichols informed Grievant that his application for reimbursement was being denied because he changed classes without notifying the EER/L Program at the time it occurred, in violation of its policy, “EER/L Process and Procedure, Requirements (L): Course names, course numbers and dates on the EER/L A1 or EER/L B1 form must correspond with the course names, course numbers and dates supplied on the corresponding EER/L A2 and B2 forms.”⁶

10. Grievant appealed the denial of his application to Linda Leighton-Clark by email dated January 6, 2016. After reviewing Grievant’s A1 and A2 forms and the emails between Grievant and Ms. Nichols, Ms. Leighton-Clark sent Grievant a lengthy email, which included images of Grievant’s completed forms and calendars, explaining that she was upholding Ms. Nichols’ denial of his reimbursement application.⁷

Discussion

Before addressing the merits of Grievant’s claim, the undersigned must first address a Motion to Quash *Subpoena Duces Tecum* Respondents filed the day before

⁵ See, Respondents’ Exhibit 3, emails.

⁶ See, Respondents’ Exhibit 3, emails.

⁷ See, Respondents’ Exhibit 3, emails.

the level three hearing. On July 20, 2016, the undersigned issued a *Subpoena Duces Tecum* for Linda L. Leighton-Clark, pursuant to a request made by Grievant, ordering Ms. Clark to appear at the level three hearing and bring with her the following:

1. A copy of the March 25, 2016, EER/L Program Survey sent to participants and the questions, responses, individual comments and final results for the survey;
2. A copy of Forms EER/L A-1, A-2, B and C for the program participants who have and have not been reimbursed; and,
3. Number of individual EER/L participants who have been reimbursed and the number who have not been reimbursed.⁸

Because the Motion to Quash was received the day before the level three hearing, the same had to be addressed at the commencement of the level three hearing. At which time, the undersigned heard the arguments of both parties on the issues. After a lengthy discussion to clarify what information was being sought and how the same was relevant, the undersigned ruled that Motion to Quash with respect to the requests set forth in paragraphs 1 and 2 above would be granted as the information sought was irrelevant as there had been no claim that would require Grievant to compare himself to others, such as discrimination. Further, Grievant asserted that the requests would be useful in finding witnesses. However, as Grievant had requested this information be brought to the hearing and not produced in advance in discovery, it would be too late to call any witnesses that might be discovered from this information. After the undersigned made these rulings, Grievant indicated that he had no objection to the same. Therefore,

⁸ The requests listed in the *subpoena duces tecum*, as stated herein, were taken verbatim from Grievant's request to the Grievance Board.

Grievant, essentially, withdrew his requests. As to the request made in paragraph 3 above, the undersigned granted the Motion to Quash, but ruled that Grievant would be permitted to ask the witnesses from the EER/L Program about the information sought in the request, and about the number of people denied reimbursement through the program. It is further noted that no specific documents were requested in paragraph 3 above, and that the request only sought information about the number of those applicants who were reimbursed, and the number of those not reimbursed. Respondents provided some information in response to this request in its Motion to Quash, but ultimately answered that it did not know how many applicants had been paid reimbursement.

As this is not a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence. W.VA. CODE ST. R. § 156-1-3 (2008); *Howell v. W. Va. Dep't of Health and Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). "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). "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 and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant argues that his application for educational reimbursement was wrongly denied by the EER/L Program in that the "process and procedures" were too narrowly applied causing him "undue economic hardship." Grievant further asserts that he did not fail to notify the EER/L Program of the change in his course, and that the EER/L Program

policy does not require the denial of his reimbursement despite the errors in his application. Grievant also argues that the decision to deny his reimbursement was unfair, and that the EER/L Program should have exercised discretion to grant his reimbursement. Respondents assert that the EER/L Program properly denied Grievant's application for reimbursement of the costs because he failed to comply with the applicable policies and procedures governing the same.

Respondents point to the following provisions of the EER/L Program's "Process and Procedures" for denying Grievant's reimbursement:

- K. Course names, course numbers and dates supplied on the EER/L A1 or EER/L B1 form must correspond with the course names, course numbers and dates supplied on the corresponding EER/L A2 and B2 forms.
- N. Employees must notify the EER/L Program Manager of any changes made after the initial application in order for those changes to be considered. Failure to notify the EER/L Program Manager of any changes may result in denial of reimbursement and/or subsidized education leave.⁹

Respondents further point to the following provision of the Division of Personnel Education Expense Reimbursement/Leave Program Policy:

- d. (2) Employees must notify the appointing authority or designees of any changes made after the initial application in order for those changes to be considered. Failure to notify the appointing authority of course changes may result in denial of reimbursement and/or subsidized education leave.

⁹ See, Grievant's Exhibit 2. It is further noted that in their email correspondence with Grievant regarding the denial of his reimbursement, Ms. Nichols and Ms. Leighton-Clark identified these policy provisions as paragraphs "L" and "O", respectively. It appears that on or about November 5, 2015, the policy changed and those paragraphs were reorganized as paragraphs "K" and "N." The language that Ms. Nichols and Ms. Leighton-Clark cited in their correspondence and denial is the same as the current policy. The only difference is the lettering of the paragraphs. It appears that Ms. Nichols and Ms. Leighton-Clark were using the prior version of the policy after the new policy became effective.

DOP-P16, Section III.B.2.d.2.¹⁰ Upon information and belief, the EER/L Process and Procedures, as well as the required application forms, can be found on the EER/L website.

The evidence presented establishes that Grievant made application for reimbursement for one particular class, but after his application was submitted, he dropped that class to take another, and did not inform the EER/L Program of the change at that time. Instead, Grievant's only attempt to inform the program of the change came when he submitted his required A2 Form months later at the end of the semester, which included the name of the class he actually took. It is noted that Grievant did not do anything to highlight that he changed classes after his original application. He just submitted the form listing the new class. Because Grievant had the original class listed on his A1 form and the other class he actually took on the A2 form, the form appeared to contain an error, which prompted Ms. Nichols to email him. In response to Ms. Nichols' email, Grievant ultimately explained to Ms. Nichols that he had dropped the BIOS 611 class to take the BIOS 601 class. Such occurred during their December 29, 2015, email exchange. This was the first time that the EER/L Program was actually informed that Grievant had dropped the original class, BIOS 611, and added the BIOS 601 class that was listed on the A2 Form. Yes, Grievant had put the name of the correct class he took on the A2 Form, but he had not explained that he had dropped the original approved class and added BIOS 601 until that email. Until then, it looked like there was a typographical

¹⁰ See, Respondents' Exhibit 1. This policy was not cited or referenced by Ms. Nichols or Ms. Leighton-Clark in the correspondence with Grievant regarding the denial of his reimbursement.

error on the form.

The EER/L “Process and Procedures” sets forth a number of requirements, which are listed in Section II by lettered paragraphs, and goes on to describe the process for applying for education expense reimbursement in Section III. The two EER/L policy sections referenced above are found in Section II. Applicants are first required to submit a completed A1 Form. According to the policy, such is to be submitted no later than thirty calendar days following the earliest class start date indicated on the A1 Form. The approval of the A1 Form appears to act as an approval to proceed with taking the class, or an advanced authorization.¹¹ However, such alone does not mean that the reimbursement will be granted. There are additional requirements that must be met for the reimbursement to be granted, such as the completion of the course, receipt of at least a B or a C in the course, and completion and approval of the A2 Form.

In this case, Grievant made some mistakes. Grievant completed his A1 Form and such was accepted/approved, even though the start date of the class listed thereon was apparently incorrect. The class did not start until August 17, 2015, and his form says that it was July 17, 2015. Nonetheless, this mistake was not the one that triggered the denial. Grievant’s A1 was approved. The real problem arose when Grievant dropped the course listed on his approved A1 Form, then added a different class. Grievant did not inform the EER/L Program when he made this change, and he did not submit a new A1 Form for the second class. Grievant did not seek guidance from the EER/L Program staff either. Instead, he took a class that had not been approved by the EER/L Program, and completed the same. At the very end of the semester, after receiving his grade, Grievant

¹¹ See, Grievant’s Exhibit 2, policy.

completed the A2 Form, as required by policy to get the reimbursement, and listed the name of the class he actually took. The policy requires the course names and numbers listed on the A1 and A2 forms to match. They did not. When it was learned that Grievant had taken a class other than the one for which he had been approved, his reimbursement was denied.

Grievant argued that this was a “five-minute problem” that has dragged on resulting in this grievance. Grievant asserts that he filled out the forms to the best of his ability, he was not trying to defraud the agency, and that he complied with the spirit of the program. Grievant also notes that the class he took was still directly related to his work, and he received an A for his performance. Thus, Grievant appears to argue that the denial was arbitrary and capricious. Grievant also notes that the lettered paragraphs in the denial do not correspond with the reasons set forth for his denial. Such is insignificant as the revision in the policy changed the lettering, but the actual language relied upon for the denial is the same. Grievant certainly had notice of the reason for the denial.

The “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. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (citing *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (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.” *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 614, 474 S.E.2d 534, 544 (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). “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 Resources*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001). Further, “[t]he Grievance Board has no authority to order a state agency to make a discretionary change in its policy, or to substitute its management philosophy for that of the agency. *Streets, et al., v. Dep't of Health and Human Resources/Sharpe Hospital*, Docket No. 03-HHR-039 (June 25, 2003); *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997).” *Sarver v. W. Va. Dep't of Health & Human Res./Office of Human Res. Management and Education Reimbursement Leave Program*, Docket No. 2016-1466-DHHR (Dec. 12, 2016).

The EER/L Policy sets forth requirements for reimbursement through its program. The two people who administer the program testified at the level three hearing, and made it abundantly clear that Grievant was denied reimbursement because not only did the course names and numbers on the two forms not correspond, and that such was not simply because of a typo, Grievant took a class the program never approved him to take. While the policy is not explicit about adding and dropping classes, one of the sections

listed above is very clear: “[e]mployees must notify the EER/L Program Manager of any changes made after the initial application in order for those changes to be considered. Failure to notify the EER/L Program Manager of any changes may result in denial of reimbursement” Grievant made a change to his class, and did not inform the program at that time, and informing them after completing the class was simply too late. Grievant had access to the policy and he had access to the program employees of whom he could have asked questions. He apparently chose not to avail himself of that information. Grievant had successfully completed this process two times in the past without incident, and was familiar with the established process. While this was, admittedly, a unique situation, this could have been avoided had Grievant followed the policy. Finally, Grievant is correct that the policy does not *require* denial of his application. It states that reimbursement *may* be denied. Additionally, there are no exceptions to these rules listed in the policy. Therefore, the decision to deny reimbursement if the policy is not followed is within the discretion of the EER/L Program, and the undersigned has no authority to substitute her judgment for its. Accordingly, the undersigned cannot find that the EER/L Program’s decision to deny Grievant’s reimbursement was arbitrary and capricious, or otherwise unreasonable or improper. Therefore, the grievance is denied.

The following Conclusions of Law support the decision reached:

Conclusions of Law

1. As this is not a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence. W.VA. CODE ST. R. § 156-1-3 (2008); *Howell v. W. Va. Dep’t of Health and Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). “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).

2. The “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. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001) (citing *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (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.” *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 614, 474 S.E.2d 534, 544 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

3. “Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996).” *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). “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 Resources*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

4. “The Grievance Board has no authority to order a state agency to make a discretionary change in its policy, or to substitute its management philosophy for that of the agency. *Streets, et al., v. Dep’t of Health and Human Resources/Sharpe Hospital*, Docket No. 03-HHR-039 (June 25, 2003); *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997).” *Sarver v. W. Va. Dep’t of Health & Human Res./Office of Human Res. Management and Educ. Reimbursement Leave Program*, Docket No. 2016-1466-DHHR (Dec. 12, 2016).

5. The Grievant failed to prove by a preponderance of the evidence that the EER/L Program’s decision to deny his educational expense reimbursement violated any rule, policy, or procedure. Grievant further failed to prove by a preponderance of the evidence that the denial of his educational expense reimbursement was improper, or otherwise arbitrary and capricious.

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 (eff. July 7, 2008).

DATE: January 31, 2017.

Carrie H. LeFevre
Administrative Law Judge