THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DEB BRITTON,
Grievant,

v. **Docket No. 2017-2497-CONS**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
HOPEMONT HOSPITAL,
Respondent.

DECISION

Grievant, Deb Britton, filed two grievances at Level One against her employer, Hopemont Hospital. The first grievance was filed on February 8, 2017 and alleges "While acting as an employee representative Grievant was told by Asst. Administrator John Pritt that if she said one word she would be expelled from the predetermination meeting." For relief Grievant requested to be made whole including cessation of interference with statutory rights. The second grievance was filed on March 6, 2017, and alleged that "Working staff under acuity." Grievant requests to be made whole including increasing staff to meet acuity.

The two grievances were consolidated into the above referenced matter at Level One. The Level One hearing was conducted on September 12, 2017. Grievant appeared in person and by her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. John Pritt, Assistant Chief Executive Officer, appeared on behalf of Hopemont Hospital. This grievance was denied by decision dated October 2, 2017. A Level Two mediation session was conducted on December 5, 2017. Grievant perfected

her appeal to Level Three on December 26, 2017.

The case was scheduled for a Level Three hearing before the undersigned on March 20, 2018; however, the parties notified the undersigned of their request to submit the case on the lower level record. This request was granted and the parties were given until May 21, 2018, to submit fact/law proposals. Grievant appeared by her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its counsel, Steven R. Compton, Deputy Attorney General. This matter became mature for consideration upon receipt of the last of the parties' proposals on May 21, 2018.

Synopsis

Grievant is employed at Hopemont Hospital and also serves as a union representative in disciplinary meetings conducted at Hopemont Hospital. Grievant was instructed to allow her co-worker to answer questions directed to the co-worker during a predetermination meeting. Grievant alleges that this is a violation of her statutory rights. Respondent denies that Grievant was instructed that she could not speak during the meeting. Grievant did not establish by a preponderance of the evidence that Respondent violated her rights as set out in the applicable statute.

Grievant also alleges that Respondent is working the patient care staff under acuity and does not have enough staff employed in order to meet the needs of the patients at the hospital. Grievant has failed to demonstrate by a preponderance of the evidence that Hopemont Hospital's staffing decisions are contrary to applicable law or otherwise, arbitrary and capricious.

The following Findings of Fact are based upon the lower level record.

Findings of Fact

1. Grievant is employed at Hopemont Hospital and also serves as a union representative in disciplinary meetings conducted at Hopemont Hospital.

2. On February 6, 2017, Grievant served as an employee representative for another employee during a predetermination meeting. During the Level One hearing, Grievant offered a short handwritten note from Charles Patton, the employee she was representing. Mr. Patton did not testify to the events at the hearing nor was he subject to cross examination.

3. During the hearing, Grievant offered the following testimony:

> SIMMONS: Okay. So, you were specifically told you may not speak at all at the meeting?
>
> BRITTON: Yes.
>
> SIMMONS: And, then you were asked to leave at some point, or told you had to leave if you - if you speak?
>
> BRITTON: Yes.

4. John Pritt, Assistant Administrator of Hopemont Hospital, and Elizabeth Cervi, Director of Nursing, indicated that they did not have an issue with Grievant representing Mr. Patton, but were concerned about her answering questions asked directly to Mr. Patton instead of allowing him to provide the answers.

5. Grievant was told to allow Mr. Patton to answer the questions during the predetermination meeting. Grievant was not removed from the meeting and continued to be present to witness and represent.

6. Grievant makes the claim that Hopemont Hospital is in violation of its acuity staffing levels, but offered no evidence other than her own opinions concerning staffing.

7. Respondent provided that they have not been cited concerning staffing levels during three previous surveys conducted by the West Virginia Office of Health Facility Licensure and Certification. These surveys are public record and are available on the West Virginia Office of Health Facility Licensure and Certification website.

8. Record reflects that those surveys confirmed that staffing levels at Hopemont were not cited during any of those surveys.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant alleges in her grievance that on February 6, 2017, during a predetermination meeting, in which she was representing another employee of Hopemont Hospital, CEO John Pritt informed her, "if she said one word she would be expelled from the predetermination meeting." Grievant argues that this is a violation of her statutory rights.

WEST VIRGINIA CODE § 6C-2-3(g)(1) states: "(1) An employee may designate a representative who may be present at any step of the procedure as well as at any meeting that is held with the employee for the purpose of discussing or considering disciplinary action." The Grievance Board has noted that "this . . . Code Section gives employees the right to representation during pre-disciplinary conferences." *Knight v. Dep't of Health & Human Res./BCSE*, Docket No. 2008-0981-DHHR (Aug. 6, 2009). The Grievance Board later modified *Knight*, holding that "if the topic of the meeting is conduct of the employee that could lead to discipline, the employee has a statutory right to have a representative present if requested." *Beaton, et al. v. Dep't of Health & Human Res./Sharpe Hospital*, Docket No. 2013-0496-CONS (Dec. 20, 2013).

This statutory and case law give West Virginia State public employees the right to representation in meetings that could lead to disciplinary action. The employee who is facing possible disciplinary action may request representation at such meetings, and may file a grievance if that request is denied. On February 6, 2017, Grievant attended a predetermination meeting as a representative of another employee. Although Grievant is an employee of Hopemont Hospital, Grievant was not the employee being investigated or questioned in the meeting. The record seems to support a finding that, contrary to

Grievant's allegation that she was instructed not to speak during the predetermination meeting, Respondent did not question Grievant providing representation but did not want her to answer the questions directed to the co-worker.

Respondent denies that Grievant was instructed that she could not speak during the meeting. Grievant was permitted to attend the predetermination meeting with her co-worker who was asked questions regarding possible disciplinary action. Respondent did not prevent Grievant from remaining in the meeting for the entire time her co-worker was questioned. The limited record of this case does indicate that any alleged mishandling of the role of the representative in the meeting would seem to only impact the rights of the employee who was exposed to possible discipline. The limited record does not support a finding that Grievant established by a preponderance of the evidence that Respondent violated her rights as set out in the above statute.

Grievant also alleges that Respondent is working the patient care staff under acuity and does not have enough staff employed in order to meet the needs of the patients at the hospital. Decisions about the staffing of the hospital are management decisions. The undersigned does not have authority to substitute his judgment for agency management in such matters. *See Rodeheaver v. Dep't of Health & Human Res.*, Docket No. 00-HHR-312 (July 31, 2001); *See also*, *Skaff v. Pridemore,* 200 W. Va. 700, 490 S.E.2d 787 (1997). Such management decisions are evaluated pursuant to the arbitrary and capricious standard.

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)).

"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 Resources*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Id.* (*citing Arlington Hosp. v. Schweiker,* 547 F. Supp. 670 (E.D. Va. 1982)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education. *See generally, Harrison v. Ginsberg,* [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." *Trimboli*, *supra*.

Hopemont Hospital is a ninety-eight bed, long term care nursing facility. Hopemont Hospital has sixty-four vacant positions in its Nursing Department and the hospital has between fifty-five and fifty-seven residents. Any time there are not enough permanent state employees available to work in patient care at Hopemont Hospital, Respondent uses

temporary, contract employees to help provide patient care. Respondent presented documentation that the West Virginia Office of Health Facility Licensure and Certification had conducted three recent surveys at Hopemont Hospital regarding complaints about short-staffing, and the West Virginia Office of Health Facility Licensure and Certification found that Respondent had no violation of any rules or regulations regarding staffing levels.

The record established that Respondent staffs at least the minimum amount of direct care personnel needed to serve the number of residents currently housed at the facility. At times, staff members need to work overtime in order to meet acuity levels for patient care, but Respondent attempts to hold this requirement to a minimum. Grievant has failed to demonstrate by a preponderance of the evidence that Hopemont Hospital's staffing decisions are contrary to applicable law or otherwise, arbitrary and capricious.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

2. WEST VIRGINIA CODE § 6C-2-3(g)(1) which states: "(1) An employee may designate a representative who may be present at any step of the procedure as well as at any meeting that is held with the employee for the purpose of discussing or considering disciplinary action."

3. The label given the meeting does not matter. If the topic of the meeting is conduct of the employee that could lead to discipline, the employee has a statutory right to have a representative present if requested. *Koblinsky v. Putnam County Health Department,* Docket No. 2010-1306-CONS (November 8, 2010).

4. The limited record does not support a finding that Grievant established by a preponderance of the evidence that Respondent violated her rights as set out in the applicable statute.

5. The undersigned does not have authority to substitute his judgment for agency management in such matters. *See Rodeheaver v. Dep't of Health & Human Res.*, Docket No. 00-HHR-312 (July 31, 2001); *See also*, *Skaff v. Pridemore,* 200 W. Va. 700, 490 S.E.2d 787 (1997).

6. "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 Resources*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Id.* (*citing Arlington Hosp. v.*

Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education. *See generally, Harrison v. Ginsberg,* [169 W. Va. 162], 286 S.E.2d 276, 283 (W. Va. 1982)." *Trimboli*, *supra*.

7. Grievant has failed to demonstrate by a preponderance of the evidence that Hopemont Hospital's staffing decisions are contrary to applicable law 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: June 11, 2018

Ronald L. Reece
Administrative Law Judge