

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**CYNTHIA BURWELL,
Grievant,**

v.

Docket No. 2018-0452-DHHR

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
WILLIAM R. SHARPE, JR. HOSPITAL,
Respondent.**

DECISION

Grievant, Cynthia Burwell, filed this action against her employer to Level Three of the grievance process on September 24, 2017. Her Statement of Grievance is “Denial of representation; discriminatory work overs; discrimination of discipline; indefinite suspension; retaliation for APS allegation.” For relief, Grievant seeks “to be made whole in every way including removal of any and all discipline; back pay with interest and benefits restored.”¹

A Level Three hearing was conducted before the undersigned at the Grievance Board’s Westover office on February 26, 2018. Grievant appeared in person and by her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its counsel, James “Jake” Wegman, Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties’ fact/law proposals on April 30, 2018.

¹At the beginning of the Level Three hearing, Grievant stipulated that the only issue presented for the undersigned was restoration of her leave. The other issues presented in her Statement of Grievance need not be considered, and are deemed abandoned.

Synopsis

Grievant is employed by Sharpe Hospital as a Health Service Worker. On September 21, 2017, Grievant was present during an incident in which a patient hit another patient in the head. Sharpe is required to submit such incidents to Adult Protective Services for investigation. The only issue in this case is whether Grievant is entitled to restoration of annual leave that she used in lieu of accepting an alternative work assignment during an Adult Protective Services investigation. Record of the case demonstrated that Grievant's use of leave was properly calculated as she chose to use leave rather than accept an alternative work assignment.

The following Findings of Fact are based upon the record of this case.

Findings of Fact

1. Grievant is employed by Sharpe Hospital as a Health Service Worker. Sharpe Hospital is a State-owned psychiatric hospital operated by the Department of Health and Human Resources. Patients at Sharpe Hospital suffer from medical conditions including mental illness.
2. On September 21, 2017, Grievant was present during an incident in which a patient hit another patient in the head.
3. Sharpe Hospital is required to submit such incidents to Adult Protective Services for investigation. Jeff Price, Human Resources Director, explained that during an Adult Protective Services investigation, eyewitnesses must file a report with the Nurse Clinical Coordinator. The Nurse Clinical Coordinator investigates Adult Protective Services allegations that occurred during the shift. Employees that are implicated in an Adult

Protective Services investigation are pulled from patient care and offered an alternative assignment.

4. Mr. Price indicated that employees are pulled from patient care in order to protect the patients, and to also protect the employee. If an employee is pulled from patient care, they are offered alternative work assignments.

5. Employees are not suspended pending an investigation, instead they are offered alternative work assignments pending an investigation. This allows employees to keep their hours and keep their salary. The alternative work assignments typically offered would be in housekeeping or maintenance. Employees could also be assigned to the telephone switchboard or admissions office.

6. According to Registered Nurse Michelle Farris, Nurse Clinical Coordinator, there was an allegation involving Grievant that had to be reported to Adult Protective Services.

7. Nurse Farris met with Grievant to discuss the incident. Nurse Farris indicated that Grievant refused to fill out the forms. Grievant was offered alternative work, refused that assignment, and indicated that she would use annual leave. Grievant then walked out of the office.

8. Due to Grievant refusing the alternative work assignment during the investigation, she used annual leave from September 21 through her return to work on October 2, 2017.

9. Record of this case demonstrated that Grievant was offered an alternative work assignment by Respondent. Record also demonstrated that the charge of patient

neglect was substantiated against Grievant; however, Respondent chose not to discipline Grievant.

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).

A Grievant's belief that her supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitutes a substantial detriment to, or interference with, the employee's effective job performance or health and safety." *Rice v. Div. of Highways*, Docket No. 06-DOH-247 (Aug. 29, 1997). Actions that are arbitrary and capricious, or which are discriminatory, fall within this stated exception. *Thomas v. Dep't of Health and Hum. Res.*, Docket No. 2010-1037-CONS (July 1, 2010).

"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). In determining that a discretionary decision was arbitrary and capricious, the undersigned must apply a narrow scope of review, limited to considering whether relevant factors were considered in reaching the decision, and whether there has been a clear error of judgment. *Bedford, supra*.

In the instant case, Grievant has failed to demonstrate by a preponderance of the evidence that Sharpe Hospital acted in an arbitrary and capricious manner when it offered her an alternative work assignment pending the Adult Protective Services investigation. Both Mr. Price and Nurse Farris explained that during an Adult Protective Services investigation, employees are removed from patient care. This protects both the patients and the employees. During the investigation, employees are offered alternative work so they can continue employment without suffering a loss of pay.

Grievant points to West Virginia Division of Personnel, Administrative Rule § 12.3.b Non-disciplinary Suspension, which provides in part, "An appointing authority may suspend any employee without pay indefinitely to perform an investigation regarding an employee's conduct which has a reasonable connection to the employee's performance of his or her

job . . . Such suspensions are not considered disciplinary in nature and an employee may choose to use accrued annual leave during the period of non-disciplinary suspension but is not eligible for any other leave afforded this rule.”

“Upon completion of the investigation or criminal proceeding, the appointing authority shall: initiate appropriate disciplinary action as provided in this rule; and, . . . provide retroactive wages or restore annual leave for the period of suspension . . . Further, the appointing authority and employee may agree to consider all or part of the period of unpaid suspension without pay.” West Virginia Division of Personnel, Administrative Rule §12.3.b.1 - § 12.3.b.2.

The limited record of this case does not support a finding by the undersigned that a non-disciplinary suspension took place in this case. To the contrary, the record supports a finding that Respondent offered Grievant an alternative work assignment pending the Adult Protective Services investigation. Nothing in the record even remotely hints at a finding that Grievant was being placed on a non-disciplinary suspension. Grievant refused the alternative work assignment and left the grounds of the hospital. The limited record indicates that Respondent does not suspend employees pending investigations, but instead they are offered alternative work assignments pending investigations.

The record supports a finding that Grievant refused the alternative work assignment and immediately left the office. Grievant was charged with using annual leave during the time she was off during the investigation in order to complete a forty-hour week. Respondent demonstrated that Grievant’s use of leave was properly calculated as the circumstances dictated that annual leave be assessed since Grievant chose to use leave rather than accept an alternative work assignment. This action of charging Grievant for

annual leave during the time she refused to work an alternative assignment cannot be viewed as arbitrary or capricious.

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 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).

2. A Grievant's belief that her supervisor's management decisions are incorrect is not giveable unless these decisions violate some rule, regulation, or statute, or constitutes a substantial detriment to, or interference with, the employee's effective job performance or health and safety." *Rice v. Div. of Highways*, Docket No. 06-DOH-247 (Aug. 29, 1997). Actions that are arbitrary and capricious, or which are discriminatory, fall within this stated exception. *Thomas v. Dep't of Health and Hum. Res.*, Docket No. 2010-1037-CONS (July 1, 2010).

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 Resources, Docket No. 93-HHR-322 (June 27, 1997). In determining that a discretionary decision was arbitrary and capricious, the undersigned must apply a narrow scope of review, limited to considering whether relevant factors were considered in reaching the decision, and whether there has been a clear error of judgment. *Bedford, supra*.

4. Grievant failed to prove by a preponderance of the evidence that Respondent acted in an arbitrary and capricious fashion when it offered her an alternative work assignment pending an Adult Protective Services investigation. Additionally, Grievant failed to prove by a preponderance of the evidence that Respondent acted in an arbitrary and capricious fashion when it charged her annual leave during the time she refused to work an alternative assignment.

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 *a/so* 156 C.S.R. 1 § 6.20 (2008).

Date: May 25, 2018

Ronald L. Reece
Administrative Law Judge