

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**DANETTA CALHOUN, et al.,
Grievants,**

v.

Docket No. 2016-1345-CONS

**DIVISION OF MOTOR VEHICLES,
Respondent.**

DECISION

The above-styled grievance was filed separately at Level One on February 19, 2016. The statements of grievance were identical and provided, "Grievant charged leave use for period in which the office was closed and not operating." The relief sought stated, "To be made whole in every way including restoration of leave improperly charged." The grievances were consolidated at Level One on February 25, 2016. This grievance was denied at Level One by decision dated March 21, 2016. Grievants appealed to Level Two on March 21, 2016. Following an unsuccessful mediation, Grievants appealed to Level Three on September 8, 2016.

A Level Three evidentiary hearing was conducted before the undersigned on March 29, 2018, at the Grievance Board's Westover office. Grievants appeared telephonically and by their representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union.¹ Respondent appeared by its counsel, Cassandra L. Means, Assistant Attorney

¹Danetta Calhoun, Amy Cornett, Catherine Delaney, Mary Early, Catherine Forrest, Catherine Hubbard, Joyce Jenkins, Susan Hutzler Mason, Paige Penwell, Helen Rinaldi, Karen Senesi, and Lorraine Thompson Vangosen all appeared via telephone. Robbie Perry, who is no longer employed by the Division of Motor Vehicles, did not appear for the hearing.

General, and Jill Dunn, General Counsel. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on May 25, 2018.

Synopsis

All thirteen Grievants in this consolidated case were or are employees at the Division of Motor Vehicles Regional Office in Charles Town, West Virginia. Grievants contend that they were improperly charged leave following two winter weather events in 2016. Record established that Grievants were properly charged leave consistent with the West Virginia Division of Personnel's Emergency Situations/Inclement Weather Policy. Because the Governor did not direct nonessential personnel to not report to work on the days in question, employees who were unwilling or unable to report to work as scheduled were charged with annual leave. Record supports a finding that this policy was properly applied, and Respondent did not act in an arbitrary and capricious manner.

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

Findings of Fact

1. Grievants in this consolidated grievance were or are employed at the Division of Motor Vehicles Regional Office in Charles Town, West Virginia. They are employed in various positions, including supervisors, customer service representatives, and a manager.
2. The Charles Town Regional Office is one of twenty-five regional DMV offices that processes drivers' licenses, titles, registrations, etc.
3. The Charles Town Office is managed by Lorraine Thompson Vangosen. During the time frame of this case, Ms. Thompson Vangosen reported to Regional Coordinator Cheryl Shiflett who then reported to Linda Ellis.

4. All DMV employees are provided with and made aware of the West Virginia Division of Personnel policy regarding inclement weather.

5. The policy provides that “all employees shall be required to report to work as scheduled during ES/IWC, unless specifically directed otherwise by the Governor or the Governor’s designee.”

6. The policy further provides that “employees who are unwilling or unable to report to work as scheduled during ES/IWC shall be charged annual leave, accrued compensatory time, or are required to take a personal leave of absence without pay for time absent from work; Provided, that employees and their direct supervisors may agree upon alternate work locations or work from home requirements in lieu of the annual leave/leave of absence requirement.”

7. Only the Governor has the authority to close DMV offices. A DMV office manager, such as Ms. Thompson Vangosen, lacks authority to close an office.

8. The type of work at these offices is customer driven, as such, it is not possible for office employees to fulfill their job duties remotely in lieu of taking annual leave.

9. In January 2016, a winter storm was forecasted to hit West Virginia. In anticipation of the event, Ms. Ellis composed and directed that an email be sent to all managers that attached and explained the inclement weather policy.

10. Ms. Ellis’ email provided as follows:

In the event of inclement weather, the attached policy is to be followed. Each employee must make their own personal decision regarding whether or not they will be able to come to work. Please do not try to sway your employees one way or another. Feel free to give employees a copy of the inclement Weather Policy.

A State of Emergency Declaration by the Governor does not mean state offices are closed. The Governor may or may not issue a statement relating to only essential employees reporting to work. If this happens, DMV employees are considered non-essential and thus would not report to work. This would be the only circumstance in which DMV offices would be considered closed . . .

11. The email further directed the regional office managers to ensure that their offices were open for business and to notify someone at the Regional Office Operations if the office would be delayed in opening.

12. On Friday, January 22, 2016, the forecasted storm crossed West Virginia along a southwest to northeast track. As a result, several DMV offices were closed because they were unable to provide services due to employees making the decision to go home.

13. Travel conditions remained impacted over the weekend and on Monday, January 25, 2016.

14. All DMV employees statewide who decided to leave work early on January 22 or to not report on January 25 were required to use annual leave. The Governor did not issue a proclamation closing state offices on either January 22 or January 25, 2016.

15. On February 16, 2016, an ice storm hit the Charles Town area. Due to a lack of employees, the Charles Town Regional Office was delayed in opening. After viewing footage of the roads in the Charles Town area, it was decided that travel on the roads was possible and the office should be opened. As with the January winter storm, there was no proclamation from the Governor closing state offices.

16. Grievant Lorraine Thompson Vangosen is the Regional Manager of the Charles Town Regional Office. Ms. Thompson Vangosen applied for and was charged

with 1.25 hours of annual leave for January 22, 2016; 8 hours of annual leave for January 25, 2016; and 8 hours of annual leave for February 16, 2016.

17. Ms. Thompson Vangosen stated that she did not receive notification from her supervisors that the office would be closed on the dates in question. She further stated that she did not close the office.

18. Grievant Danetta Calhoun is a Supervisor 3 at the Charles Town Office. Ms. Calhoun applied for and was charged with 2 hours of annual leave for January 22, 2016, and 8 hours of annual leave for January 25, 2016. Ms. Calhoun applied for and was charged with 8 hours of sick leave for February 16, 2016.

19. Ms. Calhoun stated that she did not believe that the office was closed on January 22, 2016. In regard to January 25, 2016, she stated she did not receive a phone call advising of an office closure. As to February 16, 2016, Ms. Calhoun utilized sick leave because she felt she was getting ill.

20. Grievant Catherine Forrest is a Lead Customer Service Representative at the Charles Town Office. Ms. Forrest applied for and was charged with 3.75 hours of annual leave for January 22, 2016, and 8 hours of annual leave for February 16, 2016. Ms. Forrest additionally applied for and was charged with 8 hours of sick leave for January 25, 2016.

21. Ms. Forrest left early on January 22, 2016, due to weather but was not advised that the office was closing. In regard to January 25, 2016, Ms. Forrest utilized sick leave as opposed to annual leave. She indicated that her absence was not due to being advised of an office closure, but because of the poor conditions of the roads.

22. Grievant Amy Cornett is a CSR at the Charles Town Office. Ms. Cornett applied for and was charged 4.5 hours of annual leave for January 22, 2016, 8 hours of annual leave for January 25, 2016, and 7 hours of annual leave for February 16, 2016. Concerning this leave, Ms. Cornett explained that it was snowing and that her car does not do well in snow and ice. She stated that no one advised her of an office closure.

23. Grievant Catherine Hubbard is a CSR at the Charles Town Office. Ms. Hubbard applied for and was charged with 4.5 hours of annual leave for January 22, 2016, 8 hours of annual leave for January 25, 2016, and 6 hours of annual leave for February 16, 2016. Ms. Hubbard indicated that she left work early due to road conditions and that no one advised her to leave.

24. Grievant Joyce Jenkins is a supervisor at the Charles Town Office. Ms. Jenkins applied for and was charged with 1 hour of annual leave for January 22, 2016, and 8 hours of annual leave for January 25, 2016. Ms. Jenkins clarified that it was her choice if she wanted to leave work. She did not receive a phone call from Lorraine Thompson Vangosen advising that the office would be closed.

25. Grievant Catherine Delaney is a CSR at the Charles Town Office. Ms. Delaney applied for and was charged with 2.5 hours of annual leave for January 22, 2016, 8 hours of annual leave for January 25, 2016, and 5 hours of annual leave for February 16, 2016. Ms. Delaney left work early by her own choice and no one instructed her to leave. She did not receive a phone call from Ms. Thompson Vangosen advising her that the office was closed. Ms. Delaney left the office because of snow and that the roads were snow and ice covered.

26. Grievant Mary Early is a CSR at the Charles Town Office. Ms. Early applied for and was charged with 3 hours of annual leave for January 22, 2016, and 8 hours of annual leave for January 25, 2016. Ms. Early left the office because of the snow and upon realizing that the roads were snow and ice covered. She did not receive a phone call from Ms. Thompson Vangosen advising her that the office was closed.

27. Grievant Karen Senesi is a CSR at the Charles Town Office. Ms. Senesi applied for and was charged with 4 hours of annual leave for January 22, 2016, and 8 hours of annual leave for January 25, 2016. Ms. Senesi left the office because of the snow and upon realizing that the roads were snow and ice covered. She did not receive a phone call from Ms. Thompson Vangosen advising her that the office was closed.

28. Grievant Susan Hutzler Mason is a CSR at the Charles Town Office. Ms. Mason applied for and was charged with 3.5 hours of annual leave for January 22, 2016, 8 hours of annual leave for January 25, 2016, and 1.25 hours of annual leave for February 16, 2016. Ms. Mason left the office because of the snow and upon realizing that the roads were snow and ice covered. She did not receive a phone call from Ms. Thompson Vangosen advising her that the office was closed.

29. Grievant Paige Penwell is a CSR at the Charles Town Office. Ms. Penwell applied for and was charged with 3 hours of annual leave for January 22, 2016, and 8 hours of annual leave for January 25, 2016. Ms. Penwell applied for and was charged with 8 hours of sick leave for February 16, 2016. Ms. Penwell stated that she left early on January 22, 2016, because of snow and ice-covered roads. Ms. Penwell stated that she received a phone call from Ms. Thompson Vangosen advising that the office would be closed on January 25, 2016.

30. Respondent extended a settlement offer to Ms. Penwell to credit her annual leave used for January 25, 2016. The offer did not include reimbursement for January 22, 2016, in which she chose to leave work. The record reflects that the settlement offer has not been accepted by Ms. Penwell.

31. Grievant Helen Rinaldi is a CSR at the Charles Town Office. Ms. Rinaldi applied for and was charged with 4.25 hours of annual leave for January 22, 2016, 8 hours of annual leave for January 25, 2016, and 6 hours of annual leave for February 16, 2016.

32. Ms. Rinaldi stated that her manager told her not to come to work on the days in question. As a result, Respondent and Grievant have been in the process of reaching a settlement agreement.

33. Grievant Robbie Perry was employed by Respondent at the Charles Town Office. She has since resigned from her position. Ms. Perry advised that her manager told her not to come to work on the days in question. As a result, Respondent and Grievant have been in the process of reaching a settlement agreement.

34. Three of the original sixteen Grievants settled their claims with Respondent and were dismissed as parties to this matter. Respondent made offers to all other employees who provided that they were advised by their manager of an office closure.

Discussion

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). "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).

In the instant matter, Grievants assert that they were improperly charged with leave during two winter weather events in 2016. It is undisputed that Grievants were charged with varying amounts of leave during some or all of three days at issue. The record supports a finding that Grievants fail to acknowledge that their personal choice to use leave on the days at issue falls within the inclement weather policy of the Division of Personnel. The policy provides that "all employees shall be required to report to work as scheduled during ES/IWC, unless specifically directed otherwise by the Governor or the Governor's designee."

For the days at issue in this grievance, it is undisputed that the Governor did not direct that state offices be closed due to weather conditions. Because there was no proclamation closing state offices, the inclement weather further provides that "employees who are unwilling or unable to report to work as scheduled during ES/IWC shall be charged annual leave, accrued compensatory time, or are required to take a personal leave of absence without pay for time absent from work; Provided, that employees and their direct

supervisors may agree upon alternate work locations or work from home requirements in lieu of the annual leave/leave of absence requirement.”

The record supports a finding that Grievants’ leave falls within the inclement weather policy. To credit Grievants’ leave due to a personal decision to leave work early or to not report during poor weather conditions would be inconsistent with the Emergency Situations/Inclement Weather Policy. It would also result in disparate treatment for other Respondent employees. The weather events at issue affected more than just the Charles Town Office. All Respondent employees statewide who chose to leave early or not report were properly charged with leave.

Finally, Grievants have failed to demonstrate that the actions taken by Respondent were arbitrary and capricious. "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*. It was not arbitrary and capricious for Respondent to comply with the Inclement Weather Policy by requiring Grievants to use annual leave for their absences on the days at issue.

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. "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*.

3. The action taken by Respondent in requiring employees to submit annual leave for the time they were unable or unwilling to report to work during inclement weather is consistent with the Division of Personnel's Emergency Situations/Inclement Weather Policy.

4. Grievants have failed to meet their burden of proof in establishing that Respondent misapplied a policy or acted in an arbitrary and capricious fashion.

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 (eff. July 7, 2008).

Date: June 19, 2018

Ronald L. Reece
Administrative Law Judge