THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

CARRIE THOMAS,

Grievant,

v. **Docket No. 2018-0903-DHHR**

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

Respondent.

DECISION

Grievant, Carrie Thomas, is employed by Respondent, Department of Health and Human Resources/William R. Sharpe, Jr. Hospital. On January 26, 2018, Grievant filed this grievance against Respondent stating, "I have lost 11 hours of annual leave due to staffing shortages." For relief, Grievant seeks "[t]o otherwise to be made whole".

A level one hearing was held on February 8, 2018. A level one decision was rendered on March 1, 2018, denying the grievance. Grievant appealed to level two on March 2, 2018, and a mediation session was held on June 7, 2018. Grievant appealed to level three of the grievance process on June 7, 2018. By letter dated November 16, 2018, the Grievance Board allowed the parties to submit this matter to level three based upon the level one record. Grievant was represented by Gordon Simmons, Steward, UE Local 170, West Virginia Public Workers Union. Respondent was represented by counsel, Mindy Parsley, Assistant Attorney General. This matter became mature for decision on January 4, 2019, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant lost 11.3 hours of excess annual leave at the end of 2017. Grievant claims discrimination due to Respondent's failure to inform her of her leave balance in a timely manner and to provide a substitute to process leave requests in place of her absent supervisor. Grievant contends equitable estoppel should reinstate her lost leave. Respondent counters that it emailed leave balances to employees at work on November 14, 2017, and provided a substitute supervisor to process leave requests. Grievant was on extended leave so did not have access to her work email. Grievant claims she never received her leave balance even after her return on December 18, 2017. Grievant did not prove that Respondent had a duty to ensure that Grievant knew her leave balance without her asking or that Respondent failed to timely inform her of her annual leave balance, let alone define the requisite period of time in which it was obligated to inform her. Grievant did not prove that Respondent failed to provide her a substitute supervisor to process her leave request. Grievant did not prove that Respondent discriminated against her or failed to fulfill any duty under equitable estoppel. 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 has been employed as a registered nurse (RN) for more than 19 years at William R. Sharpe, Jr., Hospital, a psychiatric facility operated by the West Virginia Department of Health and Human Resources, hereinafter "Respondent." (Level 1 transcript, p. 9)

2. Pursuant to the Administrative Rule of the West Virginia Division of Personnel, an employee with Grievant's tenure accrues 16 hours of annual leave per month, for a total of 192 hours per year. (Level 1 transcript, p. 15)

3. Pursuant to the Administrative Rule of the West Virginia Division of Personnel, an employee with Grievant's tenure can carry forward 320 hours of annual leave from one calendar year to the next. (Level 1 transcript, p. 15)

4. At the end of 2017, Grievant had 331.3 hours of annual leave. (Level 1 Decision, p. 2)

5. At the end of 2017, Grievant lost the excess 11.3 hours of annual leave when she was limited to carrying forward 320 hours of leave into 2018. (Level 1 transcript, p. 20)

6. In previous years, Grievant kept her annual leave under 300 hours. (Level 1 transcript, p. 8)

7. The Office of Human Resources Management (OHRM) directed Respondent to send employees notice of their leave balance as a curtesy and to set forth the consequences of not using it. No evidence was presented regarding a time period for accomplishing this directive. (Level 1 transcript, p. 8)

8. Over the years, Grievant regularly overheard the nurse manager telling employees they needed to use up their leave, but Grievant "was never one of those people." (Level 1 transcript, p. 9)

9. Grievant had two extended medical leaves in 2017, the "last being on June 30th." Grievant returned to work on December 18th. (Level 1 transcript p. 9)

10. Grievant had regularly used her annual leave in prior years, but did not use much annual leave in 2017, due to being on extended medical leave. (Level 1 transcript p. 8)

11. Grievant did not utilize any annual leave in January, February, July, and August of 2017. (Level 1 transcript p. 16)

12. In 2017, Grievant went months without using annual leave because she did not realize she would have excess leave at the end of the year and was "so glad to be working and coming back to work" due to her medical leave that vacation was far from her thoughts. (Level 1 transcript p. 9 & 10)

13. On November 14, 2017, Respondent emailed employees and the supervisor concerning each employee's accrued annual leave and the number of hours of leave each would lose at the end of 2017. (Level 1 transcript, p. 15)

14. Through its November 14, 2017, email, Respondent informed Grievant that she would lose 49.3 hours of annual leave. (Level 1 transcript, p. 15)

15. Grievant did not know about the November 14, 2017, email containing her annual leave balance. (Level 1 transcript p. 6-7)

16. Even though employees could access Kronos[1] to request annual leave, Grievant had not yet been trained thereon. (level 1 transcript, p. 18-19)

17. RNs at Sharpe usually request time off through Nurse Manager Darlene Bender, who then calls the nurse clinical coordinator to determine whether there is an extra RN scheduled to work, after which she requests the extra nurse to fill in for the RN taking annual leave. (Level 1 transcript, p. 12)

[1]The electronic timekeeping system for State employees.

18. Darlene Bender was off work most of December in 2017. (Level 1 transcript p. 12)

19. While Nurse Manager Darlene Bender was off in December 2017, Lead Nurse Kimberly Brady performed Ms. Bender's nurse manager duties, including processing leave requests. (Level 1 transcript, p. 12-14)

20. Grievant could have, but did not, request annual leave through Ms. Brady during Ms. Bender's absence. (Level 1 transcript, p. 12-14)

21. Grievant had the ability to determine her annual leave balance upon her return to work on December 18, 2018.

22. Grievant never viewed the email that Respondent sent her on November 14, 2018. (Level 1 transcript p. 7)

23. Upon returning to work on December 18, 2017, Grievant could have requested and been granted annual leave on December 18, 19, 21, 26, and 27, but did not do so. (Level 1 transcript, p. 10-13 & Level 1 Decision, p. 4)

24. In addition to normal holiday leave, employees also received half days off on December 22 and 29 through a proclamation by the Governor. (Level 1 transcript, p. 17)

25. Grievant worked December 25, 2017. (Level 1 transcript, p. 19)

26. At some point after returning to work on December 18, 2017, Grievant requested annual leave for December 28, 2017, and other days. (Level 1 transcript p. 11-12)

27. Grievant did not receive annual leave on December 28, 2017, and could not take annual leave on some of the other days she worked between December 18, 2017,

and December 31, 2017, because she was the only RN available on those days. (Level 1 transcript p. 5)

28. Nurse Manager Darlene Bender approved eight hours of annual leave requested by Grievant for use between December 18, 2017, and December 31, 2017. (Level 1 transcript, p. 5)

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*.

The parties agree that Grievant lost 11.3 hours of annual leave at the end of 2017, when these hours exceeded the 320 hours of annual leave she was allowed to carry-forward into 2018. Grievant contends that she lost this annual leave due to Respondent's failure to inform her of her leave balance in a timely manner, which she presumes would have enabled her to use up her excess leave. Respondent provided Grievant her leave balance through her work email on November 14, 2017. Grievant contends that she was on extended medical leave until December 18, 2017, but even after her return was never informed of her leave balance. Grievant did not provide any authority for her proposition that Respondent had a duty to take the initiative of providing her with her annual leave balance, other than the directive OHRM gave Respondent to, as a curtesy, provide

employees with their leave balances. Grievant did not provide any authority setting forth the requisite period-of-time in which Respondent was obligated to inform her nor did she make any argument concerning the mechanism Respondent was obligated to use in providing her that leave balance.

Grievant did not present any evidence showing she did not know she could only carry-forward 320 hours of annual leave into 2018, or that Respondent's policy limiting carryover of annual leave into the next calendar year was a new policy. Grievant is a 19-year employee with the Respondent. Grievant should have known that it was possible for her to lose excess leave if she had too much of it at the end of the year. Grievant presented no evidence that she made unrequited inquires of Respondent regarding her annual leave balance. There was no evidence that Grievant was prohibited from acquiring her annual leave balance from Respondent at any point throughout the year or that Grievant was prevented from keeping a running tabulation of her leave. It is not prudent to wait until two weeks remain in the year before attempting to use up excess leave. Grievant has some responsibility to know her approximate leave balance and to use it expediantly enough so that she will not have to scramble at the end of the year to avoid losing it. Grievant testified that she did not use any annual leave from January through April, that she had not used as much leave as she normally does because she took two lengthy periods of medical leave, and that she was off between at least November 14, 2017, until December 18, 2017. Grievant testified that she did not request or utilize annual leave earlier in the year because she did not realize she would have excess carryover and was "so glad to be working and coming back to work but at that moment in time vacation was far from my thoughts at that time because of my medical

leave." Grievant should have known that she had a substantial leave surplus and that she was likely near her carryover balance. Employees of course have work obligations that must be balanced against their ability to utilize leave whenever they wish. Given Grievant's lack of initiative and overreliance on Respondent to keep her informed as to her leave balance, the issue at the root of this grievance becomes one of determining the equilibrium point between Grievant's responsibility to plan ahead to ensure she does not lose her leave and Respondent's culpability in Grievant's lack of planning. Grievant has not proven that Respondent failed to fulfill any obligation on its part to keep her updated or to process her leave request. Ultimately, Grievant's lack of planning should not constitute an emergency for Respondent and obligate Respondent to grant her leave requests during the last weeks of the year just because she has excess leave that must be used.

Grievant contends that her loss of annual leave also resulted from the unavailability of Nurse Manager Darlene Bender to process her leave requests. Respondent counters that even though Ms. Bender was off much of December, Grievant could have processed her annual leave request through Lead Nurse Kimberly Brady, who was covering for Nurse Manager Bender. Grievant's leave time has no value if Respondent does not provide her a mechanism to process her leave requests. Nurse Manager Darlene Bender typically processes leave requests, but was not available for most of the period Grievant worked in December. Respondent presented uncontested evidence that Lead Nurse Kim Brady processed leave requests in Nurse Manager Darlene Bender's absence. Grievant did not present sufficient evidence explaining why she did not submit her annual leave requests to Ms. Brady, other than her lack of knowledge. Even then, Grievant was after

returning able to request leave through Ms. Bender. Ms. Bender did not approve December 28, because Grievant was the only RN scheduled for duty that day. Respondent's staffing policy requires that at least one RN be on duty. If every employee waits until the last weeks of the year to use their excess annual leave, some of them will not be accommodated and will lose any excess leave. Grievant did not offer any way to resolve the dilemma caused by her being the only RN available to cover many of the days at the end of December. Grievant's representative mentioned at the level one hearing that several employees at the Division of Corrections were going to lose annual leave because they could not use it due to job vacancies in many positions and that the Governor issued an executive order preserving their annual leave, which he had not done for DHHR employees.

Grievant claims Respondent discriminated against her through its failure to follow established procedures to prevent the forfeiture of Grievant's earned annual leave. The elements of discrimination are clearly delineated in the code and case law. Discrimination for purposes of the grievance process has a precise definition. "'Discrimination' means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(D). "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h). Grievant did not set forth the procedures it contends Respondent failed to follow. It simply argued that Respondent had a duty to notify her timely, but did not

provide any deadline by which Respondent had a duty to inform her. The evidence showed that Respondent informed all employees of their leave balance by work email on November 14, 2017. Because Grievant was on leave, she could not access her work email until at least December 18, 2017. Respondent notified every employee via work email. Grievant therefore failed to prove that she was treated differently than any other employee. She also failed to even argue, let alone prove, that she was similarly situated to any employee. She has therefore failed to prove discrimination or favoritism. Perhaps, in arguing discrimination, Grievant is implying that the Governor favored employees at the Division of Corrections and thereby discriminated against her. However, Grievant did not provide any evidence showing either that the Governor had in fact preserved the annual leave of employees at the Division of Corrections or that she was similarly situated to these employees.

Grievant further contends that equitable estoppel should enable the reinstatement of her lost leave. Equitable estoppel is a "doctrine preventing one party from taking unfair advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way" and is founded on principles of fraud. BLACK'S LAW DICTIONARY 590 (8th ed. 2004) "The general rule governing the doctrine of equitable estoppel is that in order to constitute equitable estoppel or estoppel in pais there must exist a false representation or a concealment of material facts; it must have been made with knowledge, actual or constructive of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted on; and the party to whom it was

made must have relied on or acted on it to his prejudice. To raise an equitable estoppel there must be conduct, acts, language or silence amounting to a representation or a concealment of material facts. Mere silence will not raise an estoppel; to be effective it must appear that the person to be estopped has full knowledge of all the facts and of his rights, and intended to mislead or at least was willing that the other party might be misled by his attitude." *Stuart v. Lake Washington Realty Corp*., 141 W. Va. 627, 629, 92 S.E.2d 891, 894 (1956). Grievant has not proven, even if equitable estoppel were applicable to the current situation, that Respondent attempted to unfairly take advantage of her or that Respondent made a false representation or concealment of material facts surrounding Grievant's annual leave balance. The evidence showed that Respondent made a reasonable effort to inform Grievant of her leave balance, as it had all its employees, via work email and that it made Ms. Brady available to accept Grievant's leave requests in Ms. Bender's absence.

No evidence was presented that Respondent treated Grievant differently than any other employee when it emailed each employee their individual leave balance on November 14, 2017, and made Ms. Brady available to process leave requests in Ms. Bender's absence. It therefore appears that Grievant is requesting the undersigned to change Respondent's leave balance notification policies so that, at the very least, Respondent would be required to take the initiative, without waiting for an employee's request, to confirm that every employee in fact knows their leave balance by a set date. "[I]t is not the role of this Grievance Board to change agency policies…. The [Grievance Board] has no authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or regulation which mandates such a policy be

developed or changed." *Jenkins v. West Virginia University*, Docket No. 2008-0158-WVU (June 2, 2009) (*citing Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997) (*per curiam*)) (other citations omitted). "The Grievance Board does not have authority to substitute its judgment for agency management in such matters as determining the work schedule for employees assigned to a particular department. *See Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997) (*per curiam*); *Board v. Dep t of Health and Human Resources/Lakin Hospital*, Docket No. 99-HHR-329 (Feb. 2, 2000)." *Rodeheaver v. Dep't of Health and Human Res*., Docket No. 00-HHR-312 (July 31, 2001). "A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with the employee's effective job performance or health and safety." *Ball v. Dep't of Transportation/Division of Highways and Division of Personnel,* Docket No. 96-DOH-141 (July 31, 1997). Grievant has not shown that Respondent's practice regarding leave balance notification violates any law. "These rules [Administrative Rules related to Annual Leave] do not allow … an exception for Grievant to carry over annual leave into the new employment year." *Gibson v. Div'n of Natural Res*., Docket No. 2009-0773-DOC (Apr. 23, 2009) "Such management decisions are evaluated pursuant to the arbitrary and capricious standard." *Miller v. Dep't of Health and Human Resources/Welch Community Hospital*, Docket No. 07-HHR-077 (Apr. 30, 2008).

Grievant did not argue that Respondent's actions were arbitrary and capricious. Yet, she impugned their integrity and requests that they be remedied. The remaining available remedy, in light of the fact that Grievant has not shown any other violation by Respondent, would be showing that Respondent's actions were 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 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). It would certainly be arbitrary and capricious

for Respondent to not provide Grievant, upon request, with a means of determining her annual leave balance in a timely manner and to not make available an alternate means of processing leave requests when the person normally responsible for processing those requests is absent. Grievant, however, did not prove that this was the 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. "Annual Leave. 14.3.a. Amount, Accrual. -- Except as otherwise noted in this rule, each permanent, probationary, and provisional employee is eligible to accrue annual leave with pay and benefits. The table below lists the rates of accrual according to the employee's length of service category and the number of hours of annual leave that may be carried forward from one calendar year to another: provided, that a "day" is based on the agency's established number of hours in the work day and shall not exceed eight (8) hours. …"

Length of Service Category	Accrual Rate: Hours Equal To	Carry-forward Rate: Hours Equal To

Less than 5 years of qualifying service	1.25 days/month	30 days
5 years but less than 10 years of qualifying service	1.50 days/month	30 days
10 years but less than 15 years of qualifying service	1.75 days/month	35 days
15 years or more of qualifying service	2.00 days/month	40 days

W. VA. CODE ST. R. § 143-1-14.3.a. (2018).

3. "These rules [Administrative Rules related to Annual Leave] do not allow … an exception for Grievant to carry over annual leave into the new employment year." *Gibson v. Div'n of Natural Res*., Docket No. 2009-0773-DOC (Apr. 23, 2009)

4. Discrimination for purposes of the grievance process has a very specific definition. "'Discrimination' means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. VA. CODE § 6C-2-2(d). "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee." W. VA. CODE § 6C-2-2(h).

5. “[I]t is not the role of this Grievance Board to change agency policies…. The [Grievance Board] has no authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or regulation which mandates such a policy be developed or changed.” *Jenkins v. West Virginia University*, Docket No. 2008-0158-WVU (June 2, 2009) (*citing Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997) (*per curiam*)) (other citations omitted).

6. “The Grievance Board does not have authority to substitute its judgment for agency management in such matters as determining the work schedule for employees assigned to a particular department. *See Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997) (*per curiam*); *Board v. Dep t of Health and Human Resources/Lakin Hospital*, Docket No. 99-HHR-329 (Feb. 2, 2000).” *Rodeheaver v. Dep’t of Health and Human Res.,* Docket No. 00-HHR-312 (July 31, 2001). “Such management decisions are evaluated pursuant to the arbitrary and capricious standard.” *Miller v. Dep’t of Health and Human Resources/Welch Community Hospital*, Docket No. 07-HHR-077 (Apr. 30, 2008).

7. “A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with the employee's effective job performance or health and safety.” *Ball v. Dep’t of Transportation/Division of Highways and Division of Personnel*, Docket No. 96-DOH-141 (July 31, 1997).

8. 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).

9. "'[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).

10. Grievant did not prove by a preponderance of evidence that Respondent had a duty to ensure that Grievant knew her annual leave balance even though she had not requested it.

11. Grievant did not prove by a preponderance of evidence that Respondent failed to timely provide her with her annual leave balance either spontaneously or in response to a request by Grievant.

12. Grievant did not prove by a preponderance of evidence that Respondent failed to provide her a substitute supervisor to process her annual leave requests.

13. Grievant did not prove by a preponderance of evidence that Respondent discriminated against her or that Respondent failed to fulfill any duty owed her under equitable estoppel.

14. Accordingly, the 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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: February 15, 2019

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Joshua S. Fraenkel
Administrative Law Judge