

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**MELLISA WALKER,
Grievant,**

v.

Docket No. 2018-1221-JefED

**JEFFERSON COUNTY BOARD OF EDUCATION,
Respondent.**

DECISION

Grievant, Melissa Walker, filed this action on September 10, 2018, against her employer, Jefferson County Board of Education. Grievant claims that her application for benefits from Respondent's Sick Leave Bank was improperly denied because Respondent's Sick Leave Bank Committee did not comply with the Policy by failing to refer Grievant for a medical examination. Grievant claims that the Policy is vague and further alleges that her request was denied because it requested benefits in relation to a psychological or psychiatric condition rather than a physical ailment. For relief, Grievant "seeks an award of benefits from the sick leave bank to the extent permitted by the policy" and "an award of interest on all monetary sums."

Superintendent, Dr. Bondy Shay Gibson, denied the case at Level One after a conference. A Level Two mediation session was conducted on August 27, 2018. Grievant perfected her appeal to Level Three on September 10, 2018. The undersigned conducted a Level Three evidentiary hearing on December 4, 2018, at the Grievance Board's Westover office. Grievant appeared in person and by her attorney, John Everett

Roush, American Federation of Teachers-WV, AFL-CIO. Respondent appeared by its counsel, Tracey B. Eberling, Esq. Steptoe & Johnson PLLC. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on January 4, 2019.

Synopsis

Grievant was employed by Respondent as a classroom teacher during the 2017-2018 school year. Grievant submitted a request for days of sick leave from Respondent's Sick Leave Bank. The Committee charged with reviewing and approving or disapproving these requests voted unanimously to disapprove Grievant's request. The record of this case did not support a finding that this action was in violation of the applicable policy, or an action that could be viewed as arbitrary and capricious. Accordingly, this grievance is denied.

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

Findings of Fact

1. Grievant was a regularly employed by Respondent as a classroom teacher during the 2017-2018 school year. Grievant was a full-time fifth grade writing teacher at Blue Ridge Elementary School.

2. Pursuant to state code, county boards of education have the ability to establish personal leave banks for their employees. Respondent has established a Sick Leave Bank for its professional employees.

3. Respondent's Sick Leave Bank is headed by a committee consisting of four Jefferson County Board of Education employees who are selected by the employees they

represent. Only the four elected members of the Committee have voting rights to approve or disapprove benefits from the Sick Leave Bank.

4. Respondent's Professional Sick Leave Bank Policy provides that application for days from the Sick Leave Bank must be made by "written application to the Benefits Coordinator on forms provided by the Benefits Coordinator, and it shall be accompanied by a physician's statement describing the illness and a prognosis for a date to return to work." Grievant's Exhibit No 1.

5. Grievant submitted her Sick Leave Bank Enrollment Form on August 14, 2017. Grievant's enrollment was approved on September 14, 2017, and she was notified that two days of sick leave would be deducted from her personal leave.

6. In the spring of the 2017-18 school years, Grievant was absent from work and exhausted all of her personal leave as of March 8, 2018.

7. On March 22, 2018, six months after enrolling in the Sick Leave Bank, and contributing two days, Grievant submitted a request for 30 days from the Bank to Shelby Todd, Jefferson County School's Coordinator of Employment Services and Benefits.

8. Grievant submitted the one-page Personal Leave Beginning Leave Form with her request. The physician's statement on the form provided that Grievant was suffering from an illness, severe anxiety disorder, which started on March 19, 2018. No other information was provided.

9. Grievant's application did not list a prognosis, a treatment plan, or a date on which she was expected to be able to return to work in accordance with Jefferson County School's Policy.

10. On March 23, 2018, the Committee met to consider Grievant's request. Record established that the fact that Grievant's request was for absence due to a mental health condition was not the basis for the unanimous disapproval of Grievant's request. The disapproval was due to the application not listing a prognosis, a treatment plan, or a date on which she was expected to return to work.

11. Grievant was notified by letter dated March 26, 2018, of the Committee's decision and notified that she was eligible to request days from the Leave Donation Program.

12. Following receipt of the notification of the Committee's decision, Grievant submitted additional information to Ms. Todd. The document did not address Grievant's prognosis or possible return to work date.

13. Grievant's probationary contract with Respondent was not renewed after the 2017-18 school year and as a result, she is no longer employed by Respondent.

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 (2018); *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).

The record of this case demonstrates that the Committee's decision to disapprove Grievant's application for days from the Sick Leave Bank was in accordance with Respondent's Policy. Grievant did not present any evidence that either the Committee's reading of the Sick Leave Bank Policy or its decision to disapprove her request for days from the Sick Leave Bank was arbitrary and capricious.

Grievant argues that the Policy provides for medical review by a physician if the Committee does not unanimously grant an applicant's request for days from the Sick Leave Bank. Grievant asserts that because the Committee voted to deny her request, she was entitled to a medical review. Committee member Jennifer Moss indicated that it had been the Committee's position that a medical review by a physician is required only if there is a split vote. Ms. Moss advised that the Committee has never interpreted the Policy to provide for a physician's second opinion if there is a unanimous denial of an applicant's request, as in the instant case. The Sick Leave Bank Policy provides:

Should the Sick Leave Bank Approval Committee's vote not be unanimous in granting the leave requested by the applicant, the committee shall require a medical review by a physician of the committee's choice at the applicant's expense.

It is reasonable to interpret this language to call for a medical review only in the event there is disagreement among the Committee members in granting a request for

sick leave days. In the instant case, the Committee did not require a medical review because there was a unanimous decision to deny Grievant's request. This interpretation of its policy is entitled to deference from the undersigned unless shown to be clearly wrong or arbitrary and capricious, which it was not. The Grievance Board gives reasonable deference to the agency's interpretation of its own policy. *Dyer v. Lincoln County Bd. of Educ.*, Docket No. 95-22-494 (June 28, 1996). See generally *W. Va. Dep't of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993). Such interpretations must be judged by the arbitrary and capricious standard. *Dyer, Supra*.

Grievant seemed to claim that the Committee denied her request for days from the Sick Leave Bank because her application was related to a mental condition, as opposed to a physical condition. This claim is not supported by the record. Ms. Moss indicated that another member of the Committee, Barbara Argueta, is a school psychologist and equipped to evaluate various mental conditions. Additionally, the Committee had granted the request of another employee for an anxiety-related condition.

The Sick Leave Bank Policy requires any request for days from the Bank be made by "written application to the Benefits Coordinator on forms provided by the Benefits Coordinator," which "shall be accompanied by a physician's statement describing the illness and a prognosis for a date to return to work." Grievant's Exhibit No. 1. Grievant submitted the one-page Personal Leave Beginning Leave Form with her request of days from the Bank. Contrary to the requirement of the Policy, there was no prognosis provided, nor was such information provided in her supplemental submission following

the denial of her request. The Committee was left with little information to determine the severity of, and anticipated days of absence required by, Grievant's condition.

Ms. Moss explained that in evaluating requests for days from the Sick Leave Bank, the Committee considers the reason for the request, the prognosis, and the period of time necessary for the particular employee to return to work. In the instant case, the Committee was unable to consider the prognosis or calculate the amount of days she would require from the Bank. With insufficient information, including a missing prognosis required under the Policy coupled with the lengthy amount of time requested, the Committee used its discretion to disapprove Grievant's request.

Grievant has failed to meet her burden of proof in demonstrating that the Committee's decision to disapprove her request for days from the Sick Leave Bank was arbitrary and capricious. The record demonstrated that the Committee's decision to disapprove Grievant's request was in accordance with its Sick Leave Bank Policy. As noted above, the Committee's interpretation of its Policy is entitled to deference and its decision to disapprove Grievant's request for days from the Sick Leave Bank will stand.

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 (2018); *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)).

3. Grievant failed to establish by a preponderance of the evidence that the Sick Leave Bank Committee's actions were a violation of its Policy, or arbitrary and capricious in disapproving her application.

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 (2008).

Date: February 7, 2019

Ronald L. Reece
Administrative Law Judge