# THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**DEBBIE MCGINNIS,**
**Grievant,**

**v.** **Docket No. 2019-1200-DEP**

**DEPARTMENT OF ENVIRONMENTAL PROTECTION,**
**Respondent.**

## DECISION

Debbie McGinnis is employed by Respondent, Department of Environmental Protection ("DEP") in the Program Analyst 4 classification. Ms. McGinnis filed a level one grievance form dated March 1, 2019, alleging she was, "required to take 4 days sick leave rather than allowed to work at home during period of contagiousness." As relief, Grievant seeks restoration of her leave.

A level one hearing was conducted on March 28, 2019, and a decision denying the grievance was issued on April 11, 2019. Grievant filed an appeal to level two dated April 15, 2019. A mediation was conducted on July 25, 2019, and Grievant appealed to level three on the same day.

A level three hearing was conducted on November 22, 2019, at the Charleston office of the West Virginia Public Employees Grievance Board. Grievant appeared personally and was represented by Gary DeLuke, UE Local 170, West Virginia Public Workers Union. Respondent appeared through DEP Human Resources Manager, Chad Bailey and was represented by Anthony D. Eates II, Deputy Attorney General. This matter became mature for decision on January 13, 2020 upon receipt of the last Proposed Findings of Fact and Conclusions of Law submitted by the parties.

## Synopsis

Grievant has a medical condition which causes her to have sever swelling when standing on a concrete surface for extended periods of time. Respondent has accommodated Grievant by allowing her to perform the majority of her work from home. Occasionally Grievant is required to come into the office for specific meetings. On Tuesday, February 26, 2019, Grievant sent a doctor excuse to her supervisor stating that she was unable to come to work from February 25, 2019, through March 3, 2019, because she had an upper respiratory infection and was very contagious. She informed her supervisor that she was not going to be able to attend specific meetings at the office that week. Her supervisor told her that she needed to take sick leave for the period specified by the doctor. Grievant did not believe she should have to take leave because she could work from home and attend the meetings remotely even though she was ill. Respondent proved that it was not unreasonable nor arbitrary and capricious to require Grievant to take sick leave for the days her doctor advised her not to go to work.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

## Findings of Fact

1. Debbie McGinnis is employed by Respondent, Department of Environmental Protection ("DEP") in the Program Analyst 4 classification. Her direct supervisor is Kim Harbour, Application Development & Support ("ADS") Manager.

2. Grievant suffers from a condition which is characterized by a deterioration of the bones in her feet. The condition causes swelling and may lead to a complete

collapse of the foot. Grievant's condition is significantly exacerbated by standing and walking on concrete floors. (Grievant Exhibit 1). Grievant also suffers from COPD.[1]

3. Grievant requested and received an accommodation for her job from Respondent which allows her to generally work from home. The accommodation letter was written by Human Resources ("HR") Manager, Chad Bailey on June 5, 2014, and states in pertinent part the following:

> . . . [Y]ou will be allowed to continue working from home. However, you will be required to attend meetings held at the Charleston headquarters as directed by your immediate supervisor. In keeping with the accommodation offered to you, room number 2002 has been prepared for you to use on the days you are required to be in the office.

(Grievant Exhibit 2)

4. On her last two EPA 3s[2] Grievant has scored very well and received an overall rating of "Meets Expectations."[3] In her most recent evaluation, the following notes were made:

- "Debbie sets her own schedule and assignments."
- "Inspectors contact Debbie after hours and on weekends and she is willing to help them."
- "Debbie adjusts her hours (where possible) to avoid overtime."[4]

5. Grievant was scheduled to attend project meetings at the DEP offices in Kanawha City during the time covered by her medical excuse. She knew that she was expected to attend the meetings which is why she sent the medical information to her supervisor.[5]

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[1] Chronic Obstructive Pulmonary Disorder, Grievant's testimony.
[2] EPA stands for "Employee Performance Appraisal."
[3] Grievant Exhibits 3A & 3C.
[4] Grievant Exhibits 3A, EPA 3 signed on March 22, 2019.
[5] Grievant's testimony.

6. Meetings were set during the week of February 25, 2019, through March 1, 2019 for a group of programmers, including Grievant, to receive additional training and work sessions to facilitate completion of a large project known as the Data Warehouse Project which is aimed at consolidating all the DEP data kept in various "silos" into a central data point. This project was significantly behind schedule. It was Ms. Harbour's expectation that all programmers, including Grievant, attend these meetings to share in the training and learn from each other's experiences working with the database software.

7. Kim Harbour is the manager for all these programmers and is responsible for the Data Warehouse Project. She had assigned Regino Suplido[6] to be the team leader. Mr. Suplido traveled from his home base in Bethesda, Maryland to lead these meetings.

8. On Tuesday, February 26, 2019, at 9:21 a.m. Grievant sent the following email to her supervisor, Kim Harbour:

> I started getting sick on Saturday morning. I slept most of the day and on Sunday. I saw my family doctor after work yesterday. I have an upper respiratory infection and I'm contagious. He told me to stay in so as not to spread to others. Of course, the flip side is to make sure I don't pick up anything else on top of this. If it gets down in my lungs, it could be very detrimental with the COPD. When I sneeze and cough it's hitting on an area in my back and is quite painful – almost drops me to my knees.
>
> I've attached my excuse from my doctor.
>
> I won't be able to attend the data warehouse meetings this week. I'm working with Reggie to get my new set of errors corrected on my last work flow.

(Grievant Exhibit 5)

[6] The witnesses consistently referred to Mr. Suplido as "Reggie."

9. The attached excuse from the doctor stated Grievant was under his/her care from February 25, 2019 to March 3, 2019 and Grievant would be able to return to work on March 4, 2019. The words "very contagious" were hand-written at the bottom of the excuse. (Grievant Exhibit 4).

10. Manager Harbour responded:

> I'm sorry to hear that. Feel better!
> I don't expect people to work when they're sick – be sure to use your sick leave. …

11. Grievant replied that she could work at home. Ms. Harbour said Grievant sounded like she was "in bad shape," and concluded "if you have a doctor's excuse and can't come in to work, you should take sick leave." Ms. Harbour pointed out to Grievant that she had not taken any sick or annual leave in 2018.[7]

12. Even though the medical excuse said Grievant could not go to work from Monday, February 25, 2019, to March 3, 2019, Grievant did not notify Ms. Harbour of her illness until the morning of Tuesday, February 26, 2019. When Ms. Harbour told Grievant she had to take sick leave Grievant replied that she had already worked for 3.75 hours on that day. Ms. Harbour did not require Grievant to take sick leave for Monday, or the time she had already worked on Tuesday, even though that time period was covered by the medical excuse saying Grievant should not report to work. Grievant was required to take leave for Wednesday, Thursday, and Friday plus the 4.25 hours that remained on Tuesday, February 25, 2019. The total amount of sick leave Grievant was required to take was 28.25 hours.

[7] For reasons which were not explained at the hearing Grievant included in her final response "FYI, according to the CPRB, I'm not eligible to retire until 12/2020."

13. Manager Harbour contacted the team leader, Mr. Suplido, and confirmed that Grievant had “about 8 hours of work to complete her part of the project.” Ms. Harbour told Grievant she could complete that work in the next week. (Grievant Exhibit 5).

14. Mr. Suplido sent Grievant an e-mail saying that Manager Harbour had stopped by his office to let him know that Grievant would be off ill for the rest of the week. He thought Grievant might want to work from home and “share [his] screen”. Grievant told Mr. Suplido that Ms. Harbour had “forced” her to take sick leave. He indicated that he had told Ms. Harbour that Grievant could call in. Ms. Harbour told Mr. Suplido that Grievant could not work and asked for an estimate of the time Grievant needed to finish her project. (Grievant Exhibit 6)

15. Grievant wanted to save as much sick leave as possible in case she suffered a serious medical condition and to convert into retirement credit upon her retirement. Grievant was entitled to the same leave benefits as employees who reported to work each day; nothing more, or less.

**Discussion**

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. VA. CODE R §156-1-3. *Burden of Proof.* "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. W. Va. Dep't of Health & Human Res.,* Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

The only policy, rule, regulation, or statute cited by either party is the Division of Personnel *Administrative Rule* 14.4 related to sick leave. That policy addresses how sick leave is accumulated and in what amount. It also discussed the use of sick leave for medical or dental appointments, illness, bereavement, pregnancy, and other specified reasons, as well as how it may be requested and granted. Neither party pointed to any provision in the policy which relates to use of sick leave by employees who are permitted to work at home.[8]

Grievant argues that the reason her doctor told her to stay at home for a week was to avoid contact with other employees because the illness she was suffering was very contagious. She argues that while she was not able to come to work, she was well enough to attend the meeting remotely and reasonably should have been allowed to do so rather than take sick leave. This position is not supported by the evidence. In her email Grievant noted that she had a serious chest infection which left her only able to lay around. She added: "When I sneeze and cough it's hitting on an area in my back and is quite painful – almost drops me to my knees." Ms. Harbour's conclusion that Grievant appeared to be too ill to participate in the meeting was not unreasonable in light of the medical excuse and Grievant's own description of her illness.

Next, Grievant argues that no one told her she was expected to come to the meetings in person. She was specifically allowed to work at home and only required to come "to attend meetings held at the Charleston headquarters *as directed by your immediate supervisor.*" (Emphasis added). Grievant alleges that Ms. Harbour never

[8] Upon independent examination, the undersigned was not able to find such provisions in the rule.

specifically directed her to come into the office for the meetings with the team leader and other programmers. On the other hand, Ms. Harbour testified that she made it clear that she expected the Data Warehouse Project staff, including Grievant, to attend the meetings in-person at DEP headquarters.

. In situations such as this, where the existence or nonexistence of certain material facts hinges on the credibility of conflicting witness testimony, detailed findings of fact and explicit credibility determinations are required. *Jones v. W. Va. Dep't of Health & Human Res.,* Docket No. 96-HHR-371 (Oct. 30, 1996); *Pine v. W. Va. Dep't of Health & Human Res.,* Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. *See Lanehart v. Logan County Bd. of Educ*., Docket No. 95-23-235 (Dec. 29, 1995); *Perdue v. Dep't of Health and Human Res./Huntington State Hosp*., Docket No. 93-HHR-050 (Feb. 4, 1994).

The Grievance Board has applied the following factors to assess a witness's testimony: (1) demeanor; (2) opportunity or capacity to perceive and communicate; (3) reputation for honesty; (4) attitude toward the action; and (5) admission of untruthfulness. Additionally, the administrative law judge should consider (1) the presence or absence of bias, interest or motive; (2) the consistency of prior statements; (3) the existence or nonexistence of any fact testified to by the witness; and (4) the plausibility of the witness' information. *Yerrid v. Div. of Highways*, Docket No. 2009-1692-DOT (Mar. 26, 2010); *Shores v. W. Va. Parkways Econ. Dev. & Tourism Auth.,* Docket No. 2009-1583-DOT (Dec. 1, 2009); *Elliott v. Div. of Juvenile Serv.,* Docket No. 2008-1510-MAPS (Aug. 28, 2009); *Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD-216 (Dec. 28, 1999).

Grievant has an interest in her testimony to support her claim. Additionally, her statements do not comport with important facts. Team Leader Suplido usually works out of his home in Maryland. Manager Harbour had him travel to Charleston to conduct the meeting with the team of programmers. It is unlikely that she would require him to travel to Charleston from Maryland while the programmers who live in the Kanawha Valley participated remotely. Most importantly, Grievant had a medical excuse in her possession on Monday but did not give it to her supervisor on Tuesday, the day the meetings began. Grievant testified that she worked in the evenings or on weekends when necessary to make up for normal work time she missed due to illness. She did not provide medical excuses for those illnesses. In the present case she did not turn in her medical excuse until Tuesday. Had she not been expected to come into the office she could merely have worked from home as usual without providing the medical excuse. Instead she sent the medical excuse for the specific reason of not coming to the office. Her position was that she was very contagious and wanted to work from home so as not to infect her coworkers. It is more likely than not that Grievant provided the medical excuse to Ms. Harbour because she had been directed to attend the meeting in-person.

The final issue is whether Manager Harbour's decision to require Grievant to take sick leave for the time covered by Grievant's medical excuse was arbitrary and capricious. 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." *Eads, supra (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 [the employer]." *Blake v. Kanawha County Bd. of Educ.,* Docket No. 01-20-470 (Oct. 29, 2001); *Butler v. Dep't of Health & Human Res.*, Docket No. 2014-0539-DHHR (Mar. 16, 2015).

Any employee who was not working at home would be required to take sick leave had they provided the medical excuse provided by Grievant. In fact, they would be glad they had the sick leave rather than lose pay. Manager Harbour did not treat Grievant any differently than she would have treated any other employee in similar circumstances. Her requirement that Grievant take sick leave for the time she was ill and could not attend a required meeting was reasonable and not arbitrary or capricious.

Grievant did not prove by a preponderance of the evidence that the requirement that she take sick leave when she was ill violated any law, policy, rule or regulation. Grievant also did not prove that the requirement that she take sick leave when she was ill was arbitrary and capricious. Accordingly, the grievance is **DENIED.**

## Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. VA. CODE R §156-1-3. *Burden of Proof.* "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. W. Va. Dep't of Health & Human Res.,* Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

2. 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." *Eads, supra (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 [the employer]." *Blake v. Kanawha County Bd. of Educ.,* Docket No. 01-20-470 (Oct. 29, 2001); *Butler v. Dep't of Health & Human Res.*, Docket No. 2014-0539-DHHR (Mar. 16, 2015).

3. Grievant did not prove by a preponderance of the evidence that the requirement that she take sick leave when she was ill violated any law, policy, rule or regulation. Grievant also did not prove that the requirement that she take sick leave when she was ill was arbitrary and capricious.

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* 156 C.S.R. 1 § 6.20 (2018).

**DATE: February 25, 2020**

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**WILLIAM B. MCGINLEY**
**ADMINISTRATIVE LAW JUDGE**