PHYLLIS STEVENS,

Grievant,

v.

Docket No. 96-26-397

MASON COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Phyllis Stevens, was employed as a secretary/receptionist with the Mason County Board of Education ("MCBOE"). She grieves the decision of the Sick Leave Bank ("SLB") Committee to deny her request for thirty days of leave. This grievance was denied at Level II and waived at Level III. At Level II, the Grievance Evaluator suggested Grievant reapply to the SLB immediately with the proper supportive medical data. Grievant elected not to accept this recommendation and filed an appeal to Level IV. A Level IV hearing was held on April 7, 1997, and this case became mature for decision on June 23, 1997, the deadline for the parties' proposed findings of fact and conclusions of law.

The undersigned administrative law judge makes the following Findings of Fact based on the record as a whole which includes the testimony and exhibits from Levels II and IV.

Findings of Fact

1. Grievant was employed by MCBOE as a receptionist/secretary in the Central Office for a number of years. She contributed to the SLB when it was originally formed in the late 1980's. Grievant has contributed a total of four days to the SLB.

2. In November 1995, she was hospitalized for anxiety and depression. She did not

return to work after she was released from the hospital.

3. On February 26, 1996, Grievant requested thirty days from the SLB, as her sick and personal leave days were exhausted.

4. The purpose of the SLB is "to provide protection for individuals who encounter severe medical hardship (catastrophic illness or serious injury) with themselves or in their immediate household and who have exhausted their personal leave." (Level II; Gr's Exh. No. 1).

5. A physician's statement to document need is required before the committee can approve the request . . . ." Id.

6. The following medical data was submitted by Grievant with her application, and was the information upon which the Committee made its decision.

A. A February 2, 1996 letter from her family doctor, Dr. Barbara Vizy, which stated: "I have been seeing Phyllis on a regular basis for problems with vertigo, depression and anxiety." Dr. Vizy noted she had been working to adjust Grievant's medication, and to rule out any other causes of her problems. She indicated Grievant needed some time off, and thought Grievant might be able to return to work on February 29, 1996, although that time may need to be extended. B. A February 29, 1996 letter from Dr. Vizy which stated she had been seeing Grievant since her discharge from a psychiatric facility in November 1995. She noted that during her treatment for acute anxiety and depression she began having "a subjective feeling of 'floating'". The vertigo and psychological symptoms were thought to be related and various medications had been tried. The anxiety had responded to the medication, but the dizziness continued. Even though Grievant continued to see her psychiatrist on a regular basis and had consulted two Ear, Nose, and Throat specialists, she continued to have trouble with dizziness. Grievant was to be seen at the Cleveland Clinic on February 29, 1996. Dr. Vizy concluded stating that it was in Grievant's best interest to continue on leave.

C. A letter from Dr. Anthony Furlan, Head of Adult Neurology and the Director of the Cerebrovascular Center at Cleveland Clinic dated March 21, 1996, in which he indicated he had examined Grievant on March 4, 1996, and noted her complaint of a "bobbing, floating sensation". Grievant's neurological tests were essentially normal as were her vestibular laboratory studies. Dr. Furlan diagnosed a "resolving vestibular dysfunction (See footnote 1)

and stress/anxiety." He noted there were "some work related issues she needed to deal with" and placed her on low doses of Valium and home exercises for vestibular rehabilitation. Dr. Furlan expected Grievant to "feel better" with this limited intervention.

7. The SLB met on April 9, 1996, to consider Grievant's request. Ms. Judy Barnette, who is a member of the committee, was mailed a notice of the meeting to heraddress of record. Ms. Barnette was the WVSSPA (See footnote 2) representative to the committee. She did not attend because she did not receive this notice as she had moved and had not changed her address with the Central Office.

8. The rest of the committee, four members, met and reviewed the medical records submitted by Grievant. The four members present were Mr. Harry Siders, Mr. George Miller, Mr. F. James Raymond, and Ms. Pamela Adkins. The vote to deny Grievant thirty days of sick leave from the Bank was unanimous .

9. During the meeting, Mr. Harry Siders (See footnote 3) , the president of the Mason County Board of Education, obtained a dictionary, and all members discussed the meaning of catastrophic illness.

10. Mr. George Miller, Assistant Superintendent, did not equate the terms life-threatening and catastrophic illness. Mr. Miller did not view Grievant's disease process as a severe medical hardship.

11. Ms. Pamela Adkins, a speech pathologist and audiologist and the WVEA (See footnote 4) representative to the committee, did equate the terms life-threatening and catastrophic illness, but she viewed Grievant's illness as disabling rather than catastrophic or life-threatening. She testified the individuals she represents have instructed her to interpret the guidelines very strictly when she reviews the applications for SLB days. 12. Mr. F. James Raymond, Mason County's financial officer, applied the term catastrophic illness to his decision-making and felt such an illness would be an extremely serious situation. He saw Grievant's disease process as inner ear problem and not catastrophic.

13. Grievant was notified of the committee's decision by letter dated April 11, 1996.

14. Typical examples of individuals who had received SLB benefits in the past were employees who have been diagnosed with cancer, heart attacks, and pneumonia/respiratory failure. Some of these individuals died as the result of their disease processes, some did not.

Examples of individuals who have not received SLB benefits were employees diagnosed with a broken leg, or scheduled for a hysterectomy or herniated disc surgery.

Issues

Grievant believes the SLB Committee is not adhering to its policy and is interpreting the term catastrophic illness to mean life-threatening. Additionally, Grievant argued the proper procedures of the committee were not followed as Ms. Barnette was not in attendance. These issues were clearly presented below.

Also at the Level IV hearing, Grievant wanted to place into evidence her testimony about her current medical state. This testimony was not allowed as the issue before the undersigned Administrative Law Judge was whether the committee made the correct decision with the data it had before it.

Additionally at Level IV, Grievant argued the Committee had not applied its policy in an uniform manner. MCBOE stated this argument was not presented below and couldnot now be addressed for the first time at Level IV. Grievant argued that this argument was inherent in the original statement of grievance, was indicated by the subpoena request at Level II, and Grievant's statement of grievance at Level IV. Mr. Miller testified that MCBOE had not received a copy of the Level IV filing.

The undersigned Administrative Law Judge ruled that this issue could be considered at Level IV pursuant to the Supreme Court's direction in Spahr v. Preston County Board of Education, 391 S.E.2d 739 (W. Va. 1990), that the grievance process was not to become "a procedural quagmire where the merits of the cases are forgotten." Id. At 743. See Duruttya v. Bd. of Educ. of County of Mingo, 382 S.E.2d 40 (W. Va. 1989). Grievant completed her grievance forms without the assistance of counsel and believed she was stating her complaints clearly, one of which was that she believed the policy was not being uniformly applied.

Discussion

W. Va. Code § 18A-4-10 ¶5 states "[a] county board of education may establish a personal

leave bank" and, if it chooses to do so, "[s]uch personal leave bank shall be established and operated pursuant to rules adopted by the county board." The purpose of such banks is to provide income to active employees who have used all their leave time and are still absent from work due to an accident or an injury. Id. When MCBOE established an SLB in 1989, it wrote rules and guidelines for membership and eligibility, as well as regulations for its operation.

The Grievance Board has few decisions dealing with SLB's. In Neal v. Cabell County Board of Education, Docket No. 94-06-23 (Dec. 22, 1994), Administrative Law Judge Dunn held that requiring an employee to prove severe medical hardship(catastrophic illness or serious accident) was consistent with the language in W. Va. Code §18A-4-10, had a rational basis, was not arbitrary, and was within the discretion granted to a county board by the Legislature. Id. at 8. W. Va. Code § 18A-4-10 does not require sick leave banks to be available to an employee for any accident or illness no matter the severity, as no leave bank could be created to meet that kind of demand. Id.

Neal also held an illness or accident did not have to be life threatening to meet the definition of catastrophic or a severe medical hardship. Jeffers v. Mason County Board of Education, Docket No. 95-26-183 (Oct. 31, 1995), contains a discussion of the term catastrophic and defines it as: a disaster or a great and sudden calamity. The American Heritage Dictionary at 247. Severe was defined as unsparing, harsh, taxing, and forbidding. Id. at 1123. Thus, an illness or accident may be a calamity, harsh, and taxing without being life-threatening. By the same token an illness or accident would have to be a calamity, unsparing, and very serious in scope and duration to qualify for leave from the SLB. Jeffers, supra.

At times it may be difficult to separate the terms life-threatening and catastrophic, as some illness may be both and meet the guidelines set by the policy for a grant of leave. At other times, as in the case of a heart attack or some cancers, the disease is catastrophic, but curable, and again meets the guidelines set in the policy; i.e. the disease is severe and serious in scope and duration. There are, of course, other times when a disease process is frustrating, temporarily incapacitating, and painful, but not catastrophic. These difficult decisions are left to the discretion of the SLB Committee, and as long as their decisions are not arbitrary and capricious, they must stand. The members reviewed the medical data

submitted by Grievant, and discussed the meaning of the term catastrophic, and Mr. Miller, at least, had received a copy of Jeffers. There was no evidence to demonstrate that Mr. Miller, Mr. Raymond, or Mr. Siders equated catastrophic and life-threatening. There was evidence that these individuals believed Grievant did not meet the stated guidelines. Ms. Adkins did equate life-threatening and catastrophic; however, she also testified that she did not believe Grievant's illness was severe; and thus, Grievant did not meet the catastrophic guidelines. Even if, for the sake of argument, Ms. Adkins did change her vote, the decision would have been to deny Grievant because the prior vote had been unanimous, 4 to 0.

The SLB Committee's decision in this case is subject to the clearly wrong or arbitrary and capricious standard of review. The arbitrary and capricious standard of review requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the Committee. See generally, Harrison v. Ginsberg, 286 S.E.2d 276 (W. Va. 1982). Generally, an action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem or situation, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985). The burden of proof is on Grievant to demonstrate the decision to not grant her SLB leave was arbitrary and capricious.

A review of the medical data submitted by Grievant did not indicate the condition was serious, and did indicate the condition was expected to be short-term, was improving,and her tests were within normal limits. Given this information, the Committee's decision to deny Grievant thirty days of sick leave was not arbitrary and capricious.

Grievant's argument that the meeting of the committee was not properly conducted because Ms. Barnette did not receive notice, and because not all members of the committee were present must also fail. The parties stipulated Ms. Barnette's notice was sent to her address of record. The reason she did not receive it, was her own fault, not MCBOE's. As there is no quorum requirement in the SLB policy, and only one member was absent, it cannot be against the policy for the SLB Committee members to conduct their business with a majority of its members present.

Grievant's uniformity argument requires an examination of the lists of individuals who did and did not receive benefits. No individual who was granted sick leave had an illness similar to Grievant's. Also a review of the types of illnesses, both for those granted and for those denied, demonstrated a consistent pattern or uniformity of decision; routine surgery or temporary illnesses were not granted leave. Individuals with severe problems, such as cancer and heart and respiratory difficulties were. Grievant's application did not demonstrate a disease of such severity or duration so as to indicate to the committee that she met the requirements for leave, and her illness did not rise to the level of the other diseases for which leave had been granted. The data presented by Grievant and for which she requested leave, did not demonstrate a disease process which rose to the level of a catastrophic illness.

The above-discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. As this is a non-disciplinary grievance, the grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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). See W. Va. Code § 18-29-6.

2. MCBOE's limitation that eligibility for sick leave benefits be restricted to members with severe medical hardship is consistent with the language of W. Va. Code §18A-4-10. Further, this language is rational, not arbitrary, and within the discretion granted by the Legislature. Neal v. Cabell County Bd. of Educ., Docket No. 94-06-238 (Dec. 22, 1994).

3. In the absence of evidence to the contrary, public officers will be presumed to have properly performed their duties and not to have acted illegally, but regularly and in a lawful manner. Perry v. Miller, 181 W. Va.192, 382 S.E.2d 29 (1989). Thus, in the absence of evidence to the contrary, it is presumed that Board President Siders properly applied the term catastrophic illness.

4. The medical evidence before the SLB did not demonstrate Grievant suffered from either a catastrophic illness or a severe medical hardship and MCBOE's decision to deny Grievant's request was not clearly wrong or arbitrary and capricious.

5. The SLB uniformly applied the guidelines to Grievant's leave request.

6 6.

The SLB properly followed its procedures in voting and notice requirements.

Accordingly, this Grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mason County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: March 12, 1998

Footnote: 1

The vestibule of the internal ear governs the balance functions. I. Dox, B. Melloni, & G. Eisner, Melloni's Illustrated Medical Dictionary, at 522 (2d ed. 1985).

Footnote: 2

This acronym stands West Virginia School Service Personnel Association.

Footnote: 3

Mr. Siders was ill and unable to attend the Level IV hearing. The parties were to depose him after the hearing and before the proposed findings of fact and conclusions of law were due. The undersigned Administrative Law Judge did not receive this deposition, and it is assumed it was not conducted.

Footnote: 4

This acronym stands for West Virginia Education Association.