PAUL GLEASON,

Grievant,

v.

DOCKET NO. 02-26-129

MASON COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Paul Gleason, filed this grievance against his employer, the Mason County Board of Education ("Board"), on January 30, 2002:

> Grievant is a regularly employed school bus operator and is a member of Respondent's personal leave bank. The Grievant applied for benefits from said bank and his request for benefits was denied. Grievant contends that this denial was contrary to the Respondent's policy governing the personal leave bank and was arbitrary, capricious & discriminatory.
>
> Relief sought: Grievant seeks the award of personal leave days from the personal leave bank up to the maximum allowed by the policy, i.e., 120 days.

The grievance was denied at level one by decision dated February 1, 2002. Grievant appealed to level two, and a level two hearing was held on April 4, 2002. The grievance was denied again by decision dated May 2, 2002, and Grievant appealed directly to level four on May 9, 2002. A level four hearing was held in the Grievance Board's Charleston, West Virginia, office on August 26, 2002, and this matter became mature for decision on September 30, 2002, the deadline for the parties' proposed findings of fact andconclusions of law. Grievant was represented by John E. Roush, Esq., West Virginia School Service Personnel Association, and the Board was represented by Gregory W. Bailey, Esq., Bowles Rice McDavid Graff & Love.

SUMMARY OF EVIDENCE

Level Two Grievant's Exhibits

Ex. 1 -

Mason County Board of Education Policy 816 Personal Leave Bank.

Ex. 2 -

December 6, 2001 Request for Days.

Ex. 3 -

December 19, 2001 letter from Chris Campbell to Paul Gleason.

Ex. 4 -

December 20, 2001 letter from Breton L. Morgan, M.D.

Ex. 5 -

January 9, 2002 letter from Chris Campbell to Paul Gleason.

Ex. 6 -

January 10, 2002 letter from Richard A. Ansinelli, M.D. to Mason County School Board.

Ex. 7 -

January 25, 2002 letter from Chris Campbell to Paul Gleason.

Ex. 8 -

January 30, 2002 Request for Days.

Level Two Board Exhibits

Ex. 1 -

September 15, 1997 Personal Leave Bank Membership Form.

Ex. 2 -

Personal Leave Bank Medical Form.

Ex. 3 -

January 22, 2002 minutes of the Sick Leave Bank Committee.

Level Four Board Exhibit

Ex. 1 -

July 23, 2002 letter from Rich Gleason to Dr. Larry E. Parsons.

Testimony

Grievant testified in his own behalf, and the Board presented the testimony of Dr. Larry Parsons.

Based upon a review of the entire record, I find the following facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. At all relevant times, Grievant was employed by the Board as a bus operator. Grievant began his employment in November 1988, and continued as a regular employee until his retirement effective July 30, 2002. LIV Board Ex. 1. (See footnote 1)

2. The Board adopted a Personal Leave Bank policy (Policy 816), that was last revised in April 2001. LII G. Ex. 1.

3. Grievant was a member in good standing of the Personal Leave Bank. He signed a form upon joining that included an acknowledgment that he agreed to abide by the terms and conditions of the Personal Leave Bank, and that the decisions of the Personal Leave Bank would be final.

4. The standard established for Personal Leave Bank eligibility requires that an employee be suffering from a “life-threatening/terminal illness as determined by the PLB committee.” LII G. Ex. 1.

5. Grievant developed a heart condition that prevented him from working in the Fall of 2001. After he had utilized all of his own personal leave, Grievant applied for an award of Personal Leave Banks on December 6, 2001. (See footnote 2) LII G. Ex. 2. 6. By letter dated December 19,

2001, the Personal Leave Bank Committee requested that Grievant submit additional information concerning his application for an award of days. LII G. Ex. 3.

7. Grievant submitted a letter from Dr. Breton L. Morgan dated December 20, 2001, in support of his request, wherein Dr. Morgan stated: The above named patient has been under my care. He has a cardiac condition which is life threatening. Due to this condition, he can lose sudden loss of unconsciousness. He is unable to operate a bus under these conditions." LII G. Ex. 4.

8. By letter dated January 9, 2002, the Personal Leave Bank Committee made a second request for additional information. LII G. Ex. 5.

9. In response, Grievant submitted a letter from Dr. Richard A. Ansinelli dated January 10, 2002. Dr. Ansinelli stated: "I saw the patient in follow-up on December 18, 2001, and found him to be clinically stable. However, given his poor ejection fraction and severe left ventricular dysfunction, which is a life threatening condition, I believe he should not drive a school bus, and believe that his condition warrants permanent disability." LII G. Ex. 6.

10. The Personal Leave Bank Committee considered Grievant's request for an award of days and the medical information supplied by his physicians, and voted to deny his request. LII G. Ex. 7.

11. It was the consensus of the Committee that while Grievant was physically disabled, he did not meet the published criteria for an award of Personal Leave Bank days. Of particular significance was the lack of any information that stated or suggested thatGrievant's condition was terminal. LII Test., Larry Parsons, p. 48; LIV Test., Larry Parsons.

DISCUSSION

As this is a non-disciplinary grievance, Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §§ 4.21 (2000); 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. Grievant claims that the Committee's determination that his condition did not fit within the language of the Personal Leave Bank Policy was arbitrary and capricious and discriminatory. The Board denies Grievant's allegations.

The Grievance Board has recognized the authority of county boards of education to establish eligibility standards for Personal Leave Bank awards. Moreover, decisions rendered by the personal

leave bank committees are subject to the “clearly wrong or arbitrary or capricious standard of review.” Stevens v. Mason County Bd. of Educ., Docket No. 96-26-397 (Mar. 12, 1998). 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.2d1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16., 1996). While a searching inquiry into the facts is required to determine if an action is arbitrary andcapricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of the board of education. See generally Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

The Personal Sick Leave Bank Committee distinguished between a physical disability that prevented an employee from performing his or her job and a “life threatening/terminal illness,” and regarded Grievant as suffering from the former, rather than the latter, condition. LII Tr., Parsons, p. 48. The Committee regarded the “terminal” aspect of the eligibility criteria as significant. LII Tr., Parsons, pp. 52-57.

This limited interpretation of a sick leave bank policy is not unusual, and has been upheld by the Grievance Board. See Hall v. Putnam County Bd. of Educ., Docket No. 02- 40-036 (Apr. 23, 2002)(grievant suffered from debilitating foot injury); Jeffers v. Mason County Bd. of Educ., Docket No. 95-26-183 (Oct. 31, 1995)(grievant suffered from low back pain with sciatica); Stevens v. Mason County Bd. of Educ., Docket No. 96-26-397 (Mar. 12, 1998)(grievant suffered from depression and anxiety).

In Neal v. Cabell County Board of Education, Docket No. 94-06-23 (Dec. 22, 1994), aff'd Cabell County Cir. Ct., Case No. 95C41 (Sept. 27, 1995), the Administrative Law Judge held that requiring an employee to prove severe medical hardship (catastrophic illness or serious accident) was consistent with the authorizing 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 Sick Leave Bank could be created to meet that kind of demand. Id. Thegrievance in Neal was granted and the grievant awarded personal sick leave days

because the county board's policy did not limit eligibility to a life threatening illness.

Jeffers, supra, 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 Sick Leave Bank. Jeffers, supra. At times, it may be difficult to separate the terms life-threatening and catastrophic, as some illnesses 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 Sick Leave Bank Committee, and as long as their decisions are not arbitrary and capricious, they must stand. Stevens v. Mason County Bd. of Educ., Docket No. 96-26-397 (Mar. 12, 1998).

In this instant case, the evidence established that the Personal Leave Bank Committee attempted to secure sufficient information to enable it to make an informed decision on Grievant's request. The Committee made two requests for additional information, and gave consideration to the additional information supplied by Grievant inresponse to those requests. While the undersigned may disagree with the Committee's decision in this matter, she is not permitted to simply substitute her judgment for that of the Committee.

Grievant also claims it was discriminatory for the Personal Sick Leave Bank Committee to deny his request, because it had granted an award to another employee. Discrimination is defined in W. Va. Code § 18-29-2(m) as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." A grievant, seeking to establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m) must demonstrate the following:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and,

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once a grievant establishes a prima facie case of discrimination, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24,1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

Grievant identified another bus operator, Dorsey Campbell, who was awarded Personal Sick Leave Bank days for a heart condition, and who has returned to work. Grievant claims Mr. Campbell is on the Personal Sick Leave Bank Committee. However, Grievant has not reviewed Mr. Campbell's medical history, and no other evidence was presented regarding Mr. Campbell. Based upon this very limited evidence, the undersigned cannot conclude Grievant has made a prima facie of discrimination.

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 §§ 4.21 (2000); 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. The Board's limitation that eligibility for sick leave benefits be restricted to members with "personal illness, injury, or incapacitation of a catastrophic life threatening and/or disabling nature" 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. Hall v. Putnam County Bd. of Educ.,

Docket No. 02-40-036 (Apr. 23, 2002); Stevens v. Mason County Bd. of Educ., Docket No. 96-26-397 (Mar. 12, 1998); Neal v. Cabell County Bd. of Educ., Docket No. 94-06-238 (Dec. 22, 1994).

3. County boards of education have broad discretion in personnel matters, including making job assignments and transfers, but must exercise that discretion in a manner which is not arbitrary or capricious. Dillon v. Wyoming County Bd. of Educ., 351 S.E.2d 58 (W. Va. 1986); Conrad v. Nicholas County Bd. of Educ., Docket No. 97-34-388 (Jan. 12, 1998); Mullins v. Logan County Bd. of Educ., Docket No. 94-23-283 (Sept. 25, 1995); Dodson v. McDowell County Bd. of Educ., Docket No. 93-33-243 (Feb. 15, 1994).

4. 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.2d1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16., 1996).

5. While a searching inquiry into the facts is required to determine if an action is arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of the board of education. See generally Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

6. The "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. Adkins v. W. Va. Dept. of Educ., No. 29066 (W. Va. 2001)(citing In re Queen, 196 W. Va. 442, 473 S.E.2d 483 (1996). 7. The evidence shows the Committee considered the information presented by Grievant in support of his request for Sick Leave Bank days, followed its past practice, and was consistent with its prior decisions, and thus, its decision to deny his request cannot be found to be clearly wrong, implausible, or arbitrary and capricious.

8. Discrimination is defined in W. Va. Code § 18-29-2(m) as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

9. A grievant, seeking to establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m) must demonstrate the following:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular; and,

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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. Any 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. 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: October 31, 2002

Footnote: 1

Shortly before the level four hearing Grievant received permanent disability retirement, requiring him to resign from regular employment with the Board.

Footnote: 2

The initial request was for 40 days. An employee may receive up to 120 days from the bank, but the requests may not exceed 40 days at a time. Grievant's intention was to request the 120 days in three successive requests for 40 days.