HELEN HALL,

Grievant,

v.

DOCKET NO. 02-40-036

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Helen Hall, filed this grievance against her employer, the Putnam County Board of Education ("Board"), on November 7, 2001, alleging as follows:

> Violation of Putnam County Bd. of Ed. Policy p.4.3., sick leave bank with regard to denial of requested days from sick leave bank. Issue of violation involves timelines and method of decision making and the appeal process.
>
> Relief sought: Relief sought is granting of sick leave days from bank as requested.

The grievance was waived at level one, a level two hearing was held before Grievance Evaluator Harold "Chuck" Hatfield on January 10, 2002. Mr. Hatfield denied the grievance by decision dated January 22, 2002, and Grievant appealed to level four on February 7, 2002. A level four hearing was held in the Grievance Board's Charleston, West Virginia, office on March 20, 2002, and this matter became mature for decision on April 15, 2002, the deadline for the parties' submission of proposed findings of fact andconclusions of law. Grievant was represented by Susan Hubbard, West Virginia Education Association, and the Board was represented by John A. Grafton, Esq.

SUMMARY OF EVIDENCE

Level Two Joint Exhibits

Ex. 1 -

Grievance form.

Ex. 2 -

Putnam County Schools Policy Sick Leave Bank.

Level Two Grievant's Exhibits

Ex. 1 -

Sick Leave Bank Withdrawal Form, dated October 9, 2001; October 9, 2001 letter from Helen Hall to Sick Leave Bank Committee; October 3, 2001 letter from Jeffrey E. Shook, D.P.M., to Bill Duncan.

Ex. 2 -

October 30, 2001 office notes from Carla Spurlock regarding Helen Hall.

Ex. 3 -

October 29, 2001 letter from William D. Duncan to Helen Hall; January 31, 2002 e-mail from Helen Hall to Susan Hubbard.

Board Exhibits

None.

Testimony

Grievant testified in her own behalf, and presented the testimony of Bill Duncan, and Thomas Tull. The Board presented the testimony of Bill Duncan.

FINDINGS OF FACT

Based upon a careful review of all of the testimony and evidence of record, I find the following facts have been proven by a preponderance of the evidence.

1. Grievant is currently employed as a full-time teacher at Hurricane Middle School, and has been under contract with the Board for 26 years.

2. Grievant has had significant problems with her right foot and ankle over the past few years. She had reconstructive surgery on her right foot on December 5, 1998,and although she recovered, she developed a recurrence of the problem, and in the Fall of 2001, her physician, Jeffrey E. Shook, recommended she undergo surgery at once to avoid risk of further damage. LII G. Ex. 1.

3. W. Va. Code § 18A-4-10 permits county boards of education to establish personal leave banks for their employees. The employees may join the leave banks by donating leave days, and then drawing upon the leave days held by the bank when needed. This provision also requires the county boards of education to adopt rules governing the establishment and operation of the leave banks they create.

4. The Board created a sick leave bank for use by its employees in accordance with W. Va. Code § 18A-4-10. The Board's Sick Leave Bank Policy was established to “relieve employees from undue financial burdens due to extended absence from work for personal illness, injury, or incapacitation of a catastrophic life threatening and/or disabling nature.” LII Jt. Ex. 1.

5. Grievant, as a member of the Sick Leave Bank, requested 30 days of sick leave bank time on October 9, 2001, due to the surgery to be performed on her right foot. She included with her request Dr. Shook's letter, which stated in part:

> Mrs. Hall requires revisional surgery on her right foot with a heel cord lengthening to preserve the integrity and function of her right ankle joint. This is extremely important for her. If she does not have the surgery I feel that she will sustain significant damage to her ankle joint in the near future.
>
> Initially I instructed Mrs. Hall to apply for short-term temporary complete disability so that she can have her surgery. I have been informed by Mrs. Hall that this is not available for her. I have been informed by Mrs. Hall that she can get sick leave days from a Sick Leave Bank to help her with her time off so that she can have this surgery in the near future. I strongly urge you to consider allowing her to have this time off. I strongly urge you to considercomplete temporary disability for a three to six month period of time. The minimum time required for her postoperative convalescence would be 10 to 12 weeks. She did do very well with her past surgery and was back to work in there(sic) to four months.

LII G. Ex. 1.

6. Bill Duncan, Board Treasurer, and member of the Sick Leave Bank Review Committee ("Committee"), forwarded Grievant's request to the other members of the Committee, asking them to review the information and vote on Grievant's request. It is not unusual for the Committee to vote by mail.

7. Mr. Duncan was out of the office on business from October 23 through October 29, 2001. When he returned on October 29, 2001, the Committee's results had come in, and he tallied the votes of the Committee members.

8. The Committee, made up of 5 members, voted 3 to 2 to deny Grievant's request for Sick Leave Bank time on October 29, 2001, because it did not "feel it met the definition of a catastrophic or life threatening illness that the policy stipulates." LII G. Ex. 3. Mr. Duncan informed Grievant that same day of the Committee's vote.

9. Grievant appealed the Committee's decision, in accordance with the Policy, and Carla Spurlock of Dr. Shook's office called Mr. Duncan to discuss Grievant's condition and invoke a plea on her behalf. Ms. Spurlock left a message for Mr. Duncan, and memorialized the message as follows:

> As stated in the letter sent to your attention on 10-3-01 the letter clearly states that this is a disabling nature. If Helen Hall does not have this surgery she will become disabled and will not be able to work. Again as Dr. Shook stressed in his letter it is extremely important that Helen Hall has this surgery so she will be able to continue to work. Pleas(sic) review the letter sent toyou on 10-3-01 and reconsider your decision for Helen Halls request for sick time.

LII G. Ex. 2.

10. The Committee met on November 1, 2001, and again denied Grievant's request by a vote of 3 to 2.

11. Grievant underwent the scheduled surgery on her right foot on November 12, 2001. At that time, Dr. Shook told her she needed a second operation, and that operation was performed on December 7, 2001.

12. Grievant again appealed to the Committee, but her request was denied a third time.

13. Dr. Shook did not release Grievant to return to work until March 4, 2002.

DISCUSSION

Grievant has the burden of proving each element of her grievance 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 argues the Board has violated its policy by failing to respond to Grievant's request in a timely manner, and by impermissibly narrowing the eligibility requirements of the Sick Leave Bank so that an employee cannot receive benefits unless he or she is suffering from a life-threatening condition. Further, Grievant alleges the Board did not properly consider her condition; andthus, its denial was arbitrary and capricious. The Board denies it violated its own policy, and argues it took all factors into consideration before denying Grievant's request.

There is no dispute that Grievant is a contributing member to the Sick Leave Bank. Grievant submitted her request for Sick Leave Bank time, along with the appropriate Sick Leave Bank withdrawal form, and supporting documentation from her physician, on October 9, 2001. The Policy indicates the Sick Leave Bank Committee “shall respond to a request for days to be awarded to a member within ten (10) working days.” Thus, the final date for the Committee's response was October 23, 2001. However, as indicated above, Mr. Duncan was out of the office from October 23 through 29, 2001. He immediately informed Grievant of the Committee's decision upon his return on October 29, 2001.

Grievant contends the failure of the Committee to respond to her request within 10 working days entitles her to the relief requested. There is nothing in the Policy which sets forth a penalty for the Committee's failure to respond in a timely manner, and the Committee did respond before Grievant's scheduled surgery. She has failed to show any direct harm from the Committee's failure to respond within the 10-day time period, and the undersigned concludes this error was harmless with respect to this grievance. See Alcohol Beverage Control Admin. v. Scott, 205 W. Va. 398, 518 S.E.2d 639 (1999).

Grievant also argues the Committee has impermissibly narrowed the eligibility requirements of the Sick Leave Bank, which is inconsistent with the language of W. Va. Code § 18A-4-10, which only refers to employees who are “absent from work due to accident or illness.” By limiting eligibility to employees who are suffering from acatastrophic or life-threatening situation, Grievant avers the Board has created a regulation which is too strict and denies her rights afforded under the statute.

The Grievance Board has few decisions dealing with Sick Leave Banks. 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 Sick 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 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 meetsthe 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).

Finally, Grievant claims that the Committee's determination that her condition did not fit within the language of the regulation was arbitrary and capricious. Grievant makes no claim that her condition is life threatening; however, she does maintain that it is of a disabling nature, and the Committee erred in denying her Sick Leave Bank days.

County boards of education have broad discretion in personnel matters, 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). 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).

Dr. Shook's letter to the Committee indicates he recommended that Grievant apply for temporary disability during her period of recovery, and talks about the possibility of further damage if she did not have the surgery immediately. See LII G. Ex. 1. The follow- up telephone call to Mr. Duncan from Ms. Spurlock indicates Dr. Shook believed if Grievant did not have the surgery immediately, she would become disabled and unable to work. LII G. Ex. 2. Mr. Duncan testified that the Committee interprets the language in the Policy regarding a disabling condition to mean a condition which would ultimately require the employee to file for permanent disability benefits. Mr. Duncan also testified that the Committee has, in the past, only approved Sick Leave Bank days for employees with life- threatening conditions, such as cancer or stroke. The Board's attorney provided a print-out after the level four hearing, upon Grievant's request, listing all past requests for Sick Leave Bank days, the reasons given, and the disposition, which supports Mr. Duncan's testimony.

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. The evidence shows the Committee considered all of the evidence presented by Grievant to support her request, and consistently voted 3 to 2 to deny her request. Given the Committee's past practice of interpreting and limiting its approval of Sick Leave Bank days to those employees with life-threatening conditions, its decision in this matter is not clearly wrong, implausible, nor can it be found to be arbitrary and capricious.

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. 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 all of the information presented by Grievant in support of her request for Sick Leave Bank days, followed its past practice, and was consistent with its prior decisions, and thus, its decision to deny her request cannot be found to be clearly wrong, implausible, or arbitrary and capricious.

Accordingly, this Grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Putnam 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 byW. 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: April 23, 2002