LINDA GOLEMBESKY,

Grievant,

v. **Docket No. 03-16-002**

HARDY COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Linda Golembesky ("Grievant") initiated this proceeding in November of 2002, alleging she should have been granted days from Respondent's personal leave bank. Level one was bypassed by agreement of the parties on November 22, 2002. A level two hearing was held on December 18, 2002, and the grievance was denied in an undated decision. Level three consideration was bypassed, and Grievant appealed to level four on January 2, 2003. The parties elected to have a decision rendered based upon the record developed below, supplemented by fact/law proposals submitted by February 20, 2003. Grievant was represented by Frank Caputo of the American Federation of Teachers, and Respondent was represented by Ronald V. Whetzel, Superintendent.

The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1. Grievant has been employed by the Hardy County Board of Education ("HCBOE") as a classroom teacher for approximately 9 years. 2. Since the beginning of her employment, Grievant has been a member in good standing of HCBOE's personal leave bank.

3. HCBOE's Personal Leave Bank Policy "GBR" provides, in pertinent part, as follows:

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> The purpose of the bank is to provide leave for employees who encounter severe medical hardship, either with themselves or in their immediate households.

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Requests may be approved only by a majority vote of the full membership of the committee, consisting of five members.

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Severe medical hardship means critical illness that renders the individual unable to perform his/her job assignment for a limited period of time (up to 90 days can be granted).

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A physician's statement is required to document the need for leave, including the reason and expected length of time the individual will be unable to work.

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The committee must review the person's medical history, including previous use of the leave bank.

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A decision of the committee may be appealed to an appeal panel composed of five members, and a decision is rendered by a majority of the panel.

4. Near the end of the 2001-2002 school year, Grievant was suffering from pain in her lower back and knee. On May 30, 2002, her chiropractor diagnosed a stress fracture.

5. Because she had exhausted her leave, Grievant requested 11½ days from the personal leave bank, which would conclude her leave at the end of the school year.

6. With her application for leave bank days, Grievant submitted a brief statement from her chiropractor which stated Grievant should be excused from work “untilthe rest of the school year” because she was “unable to work due to severe lower back and knee pain.”

7. At a meeting on June 10, 2002, by unanimous vote, the leave bank committee voted to deny Grievant's request. One member of the committee was not present for the meeting.

8. Grievant's request was denied because the committee members present did not believe her condition met the criteria of severe medical hardship and was not a critical condition. One member equated “critical” with “life threatening.”

9. Pursuant to provisions of the leave bank policy, Grievant appealed her request to the appeal panel. The panel met on July 8, 2002, and voted to deny Grievant's request. Due to some miscommunication, Grievant did not attend the meeting.

10. The appeal panel reconvened on September 17, 2002, and Grievant attended, providing the same documentation she had previously provided the leave bank committee (i.e. the brief statement from her chiropractor). A discussion ensued, and the panel requested additional information regarding Grievant's condition, including a diagnosis from a medical doctor.

11. In a letter dated September 18, 2002, the appeal panel asked Grievant to confer with her doctor and provide the following:

1. Date of the diagnosis of the stress fracture.

2. Any information or estimate as to how long this condition had existed prior to the diagnosis.

3. Statement as to your capacity to continue your work with this condition, or if you could have worked with accommodations.

12. Grievant's surgeon returned the September 18 letter to the appeal panel with a brief notation beside each question, as follows:

Question #1 -- 5/30/02

Question #2 -- Unknown

Question #3 -- Unable to work due to immobility

13. No further detailed medical information was provided by Grievant to the leave bank committee or the appeal panel.

14. At another meeting on October 18, 2002, the appeal panel discussed Grievant's request, with Grievant in attendance, and voted 4-0 to deny her request. The panel members did not believe that her condition constituted a severe medical hardship.

15. Grievant previously received time from the personal leave bank in 1999, partly due to back

and leg pain diagnosed by a chiropractor.

16. Respondent's leave bank has granted requests for leave time on five occasions (besides Grievant's prior request). Three of those individuals eventually passed away as a result of their conditions. Another had breathing problems which resulted in his retirement. The final employee had complications and a severe infection from a pregnancy, which resulted in surgery.

17. Grievant testified that, as a result of her stress fracture, she was only able to ambulate by using a walker. This information was neither provided nor explained by her doctors.

Discussion

As this is a non-disciplinary grievance, 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.

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 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).

First, Grievant alleges that the leave bank policy's limitation of awards to “severe medical hardship” and “critical” conditions exceeds its statutory authority. Such limitations in sick leave bank policies are not unusual, and have been upheld by the Grievance Board. See Hall v. Putnam County Bd. of Educ., Docket No. 02-40-036 (Apr. 23, 2002); Jeffersv. Mason County Bd. of Educ., Docket

No. 95-26-183 (Oct. 31, 1995); Stevens, supra. 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, which authorizes boards to create these banks, 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.

Second, Grievant contends that it was discriminatory for the leave bank committee to grant her leave bank days in 1999 for a similar condition, then deny her time in 2002 for the same problem. 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).

In the instant case, Grievant has not argued that her condition was as severe as or worse than that of any of the other employees who have received leave bank awards. Rather she contends that

the leave bank committee failed to follow its past practice by not granting her leave bank days for the same condition. This would seem to not constitute a discrimination allegation, but one of arbitrary and capricious application of the policy. Indeed, if the condition and underlying medical documentation were in fact the same, the undersigned would agree that the leave bank is applying the policy inconsistently. However, the record is unclear as to what information the committee had before it when Grievant's previous request was granted. Without that information, the undersigned cannot conclude that the committee's decision in this case was inconsistent with the prior one, because the medical documentation could have been vastly different.

While Grievant's knee problem was unquestionably limiting, it cannot be concluded that the leave bank committee's decision to deny her request was arbitrary and capricious, in view of the information presented to them. As discussed in previous cases involving leave bank decisions, severe medical hardship encompasses illnesses which constitute “calamity, unsparing, and very serious in scope and duration.” Jeffers, supra. While Grievant is correct in pointing out that some committee members believed the condition must be “life threatening” to qualify, which is incorrect, Grievant's condition still did not rise to the level contemplated by the term “severe medical hardship.” As noted recently in Gleason v. Mason County Board of Education, Docket No. 02-26-129 (Oct. 31, 2002), a condition may be “frustrating, temporarily incapacitating, and painful,” but not rise to the level of qualifying for personal leave bank time. Making the decision as to whether a condition qualifies is left to the discretion of the leave bank committee, and as long as that decision is not arbitrary and capricious, it must stand. Stevens, supra.

Given the information before it, the committee's decision in this case was not arbitrary and capricious. Perhaps a detailed explanation from her doctor regarding her condition and limitations would have resulted in a different decision, but that was never provided to the committee or the appeal panel, even though Grievant's case was discussed in four separate meetings. As to Grievant's final allegation that both the committee and the appeal panel violated HCBOE's leave bank policy by voting without all members present, the undersigned disagrees. The policy merely states that a majority vote of the committee or appeal panel is required. Only one member of each group was absent when votes were taken, and the decisions were unanimous. Accordingly, even if the entire committee/panel had been present on each occasion to vote on Grievant's case, her request would still have been denied. No violation of the policy occurred, nor would the outcome of this case have

been different if the full membership had voted.

The following conclusions of law support the decision reached.

Conclusions of Law

1. As this is a non-disciplinary grievance, 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 suffering 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. 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. 94-06-23 (Dec. 22, 1994), aff'd Cabell County Cir. Ct., Case No. 95C41 (Sept. 27, 1995).

3. Decisions rendered by the personal leave bank committees are subject to the "clearly wrong or arbitrary or capricious standard of review." Stevens, supra. 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 and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of theboard of education. See generally Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982).

4. 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."

5. 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).

6. Grievant has not compared herself to any similarly situated employees, so she has failed to establish a prima facie case of discrimination.

7. In light of the information before it, HCBOE's decision to deny Grievant's request for leave bank days was not arbitrary and capricious.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Hardy County, and such appeal must be filed within thirty (30) days ofreceipt 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.

Date: March 10, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge