PATRICIA HENSLEY,
Grievant,

v. **DOCKET NO. 04-HHR-375**

DEPARTMENT OF HEALTH
AND HUMAN RESOURCES,
Respondent.

DECISION

On October 21, 2004, Grievant filed a grievance against her employer, the Department of Health and Human Resources, challenging her suspension without pay, alleging it was arbitrary and capricious, discriminatory and without good cause, in violation of her due process rights. After her initial suspension, she was again suspended for 30 additional days on November 8, 2004, December 7, 2004, and January 7, 2005. After each renewal of her suspension, she filed a new grievance, each of which was consolidated with the first.[1]

As relief, Grievant seeks reinstatement, back pay and lost benefits.

A level four hearing was held in the Grievance Board's office on January 12, 2005. Grievant was represented by Dale Browning. Respondent was represented by counsel, Landon R. Brown. The matter became mature for decision at the close of the hearing, both parties declining the opportunity to submit proposed findings of fact and conclusions of law.

Based on a preponderance of the evidence adduced at the level four hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant is employed by Respondent as a Health and Human Services Aide in the Cabell County office. She began employment with Respondent on August 16, 2004.

2. During Grievant's employment, Respondent's Office of Investigative Services (OIG) began an investigation into Grievant's receipt of child care benefits in March, April and May, 2004. Investigator Christopher Nelson spoke with Gary McMullen, Community Services Manager, about the allegations as early as September 3, 2004.

3. Grievant was alleged to have received subsidized child care (known as "Link" benefits) when she was not eligible to do so because she had failed to report a change in her college enrollment and employment.

4. At 4:15 p.m. on October 13, 2004, Grievant met with Mr. McMullen, and was given a letter from

Regional Director James Kimbler informing her that she was being suspended "for a period not to exceed thirty (30) calendar days." The letter further stated:

> This suspension is being issued pending the results of an investigation into the allegation that you received day care services for periods during which you were not entitled to those services. More specifically, it is alleged that payments were improperly made to a day care facility on your behalf as a result. . . .
>
> This action was necessary to preserve the integrity of any evidence relevant to these allegations which would prove your innocence or the truthfulness of the allegations.

5. The OIG completed its investigative report on or about October 18, 2004, wherein it concluded that Respondent had cause to refer Grievant's case to law enforcement for prosecution for welfare fraud. On January 7, 2005, a Cabell County Grand Jury Indictment was unsealed, charging Grievant with felony welfare fraud for alleged offenses occurring "between the months of March, 2004, through May, 2004."

6. "Link" is a program administered for Respondent by a contractor, and all records and personnel related to the program are kept at the contractor's office, in a separate location from Grievant's work location. Grievant's computer privileges do not allow her access to any records regarding child care benefits, and nobody at Grievant's work location was involved with the Link program.

DISCUSSION

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). In this case, Respondent derives its authority to suspend Grievant before any charges are proven from the Division of Personnel Administrative Rule, section 12.3, which states:

> Eight (8) calendar days after oral notice confirmed in writing or by written notice, the appointing authority may suspend any employee without pay for cause or to conduct an investigation regarding an employee's conduct which has a rational nexus to the employee's performance of his or her job. The suspension shall be for a specific period of scheduled work time, except where an employee is the subject of an indictment or other criminal proceeding. Accrued leave shall not be paid to employees during any period of suspension. The appointing authority shall allow the employee being suspended a reasonable time to reply in writing, or upon request to appear personally and reply to the appointing authority or his or her designee. The eight (8) calendar day notice is not required for employees in certain cases when the public interests are best served by withholding the notice. The appointing authority shall file the statement of reasons for the suspension and the reply, if any, with the Director of Personnel.

Respondent contends the suspension was "to conduct an investigation regarding an employee's conduct which has a rational nexus to the employee's performance of his or her job." It further relies on its own Policy 2108, Employee Conduct, which requires employees to comply with all laws, be ethical and attentive to their jobs, refrain from disrupting the operations of the agency, etc.

One thing this case is not about is whether Grievant actually committed the acts or omissions of which she is accused. Grievant was not suspended for welfare fraud, she was suspended to conduct an investigation. More specifically, she was suspended for 120 days to complete an investigation that was finished five days after her initial suspension. Had she been given the eight days notice required by the Administrative Rule, the final investigative report would have been completed three days prior to the action.

Further, Grievant was not suspended for conduct that occurred at the workplace, or indeed that had occurred while she was an employee of Respondent. The conduct is alleged to have occurred three months before she was ever hired by Respondent. That word "alleged" is significant: Grievant has never been proven to have committed welfare fraud or any other illegal act. At the time of the level four hearing, she had been indicted, but had not been arraigned or even arrested. Although Respondent argues that there is a nexus because Grievant was accused of welfare fraud and works at a welfare agency, that generic association is too tenuous to establish a material connection. "An employing agency may impose discipline, including dismissal, upon an employee whose 'misconduct is of a substantial nature' directly affecting 'the rights and interests of the public **by bearing directly in a substantial manner on the duties which the employee is required to discharge**[.]' *Thurmond v. Steele*, 159 W. Va. 630, 635, 225 S.E.2d 210, 213 (1976)(emphasis added)." [redacted] Grievant, in this case, is accused of no misconduct as an employee and no other conduct even tangentially related to her job.

Respondent contended Grievant's immediate suspension on October 13 was necessary to "preserve the integrity of any evidence relevant to the allegations." This, despite the fact that Grievant had no access to any evidence related to the allegations and did not work with any people who did. And despite the fact that Respondent's supervisor had known about the allegations, and the investigation had been ongoing, for over a month. In fact, there was no evidence related to her job that needed to be preserved. What happened was that Respondent anticipated an indictment and knew it might be able to impose an indefinite suspension when that happened, but only had the authority to suspend for a defined period while it conducted an investigation. It therefore simulated the indefinite suspension by imposing a series of 30-day suspensions. This was not what the policy intended.

Grievant complains that the suspension and its extensions were arbitrary and capricious. 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." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). 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*, *infra*. "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 [his] judgment for that of [the employer]." *Trimboli*, *supra*.

Respondent had no valid reason for suspending Grievant from employment. Its decision to do so was "without consideration, and in disregard of facts and circumstances of the case." Grievant's alleged misconduct bore no relationship and had no rational nexus to her job duties, there was no evidence to be preserved anywhere within the sphere of her work-related influence, and the investigation to which her continued presence was a threat had started over a month before her suspension and was completed five days after she was suspended. Had Grievant been given the requisite eight-day notice, the investigation would have been complete before her suspension started, negating its ostensible necessity. Although Respondent referred the case for prosecution, it proffered no evidence related to any further investigation by law enforcement. After the investigation was concluded, Respondent took no disciplinary action based on the findings of the OIG. The following Conclusions of Law support this decision:

CONCLUSIONS OF LAW

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. W. Va. Code § 29-6A-6; *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988). "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 employer has not met its burden. *Id.*

2. 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.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). 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 [his] judgment for that of [the employer]. *See generally*, *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982)." *Trimboli*, *supra*, *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

3. "An employing agency may impose discipline, including dismissal, upon an employee whose 'misconduct is of a substantial nature' directly affecting 'the rights and interests of the public **by bearing directly in a substantial manner on the duties which the employee is required to discharge**[.]' *Thurmond v. Steele*, 159 W. Va. 630, 635, 225 S.E.2d 210, 213 (1976)(emphasis added)." [redacted]

4. Grievant sustained her burden of proving her initial suspension and its subsequent extensions was arbitrary and capricious and was outside the scope of Respondent's authority.

For the foregoing reasons, this grievance is **GRANTED**. Respondent is **ORDERED** to permit Grievant to return to work, to compensate her for and restore any salary and benefits to which she would have been entitled had she not been suspended, plus interest at the legal rate. Nothing in this Decision or Order is intended to prevent Respondent from taking any appropriate actions stemming from Grievant's indictment.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred, and such appeal must be filed within thirty (30) days of receipt of this Decision. W. Va. Code § 29-6A-7 (1998). 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: January 28, 2004

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M. Paul Marteney
Administrative Law Judge

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[1]The latter grievances were docketed originally as 04-HHR-415, 04-HHR-431, and 05-HHR-006.