
NO. 32287

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

RAYMOND CANFIELD,
GARY ROY, and
RICHARD TETER,

Appellants Below, Appellees,

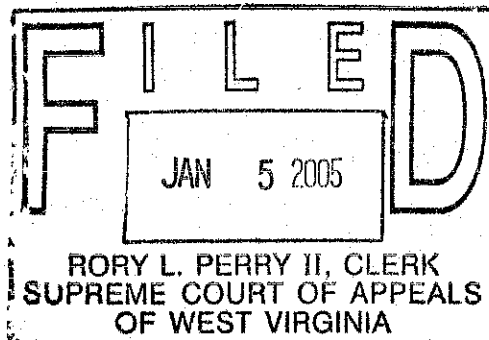
v.

WEST VIRGINIA DIVISION OF CORRECTIONS and
WEST VIRGINIA DIVISION OF PERSONNEL,

Appellees Below,

WEST VIRGINIA DIVISION OF CORRECTIONS,
HUTTONSVILLE CORRECTIONAL CENTER,

Appellants.



BRIEF OF THE
WEST VIRGINIA DIVISION OF PERSONNEL

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BRIEF OF THE
WEST VIRGINIA DIVISION OF PERSONNEL

Comes now the Intervenor, Appellee Below, West Virginia Division of Personnel (hereinafter "DOP"), by counsel, Karen O'Sullivan Thornton, Assistant Attorney General, and submits this Brief in support of Appellant, West Virginia Division of Corrections, Huttonsville Correctional Center (hereinafter "Corrections"). Corrections seeks reversal of an order entered March 3, 2004, by the Circuit Court of Randolph County, wherein the court overturned the decision of the West Virginia Education and State Employees Grievance Board (hereinafter "Grievance Board") that Appellees were not entitled to sick

leave, annual leave, and seniority time while off work and receiving Workers' Compensation benefits.

I.

KIND OF PROCEEDING AND NATURE OF RULING BELOW

The Appellees are State employees employed by Huttonsville Correctional Center. The Appellees filed separate grievances in July of 2002, alleging they were entitled to restoration of leave, holiday pay, increment pay and seniority credit which they did not earn while off of work receiving Workers' Compensation benefits. The Grievances were denied at Levels I-IV of the grievance process. On April 18, 2003, the Administrative Law Judge (hereinafter "ALJ") for the Grievance Board issued a final decision holding that the Appellees had not been discriminated against by Corrections and were not entitled to credit for sick leave, annual leave, and seniority time while off work and receiving Workers' Compensation benefits.

The Appellees appealed the decision of the ALJ to the Circuit Court of Randolph County and on March 3, 2004, Judge Henning entered an Order reversing the decision of the ALJ and granting the relief requested by the Appellees. Upon receiving the Order of the court, Corrections filed a Motion to Alter or Amend Judgment. By Final Order dated April 5, 2004, Judge Henning denied said Motion. On July 29, 2004, Corrections filed a Petition for Appeal to this Court asserting that the ALJ correctly upheld the lawfulness of the DOP's Workers' Compensation Temporary Total Disability Rule and pertinent Administrative Rules, and that the circuit court was in error when it found these Rules to be discriminatory pursuant to West Virginia Code § 23-5A-1 (2002).

On August 20, 2004, DOP filed a Motion to Intervene as an indispensable party to this action, said Motion being granted by this Court on September 22, 2004. DOP now files this Brief in Support of Corrections' appeal.

II.

STATEMENT OF FACTS

DOP concurs with, relies upon and adopts Corrections' Statement of the Facts of the Case as detailed in their Petition for Appeal and corresponding brief.

III.

DISCUSSION OF LAW

A. STANDARD OF REVIEW

This appeal comes before this Court not on the merits of the case, but on the limited grounds of judicial review specified in W. Va. Code § 29-6A-7. W. Va. Code § 29-6A-7 provides a circuit court with a narrow standard of review. A circuit court may only overturn a decision of the West Virginia Education and State Employees Grievance Board (hereinafter "Grievance Board") if the decision:

1. was contrary to law or a lawfully adopted rule, regulation or written policy of the employer;
2. exceeded the hearing examiner's statutory authority;
3. was the result of fraud or deceit;
4. was clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
5. was arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

W. Va. Code § 29-6A-7 (2001).

This Court has interpreted this statutory provision on many occasions, holding that "a final order of the hearing examiner . . . based upon findings of fact, should not be reversed unless clearly wrong." *Randolph Co. Bd. of Ed. v. Scalia*, 182 W. Va. 289, 387 S.E.2d 524, 527 (1989) (cited in *W. Va. Dept. Of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993)); see also *W. Va. Dept. Of Health v. W. Va. Civil Service Commission*, 178 W. Va. 237, 358 S. E.2d 798 (1987).

This standard was reiterated by this Court in *Board of Educ. of Mercer v. Wert*, 192 W. Va. 568, 453 S.E.2d 402 (1994):

In applying the clearly erroneous standard to the findings of a [lower tribunal] sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. Indeed, if the lower tribunal's conclusion is plausible when viewing the evidence in its entirety, the appellate court may not reverse even if it would have weighed the evidence differently if it had been the trier of fact.

Id. at 413 (citations omitted).

Moreover, this Court has held that:

Grievance rulings involve a combination of both deferential and plenary review. Since a reviewing court is obligated to give deference to factual findings rendered by an administrative law judge, a circuit court is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations. Credibility determinations made by an administrative law judge are similarly entitled to deference. Plenary review is conducted as to the conclusions of law and application of law to the facts, which are reviewed *de novo*.

Syl. pt. 1, Cahill v. Mercer County Bd. of Educ., 208 W. Va. 177, 539 S.E.2d 437 (2000); see also, *Watts v. Department of Health and Human Resources*, 195 W. Va. 430, 434, 465 S.E.2d 887, 891 (1995).

"Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." *Syl. pt. 1,*

Chrystal R.M. v. Charlie A.L., 194 W. Va. 138, 459 S.E.2d 415 (1995).” *Syl. pt. 1, State ex rel. McGraw v. Combs Services*, 206 W. Va. 512, 526 S.E.2d 34 (1999), citing *Syl. pt. 2, Webster County Commission v. Clayton*, 206 W. Va. 107, 522 S.E.2d 201 (1999).

The record below indicates that the ALJ for the Grievance Board held a full and complete hearing on the issues and after a careful analysis of the testimony and evidence presented made her decision. This decision was not contrary to law, did not exceed statutory authority, was not the result of fraud or deceit, was not clearly wrong in view of the reliable, probative and substantial evidence on the whole record and was not arbitrary and capricious. Therefore, this Court should overturn the decision of the circuit court and affirm the decision of the ALJ.

B. THE WORKERS' COMPENSATION STATUTES, WEST VIRGINIA CODE § 23-4-1 ET SEQ. AND § 23-5A-1 LIMIT THE BENEFITS AN EMPLOYEE CAN RECEIVE WHILE RECEIVING TEMPORARY TOTAL DISABILITY BENEFITS (TTD).

West Virginia Code § 23-4-1 (2002) is designed to prohibit an employee from receiving both temporary total disability benefits and sick leave benefits for the same time period. This section states, in part:

“[t]hat since the intent of this paragraph is to prevent an employee of the state or any of its political subdivisions from collecting both temporary total disability benefits and sick leave benefits for the same time period, nothing herein may be construed to prevent an employee of the state or any of its political subdivisions from electing to receive either sick leave benefits or temporary total disability benefits but not both.”

Furthermore, W. Va. Code § 23-5A-4 (2002) promulgated and effective in 1999, reads as follows:

(a) All employees of the state of West Virginia shall continue to accrue increment pay during absences from work due to a work related compensable injury.

(b) The director of the division of personnel shall propose rules for legislative approval to implement the provisions of this section.

In the context of statutory construction, one must read the statute as it relates to longstanding common law. "The common law is not to be construed as altered or changed by statute, unless legislative intent to do so be plainly manifested." *Shifflette, supra.*; *Syl. pt. 4, Seagraves v. Legg*, 147 W. Va. 331, 127 S.E.2d 605 (1962)." *Hensley v. West Virginia Dept. of Health and Human Resources*, 203 W. Va. 456, 467, 508 S.E.2d 616, 627 (1998).

This Court has held that:

When interpreting statutes promulgated by the Legislature, we first discern the objective of the enactment. "The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." *Syl. pt. 1, Smith v. State Workmen's Compensation Commissioner*, 159 W.Va. 108, 219 S.E.2d 361 (1975)." *Syl. pt. 6, State ex rel. ACF Indus., Inc. v. Vieweg*, 204 W.Va. 525, 514 S.E.2d 176 (1999). In gleaning legislative intent, we endeavor to construe the scrutinized provision consistently with the purpose of the general body of law of which it forms a part.

"Statutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments." *Syl. Pt. 3, Smith v. State Workmen's Compensation Comm'r*, 159 W.Va. 108, 219 S.E.2d 361 (1975)." *Syl. pt. 3, Boley v. Miller*, 187 W.Va. 242, 418 S.E.2d 352 (1992). *Syl. pt. 3, Rollyson v. Jordan*, 205 W.Va. 368, 518 S.E.2d 372 (1999). See also *Syl. pt. 4*, in part, *State ex rel. Hechler v. Christian Action Network*, 201 W.Va. 71, 491 S.E.2d 618 (1997) ("In ascertaining legislative intent, effect must be given to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation." (internal quotations and citations omitted)); *Syl. pt. 2*, in part, *Mills v. Van Kirk*, 192 W.Va. 695, 453 S.E.2d 678 (1994) ("To determine the true intent of the legislature, courts are to examine the statute in its entirety and not select 'any single part, provision, section, sentence, phrase or word.'" *Syl. pt. 3*, in part, *Pristavec v. Westfield Ins. Co.*, 184 W.Va. 331, 400 S.E.2d 575 (1990).").

State ex rel. McGraw v. Combs Services, 206 W. Va. 512, 526 S.E.2d 34, 40 (1999).

This Court further held:

Once the legislative intent underlying a particular statute has been ascertained, we proceed to consider the precise language thereof. " 'A statute that is ambiguous must be construed before it can be applied.' Syllabus point 1, *Farley v. Buckalew*, 186 W.Va. 693, 414 S.E.2d 454 (1992)." *Syl. pt. 7, State ex rel. ACF Indus., Inc. v. Vieweg*, 204 W.Va. 525, 514 S.E.2d 176. See also *Syl. pt. 1*, in [206 W.Va. 519] part, *Ohio County Comm'n v. Manchin*, 171 W.Va. 552, 301 S.E.2d 183 (1983) ("Judicial interpretation of a statute is warranted only if the statute is ambiguous"). However, "[w]here the language of a statutory provision is plain, its terms should be applied as written and not construed." *DeVane v. Kennedy*, 205 W.Va. 519, 529, 519 S.E.2d 622, 632 (1999) (citations omitted). See also *Syl. pt. 4*, in part, *Daily Gazette Co., Inc. v. West Virginia Dev. Office*, 206 W.Va. 51, 521 S.E.2d 543 (1999) ("A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." (internal quotations and citations omitted)); *Syl. pt. 5*, in part, *Walker v. West Virginia Ethics Comm'n*, 201 W.Va. 108, 492 S.E.2d 167 ("Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." (internal quotations and citations omitted)).

Id at 40-41.

Additionally, "a cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute." *Meadows v. Wal-Mart, Inc.*, 207 W. Va. 203, 214, 530 S.E.2d 676, 687 (1999), citing *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W. Va. 137, 147, 107 S.E.2d 353, 359 (1959).

The statute in question is clear on its face, however, should this Court determine that the statute is ambiguous, the initial step in construing an ambiguous statute is to ascertain the legislative intent behind the statute. *Syl. pt. 1, Ohio County Comm'n v. Manchin*, 171 W. Va. 552, 301 S.E.2d 183 (1983).

To determine the legislative intent, this Court need look no further than the legislative history of W. Va. Code § 23-5A-4. Legislative history reveals that the concept of providing accrued sick leave, annual leave and seniority time/service credit to employees receiving temporary total disability benefits was considered by the state legislature. On January 28, 1999, Senate Bill 351 was introduced. See Attachment A. The committee substitute for Senate Bill 351 was enrolled, passed and effective from passage on March 11, 1999. See Attachment B. Prior to enactment, the language contained in the proposed legislation required state agencies to provide employees sick leave, annual leave, seniority time, as well as increment pay during their absence from work while receiving Workers Compensation benefits. Said language was stricken from the Bill in committee. See Attachment C. The legislature did not pass the Bill as originally written and proposed, rather considered and passed an amended version of the Bill, which provided that employees receive only increment pay while absent from work and receiving Workers Compensation benefits. W. Va. Code § 23-5A-4(a) (1999), *supra*. The legislative history of W. Va. Code § 23-5A-4 clearly sets forth the legislative intent of the statute. The legislature considered the position espoused by Appellees and rejected it prior to enacting W. Va. Code § 23-5A-4.

W. Va. Code § 23-5A-4 is clear on its face and its meaning is bolstered and solidified by its legislative history. The statute clearly limits the benefits received by all state employees absent from work due to a work related compensable injury to accrual of increment pay.

**C. THE WEST VIRGINIA DIVISION OF PERSONNEL
PROPERLY PROMULGATED ADMINISTRATIVE RULE 143
C.S.R. 3 PURSUANT TO THE SPECIFIC INTENT OF, AND
MANDATE IN, WEST VIRGINIA CODE § 23-4-1 ET SEQ.
AND § 23-5A-4.**

The DOP is the state agency granted statutory authority pursuant to W. Va. Code § 29-6-10 to promulgate the rules and regulations governing the civil service system and those individuals employed therein. The DOP is charged with promulgating legislative rules based on their interpretation of statutes. W. Va. Code § 23-5A-4 mandates the DOP establish a rule to implement said statute. DOP established 143 C.S.R. 3 through the legislative rules process and has interpreted the rule to mean exactly what the statute intended. DOP used the rule to address employees' receipt of temporary total disability benefits, providing that, once an employee's sick leave has been exhausted, the employee may "buy back" that leave. This buy back provision comports with the dictate in W. Va. Code § 23-4-1 that employees cannot receive both temporary total disability benefits and sick leave pay for the same time period. Additionally, the rule requires an employee collecting temporary total disability to apply for a medical leave of absence without pay. As is the case for any state employee on a medical leave of absence, the employees on medical leave do not receive years of service credit, sick leave or annual leave.¹

"[T]he rules promulgated by the Personnel Board are given the force and effect of law and are presumed valid unless shown to be unreasonable or not to conform with the authorizing legislation." *Farber v. Dep't of Health and Human Resources/Div. of Personnel*, Docket No. 95-HHR-052 (July 10, 1995). See, *Callahan v. W. Va. Civil Service Comm'n*,

¹Contrary to the circuit court's ruling in this matter, employees continue to accrue credit for increment pay.

166 W. Va. 117, 273 S.E.2d 72 (1980). Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous, and an agency's determination of matters within its expertise is entitled to substantial weight. *Syl. pt. 3, W. Va. Dep't. of Health v. Blankenship*, 189 W. Va. 342, 431 S.E.2d 681 (1993); *Princeton Community Hosp. v. State Health Planning*, 174 W. Va. 558, 328 S.E.2d 164 (1985); *Dillon v. Bd. of Ed. of County of Mingo*, 171 W. Va. 631, 301 S.E. 2d 588 (1983).

Pursuant to W. Va. Code § 23-5A-4 the DOP promulgated 143 C.S.R. 3 *et seq.*

The Rule, in part, states that:

"an employee electing to receive temporary total disability benefits shall apply for a medical leave of absence without pay and, for purposes of leave, is treated the same as any other employee granted a medical leave of absence without pay in accordance with the provisions of the Division of Personnel Administrative Rule 143 C.S.R. 1."

143 C.S.R. 3, § 4.2. See Attachments D and E for complete copies of 143 C.S.R. 1 and 143 C.S.R. 3 respectively.

Furthermore, 143 C.S.R. 1 provides that an employee on medical leave of absence without pay does not accrue annual and sick leave and does not receive holiday pay. See Attachment F for Division of Personnel's Workers' Comp/Sick Leave Policy.

"As authorized by legislation, a legislative rule should be ignored only if the agency has exceeded its constitutional or statutory authority or it is arbitrary or capricious." *Appalachian Power Co., v. State Tax Dept. of West Virginia*, 195 W.Va. 573, 585, 466 S.E.2d 424, 436 (1995). Moreover,

"[if] the legislative rule is valid, clear as to its intent and not contrary to the legislative enactment that triggered its promulgation, the need for further review does not arise. It becomes the court's duty to apply the rule as written."

Appalachian Power Co., 195 W.Va. at 586, 466 S.E.2d at 437.

State agencies must comply with the rules promulgated by the DOP or be in violation thereof. In the matter at hand, Corrections was simply following the legislative rules promulgated by the DOP. It is vitally important that all state agencies, including Corrections, be able to rely upon the legislative rules promulgated by the DOP and for DOP itself to be able to depend upon the legitimacy of its properly promulgated legislative rules.

DOP's Administrative Rule 143 C.S.R. 3 *et seq.* and other pertinent Administrative Rules, which deny state employees receiving temporary total disability benefits the same benefits received by employees using their sick leave, are not contrary to the legislative intent of W. Va. Code § 23-4-1 *et seq.* and § 23-5A-1 *et seq.* As it is written, W. Va. Code § 23-4-1 prohibits an employee on temporary total disability from receiving accrued sick leave, annual leave or any other type of "sick leave benefit" or compensation that an employee would have received from the employer while out on sick leave. The DOP legislatively promulgated Administrative Rules reflect the clear intent and meaning of the statute authorizing their implementation.

**D. THE WEST VIRGINIA DIVISION OF PERSONNEL
ADMINISTRATIVE RULES 143 C.S.R. 1 AND 143 C.S.R. 3
DO NOT DISCRIMINATE AGAINST EMPLOYEES
RECEIVING TEMPORARY TOTAL DISABILITY BENEFITS.**

This Court is asked to determine whether the DOP Workers' Comp/Sick Leave Policy, DOP-7, and portions of DOP Administrative Rules 143 C.S.R.1 and 143 C.S.R. 3 are discriminatory as applied to civil service employees receiving Workers' Compensation benefits as opposed to employees use sick leave time. DOP asks this Court to be

cognizant of the fact that employees' receiving temporary total disability and employees on medical leave of absence are treated identically by the DOP rules and policies.

Appellees claim that Corrections refusal to award sick leave, annual leave, seniority and holidays to them while they were off of work and receiving Workers' Compensation benefits was discriminatory and thus violative of W.Va. Code §23-5A-1. In *Powell v. Wyoming Cablevision, Inc.* 184 W. Va. 700, 403 S.E.2d 717 (1991), this Court established the standard for making a prima facie showing of discrimination under W. Va. Code § 23-5A-1 as follows:

" . . . the employee must prove that: (1) an on-the-job injury was sustained; (2) proceedings were instituted under the Workers' Compensation Act, W.Va.Code, § 23-1-1 et seq.; and (3) the filing of a workers' compensation claim was a significant factor in the employer's decision to discharge or otherwise discriminate against the employee."

Syl. Pt. 1, Powell, supra.

When an employee makes a prima facie case of discrimination, the burden then shifts to the employer to prove a legitimate, nonpretextual, and nonretaliatory reason for the alleged discharge or other discriminatory action. *Syl. Pt 2, Powell, supra.*

While DOP concedes that the Appellees have proven the first two requirements of the three part test enumerated in *Powell*, the DOP adamantly objects to the notion that Appellees were successful in proving the third and final requirement for a showing of discrimination. Once the Appellees opted to and began receiving temporary total disability benefits, instead of using their paid sick leave they were not compensated for or provided sick leave benefits. The DOP administrative rules require the same treatment by Corrections, or any other agency, of any state employee on unpaid medical leave whether

receiving temporary total disability or not. When an employee returns to work after being off of work and receiving workers' compensation benefits, the employees are likewise treated the same as any other working employee. Corrections, in the case at hand, as well as, all other state agencies in like circumstances, are required to adhere to the policies and guidelines established by the DOP and do not have the authority to ignore those policies.

Therefore, the issue becomes whether the DOP rule in and of itself is discriminatory. As the DOP rules and policies specifically provide, any employee has the option of using his sick and/or annual leave when he has incurred an injury on the job. If the injured employee does not wish to use or cannot use sick and/or annual leave, he must take an unpaid medical leave of absence. The DOP rules do not treat employees differently depending on the variety of reasons an employee may or may not elect to use sick and/or annual leave nor do the rules treat employees differently based on the myriad of reasons one might need to take a medical leave of absence. All such employees who elect to go on medical leave of absence, do so without pay. 143 C.S.R. 3 § 4.2. The only way an employee can be compensated by an employer for the time they are off work is to either take sick or annual leave. An employee electing to take a medical leave of absence, including employee's electing to receive temporary total disability benefits are not entitled to receive compensation or benefits other than accrual of increment pay. However, no employee is prevented from using his sick leave and getting compensation for those days taken.

In spite of the overwhelmingly supported legal argument to the contrary, should this Court find that the Appellees have met their burden of showing a prima facie case of

discrimination, the burden logically shifts from the employer, Corrections, to the DOP, whose rules are properly being carried out by Corrections.

There clearly is a legitimate non pretextual and nonretaliatory basis for DOP's rules and corresponding policies placing employees receiving temporary total disability benefits and other employees who are off work on a medical leave of absence without pay in the same category in terms of treatment by employers. Both sets of employees are not working and, for whatever reason, not using their accrued sick and/or annual leave. Leave without pay is the most simple and accurate description of employees receiving temporary total disability under W. Va. Code § 23-4-1, which forbids employees from receiving pay and/or benefits from the employer while they are on leave.

The DOP rules require all state agencies, including Corrections to provide the same or equal treatment to all employees injured on the job. The rules are valid and non discriminatory. The DOP promulgated the rules and has interpreted the rules in a manner that is wholly consistent with the enabling legislation rather than in an arbitrary and capricious manner as Appellees suggested.

The State Personnel Board and the Director of DOP have wide discretion in performing their duties although they cannot exercise their discretion in an arbitrary or capricious manner. See, *Bonnett v. West Virginia Dep't of Tax and Revenue and Div. of Personnel*, Docket No. 99-T&R-118 (Aug 30, 1999), *Aff'd Kan. Co. Cir. Ct. Docket No. 99-AA-151* (Mar. 1, 2001). An action is arbitrary and capricious if the agency making the decision 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 is 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). 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 her judgment for that of DOP. See generally, *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276 (1982).

The Personnel Board has wide discretion in performing its duties although it cannot exercise its discretion in an arbitrary or capricious manner. The rules promulgated by the Personnel Board are given the force and effect of law and are presumed valid unless shown to be unreasonable or not to conform with the authorizing legislation. *Moore v. W. Va. Dep't of Health and Human Resources/Div. of Personnel*, Docket No. 94-HHR-126 (Aug. 26, 1994). See *Callahan, supra*. Finally, and in general, an agency's determination of matters within its expertise is entitled to substantial weight. See *Princeton, supra*.

The DOP rules at issue before this Court, reasonably embody the legislative history and statutory dictates of W. Va. Code § 23-4-1 *et seq.* and § 23-5A-4. The rules are reasonably designed to carry out the general and overall mission of DOP to ensure the equal treatment of employees within the Classified Service Plan. In spite of this, however, at the Appellees urging, the circuit court, held that the DOP rules were discriminatory

pursuant to W. Va. Code § 23-5A-1.^{2 3}

Even if this Court agrees with the circuit court that Appellees made a prima facie showing of discrimination, there is ample evidence in the record regarding the reasoning and rationale for, and process that, the DOP went through in order to promulgate 143 C.S.R. 3, to legitimately justify applying the rule to all state employees similarly situated, so as to obfuscate any claim of discrimination.

An adverse ruling in this matter would hinder, and in reality paralyze DOP's ability to enforce the existing statutory mandates, statutorily promulgated rules and subsequently established policies. The effect upon the rules and policies of DOP and upon the agencies, such as Corrections, who are mandated to follow said rules and policies, would be devastating.

IV.

CONCLUSION

WHEREFORE, for the reasons stated more fully above, the West Virginia Division of Personnel respectfully requests that this Court grant the Appeal of the West Virginia Division of Corrections and reverse the Order of the Circuit Court of Randolph County.

² W. Va. Code § 23-5A-1 states "[n]o employer shall discriminate in any manner against any of his present or former employees because of such present or former employee's receipt of or attempt to receive benefits under this chapter [Workers' Compensation]".

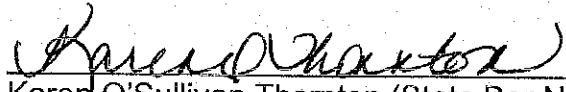
³ Though not an issue on administrative appeal throughout the grievance process, the circuit court ruled that an injured employee receiving temporary total disability benefits cannot be treated differently from an injured employee using sick leave.

Respectfully Submitted,

WEST VIRGINIA DIVISION OF
PERSONNEL,

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