RUTH BROWN, *et al.*,

Grievant,

v.

Docket No. 03-HHR-062

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES/WELCH EMERGENCY HOSPITAL, and WEST VIRGINIA DIVISION OF PERSONNEL,

Respondents.

DECISION

The grievants, Wilma Blevins, Angela Coleman, Mark Simpson, Deborah Burks, Samantha Kennedy, and Shirley Miller (collectively "Grievants") (See footnote 1) grieve the application of a holiday pay policy by respondent West Virginia Department of Health and Human Resources ("DHHR") at Welch Emergency Hospital (now Welch Community Hospital), which is run by DHHR.

Grievants are a subset of a larger group of employees at Welch Community Hospital ("Welch Community") who filed a grievance that, at Level III, was divided by subject matter into three separate grievances. Upon agreement of the parties, this grievance was waived to Level III. A Level III hearing was held on February 19, 2003, (See footnote 2) after which it was denied in a decision issued February 26, 2003. Decision III at 10.

Upon appeal to Level IV, this grievance was placed in abeyance pending resolution of a related grievance, styled *Charlotte Buckner v. West Virginia Department of Health andHuman*

Resources/Welch Community Hospital and Division of Personnel, Docket No. 03- HHR-038D. After a decision was issued in *Buckner* on September 30, 2004, this grievance was reinstated to the active docket.

A Level IV hearing was held on March 17, 2005, in the hearing room of the West Virginia Education and State Employees Grievance Board ("the Grievance Board") in Beckley. Grievants were represented by attorney Kathryn Reed Bayless, DHHR was represented by Assistant Attorney General Landon Brown, and respondent Division of Personnel ("DOP") was represented by Assistant Director Lowell D. Basford.

At the outset of the hearing, both Assistant Director Basford and Ms. Bayless moved to incorporate the record from the remedy portion of the Level IV *Buckner* proceedings. (See footnote 3) Over objection of respondent DHHR, the motion to incorporate the Level IV record of the remedy phase of *Buckner* as part of the record in this grievance was granted. Upon granting of this motion, Assistant Director Basford absented himself from the Level IV hearing in this grievance.

This grievance matured for decision on May 2, 2005, which was the deadline for submission of proposed findings of fact and conclusions of law. DOP did not tender any post-hearing submission.

After careful review of the entire record, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

Findings of Fact

1 1. Grievants are all Baylor nurses. (See footnote 4)

2 2. A Baylor nurse is distinguished from other nursing staff by a unique schedule consisting of two 12-hour shifts on the weekend and one 8-hour shift during the week, for a total thirty-two hours. In exchange for agreeing to work on weekends, Baylor nurses are paid for a forty-hour work week despite working only thirty-two hours per week. The Baylor nurses are not asked to work overtime.

3 3. While on duty, Baylor nurses perform the same nursing duties as any other nurse.

4 4. As reflected in the Level IV testimony of Human Resources Manager, Cathy Addair, the Baylor plan was developed to address recruitment and retention problems with respect to the nursing staff at Welch Community. As noted, it also ensures weekend coverage.

5 5. By memorandum, dated December 10, 2002, DHHR established a new policy dealing with a shift differential and holiday pay for employees in its health care facilities. Resp.Exh.1 at IV.

Employees working under the Baylor Plan were expressly excluded from eligibility for both the shift differential and the holiday pay that were otherwise available under the new policy. Resp.Exh.1 at IV. (See footnote 5)

6 6. The holiday pay policy provides for double time pay (See footnote 6) for any hours worked during the "24 hour period beginning at 11:00 pm on the holiday eve through 11:00 pm of the holiday" for Thanksgiving Day, Christmas Day, and New Years Day. Resp.Exh.1 at IV.

7 7. According to the testimony of Desmond Byrne, Director of Human Resource Planning and Development at Welch Community, DHHR intended the holiday pay provisions to operate as a reward to loyal employees for remaining at Welch Community and to help make Welch Community more competitive with the private sector.

Discussion

This is not a disciplinary grievance. Therefore, Grievants bear the burden of proving their allegations by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). "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 and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Although Grievants do not expressly make a claim of discrimination, this is the thrust of their argument regarding the exclusion of Baylor nurses from holiday bonus pay. In support of this argument, Grievants correctly note that DHHR admits that Baylor nurses (See footnote 7) are treated differently from other Welch Community employees because they are not eligible for bonus pay for working holidays. West Virginia Code section 29-6A-2 defines discrimination 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." This same definition is found in the statutes relating to education employees. W. Va. Code 18-29- 2(m). In discussing a discrimination claim raised by an education employee, the Supreme Court of Appeals of West Virginia noted that "[t]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]" *Bd. of Educ. v. White*, 605 S.E.2d 814, 818 (W. Va. 2004).

This means that the initial question that must be resolved is whether Grievants are similarly situated to the nurses who receive holiday bonus pay pursuant to the policy described in the

December 10, 2002, memorandum. DHHR asserts that Baylor nurses are not similarly situated to other employees at Welch Community because of the uniqueness of their schedules and the fact that they are paid for a forty-hour week, while only actually working thirty-two hours. This argument seems more appropriate to the question of whether the shift differential should apply to the Baylor nurses. However, Grievants have abandoned that issue.

It is not clear how the fact that Grievants get paid for a forty-hour week, while working thirty-two hours, relates to working on a holiday. Other nurses get paid for working their regular schedules but are eligible to receive the holiday bonus if that regular schedule causes them to work on one of the specified holidays. Welch Community made a decision to create a different schedule/pay plan for Baylor nurses to ensure weekend coverage. Welch Community continues to receive the benefit of that bargain. In all other respects, Baylor nurses are the same as any other nurse. Grievants assert, without contradiction,that Baylor nurses perform the same duties as their colleagues who are not working under the Baylor Plan. If a Baylor nurse is on duty, there is no need to schedule a non-Baylor nurse to cover that particular post or shift, regardless of whether it falls on a holiday. In this respect, Baylor nurses are similarly situated to other nurses at Welch Community.

Nonetheless, Baylor nurses are being treated differently with respect to holiday bonus pay. This issue was addressed, albeit under a different standard, in the aforementioned grievance styled *Charlotte Buckner v. West Virginia Department of Health and Human Resources/Welch Community Hospital and Division of Personnel*, Docket No. 03-HHR-038D. The grievant, Buckner, is also a Baylor nurse at Welch Community. She filed a grievance based on, among other things, Welch Community's refusal to pay her the shift differential and the holiday bonus described in the December 10 memorandum. There was a default on the part of DHHR with respect to Buckner's grievance. Therefore, pursuant to West Virginia Code section 29-6A-3, it was presumed that she prevailed on the merits. In that respect, *Buckner* differs from the instant grievance, where Grievants must meet their burden of proof in order to prevail on the merits.

Once the default was established, the *Buckner* grievance proceeded to a hearing to determine whether the relief requested was contrary to law or clearly wrong. As explained in the *Buckner* decision, at the remedy phase

> [t]he burden of proof is on a respondent to prove by clear and convincing evidence that the remedy requested would be contrary to law or clearly wrong. This standard requires a respondent to produce evidence substantially more than a preponderance of the evidence, but less than that required to prove the matter beyond a reasonable

> doubt. *Lohr v. Div. of Corrections*, Docket No. 99-CORR-157D (Nov. 15, 1999).

The shift differential issue was resolved in DHHR's favor. However, the holiday bonus issue was resolved in Buckner's favor.

Of course, under the default provisions, there was a presumption that Buckner had established a case of discrimination or favoritism. Nonetheless, the factual observations set forth in the *Buckner* decision are equally applicable to Grievants. In pertinent part, that decision states that

> Grievant [Buckner] does not receive holiday pay and the other nurses do. Prior to the new Policy/Plan, no one received double holiday pay. Grievant's weekend work days may very well fall on one of the three holidays, and it would be clearly wrong for her not to receive this same treatment. Respondent did not demonstrate by clear and convincing evidence that Grievant should be excluded from double holiday pay.

As noted in *Buckner*, under the challenged policy a Baylor nurse does not receive the holiday bonus for working on any of the three designated holidays. However, if a Baylor nurse works a holiday shift, DHHR is relieved from the obligation to pay the holiday bonus to a non-Baylor nurse who would otherwise be working.

DHHR's stated purpose in implementing the holiday bonus was to reward loyal employees for staying with Welch Community. There is no basis for making a distinction between retaining a Baylor nurse and retaining any other nurse. To the extent that all or part of a Baylor nurse's work shift falls on one of the three specified holidays, there is no reason such Baylor nurse should not receive the same holiday bonus as any other nurse would receive. While it is true that nurses who work under the Baylor Plan are already given what amounts to a shift differential, such differential has nothing to do with holiday pay. Grievants have established, by a preponderance of the evidence, that they have been treated differently than other similarly situated employees, and that such differences are unrelated to their actual job responsibilities. W. Va. Code § 29-6A-2. There remains the question of whether Grievants agreed, in writing, to the dissimilar treatment. There is no evidence of such written agreement. Accordingly, it cannot be said that Grievants have agreed in writing to being excluded from eligibility for holiday bonus pay. W. Va. Code § 29-6A-2.

Grievants have proven a case of discrimination with respect to holiday bonus pay at Welch Community. This grievance must be granted.

Based upon the foregoing, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

Conclusions of Law

1 1. This is not a disciplinary grievance. Therefore, Grievants bear the burden of proof. W. VA. CODE ST. R. § 156-1-4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990).

2 2. Grievants must prove their allegations by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-4.21 (2004). "The generally accepted meaning of preponderance of the evidence is 'more likely than not.' *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 640, 600 S.E.2d 346, 352 (2004)." *Cobb v. W. Va. Human Rights Comm'n ex rel. Wattie*, 2005 W. Va. LEXIS 112, *49 n.26 (July 7, 2005).

3 3. Grievants have proven discrimination in their exclusion from the holiday bonus plan described in the December 10, 2002, memorandum.

Accordingly, this grievance is **GRANTED**. DHHR is **ORDERED** to include Grievants among its employees who are eligible to receive the holiday bonus pay described in the December 10, 2002, memorandum. DHHR is further **ORDERED** to pay each Grievant any holiday bonuses he or she would have earned from the date the holiday pay policy was otherwise implemented at Welch Community. The determination of the holiday bonus amounts shall be consistent with the manner in which holiday bonus amounts, if any, were calculated for Charlotte Buckner.

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. Any 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 West Virginia Code section 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:

August 15, 2005

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JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

Ruth Brown is no longer a grievant with respect to this portion of an earlier, larger grievance. Nonetheless, her name has been retained in the style of this grievance.

Footnote: 2

References to pages in the Level III transcript shall appear herein as "Tr.__."

Footnote: 3

Because Buckner involved a claim that DHHR was in default, the hearing was bifurcated into a default hearing and a remedy hearing.

Footnote: 4

Grievant Mark Simpson is actually a Baylor nurse who is a nursing supervisor.

Footnote: 5

Originally, Grievants challenged their exclusion from the shift differential, as well as the holiday pay provisions. In light of the Buckner decision, Grievants withdrew their claims as they related to the shift differential. This grievance relates to holiday bonus pay.

Footnote: 6

As explained at the Level IV hearing, this actually works out so that the employee receives triple the normal rate of pay for hours worked on any of the three holidays.

Footnote: 7

Solely for purposes of this discussion, the term "Baylor nurses" does not include Charlotte Buckner.