THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

MARK SCHILL,

Grievant,

v. **Docket No. 07-RJA-045**

Sue Keller

Senior Administrative Law Judge

REGIONAL JAIL & CORRECTIONAL FACILITY AUTHORITY,

Respondent.

D E C I S I O N

Mark Schill ("Grievant"), employed by the Regional Jail and Correctional Facility Authority ("RJCFA") as a Correctional Officer 2 at the Eastern Regional Jail, filed a level one grievance on January 4, 2007, in which he alleged a violation of *W. Va. Code* § 2-2- 1(15) when holiday pay was not granted for the day of special observance noting the passing of former President Gerald Ford. For relief, Grievant requests eight hours of holiday pay for all state employees. The level one and level two hearing evaluators lacked authority to grant the requested relief. The grievance was denied following an evidentiary hearing at level three. Upon appeal to level four, Grievant, appearing *pro se,* and RJCFA counsel Chad M. Cardinal, agreed to submit the grievance for decision based on the level three record. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before April 20, 2007.

Synopsis

___Grievant argues that a Day of Mourning proclaimed by President Bush and Governor Manchin was a legal holiday pursuant to the language of *W. Va. Code* § 2-2- 1(15). RJFCA asserts that no specific holiday was created. This issue has beenaddressed by the West Virginia Supreme Court of Appeals in *Mitchell v. City of Wheeling*, 202 W. Va. 85, 502 S.E.2d 182 (1998), in which it was held that to create a legal holiday a governor must either cite *W. Va. Code*, 2-2-1, or use the applicable

language of *W. Va. Code*, 2-2-1. Grievant failed to prove that he was entitled to a day of holiday pay.

The following facts have been derived from a preponderance of the evidence made part of the level three record.

Findings of Fact

1. Grievant has been employed by RJCFA as a Correctional Officer 2 at the Eastern Regional Jail and Correctional Facility at all times pertinent to this grievance.

2. By Executive Order issued on December 28, 2006, President George W. Bush declared January 2, 2007, as a National Day of Mourning throughout the United States following the death of former President Gerald R. Ford. Federal offices were closed in observance of the Day of Mourning; however, the President did not declare a legal holiday for all citizens.

3. RJCFA Policy 3020, “Legal Holidays,” provides for certain statutory holidays, and notes “the Authority will observe any national or state election day, and any other day appointed or designated by the Governor of the State of West Virginia.”

4. Governor Joe Manchin declared January 2, 2007, to be a Day of Mourning, but did not declare it to be a state holiday.

5. Grievant was scheduled to work on January 2, 2007.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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 (2004); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See W. Va. Code* § 29-6A-6. *See also 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). "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).

Grievant argues that neither the intent of the President or the Governor to create a holiday is at issue, but rather, that the holiday is statutory in nature. Specifically, *W. Va. Code* § 2-2-1(15) states: Any day proclaimed or ordered by the Governor or the President of the United States as a day of special observance or Thanksgiving, or a day for the general cessation of business, is a holiday.

RJCFA asserts that to create a legal holiday the Governor must make such intent clear, or

specifically address Section 2-2-1, and declare that the holiday is for all citizens. Because Governor Manchin did not proclaim the day as a holiday, RJCFA argues that the grievance must be denied.

When former President Richard M. Nixon passed away in April 1994, President Bill Clinton issued a statement calling on the nation to mourn. By proclamation on April 22, 1994, the President announced the closing of most federal agencies, but made no reference to a national holiday. Presidential Proclamation No. 6677, 59 Fed. Reg. 21913 (1994). Thereafter, Thomas Mitchell, a police officer with the City of Wheeling, filed suit against the city asserting that April 27, 1994, was a legal holiday and seeking an order from the circuit court providing him an additional day of leave. The circuit court granted summary judgment to Mitchell and found that April 27, 1994, was a holiday and that Mitchell was entitled to holiday compensation. On appeal, the West Virginia Supreme Court of Appeals held that "[w]hen a governor intends to appoint or recommend an additional legal holiday applicable to all the citizens in this State pursuant to *W. Va*. Code, 2-2-1, he must make such intent clear in the order or proclamation by either citing *W. Va.* Code, 2-2-1, or by using the applicable language of W. Va. Code, 2-2-1." *Syl. Pt. 1 Mitchell v. City of Wheeling*, 202 W. Va. 85, 502 S.E.2d 182 (1998), *(citing Pullano v. City of Bluefield*, 176 *W. Va.* 198, 342 S.E.2d 164 (1986)).

The Court further held that “[f]or a Presidential order or proclamation to create a legal holiday in West Virginia, as defined in *W. Va. Code*, 2-2-1, the President must make such intent clear in his order or proclamation by either citing clear authority to create a holiday or using the applicable language of *W. Va. Code*, 2-2-1, and by expressing a clear intent that the holiday is to be for all citizens.” *Syl. Pt.3 Mitchell*, *supra.*

In the present matter, however, Grievant does not argue that either President George Bush or Governor Joe Manchin declared a holiday, but rather that “it was the intent of the state legislature, when they enacted [*W. Va. Code* §] 2-2-1 with paragraph 15" that days proclaimed to be of particular importance to the people of West Virginia or the United States as a whole, should be observed as holidays. Thus, it appears that Grievantdisagrees with the Court that specific language must be used, and that any day noted by proclamation is a holiday.

While a President or Governor may perceive many days worthy of note, the legislation relied upon by Grievant has been interpreted by the Court to limit legal holidays to those specifically identified as such. It is noted that subsequent to the ruling in *Mitchell*, there has been no further legislative action to correct any misinterpretation. Therefore, no legal holiday was created when a day of mourning was

designated by the Governor and President.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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 (2004); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See W. Va. Code* § 29-6A-6.

2. "Any day proclaimed or ordered by the Governor or the President of the United States as a day of special observance or Thanksgiving, or a day for the general cessation of business, is a holiday." *W. Va. Code* § 2-2-1(15).

3. "When a governor intends to appoint or recommend an additional legal holiday applicable to all the citizens in this State pursuant to *W. Va*. Code, 2-2-1, he must make such intent clear in the order or proclamation by either citing *W. Va.* Code, 2-2-1, orby using the applicable language of W. Va. Code, 2-2-1." *Syl. Pt. 1 Mitchell v. City of Wheeling*, 202 W. Va. 85, 502 S.E.2d 182 (1998), citing, *Pullano v. City of Bluefield*, 176 *W. Va.* 198, 342 S.E.2d 164 (1986).

4. Grievant has failed to prove that the Court's interpretation of *W. Va. Code* § 2-2-1(15) is incorrect, or that every special day of concern designated by the President and/or Governor, is a legal holiday.

Accordingly, the grievance is **DENIED.**

This Decision is final upon the parties and is enforceable in the Circuit Court of Kanawha County. Any party may appeal this decision to the Circuit Court of Kanawha County within thirty days of receipt of the decision. This decision is not automatically stayed pending the outcome of the appeal. *W. Va. Code* § 6C-2-5(c). Neither the West Virginia Public Employees Grievance Board nor any of its administrative law judges is a party to such appeal and should not be so named.

DATE: MAY 7, 2007

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE