THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

JANE ELLEN STOVER,
Grievant,

v. **Docket No. 2011-0409-MAPS**

DIVISION OF CORRECTIONS/MOUNT OLIVE CORRECTIONAL COMPLEX and DIVISION OF PERSONNEL,
Respondents.

DECISION

Jane Ellen Stover, Grievant, is employed by the Division of Corrections, Respondent, at its Mount Olive Correctional Complex. This grievance was filed at level one on or about September 17, 2010. The Statement of Grievance states as follows:

> The WV Division of Corrections, Mount Olive Correctional Complex, is treating the election on Saturday, 28 August 2010, different than previous elections. All employees were not compensated and/or paid the correct amount of overtime for this holiday. WV Codes including but not limited to have been violated: 2-2-1 Legal Holiday; official acts or court proceeding, 3-1-42 Time off for Voting, & Administrative Rule 14.1 Official Holidays.
>
> Grievant seeks relief fashioned in such a way that all employees be made whole and to be paid their correct wages.

By agreement of the Grievant and Respondent Division of Corrections, level one was waived. A level two mediation session was conducted on January 7, 2011. Appeal to level three was perfected on January 21, 2011. The Division of Personnel was joined as a party to this grievance after the mediation session. A level three hearing was scheduled to be conducted on July 27, 2011; however, the parties agreed to waive the level three hearing, submit the case on stipulated facts, and to prepare and exchange their briefs arguing the application of relevant law to the stipulated facts by September 1, 2011.

This grievance was reassigned to the undersigned Administrative Law Judge on July 19, 2011, for administrative reasons. Grievant appeared by her counsel, Vincent Trivelli. Respondent Division of Corrections appeared by its counsel, Charles Houdyschell, Jr., Senior Assistant Attorney General. Respondent Division of Personnel appeared by its counsel, Karen Thornton, Assistant Attorney General.

Synopsis

A special election was held on Saturday, August 28, 2010. State employees who worked on that day received a compensatory day off on a different day. Grievant did not work on the Saturday of the special election, but argues that she should have been compensated and/or paid overtime for that date. Grievant argues that the special election was a holiday which requires all State employees to receive additional compensation. Respondent relied upon an official Opinion of the Attorney General to compensate only those employees who reported to work on the Saturday when the special election was held. Grievant did not meet her burden of proof and demonstrate that she was entitled to compensation for the legal holiday in question.

The following facts are undisputed:

Finding of Facts

1. In order to fill the seat of the late Senator Robert C. Byrd, a special election was declared with a special primary election set for Saturday, August 28, 2010.

2. Grievant, Jane Stover, an employee of the Division of Corrections, was not scheduled to work on the day of the special primary election.

3. By memo dated August 26, 2010, the Division of Personnel informed State agencies that employees scheduled to work and working on the day of the special election were entitled to a comparable day off.

4. Employees not scheduled to work or not working on the day of the special election were not given a comparable day off.

5. Employees working during the special election were to be allowed up to three hours paid time off to go and vote in the special election if they so chose. However, if they opted to use this time to vote, that would be deducted from any comparable time off given at a later date.

6. The Division of Corrections acted in accordance with this memo, and Grievant was not provided a comparable day off because she did not work the day of the special election.

7. Grievant worked on August 24, 2010, her last scheduled work day immediately preceding the August 28, 2010 election day. Grievant worked on August 29, 2010, the day immediately following the election day.

8. On or about September 17, 2010, Grievant filed the above-styled grievance.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is

evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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 points out that the special election was a legal holiday. She argues that, pursuant to statutory law and rules, all State employees should receive the same compensation for the holiday, not just those who were required to work on the Saturday of the special election. Grievant asserts that there is no statutory nor regulatory connection between the statutory exemption from the weekend transfer rule for elections and the issue of whether all employees would be compensated for the election at issue - a legal holiday - or just those who were scheduled to work on the day at issue.[1]

Respondents counter that they relied upon the Attorney General Opinions written in response to the Governor's office request related to the special election held on a Saturday. There is no dispute that the Division of Corrections complied with the August 26, 2010 memorandum from the Director of the Division of Personnel and the opinions of

[1]The legal holiday created by the special election which occurred on Saturday, August 28, 2010, could not be transferred to the preceding Friday because the clear and unambiguous language of W. VA. CODE § 2-2-1 specifically excluded legal holidays resulting from special election from the statute's transfer provision. Op. Att'y Gen., No 3, (Aug. 24. 2010), Op. Att'y Gen., No. 4, (Aug 25. 2010).

the Attorney General's office. In short, Respondents assert that the compensation method utilized for the special election was legal and appropriate.

In the first opinion of the Attorney General, it is noted that legal holidays in West Virginia are listed in W. VA. CODE § 2-2-1. This provision provides, in part, the following:

> Any day on which a general, primary or special election is held is a holiday throughout the state, a political subdivision of the state, a district or an incorporated city, town or village in which the election is conducted. W. VA. CODE § 2-2-1(a)(13).

Saturday, August 28, 2010, was a legal holiday since it was a special election day as set out in the Code. With regard to the observance of legal holidays, W. VA. CODE § 2-2-1(b) states:

> If a holiday otherwise described in subsection (a) of this section falls on a Sunday, then the following Monday is the legal holiday. If a holiday otherwise described in subsection (a) of this section falls on a Saturday, then the preceding Friday is the legal holiday: *Provided*, That this subsection (b) shall not apply to subdivisions (13), (14) and (15), subsection (a) of this section.

Pursuant to the foregoing provision, most legal holidays which fall on a weekend are observed either on the preceding Friday or the following Monday. However, the statute specifically excludes special elections from the application of this subsection, so the special election held on Saturday, August 28, 2010, could not be transferred to the preceding Friday or the following Monday.

This issue was recently discussed in *White v. Div. of Juvenile Services and Div. of Personnel,* Docket No. 2011-0417-MAPS (July 28, 2011). In *White*, an employee of the Donald H. Kuhn Juvenile Diagnostic and Detention Center filed a grievance challenging the fact that, similar to the instant case, he had not worked the day of the special election

and was not awarded a comparable day off. In *White*, Administrative Law Judge William B. McGinley discussed the inapplicability of the transfer statute as follows:

> The legislature clearly exempted special elections from the transfer provisions of W. VA. CODE § 2-2-1(b). The obvious reason for that exemption is to reduce the cost of special elections since the majority of State employees and county school employees do not work on the weekend and therefore would not need to be compensated for the holiday. The lack of the exemption from the DOP rule cannot be given the effect of thwarting the clear and unambiguous language of the statute that excludes the special election from the transfer exception. The legal holiday created by the special election on Saturday, August 28, 2010, could not be legally transferred to the preceding Friday.

The applicable Division of Personnel rule referenced by Judge McGinley states that "Employees shall be released from work with pay in observance of the following official holidays:. . . any day on which a Primary or General election is held throughout the State." 143 C.S.R. 1 § 14.1(a). It goes on to provide:

> (d) To receive pay for any holiday, an employee must, at a minimum, work or be on approved paid leave for his or her full scheduled workday immediately preceding the holiday and at least one quarter hour of his or her scheduled workday immediately following the holiday or vice versa.

Grievant did not work on Saturday, August 28, 2010, nor on the Friday immediately preceding that day. It appears she did work immediately following the holiday; however, this does not provide any theory of entitlement to any compensation. In view of both the above statutes and legislative rule, Grievant failed to prove that she was legally entitled to be paid for the legal holiday that resulted from the special election held on Saturday, August 28, 2010.

The following conclusions of law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *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).

2. Saturday, August 28, 2010, was a legal holiday in the State of West Virginia due to the fact that it was the day that a special state-wide election was held. W. VA. CODE § 2-2-1(a)(13).

3. The legal holiday created by the special election which occurred on Saturday, August 28, 2010, could not be transferred to the preceding Friday or the following Monday because the clear and unambiguous language of W. VA. CODE § 2-2-1 specifically excluded legal holidays resulting from special elections from the statute's transfer provision. W. VA. CODE § 2-2-1(b).

4. Grievant failed to meet her burden of proof and demonstrate that she was entitled to compensation for the legal holiday that occurred on Saturday, August 28, 2010.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. 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. 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: October 31, 2011

Ronald L. Reece
Administrative Law Judge