THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

RICHARD BAILEY, et al.,
Grievants,

v. **Docket No. 2011-0342-CONS**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
WILLIAM R. SHARPE, JR. HOSPITAL,
Respondent.

DECISION

Grievants filed this challenge to what they describe as an improper smoking policy on or about September 14, 2010. Grievants are seeking a designated smoking area as their relief. This grievance was dismissed at level one on the basis it was not timely filed. Level two mediation was conducted on February 7, 2011. Appeal to level three was perfected on that same date. A level three hearing was conducted before the undersigned Administrative Law Judge on August 3, 2011, in the Board's Westover office. Grievants appeared by Jamie Beaton, and by their representative, Gordon Simmons, UE Local 170 West Virginia Public Employees Union. Respondent appeared by Harry C. Bruner, Jr., Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on September 7, 2011.

Synopsis

On May 1, 2009, Sharpe Hospital instituted Policy #34.316, mandating a tobacco free campus. In addition, Respondent informed employees that they were not to leave the hospital grounds during their morning and afternoon breaks. Grievants seek a designated

smoking area to be used during their breaks. Grievants met their burden of proof and established that Respondent violated policy related to smoking tobacco. Respondent is ordered to either provide a designated smoking area for employees or obtain the necessary approval of the Director of Personnel to impose a stricter smoking policy.

The following findings of fact are based on the record developed at level three.

Findings of Fact

1. Grievant Jamie Beaton is a five-year employee of William R. Sharpe Hospital, operated by the Bureau for Behavioral Health and Health Facilities, West Virginia Department of Health and Human Resources. Mr. Beaton was designated to be the spokesman for all Grievants in this case.

2. Respondent formed a task force consisting of hospital employees who were smokers and non-smokers. The task force was formed to develop a tobacco free campus policy for the hospital. On May 1, 2009, Sharpe Hospital instituted Policy #34.316, mandating a tobacco free campus.

3. Prior to the policy, employees at Sharpe Hospital were provided a designated smoking area on the hospital grounds.

4. On February 3, 2011, hospital administrator Parker Haddix issued a directive prohibiting employees from leaving work premises during breaks with the exception of lunch. Because Respondent's employees are prohibited from tobacco use on hospital premises, they are not permitted to use tobacco during their two fifteen-minute breaks.

5. West Virginia Division of Personnel policy addressing smoking restriction in the workplace provides that, "Employees who desire to smoke may do so during their scheduled or any other authorized break period provided they use an outdoor designated

smoking place beyond an adjacent non-smoking space." Grievant's Exhibit No. 6, level three.

6. West Virginia Division of Personnel policy addressing smoking restrictions in the workplace provides that, "An appointing authority or her or his designee may impose additional or stricter guidelines which employees shall follow within the agency's workplace, provided such guidelines are implemented with the express mutual approval of the affected appointing authority and the Director of the Division of Personnel." Grievant's Exhibit No. 6, level three.

7. The necessary approval of the Director of the Division of Personnel for stricter guidelines regarding Respondent's smoking policy was not obtained.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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).

The first issue to discuss in this grievance is one of timeliness. Therefore, the burden shifts to Respondent to prove the grievance was not timely filed. Timeliness is an affirmative defense, and the burden of proving the affirmative defense by a preponderance of the evidence is upon the party asserting the grievance was not timely filed. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Higginbotham v. W. Va. Dep't of Pub. Safety*, Docket No. 97-DPS-018 (Mar. 31, 1997); *Sayre v. Mason County Health Dep't*, Docket No. 95-MCHD-435 (Dec. 29, 1995), *aff'd*, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). *See Ball v. Kanawha County Bd. of Educ.*, Docket No. 94-20-384 (Mar. 13, 1995); *Woods v. Fairmont State College*, Docket No. 93-BOD-157 (Jan. 31, 1994); *Jack v. W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991).

The grievance process must be started within 15 days following the occurrence of the event upon which the grievance is based, or within 15 days of the most recent occurrence of a continuing practice. W. VA. CODE § 6C-2-4(a)(1); *Seifert v. Hancock County Bd. of Educ.*, Docket No. 02-15-079 (July 17, 2002). The time period for filing a grievance ordinarily begins to run when the employee is "unequivocally notified of the decision being challenged." *Harvey v. W. Va. Bureau of Empl. Programs*, Docket No. 96-BEP-484 (Mar. 6, 1998); *Whalen v. Mason County Bd. of Educ.*, Docket No. 97-26-234 (Feb. 27, 1998).

It is undisputed that the Tobacco Free Campus Policy went into effect on May 1, 2009. It is also undisputed that Grievants made no objections to the policy at that time, and Grievant Beaton indicated that he was not aware the policy was a grievable event until September 1, 2010. Grievant points out that the gravamen of this case is the February 3, 2011 letter from the hospital administrator prohibiting employees from leaving work premises during their fifteen minute breaks. In other words, Grievants are arguing substantial compliance.

The West Virginia Supreme Court of Appeals has consistently held that "where there is substantial compliance on the part of the party in regard to a procedure, a mere technical error will not invalidate the entire procedure." *West Virginia Alcohol Beverage Control Admin. v. Scott*, 205 W. Va. 398, 402, 518 S.E.2d 639, 643 (1999) (per curiam). *See also State ex rel. Catron v. Raleigh County Bd. of Educ.,* 201 W. Va. 302, 496 S.E.2d 444 (1997) (per curiam) (finding substantial compliance in filing grievance); *Mahmoodian v. United Hosp. Ctr., Inc.*, 185 W. Va. 59, 404 S.E.2d 750 (1991) (finding substantial compliance with rules for revoking physician's medical staff appointment privileges); *Hare v. Randolph County Bd. of Educ.*, 183 W. Va. 436, 396 S.E.2d 203 (1990) (per curiam) (finding substantial compliance with termination procedure); *Duruttya v. Board of Educ. of County of Mingo*, 181 W. Va. 203, 382 S.E.2d 40 (1989) (finding substantial compliance in seeking grievance hearing); *Vosberg v. Civil Serv. Comm'n of West Virginia*, 166 W. Va. 488, 275 S.E.2d 640 (1981) (holding that violation of grievance procedure by employer was merely technical and that there was substantial compliance with the procedure).

The Grievance Board has directed in the past that "the grievance process is intended to be a fair, expeditious, and simple procedure, and not a 'procedural quagmire.'" *Harmon v. Fayette County Bd. of Educ.*, Docket No. 98-10-111 (July 9, 1998), citing *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 393 S.E.2d 739 (1990), and *Duruttya v. Bd. of Educ.*, 181 W. Va. 203, 382 S.E.2d 40 (1989). *See Watts v. Lincoln County Bd. of Educ.*, Docket No. 98-22-375 (Jan. 22, 1999).

Because this alleged policy violation represents a continuing practice each time an employee requested a designated smoking area, and because the February 3, 2011, letter prohibiting Grievants from leaving occurred after the grievance was filed, the grievance is timely. This violation is a continuing practice and Grievants have substantially complied with the statutory requirements. Therefore, Respondent's argument on the timeliness issue must fail.

Turning to the merits of this grievance, it is undisputed that Respondent did not receive the necessary approval of the Director of the Division of Personnel in adopting stricter guidelines in regard to smoking restrictions. It appears to the undersigned that the purpose of state smoking restrictions is not to force an employee to quit tobacco use, however harmful it undisputedly is to the employee's health. Rather, the purpose is to secure a smoke free environment for those whose health should not be compromised by employees who smoke.

Grievants aptly point out that the controlling Division of Personnel policy provides that, "State residential facilities, including but not limited to, hospitals, group homes, prisons and guest facilities shall comply with this policy to the maximum extent possible. The only exception will be by the express mutual approval of the affected appointing authority and

the Director of the Division of Personnel. All exceptions will be made with public health and safety being the primary consideration." Grievant's Exhibit 6, level three.

Grievants have met their burden of proof and demonstrated a violation of policy. The record of this grievance failed to establish that Respondent received approval from the Director of the Division of Personnel prior to imposing its more restrictive smoking policy.

The following conclusions of law support the decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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. Employees who desire to smoke may do so during their scheduled or any other authorized break period provided they use an outdoor designated smoking place beyond an adjacent non-smoking space.

3. State residential facilities, including but not limited to, hospitals, group homes, prisons and guest facilities shall comply with this policy to the maximum extent possible. The only exception will be by the express mutual approval of the affected appointing authority and the Director of the Division of Personnel. All exceptions will be made with public health and safety being the primary consideration.

4. Grievants established that Respondent failed to get the necessary approval from the Director of the Division of Personnel to impose a more restrictive smoking policy than provided for by the Division of Personnel.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to provide employees a designated smoking area or obtain the necessary approval of the Director of the Division of Personnel to impose a more restrictive smoking policy.

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 27, 2011

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Ronald L. Reece
Administrative Law Judge