**THE WEST VIRGINIA PUBLIC EMPLOYEES**
**GRIEVANCE BOARD**

**INA JEAN GOFF,**
**Grievant,**

**v.** **Docket No. 2010-0524-DHHR**

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

# DECISION

Ina Jean Goff, Grievant, filed this grievance on October 29, 2009, alleging a denial of shift differential pay. Her relief sought is to be made whole. The level one hearing was conducted on February 5, 2010. The grievance was denied by Christopher Amos, Manager of Respondent's Grievance Unit, by Decision dated February 9, 2010. Grievant appealed to level two on February 22, 2010. Level two mediation was conducted on June 1, 2011. Appeal to level three was perfected on June 2, 2011. A level three hearing was conducted before the undersigned Administrative Law Judge on November 22, 2011, at the Board's Westover office location. Grievant appeared in person and by her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its counsel, Anne B. Ellison, 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 December 19, 2011.

## Synopsis

The Bureau for Behavioral Health and Health Facilities adopted a shift differential pay policy in December 2002, the purpose of which was to provide a one dollar per hour pay differential when qualified non-exempt staff worked eight hours, provided that they do so one full shift during the hours of 3:00 p.m. to 11:00 p.m., or 11:00 p.m. to 7:00 a.m. This policy has since been revised to allow for other shifts to receive the pay differential. In an unusual turn of events, Grievant was able to establish by a preponderance of the evidence that Respondent's old policy on shift differential pay was clearly wrong.

The following findings of fact are based upon the record developed at level one and level three.

## Findings of Fact

1. Grievant has worked as a licensed practical nurse for nine years at the William R. Sharpe, Jr. Hospital, a psychiatric facility operated by the Bureau for Health and Health Facilities of the Department of Health and Human Resources.

2. Respondent's shift differential policy in effect at the times in which Grievant seeks payment of $1 per hour provided that employees were eligible for a one dollar shift differential if they worked the 3:00 p.m. to 11:00 p.m. or 11:00 p.m. to 7:00 a.m. shift. In addition, employees were eligible for shift differential if they were mandated to work a full or partial shift from the hours of 3:00 p.m. to 11:00 p.m. and 11:00 p.m. to 7:00 a.m. in addition to their regular eight hour shift. Grievant's Exhibit No. 1, Level one hearing.

3. Grievant is seeking to be paid shift differential for the hours of 3:00 a.m. to 7:00 a.m. during the 12 hour shifts she worked from 3:00 a.m. to 3:00 p.m. Grievant was generally scheduled to work day shift, which did not qualify for payment of shift differential.

4. When Grievant worked additional hours at the end of her day shift, she would receive the shift differential, regardless of whether she was requested to stay over or was directed to do so.

5. Day shift employees were always paid a shift differential for additional hours worked after that shift, regardless of whether they were mandated to do so or not.

6. When Grievant reported to work early during the day shift, she was not paid the shift differential.

7. Respondent's policy does provide that staff who are mandated to work, in addition to their regular eight hour shift, a full or partial shift will receive shift differential for the actual hours worked.

8. It is undisputed that Grievant was not paid shift differential for 724 hours worked outside of day shift for a period of one year prior to the filing of the instant 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 argues that the differential pay policy was clearly wrong, in that it made a distinction between mandated time after a shift and time in which an employee is requested to report before a scheduled shift. Respondent counters that Grievant received payment of shift differential in a manner that was consistent with the applicable policy. The Bureau for Behavioral Health and Health Facilities Shift Differential/Holiday Pay December 10, 2002, policy, provides the following in regard to shift differential:

> A. A one dollar per hour shift differential will be paid to non-exempt staff who work the full eight hour shifts which are 3:00 PM to 11:00 PM and 11:00 PM to 7:00 AM.
>
> B. Eligible staff who are mandated to work, in addition to their regular eight hour shift, a full or partial shift identified in [I.]A above will receive shift differential for the actual hours worked.
>
> C. Non-exempt staff who work 12 hour shifts will receive shift differential for eight hours provided they work one full shift during the hours of 3:00 PM to 11:00 PM or 11:00 PM to 7:00 AM.

The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001)(*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483

(1996)). "Generally, an action is considered arbitrary and capricious if the agency 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 was 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)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93- HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

As noted in *Bennett v. W. Va. Dep't of Health and Human Resources/Bureau for Children and Families* , Docket No. 99-HHR-517 (Apr. 26, 2000), the undersigned does not have authority to second guess a state employer's employment policy, to order a state agency to make a discretionary change in its policy, or to substitute his management philosophy for DHHR's. *Skaff v. Pridemore* , 200 W. Va. 700, 490 S.E.2d 787 (1997), *Kincaid v. W. Va. Div. of Corrections*, Docket No. 98-CORR-144 (Nov. 23, 1998). An agency's determination of matters within its expertise is entitled to substantial weight. *Princeton Community Hosp. v. State Health Planning* , 174 W. Va. 558, 328 S.E.2d 164 (1985). Unless a Grievant presents sufficient evidence to demonstrate DHHR's shift differential policy is clearly wrong, inappropriate, or the result of an abuse of discretion, an

administrative law judge must give deference to DHHR and uphold the policy. *Smith v. Parkways Economic Development and Tourism Auth.* , Docket No. 97-PEDTA-484 (Apr. 17,1998); *O'Connell v. Dep't of Health and Human Resources*, Docket No. 95-HHR-251 (Oct. 13, 1995); *Farber v. Dep't of Health and Human Resources* , Docket No. 95-HHR-052 (July 10, 1995).

The Grievance Board previously visited Sharpe's shift differential policy in *Streets, et al. v. WV DHHR/William R. Sharpe, Jr. Hospital*, Docket No. 03-HHR-039 (June 25, 2003). That case noted that the reason for the shift differential was the recruitment and retention problem one particular facility was having for nurses, nurse directors, licensed practical nurses, and health service workers, due to competition with the private sector and the undesirability of those shifts.

Administrative Law Judge Spatafore noted that the policy on shift differential came about due to nursing recruitment and retention problems at a specific facility, which was ultimately applied to all Department of Health and Human Resources' facilities. The agency made efforts to make the policy fair while still drawing a line somewhere, which resulted in the decision to apply it to traditional afternoon and evening shifts. The ALJ concluded by noting that Grievants did not demonstrate that the content and application of the policy was clearly wrong or constituted an abuse of discretion.

In the instant case, Respondent's former and current human resources directors acknowledged that the policy was ambiguous, and unfair. As written, it provides for the nonpayment of differential pay to a worker for hours worked outside of day shift. As noted by Grievant, it can also be read to provide for differential pay for an employee working a

full or partial shift after working a regular eight hour shift. The undersigned is persuaded by Grievant's argument, and, apparently, so is Respondent, as the policy was revised in April of 2011. Under the old policy cited above, the Respondent's rationale was that an employee had the ability to refuse to come in early if they are called at home by their supervisor. This does attempt to make a difference without any distinction, and does little to encourage cooperation between staff and management when trying to work out schedules to cover shortages for partial and full shifts.

It was within the Department of Health and Human Resources authority to make discretionary decisions regarding the content and application of the policy; however, the policy cannot be clearly wrong, inappropriate, or the result of an abuse of discretion. The undersigned finds that Grievant has demonstrated, by a preponderance of the evidence, that the old policy was clearly wrong. Unlike at level one, documentation was presented to demonstrate that Grievant was not paid for shift differential when she should have been. While the employer followed its pay differential policy as it was previously written, this policy was clearly wrong and Respondent abused its discretion by not paying Grievant shift differential for time that she worked requested overtime prior to her regularly scheduled shift.

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. The granting of a pay differential in order to address recruitment and retention problems which are limited to a specific group of employees in a specific program is within the Division of Personnel's discretion and authority. *Pishner v. W. Va. Dep't of Health and Human Resources*, Docket No. 97-HHR-478 (May 21, 1998).

3. The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. *Adkins v. W. Va. Dep't of Educ.*, 210 W. Va. 105, 556 S.E.2d 72 (2001)(*citing In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)).

4. Unless a Grievant presents sufficient evidence to demonstrate DHHR's shift differential policy is clearly wrong, inappropriate, or the result of an abuse of discretion, an administrative law judge must give deference to DHHR and uphold the policy. *Smith v. Parkways Economic Development and Tourism Auth.*, Docket No. 97-PEDTA-484 (Apr. 17,1998); *O'Connell v. Dep't of Health and Human Resources*, Docket No. 95-HHR-251(Oct. 13, 1995); *Farber v. Dep't of Health and Human Resources*, Docket No. 95-HHR-052 (July 10, 1995).

5. Grievant has established by a preponderance of the evidence that Respondent's old policy on shift differential pay was clearly wrong.

Accordingly, this grievance is **GRANTED**.

Respondent is **ORDERED** to pay Grievant $724.00 for the 724 hours worked outside of her regular eight hour day shift, plus statutory interest, and restore all benefits.

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 (eff. July 7, 2008).

**Date: February 14, 2010**

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**Ronald L. Reece**
**Administrative Law Judge**