THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

RONDALL R. GROGG and
JIMMY R. BONNETT,
Grievants,

v. **Docket No. 2011-0200-CONS**

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
WILLIAM R. SHARPE, JR. HOSPITAL, and
DIVISION OF PERSONNEL.
Respondents.

DECISION

_____Grievants, Rondall Grogg and Jimmy Bonnett, filed this grievance against their employer, William R. Sharpe, Jr. Hospital, on August 23, 2010, alleging that they have been required to work outside of their pay grade and classification, making them appear to work in direct care. For relief, Grievants request that Respondent, "disallow Driver 1 to be second staff on court order clients unless the driver is a direct care worker; i.e. HSW, HSA, LPN, or RN. We, being classified as Driver 1, ask that yearly training be limited to safety for Driver 1, excluding CPR, CPI, First Aid and other classes which do not pertain to Driver 1 classification." Christopher B. Amos, Respondent's Grievance Evaluator, waived this grievance to level two by memorandum dated August 24, 2010. This grievance was acknowledged by the Grievance Board on August 24, 2010. The Division of Personnel was joined as a party to this grievance on that date. Level two mediation was conducted on October 19, 2010. The matter was placed in abeyance until November 9, 2010. Grievants perfected their appeal to level three on December 13, 2010. After a series of continuances, a level three hearing was conducted before the undersigned

Administrative Law Judge on February 23, 2012. Grievants appeared in person and by their representative, Gordon Simmons, UE Local 170. The Department of Health and Human Resources appeared by its counsel, James "Jake" Wegman, Assistant Attorney General. The Division of Personnel appeared by its counsel, Karen O'Sullivan Thornton, 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 March 25, 2012. By letter dated March 16, 2012, the Division of Personnel notified the Grievance Board that they would not be filing proposals in this grievance.

Synopsis

Grievants are employed as drivers at the William R. Sharpe, Jr. Hospital. They challenge Respondent's transportation policy that a driver can be counted as the second staff member when transporting forensic patients. They also challenge Respondent's requirement that they participate in yearly training. Grievants did not establish by a preponderance of the evidence that Respondent's transportation policy was clearly wrong or the result of an abuse of discretion. In addition, Grievants have not demonstrated by a preponderance of the evidence that Respondent's training requirements were clearly wrong or constituted an abuse of discretion.

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

Findings of Fact

1. Grievants are employed in the classification of Driver 1 by the William R. Sharpe, Jr. Hospital, a psychiatric facility operated by the West Virginia Department of Health and Human Resources.

2. Hospital policy requires that two staff accompany a forensic patient during transport, and the policy specifies that the driver can be counted as the second staff member.

3. Grievants complain that this results in providing direct patient care by being included as staff when transporting forensic patients off the grounds. In particular, the expectation that the driver engage in direct care duties is evident in those situations in which the Health Service Worker present is not the same gender as the patient being transported; for example, restroom breaks.

4. Grievants acknowledged that they did not perform direct care to patients as set out by the Health Service Worker classification specifications. Mr. Bonnett conceded that he did not provide basic personal and nursing care; bathe, groom, dress or feed patients; teach patients basic skills for development; take temperature, blood pressure, and pulse readings of patients; oversee or participate in planned recreational and social programs.

5. Mr. Grogg indicated that he was a former Health Service Worker for over twenty years. However, as a Driver 1, he did not perform direct care to the patients of the hospital.

6. Mr. Grogg did give, as an example of direct care, a situation in which a patient acted violently in the van. Mr. Grogg pulled the van over and called 911. This action was appropriate and reasonable, however, calling 911 does not qualify as providing direct care.

7. Barbara Jarrell, Division of Personnel's Director of Classification and Compensation, opined that based upon the testimony of the Grievants, their primary duties were transporting patients, and that they were properly classified.

8. "Direct Care Staff" are employees who are directly involved in providing service to the patients. "Non-Direct Care Staff" are employees who are involved in providing ancillary administration and support services to patients. Non-direct care staff are required to take some training based upon the employee's job descriptions. For example, Drivers are required to take training in areas such as CPR, first aid, restraints, patient lifting, and medication review to name a few.

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 Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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).

Grievants argue for a halt of the practice of counting them as direct care staff in the transporting of patients, and an end to the expectation that drivers perform direct care duties. They also challenge the requirement that they submit to yearly training.

Respondent counters that Grievants have not demonstrated by a preponderance of the evidence that being counted as a second staff in transporting forensic patients violates any statute, rule or policy. The undersigned agrees that Grievants have not met their burden of proof in this grievance.

Grievants did not argue that they were working out of their classification title. This would likely explain why the Division of Personnel waived any presentation of written argument. In any event, the record established that Grievants' predominate duties involved transporting patients, and that Grievants should not be classified as Health Service Workers. In regard to additional training, the Division of Personnel examines the predominate duties of the position when assessing a reallocation request. Additional training for an employee holding a classification title is in the discretion of the employer.

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 the that of the Department of Health and Human Resources. *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 the Grievants present sufficient evidence to demonstrate that Respondent's transportation policy is clearly wrong, inappropriate, or the result of an abuse of discretion, the undersigned must give deference

to Respondent 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 record established that there is always at least one Health Service Worker on the van at times when Grievants are transporting patients. If possible, it would appear wise to have matching genders for the care worker and patient so the driver does not have to escort the patient to restrooms during those stops. In any event, this fact alone does not demonstrate that counting the Grievants as second staff in transporting forensic patients was clearly wrong or constituted an abuse of discretion. In addition, Grievants have not demonstrated by a preponderance of the evidence that Respondent's training requirements were clearly wrong or constituted an abuse of discretion. To the contrary, additional training in areas such as CPR, first aid, restraints, patient lifting, and medication review are helpful for the safety of both patients and staff.

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 Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *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).

2. Unless the Grievants present sufficient evidence to demonstrate that Respondent's transportation policy is clearly wrong, inappropriate, or the result of an abuse of discretion, the undersigned must give deference to Respondent 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).

3. Grievants did not establish by a preponderance of the evidence that Respondent's transportation policy or training requirements were clearly wrong or the result of an abuse of discretion.

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: June 4, 2012

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Ronald L. Reece
Administrative Law Judge