THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JAMIE JOE BEATON,
Grievant,

v. **Docket No. 2010-1344-DHHR**

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

DECISION

Grievant, Jamie Joe Beaton, is employed by Respondent, Department of Health and Human Resources, at William R. Sharpe, Jr. Hospital. On April 11, 2010, Grievant filed this grievance against Respondent because he was "[i]nstructed to clockout after injury on the job." For relief, grievant seeks "[r]estoration of leave and to otherwise be made whole."

Following the August 20, 2010 level one hearing, a level one decision was rendered on August 30, 2010, denying the grievance. Grievant appealed to level two on August 31, 2010. Grievant perfected the appeal to level three of the grievance process on December 3, 2010. A level three hearing was held on February 27, 2012, before Administrative Law Judge William B. McGinley[1] at the Grievance Board's Westover, West Virginia office. Grievant was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by counsel, James "Jake" Wegman, Assisant Attorney General. This matter became mature for decision on March 30, 2012, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

[1] This case was assigned to the undersigned Administrative Law Judge on August 3, 2012 for administrative purposes.

Synopsis

Grievant was injured on the job, was required to clock out to seek medical attention, and claim that time as sick leave. Grievant proved by a preponderance of the evidence that his employer directed him to seek treatment. Therefore, pursuant to federal regulation and Respondent's policy, the time Grievant spent seeking medical attention should have been counted as hours worked. Respondent inappropriately required Grievant to clock out to receive medical attention. Accordingly, the grievance is granted.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant is employed at William R. Sharpe, Jr. Hospital as a Health Services Assistant.

2. On April 7, 2010, Grievant was injured while performing his job duties. Grievant and another employee attempted to restrain a patient who was attacking another patient. Grievant was knocked down and both the employee and the patient landed on top of Grievant, resulting in a back injury.[2]

3. Grievant's employer directed him to go to the hospital to evaluate his injury.[3]

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[2] Level one transcript page 6.
[3] Level one transcript pages 11 and 14, and Grievant's level three testimony.

4. The Nursing Clinical Coordinator required Grievant to clock out to receive treatment. Grievant used sick leave for the time he was clocked out on the date of the injury.

5. Grievant clocked out, sought treatment at Stonewall Jackson Memorial Hospital, and then clocked back in to finish his shift.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (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).

At issue in this case is whether Respondent's requirement that Grievant clock out to receive treatment for his work-related injury was proper. This determination is merely a question of fact. If Grievant was directed to receive medical attention by his employer, both federal regulation and Respondent's own policy require he be paid for that time as hours worked. "Time spent by an employee in waiting for and receiving medical attention on the premises or at the direction of the employer during the employee's normal working hours on days when he is working constitutes hours worked." 29 C.F.R.

§ 785.43 (2005) and West Virginia Department of Health and Human Resources Policy Memorandum 2102, Part IX, Section Y.

The only evidence offered regarding the dispositive issue of whether Grievant was directed to seek treatment was the Grievant's testimony at both level one and level three. At level three, in answer to the question "You were instructed to go to the hospital?" Grievant answered, "Yes." At level one, Grievant testified, "I chose [to go] but I was also directed to go to the hospital along with the physician that was on call."[4] When questioned about what the Nursing Clinical Coordinator, charge nurse, or doctor on call said, Grievant testified, "Yes, you need to go get check[ed] out" without specifying which person or persons made the statement.[5] Although the exact circumstances are not clear, Respondent did not discredit Grievant's testimony that he was directed to go to the hospital to have his injury evaluated. Although Grievant did not specifically testify as to which employee of the Respondent instructed him to do so, it is reasonable to believe from Grievant's undisputed testimony that, more likely than not, he was directed to seek treatment. Therefore, under the regulation and policy, the time Grievant spent at the hospital constituted hours worked and he should not have been required to clock out or use sick leave for that time.

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 his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2008); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-

[4] Level one transcript page 11.
[5] Level one transcript page 14.

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).

2. "Time spent by an employee in waiting for and receiving medical attention on the premises or at the direction of the employer during the employee's normal working hours on days when he is working constitutes hours worked." 29 C.F.R. § 785.43 (2005) and West Virginia Department of Health and Human Resources Policy Memorandum 2102, Part IX, Section Y.

3. Grievant proved by a preponderance of the evidence that he was directed by his employer to seek medical attention, therefore, Respondent improperly required Grievant to clock out.

Accordingly, the grievance is **GRANTED.** Respondent is **ORDERED** to restore Grievant's sick leave.

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* W. VA. CODE ST. R. § 156-1-6.20 (2008).

DATE: August 27, 2012

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Billie Thacker Catlett
Administrative Law Judge