THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

HARRY E. WHITLOW, JR.,
Grievant,

v. **Docket No. 2016-1596-NRCTC**

NEW RIVER COMMUNITY and TECHNICAL COLLEGE,
Respondent.

DECISION

Grievant, Harry E. Whitlow, Jr., is a classified employee of New River Community and Technical College, working as a Student Program Advisor. Grievant filed the present amended grievance against Respondent on November 18, 2016, at Docket No. 2016-1596-NRCTC, asserting, in pertinent part, in Statement of Grievance Number One:

> The President of New River Community and Technical College stated in a classified staff meeting that the current difficulties at our institution are to some degree rooted in problems that occurred before his tenure. Nothing was done to my knowledge to address these problems other than budget cuts that were enacted going into the Spring 2016 semester. The college also continued to give raises to upper level administration and invest money in unnecessary facilities throughout this time period. One must assume these problems, which had been festering for years prior to the current administration, that resulted in pay cuts and hardships to me and other classified staff could have been avoided all together [sic] if action was taken sooner.

Grievant seeks the following relief:

> I believe there needs to be a thorough investigation from outside the institution and a detailed explanation focused on transparency in reference to the situation.

Grievant's second amended statement of grievance, in pertinent part, alleges as follows:

> Classified Staff suffered a twenty percent pay cut which was accompanied by a twenty percent reduction in work hours. . . .–Employee PIQs were not adjusted to reflect a necessary reduction in employee responsibilities during this time*. No official policy came from the administration making it clear that classified staff would not be held accountable for not completing their duties during this furlough.* (*Emphasis added.*)

Grievant seeks the following relief:

> There needs to be an investigation as to how the administration's actions adhere to state code in reference to employee rights. Steps should be taken to insure the administration does not engage in such . . . behavior. . . . Employee lost benefits and pay should be restored.
>
> Additionally, furlough of exempt employees is prohibited under federal regulation. Exempt employee pay cannot be cut be [sic] reducing hours during the work week. . . .

Grievant's third amended statement of grievance alleges as follows:

> I am the budget manager for the Mercer County Student Government Association. SGA funds are specific [sic] allocated money derived from student activity fees that are to be distributed for purposes decided by the legitimate student government within state law. The administration took control of all moneys in every budget, including student government funds.

Grievant seeks the following relief:

> I ask that the institution comply with state code, specifically but not limited to 18B-5-2a. That means no more taking allocated budgets, including student government money, and spending it as [sic] their discretion. I would also like to see money seized from past Student Government Funds . . . restored.

A Level I hearing on this grievance was held on August 1, 2016, and a Level II took place on November 2, 2016. Respondent filed a Motion to Dismiss on January 13, 2017. Grievant filed a Response to the Motion to Dismiss on January 19, 2017. A Level III hearing was held on February 6, 2017, before the undersigned at the Raleigh County Commission on Aging offices in Beckley, WV. Grievant appeared *pro se* at the Level III hearing. Deputy General Counsel, Ms. Candace Kraus, represented Respondent. At the conclusion of the Level III hearing, the parties agreed to submit post-hearing arguments, the last of which was received on March 9, 2017, upon which date this matter became mature for consideration.

Synopsis

Respondent, in its effort to maintain the financial stability of the college in a manner that least affected its employees and students, temporarily reduced all classified employees' work hours by 0.2 full-time equivalent ("FTE"). Grievant claims, *inter alia.,* that New River did not have either the authority to reduce classified staff work hours and commensurate wages by 0.2 FTE, or the discretion to direct specific college funds toward identified budgetary needs. More specifically, Grievant claims that Respondent violated the federal Fair Labor Standards Act ("FLSA") by implementing the reduced schedule of hours and that he is entitled to recoup lost wages and benefits for the period of the temporary reduction. However, under the FLSA, the reduction of an exempt employee's weekly pay or hours is permitted, so long as the employee continues to be paid in excess of the federal minimum hourly wage. Grievant failed to meet his burden of

proof as to all claims made against Respondent. The following findings of fact are made based upon the entirety of the record.

Facts

1. Grievant, Harry E. Whitlow, Jr., was a classified employee, working as a Student Program Advisor at New River Community and Technical College ("New River") at all times relevant to this grievance. This position is “exempt” pursuant to the federal Fair Labor Standards Act (“FLSA”).

2. New River experienced extreme budgetary constraints during the spring of 2016. In its effort to maintain the financial stability of the college, New River temporarily reduced the work hours of all of its classified employees by 0.2 full-time equivalent (“FTE”), with a commensurate reduction in wages.

3. As a classified employee, Grievant was subject to the FTE reduction. (See L-III, Respondent’s Ex. 1)

4. During the period of the FTE reduction, Grievant never worked in excess of seven and one-half (7.5) hours per day, four (4) days per week; i.e., his workweek never exceeded thirty (30) hours per week. (L-III Recording, Hearing Part 2 at 12:01:51-12:03:20) Grievant’s hourly wage was $15.78 during said period, totaling approximately $473.40 per week. (L-III Recording, Hearing Part 2 at 12:04:37-12:07:35; Resp. Ex. 3) This wage was in excess of the federal minimum hourly rate of $7.25 per hour, and also in excess of the minimum threshold for FLSA exemption of $455.00 per week.

5. During the time period at issue, Grievant was able to complete his duties and his work production was not negatively appraised in any way. (L-III Recording, Hearing Part 2 at 12:10:05-12:13:07; Resp. Ex. 4-6).

6. During the FTE reduction, Respondent never disciplined Grievant for failure to fully perform his duties and his evaluations. (L-III Recording, Hearing Part 2 at 12:13:08-12:13:20)

7. When New River determined it was financially feasible to do so, it restored Grievant's weekly work hours and wages to 1.0 FTE, effective on June 27, 2016. (L-III Resp. Ex. 2, 3, 7 & 8)

8. New River's Governing Board utilized "student government monies" or student fees at New River for needs or purposes other than those for which the fees were originally designated.

Discussion

The undersigned will first consider Respondent's Motion to Dismiss, which was made upon various grounds, and Grievant's Reply to it. Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." W. VA. CODE ST. R. § 156-1-3. "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 and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Firstly, Respondent essentially asserts that by amending his Statement of Grievance at Level II on August 31, 2016, and again on November 18, 2016, Grievant effectively changed the scope of his grievance in a manner that renders

it untimely-filed in its current state, requiring dismissal. In his original Statement of Grievance, filed on April 26, 2016, Grievant did not seek restoration of pay and benefits lost during the reduction of hours, but added this request in his amended grievance. Respondent correctly notes that New River restored all classified staff work hours to 1.0 FTE on June 27, 2016. Respondent points out that Grievant's salary was reduced at the time he filed his original Statement of Grievance, yet he failed to request Respondent to restore his full salary until over four (4) months afterward. As such, New River argues that Grievant's current claim was not filed until more than four (4) months after the triggering event in this matter occurred, and more than two (2) months after it had ended, meaning that Grievant has not met the fifteen-day filing requirement. W. Va. Code § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." W. Va. Code § 6C-2-4(a)(1) identifies the timelines for filing a grievance and states, "[w]ithin fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing." The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. *See Rose v. Raleigh County Bd. of Educ*., 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989). "[T]he time in which to invoke

the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance." Syl. Pt. 1, *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 391 S.E.2d 739 (1990). When an employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. *See,* W. VA. CODE ST. R. § 156-1-3; *Leichliter, supra.* The undisputed event that caused the filing of this grievance was the reduced hourly schedule Respondent implemented for its classified exempt employees. Notably, Respondent does not contend that the original grievance was filed more than 15 days after the reduction of hours was implemented. Rather, Respondent, in effect, argues that the addition of Grievant's requests for relief requires the Grievance Board to find that the grievance was untimely filed. This argument has no merit, as the occurrence upon which the grievance is based is the reduction of hours of classified exempt employees, which took place within 15 days of the grievance filing. The later amendments and addition of the request for relief for restoration of lost wages due are not prejudicial, nor should they be surprising to Respondent given that Grievant is *pro se* and attempting to "navigate" the grievance procedures absent the assistance of counsel.

Respondent further argues that the temporary 0.2 FTE reduction measure was concluded on June 27, 2016, and Grievant's 1.0 FTE was restored at that time and that allowing this matter to proceed further can, therefore, only result in what is effectively an advisory opinion on a moot issue, requiring dismissal. *See, Muncy v. Mingo County Bd. of Educ.,* Docket No. 96-29-211 (Mar. 28, 1997); *Harrison v.*

Cabell County Bd. of Educ., 177 W. Va. 257, 351 S.Ed.2d 606 (1986); *Miraglia v. Ohio County Bd. of Educ.,* Docket No. 92-35-270 (Feb. 19, 1993); *Jones v. Cabell County Bd. of Educ.,* Docket No. 97-06-041 (Aug. 6. 1997). However, this argument also lacks merit and, if accepted, would evade resolution of the primary issue at hand, whether Grievant was deprived of work and pay during the relevant time period, in violation of the law, due to Respondent's implementation of the 0.2 FTE reduction measure.

Respondent further urges dismissal of this grievance by asserting that the Grievance Board is incapable of granting any of the relief requested. As part of the relief sought, Grievant requests an investigation into whether the administration's various alleged actions adhere to state and federal law. By this request, Grievant seeks relief that is unavailable through the Grievance Board, which is without authority to require New River to either conduct or submit to an investigation. "It is well settled law that the Grievance Board will not grant relief sought that is 'speculative or premature, or otherwise legally insufficient.' *Dooley v. Dept. of Trans./Div. of Highways*, Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ.*, Docket No. 91-35-229/239 (Nov. 27, 1991)." Additionally, dissatisfied with Respondent's decisions about allocation of resources and how to best balance its budget, Grievant essentially requests the Grievance Board to order Respondent to adjust its budgetary policies and priorities in some manner. Decisions about allocation of resources, facilities investments and operational budgets are management decisions that are within Respondent's authority. The Grievance Board 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 that of a state agency. *Bennett v. W. Va. Dep't of Health and Human Resources/Bureau for Children and Families*, Docket No. 99-HHR-517 (Apr. 26, 2000). *See 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). *See also Bennett v. W. Va. Dep't of Health and Human Resources/Bureau for Children and Families*, Docket No. 99-HHR-517 (Apr. 26, 2000). 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).

In further support of its Motion to Dismiss, Respondent asserts that Grievant cannot prove that he was harmed by Respondent's failure to adjust employee Position Information Questionnaires ("PIQs"). Grievant asserts that that New River administration should have adjusted PIQs to reflect a reduction in employee responsibilities and issued an official policy to make it clear that classified employees would not be held accountable for not completing their duties through the relevant period and that failure to do so constituted some sort of violation of law or established procedures and policies. However, Grievant admits that he was able to fulfill his job responsibilities to the clear satisfaction of Respondent, as he was neither negatively evaluated nor disciplined for failure to fully or competently perform his duties during the relevant period. Additionally, Grievant never worked in excess of the four-day work schedule Respondent implemented, nor was he requested to do so. Respondent correctly asserts that, even it violated some

statute, policy, rule or procedure by failing to either adjust PIQs or issue an official policy concerning what work classified staff would be held accountable to perform under their limited hours, Grievant failed to demonstrate that he was harmed in any way by this alleged failure. It is well established that "'[m]oot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues].' *Bragg v. Dept. of Health & Human Res*., Docket No. 03-HHR-348 (May 28, 2004); *Burkhammer v. Dep't of Health & Human Res.*, Docket No. 03-HHR-073 (May 30, 2003); *Pridemore v. Dep't of Health & Human Res.*, Docket No. 95-HHR-561 (Sept. 30, 1996)." *Cundiff v. Braxton County Bd. of Educ*., Docket No. 2016-1549-BraED (July 27, 2016). Accordingly, the undersigned will not address whether Respondent was required to adjust PIQs or issue an official policy concerning the work it expected its exempt classified employees to complete during the relevant time period, as this is not a properly cognizable issue for decision.

Grievant's third amended statement of grievance alleges that New River is prohibited by W. Va. Code §18B-5-2a (2016), first enacted in 1993, from using student fees or student government fees for purposes other than that for which they were originally designated. W. Va. Code §18B-5-2a (2016) authorizes certain transfers within and among general and special revenue accounts of State institutions of higher education. However, Respondent argues in its Motion to Dismiss that W. Va. Code §18B-5-2a (2016) pertains only to certain transfers between accounts and has generally become obsolete by the simplification of the

tuition and fee process, as set out in W. Va. Code §18B-10-1 (2016), *et seq.,* enacted and in effect since 2000.[1] Moreover, W. Va. Code §18B-10-1 states in pertinent part as follows:

> (a) Each governing board shall fix tuition and other fees for each academic term for the different classes or categories of students enrolling at the state institution of higher education under its jurisdiction[.] . . .
>
> (b) *A governing board may establish a single special revenue account for . . . [a]ll tuition and required educational and general fees collected . . . [and] may expend funds from each special revenue account for any purpose for which funds were collected within that account regardless of the original purpose for which the funds were collected.* (*Emphasis added.*)
>
> (c) The purposes for which tuition and fees may be expended include, *but are not limited to,* health services, student activities, recreational, athletic and extracurricular activities. (*Emphasis added.*)
>
> W. Va. Code §18B-10-12(a) states as follows:
>
> The governing board of a state institution of higher education *may* make funds available from tuition and fees to support extracurricular activities of the students *as considered necessary.* (*Emphasis added.*)

Respondent contends that pursuant to this statute, a governing board is authorized to establish a single special revenue account for tuition and fees collected and expend funds from it for any purpose. As Respondent further notes, W. Va. Code

[1] It is noted that, according to House Bill 2815 of the West Virginia Legislature, 2017 regular session, W. Va. Code §18B-10-1 (2016), *et seq.,* and W. Va. Code §18B-5-2a (2016) will both become obsolete on or about July 7, 2017, as the Legislature passed an act to repeal these Code sections. The undersigned notes that the language of the new W. Va. Code §18B-10-1 *et seq.*, which will take effect on or about July 7, 2017, and which pertains to this issue, differs to some degree from the legislation presently in effect.

§18B-10-12(a) adds that the governing board has discretion to make tuition and fee funds available to support extracurricular activities, “as considered necessary." Respondent finally contends though there is some difference between the provisions of previously enacted and W. Va. Code § 18B-5-2a (1993) and W. Va. Code § 18B-10-1 (2001), which may relate to this particular issue of proper use of the student activity funds, it is well-settled law that where conflict exists between statutes, the last enacted statute is controlling. *See Bd. of Educ. of Ellsworth Dist. v. Tyler County Court*, 87 S.E. 870, 873, 77 W.Va. 523, 526 (W.Va., 1916). Respondent further points to the Court’s holding that “[w]hen faced with two conflicting enactments, this Court and courts generally follow the black-letter principle that ‘effect should always be given to the latest . . . expression of the legislative will. . . .’ *Joseph Speidel Grocery Co. v. Warder*, 56 W.Va. 602, 608, 49 S.E. 534, 536 (1904).” *Wiley v. Toppings*, 210 W.Va. 173, 175, 556 S.E.2d 818, 820 (W.Va., 2001). Respondent concludes that New River only needed to follow the provisions of W. Va. Code § 18B-10-1 (2001) and that it did so.

However, it is unnecessary for the undersigned to address this particular issue, because even assuming Respondent violated W. Va. Code §18B-5-2a or other applicable law by using fees initially collected for student government or activities for some other purpose, this action did not result in any harm to Grievant. Grievant asserts that when New River used the student activity or Student government fees elsewhere, "this impeded my ability to effectively complete my assigned duties as Budget Manager for the Mercer County Student Government,” However, as previously noted, the record is clear that Grievant was never

disciplined or evaluated negatively due to ineffective completion of any of his assigned duties. It is well established that "'[m]oot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues].' *Bragg, supra.; Burkhammer, supra.*; *Pridemore, supra., Cundiff, supra.* Based upon the foregoing, the undersigned need not and will not address this particular allegation of the grievance.

In consideration of all of the foregoing, Respondent failed to meet its burden of proof as to its Motion to Dismiss. Grievant timely filed his grievance and, though the above-addressed requests for relief cannot be awarded by the Grievance Board, the Grievance Board may certainly award Grievant's request for relief of reimbursement of any wages and benefits he lost due to his reduced hours, assuming he meets his burden of proof. The undersigned will now address the merits of the Grievant's claims, which were not already addressed in in the previous section relating to Respondent's Motion to Dismiss, and the relevant evidence offered in support thereof.

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); *Payne v. W. Va. Dept. of Energy*, Docket No. ENGY-88-015 (Nov. 2, 1988); *Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990); *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 Resources*, Docket No. 92-HHR-486 (May 17, 1993).

During the spring of 2016, in the effort to maintain the financial stability of the college, New River temporarily reduced all classified employees' work hours by 0.2 full-time equivalent. Grievant generally claims that New River did not have the authority to reduce classified staff work hours and commensurate wages by 0.2 FTE, or the discretion to direct college funds toward identified budgetary needs. Grievant further essentially alleges that college funds were unwisely used, which contributed to the financial constraints that caused the college to implement the reduced hours.

More specifically, Grievant contends that Respondent's act of reducing the hours of its exempt employees as a cost saving measure last spring amounted to a "furlough," that is prohibited under federal regulation. Respondent replies that the 0.2 FTE reduction implemented by New River is not a furlough and does not violate any statute, rule, policy, procedure or regulation. A reduction in an employee's FTE is not considered a reduction in force or disciplinary action when taken to deal with financial downturns. *See, Frymier v. Higher Educ. Policy Comm'n*, 655 S.E.2d 52, 221 W. Va. 306 (2007). In *Frymier, supra,* the Court upheld the implementation of an FTE reduction of an employee as a reasoned approach to addressing budgetary concerns instead of eliminating positions or instituting furloughs and ruled that an FTE reduction is a reasonable management

decision that does not require any additional action, such as “bumping,” by the employer. *Id.* In consideration of the foregoing, the reduction in hours was not a "furlough.”

Grievant further claims that the reduction of hours was a violation of the FLSA. The FLSA provides the following exemptions, in pertinent part, from wage and hour requirements as follows:

> (a) Minimum wage and maximum hour requirements
>
> The provisions of sections 206 (except subsection (d) in the case of paragraph (1) of this subsection) and 207 of this title shall not apply with respect to—
>
> (1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools) . . . .

529 U.S.C. § 213 (2015). (*Emphasis added*). The applicable federal regulations provide the following additional definitions:

> (a) The term “employee employed in a bona fide administrative capacity” in section 13(a)(1) of the Act shall mean any employee:
> (1) Compensated on a salary or fee basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities;
> (2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
> (3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

29 C.F.R. § 541.200 (2015).

> (b) The term "educational establishment" means an elementary or secondary school system, an institution of higher education or other educational institution.

29 C.F.R. § 541.204 (2015).

Contrary to Grievant's assertion, the FLSA does not prohibit New River from reducing Grievant's required work hours and weekly wages. Rather, the FLSA provides, *inter alia*, that employees are entitled to compensation at one and one-half times their hourly rate of pay, or compensatory time off, for time worked beyond forty hours per week. It further provides that certain employees are exempt from this requirement, including administrative employees, among others. *See* 29 U.S.C. § 213(a) (2015). Moreover, Grievant's contention that the federal FLSA prohibits the reduction of an employee's weekly pay or hours worked is misguided. So long as an exempt employee continues to be paid in excess of the federal minimum hourly wage, the FLSA does not prohibit a reduction of work hours and commensurate pay. Rather, any reduction in the predetermined salary and required work hours of an employee who is exempt under FLSA would merely subject the employer to a potential loss of the exemption. *See* 29 U.S.C. §§ 541.602, 541.603, and 541.710 (2015). New River could have lost Grievant's FLSA exemption if Grievant's weekly wages fell below $455.00, but they did not. (L-III Resp. Exh. 3) In a case where the exemption is lost, the employee must then be paid the federal minimum hourly wage and overtime compensation required by the FLSA.

Grievant testified at Level III that during the FTE reduction period he never worked in excess of seven and one-half (7.5) hours per day, four (4) days per week, or thirty (30) hours per week. (L-III Recording, Hearing Part 2 at 12:01:51-12:03:20) Grievant further testified that that his weekly wages during said period were $473.40. (L-III Recording, Hearing Part 2 at 12:04:37-12:07:35; Resp. Exh. 3) Thus, New River paid Grievant an hourly wage of $15.78, which is clearly in excess of both the federal minimum hourly rate of $7.25 per hour and the minimum threshold for FLSA exemption of $455.00 per week. As such, New River was clearly within its authority to reduce Grievant's weekly pay and required work hours without jeopardizing Grievant's FLSA exempt status. In consideration of the foregoing, Grievant has failed to prove that the 0.2 FTE reduction is a violation of FLSA provisions.

In summary, Grievant has failed to prove that Respondent violated any statute, rule, policy, procedure or regulation by the actions alleged, including Respondent's implementation of reduced hours and wages for its classified exempt employees in its effort to maintain the financial stability of the college in a manner that least-affected its employees and students. Absent any violation of law, the undersigned has no authority to question a state employer's employment policy, order a state agency to make a discretionary change in its policy, or to substitute its management philosophy for that of a state agency. Therefore, the grievance is denied.

Conclusions of Law

1. Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence." W. VA. CODE ST. R. § 156-1-3 (2008). "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 and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. In asserting its affirmative defense, Respondent failed to meet its burden of proof to permit dismissal of the grievance.

3. W. Va. Code § 6C-2-3(a)(1) requires an employee to "file a grievance within the time limits specified in this article." W. Va. Code § 6C-2-4(a)(1) identifies the timelines for filing a grievance and states, "[w]ithin fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing." The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. *See Rose v. Raleigh County Bd. of Educ*., 199 W. Va. 220, 483 S.E.2d 566 (1997); *Naylor v. W. Va. Human Rights Comm'n*, 180 W. Va. 634, 378 S.E.2d 843 (1989).

4. Grievant timely filed his grievance.

5. “It is well settled law that the Grievance Board will not grant relief sought that is ‘speculative or premature, or otherwise legally insufficient.’ *Dooley v. Dept. of Trans./Div. of Highways*, Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ.*, Docket No. 91-35-229/239 (Nov. 27, 1991).”

6. In a grievance that does not involve a disciplinary matter, the grievant has the burden of proving his/her grievance by a preponderance of the evidence. W. Va. Code St. R. § 156-1-3 (2008); *Payne v. W. Va. Dept. of Energy*, Docket No. ENGY-88-015 (Nov. 2, 1988); *Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990); *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 Resources*, Docket No. 92-HHR-486 (May 17, 1993).

7. Respondent acted within its authority in implementing the 0.2 FTE reduction.

8. Decisions about allocation of resources, facilities investments and operational budgets are management decisions that are within Respondent’s authority. The Grievance Board 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 that of a state

agency. *Bennett v. W. Va. Dep't of Health and Human Resources/Bureau for Children and Families*, Docket No. 99-HHR-517 (Apr. 26, 2000). *See 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). *See also Bennett v. W. Va. Dep't of Health and Human Resources/Bureau for Children and Families*, Docket No. 99-HHR-517 (Apr. 26, 2000). 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).

9. The Grievance Board does not have authority to require Respondent to conduct, nor subject it to undergo, an investigation.

10. The Fair Labor Standards Act ("FLSA") provides the following exemptions from wage and hour requirements as follows:

> (a) Minimum wage and maximum hour requirements
>
> The provisions of sections 206 (except subsection (d) in the case of paragraph (1) of this subsection) and 207 of this title shall not apply with respect to—
>
> (1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools) . . . .

529 U.S.C. § 213 (2015).

11. Federal regulations at 29 C.F.R. § 541.200 (2015) provide the following definitions:

> (a) The term "employee employed in a bona fide administrative capacity" in section 13(a)(1) of the Act shall mean any employee:
>
> (1) Compensated on a salary or fee basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities;
>
> (2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
>
> (3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

12. So long as an exempt employee continues to be paid in excess of the federal minimum hourly wage, the FLSA does not prohibit a reduction of work hours and commensurate pay.

13. A reduction in an employee's FTE is not considered a reduction in force or disciplinary action when taken to deal with financial downturns. *See Frymier v. Higher Educ. Policy Comm'n*, 655 S.E.2d 52, 221 W. Va. 306 (2007). An FTE reduction of an employee is a reasoned approach to addressing budgetary concerns instead of eliminating positions or instituting furloughs. *Id.* An FTE reduction is a reasonable management decision, which does not require any additional action, such as bumping, by the employer. *Id.*

14. New River acted within its authority to reduce Grievant's weekly pay and required work hours.

Accordingly, Respondent's Motion to Dismiss is **DENIED** and the 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* W. VA. CODE ST. R. § 156-1-6.20 (2008

DATE: May 12, 2017

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Susan L. Basile
Administrative Law Judge