

**THE WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**ANDY CLARK, et al.,  
Grievants,**

**v.**

**Docket No. 2017-1682-CONS**

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

**DECISION**

These consolidated grievances were filed against Sharpe Hospital on February 15, 2017, by Andy Clark, Ethan Minney, Marty Cleavenger, Robert Spradling, Gary Rittenhouse, Rickey Weaver, Rodney Snider, Gregory Coffman, Ronnie Waggy, and William Blake. The Statement of Grievance challenges the installation of surveillance cameras in an area where they work. Grievants seek to “be made whole in every way including removal of surveillance devices from this and similar spaces.”

This grievance was denied at Level One by decision dated May 31, 2017. A Level Two mediation session was conducted on July 28, 2017. By letter dated January 19, 2018, the undersigned granted the parties’ request that this matter be submitted on the lower level record. Grievants appeared by their representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its counsel, Brandolyn N. Felton-Ernest. This matter became mature for consideration upon receipt of the parties’ fact/law proposals on March 16, 2018.

## **Synopsis**

The record of this case demonstrated that Respondent's installation of the surveillance equipment was not in a break room, but in a work space. Grievants failed to prove by a preponderance of the evidence that Respondent violated or misapplied any policy, rule, law or regulation or otherwise acted in an arbitrary and capricious manner.

The following Findings of Fact are based upon the record of this case.

### **Findings of Fact**

1. Grievants are employed as Heating Ventilation and Air Conditioning Technicians and Environmental Control Technicians at Sharpe Hospital.
2. Approximately three years ago, Respondent began planning the placement of video cameras throughout Sharpe Hospital; however, due to a lengthy purchasing process, the placement of the cameras took place during the last year.
3. In January 2017, Respondent placed a camera in the room at issue and the camera in question has video, but no audio capability.
4. Grievants are of the opinion that the room in question is a break room, and that video surveillance in this room is a violation of their constitutional right to privacy.
5. Respondent contends that the room in question is a control room/office where the employees have no reasonable expectation of privacy. In addition, Respondent asserts that the video camera was placed in the room for a legitimate business purpose to protect the health, safety and welfare of the employees, patients and public who are served by Sharpe Hospital.
6. The record also reflects Respondent's position that the room houses control

equipment that serves a crucial function for the hospital. If something goes wrong with the control equipment in that room, it affects the entire hospital because there would be no heat, air conditioning or hot water.

### **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).

Nothing about Respondent's placement of video surveillance equipment at the hospital can be viewed as unreasonable or arbitrary and capricious. "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 Resources*, Docket No. 93-HHR-322 (June 27, 1997).

Granted, it is unlawful to use video surveillance in rooms such as employee lounges, the question of what purpose the room in question serves is essential in whether it is appropriate for Respondent to use video surveillance to monitor the room.<sup>1</sup> The record reflects that the room in question contains a table and chairs, two computers for controlling the HVAC and water systems of all Sharpe Hospital buildings, along with the fire alarm and fire suppression system. At some point, the room also contained employee lockers, but those lockers were removed prior to the installation of the video surveillance equipment. Grievants indicated that the HVAC and maintenance workers have met in that room to eat their lunches since 1994.

The record reflects that even though employees use this room for eating and taking breaks, Grievants confirmed that the majority of their work time is spent in that room monitoring the computer equipment for the HVAC and water systems. Grievants all agreed that it was called a control room, as well as a break room. The hospital contains another area designated specifically for use by these employees as an employee lounge, which contains a television, table and chairs, vending machines, work-out equipment, lockers and bathrooms. The designated employee lounge contains no computers or work stations and no video surveillance equipment.

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<sup>1</sup>W. VA. CODE § 21-3-20.

Respondent uses the video camera to monitor employee work and to ensure the safety of the HVAC and other equipment in the room. The video monitoring of this room furthers the legitimate business interests of protecting the property, health and safety of the employees, patients and the public who use Sharpe Hospital. Even though no patients or public actually come into this area, it houses equipment that provides crucial controls for HVAC, water and fire alarm systems throughout the entire hospital which the patients and public use daily. The limited record supports a finding that Respondent allowed for the refrigerator, coffee maker and television in the room to make that area more comfortable and accommodating for Grievants because they spent most of their shifts in that space monitoring the various systems in the Control Room. Grievants have failed to prove that Respondent violated or misapplied any policy, rule, law or regulation or otherwise abused its discretion.

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. "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 Resources*, Docket No. 93-HHR-322 (June 27, 1997).

3. Grievants failed to prove by a preponderance of the evidence that Respondent violated or misapplied any policy, rule, law or regulation or otherwise acted in an arbitrary and capricious manner.

For the forgoing reasons, 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* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

**Date: March 22, 2018**

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