

**THE WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**GERALD HULL and MARSHA WATSON,  
Grievants,**

**v.**

**Docket No. 2017-1966-CONS**

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

**DECISION**

These consolidated grievances were filed against Sharpe Hospital and involve Grievants being required to use holiday leave instead of sick leave. Grievants seek restoration of holiday leave and to be made whole in every way. This grievance was denied at Level One by decision dated May 19, 2017. A Level Two mediation session was conducted on July 28, 2017. By letter dated January 17, 2018, the parties' request to submit this matter on the Level One record was granted. Grievants appeared by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its counsel, Brandolyn N. Felton-Ernest, Assistant Attorney General. The matter became mature for consideration upon receipt of the parties' fact/law proposals on March 2, 2018.

**Synopsis**

Grievants are employed full-time as Health Service Workers at Sharpe Hospital. Grievants argue that Respondent should not interpret a Division of Personnel Rule to require employees to use holiday leave during a day in which they have requested sick leave. Grievants request that they be able to use sick leave and bank holiday time for a

later date. Grievants failed to meet their burden of proof and establish that Respondent's interpretation of the applicable rule was in any way unreasonable or arbitrary and capricious.

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

### **Findings of Fact**

1. The Division of Personnel Administrative Rule § 14.7 "Overtime and Holiday Work" provides, "sick and/or annual leave requested in the same workweek in which [overtime] hours are worked shall be reduced and credited back to the employee's accrued balances to reduce or avoid payment for hours in excess of the agency work schedule."

2. This rule enables the Department of Health and Human Resources to reduce or avoid overtime payments when forty hours was not actually worked.

3. Sharpe Hospital employees are permitted to bank a maximum of twenty-four hours of holiday leave. If an employee has in excess of twenty-four hours, Sharpe Hospital pays the employee down to the twenty-four maximum.

4. Grievants are employed as Health Service Workers at Sharpe Hospital. On Monday, February 20, 2017, Grievants worked the Presidents' Day holiday, earning holiday leave. Later in the workweek, each Grievant was ill and took sick leave. Respondent substituted the holiday leave, which Grievants earned earlier in the same workweek and credited back the sick leave to each Grievants' leave balance.

5. Respondent asserts that the practice of applying holiday leave, rather than sick leave, in such situations complies with Division of Personnel Administrative Rule § 14.7. Respondent further asserts that its interpretation of Division of Personnel

Administrative Rule § 14.7 does not result in any harm to the employees and Respondent consistently applies the rule to all employees of Sharpe Hospital.

6. Grievants argue that Respondent should not interpret Division of Personnel Rule § 14.7 to require employees to substitute holiday leave for sick leave. Grievants wish to use sick leave and bank holiday time for a future date.

7. If holiday leave reaches the level of more than twenty-four hours, Respondent gives employees the option of receiving a check for the holiday leave in excess of twenty-four hours, rather than losing the additional holiday leave hours. This option is not available for sick leave.

### **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).

Respondent's interpretation of Division of Personnel Rule § 14.7 is reasonable and allows Grievants' requested sick leave to be credited back to their leave balances in the same holiday workweek in which overtime hours are claimed. This ensures the total number of hours, including work time and leave, does not exceed forty hours and avoids overtime payments when forty hours was not actually worked. Nothing about Respondent's application of the rule 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).

Grievants are not losing any benefit by substituting holiday leave for sick leave. Although Grievants do not get to bank the holiday hours for future use, their sick leave gets credited back to them. The sick leave remains in the Grievant's balance for future use at any time, while holiday leave hours must be used within a certain time period. Grievants failed to prove that Respondent violated or misapplied any policy, rule, law or regulation or otherwise acted in an arbitrary or capricious manner. Under the rule, Sharpe Hospital is authorized to credit and return leave to employees in the event an employee reports over

forty hours, but did not actually work forty hours. The undersigned has previously ruled that this is a legitimate state interest.<sup>1</sup>

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. Division of Personnel Administrative Rule § 14.7 provides, "sick and/or annual leave requested in the same workweek in which [overtime] hours are worked shall be reduced and credited back to the employee's accrued balances to reduce or avoid payment for hours in excess of the agency work schedule."

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<sup>1</sup>*Goff, et al. v. Dep't of Health and Human Res.*, Docket No. 2016-1081-CONS (Feb. 16, 2017); *Karp v. Dep't of Health and Human Res.*, Docket No. 2017-1125-DHHR (Mar. 2, 2018).

4. Respondent's interpretation of the above rule is reasonable and allows Grievants' sick leave to be credited back to them. This provides that the total number of hours, including work time and leave, does not exceed forty hours and avoids overtime payments when forty hours was not actually worked.

5. Grievants failed to prove that Respondent violated or misapplied any policy, rule, law or regulation or otherwise acted in an arbitrary or 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 13, 2018**

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