

**THE WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**BARBARA KEESLER,  
Grievant,**

**v.**

**Docket No. 2016-1276-DHHR**

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

**DECISION**

Grievant, Barbara Keesler, filed this action against the Respondent, Department of Health and Human Resources, on or about February 18, 2016, alleging that she was improperly charged annual leave during a week she worked forty hours, in violation of the Fair Labor Standards Act. Grievant seeks to be made whole in every way including restoration of annual leave improperly charged. The parties agreed to proceed directly to Level Three of the grievance process. A Level Three evidentiary hearing was held before the undersigned on December 4, 2017, at the Grievance Board's Westover office. Grievant appeared in person and by her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its counsel, Brandolyn N. Felton-Ernest, Assistant Attorney General. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on January 22, 2018.

**Synopsis**

Grievant is employed at Sharpe Hospital as a Licensed Practical Nurse. During a work week at issue in this case Grievant was short of a required forty-hour week. The

record established that without Grievant's request or submission of a leave form to cover for this short amount of time, Grievant's supervisor filed out an annual leave request form on her behalf. Grievant established by preponderance of the evidence that this was a clear violation of the Division of Personnel's Administrative Rules relating to annual leave. Respondent is ordered to return this amount of leave to Grievant's annual leave balance. Grievant is ordered to reimburse Respondent for that amount of time she was paid during which no work was performed.

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

### **Findings of Fact**

1. Grievant is employed at Sharpe Hospital as a Licensed Practical Nurse at the Transitional Living Facility.
2. As an employee at Sharpe Hospital, Grievant is required to work a forty-hour work week.
3. If forty hours are not worked and a leave request is not entered by the employee, Respondent puts in a request for leave for the time owed to be signed by the employee.
4. Grievant's work schedule for the time in question was from midnight to 7:00 a.m., which was a seven-hour shift. Grievant would then work from 11:00 p.m. to midnight at night to work the one hour to equate to a full eight-hour shift on all days worked.
5. The relevant Weekly Time Sheet Report indicated that Grievant worked from midnight to 7:00 a.m. on Saturday, January 30, 2016, which was the first day of the pay period. Grievant then worked from 11:00 p.m. to midnight on January 30, 2016, for one hour, to have worked a full eight-hour work day.

6. On Sunday, January 31, 2016, Grievant worked from midnight to 7:00 a.m. for a seven-hour shift. Grievant then worked from 11:00 p.m. to midnight that evening for one hour, for a full eight-hour shift.

7. On Monday, February 1, 2016, Grievant worked from midnight to 7:09 a.m. for a 7.25 hour shift. Grievant did not then work from 11:00 p.m. to midnight that evening.

8. On Tuesday, February 2, 2016, and Wednesday, February 3, 2016, Grievant had a “timed” day off from work.

9. On Wednesday, February 3, 2016, Grievant had a “timed” day off from work, but Grievant reported to work and worked from 11:00 p.m. to midnight that evening. That one hour worked was credited on Wednesday, February 3, 2016.

10. On Thursday, February 4, 2016, Grievant worked from midnight to 7:00 a.m., for a seven-hour shift. Grievant then worked from 11:00 p.m. to midnight on Thursday, February 4, 2016, to have worked a full eight-hour shift.

11. On Friday, February 5, 2016, Grievant worked from midnight to 7:00 a.m. for a seven-hour shift. Grievant did not return to work from 11:00 p.m. to midnight.

12. Grievant’s total hours worked for the week was 39.25 hours for the week of Saturday, January 30, 2016, through Friday, February 5, 2016.

13. On February 8, 2016, Grievant’s supervisor completed and approved a form DOP-L1 for .75 hours of annual leave for the previous work week.

14. The spaces for Grievant’s signature and a signature date on the February 8, 2016, DOP -L1 form are blank. Grievant did not request expenditure of this annual leave.

## Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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 argues that Grievant has asserted no law, rule or regulation in this case which requires them to abandon or modify its rule requiring an employee to work a forty-hour week. The limited record of this case does not dispute that established requirement that an employee work a forty-hour week. While the record does not support Grievant's contention that she worked forty-hours for the week in question, Grievant's assertion is that it was inappropriate to use unrequested time from her annual leave to account for a forty hour week.

The applicable Division of Personnel Administrative Rules state as follows:

14.6. Unauthorized Leave. When an employee is absent from work without authorization for sick or annual leave, the appointing authority shall dock the

employee's pay in the next pay period for an equal amount of time paid during which no work was performed. The appointing authority shall notify the employee in writing that his or her pay is being docked and that the unauthorized leave is misconduct for which discipline is being imposed. The appointing authority shall use unauthorized leave only in cases when the employee fails to obtain the appropriate approval, according to agency policy, for the absence. The appointing authority shall transmit notice of the action in writing to the Director. W. VA. CODE ST. R. § 143-1-14.6

14.3.c. Requesting, Granting. Accrued annual leave shall be granted at those times that will not materially affect the agency's efficient operation or when requested under the provisions of the Parental Leave Act or FMLA. The employee shall request annual leave in advance of taking the leave except as noted elsewhere in this subdivision or, for unplanned annual leave, submit the leave request immediately upon return to work or, in cases of extended periods of leave, as directed by the appointing authority. Annual leave may not be granted in advance of the employee's accrual of the leave. W. VA. CODE ST. R. § 143-1-14.3.c.

The issue in this case is not Sharpe Hospital's expectation that its employees work a forty-hour work week and that employees are scheduled to work a forty-hour week. The issue is whether or not Respondent was justified in using unrequested annual leave to account for Grievant's lack of forty hours for the week, or has Grievant demonstrated by a preponderance of the evidence that this violated or misapplied any policy, rule, law or regulation.

Based upon a review of past Grievance Board cases involving the lack of completing a forty-hour week, agencies customarily issue an employee some type of discipline, such as a reprimand, for unauthorized leave. The agency then docks the employee's pay for an equal amount of time paid during which no work was performed, pursuant to the above rule. In the instant case, that would amount to .75/hour of time during which no work was performed by the Grievant. The record of this case is clear that Grievant did not request that .75/hour of annual leave be used to account for her lack of a forty-hour work week.

The DOP-L1 was completed by Grievant's supervisor, was unsigned by Grievant, and the record indicates that Grievant's supervisor expressed the need for leave to be used to complete a forty-hour week; however, Grievant declined to make this request. A reading of the above Division of Personnel Rule regarding annual leave clearly indicates that this action by the supervisor was a violation of the applicable rule.

Grievant has met her burden of proof and demonstrated by preponderance of the evidence that Respondent violated the Division of Personnel's Administrative Rule regarding annual leave. Respondent is ordered to return .75/hour of leave to Grievant's annual leave balance. Grievant is ordered to reimburse Respondent for that amount of time she was paid during which no work was performed.<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, Grievant has the burden of proving her 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).

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<sup>1</sup>See generally *Nottingham v. Div. of Corrections*, Docket No. 02-CORR-141 (Sept. 22, 2002).

2. Rule 14.6 of the Division of Personnel's Administrative Rule states as follows:

14.6. Unauthorized Leave. When an employee is absent from work without authorization for sick or annual leave, the appointing authority shall dock the employee's pay in the next pay period for an equal amount of time paid during which no work was performed. The appointing authority shall notify the employee in writing that his or her pay is being docked and that the unauthorized leave is misconduct for which discipline is being imposed. The appointing authority shall use unauthorized leave only in cases when the employee fails to obtain the appropriate approval, according to agency policy, for the absence. The appointing authority shall transmit notice of the action in writing to the Director. W. VA. CODE ST. R. § 143-1-14.6

3. Rule 14.3.c. of the Division of Personnel's Administrative Rule provides the following relating to annual leave:

14.3.c. Requesting, Granting. Accrued annual leave shall be granted at those times that will not materially affect the agency's efficient operation or when requested under the provisions of the Parental Leave Act or FMLA. The employee shall request annual leave in advance of taking the leave except as noted elsewhere in this subdivision or, for unplanned annual leave, submit the leave request immediately upon return to work or, in cases of extended periods of leave, as directed by the appointing authority. Annual leave may not be granted in advance of the employee's accrual of the leave. W. VA. CODE ST. R. § 143-1-14.3.c.

3. Grievant demonstrated by preponderance of the evidence that Respondent violated Division of Personnel's Rule relating to annual leave. The record also demonstrated that Grievant was on unauthorized leave when she was absent from work without authorization for sick or annual leave.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to return .75/hour of leave to Grievant's annual leave balance. Grievant is **ORDERED** to reimburse Respondent for that amount of time she was paid during which no work was performed.

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: February 23, 2018**

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