

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**DENNY R. MORRIS,
Grievant,**

v.

DOCKET NO. 2017-2318-MAPS

**DIVISION OF CORRECTIONS/NORTHERN
CORRECTIONAL CENTER,
Respondent.**

DECISION

This grievance was filed by Grievant, Denny R. Morris, against his employer, the Division of Corrections/Northern Correctional Center, on June 2, 2017. The statement of grievance reads, “[t]he merger of NCF and OCCC took place in October 2015. In 2016, NCF counseling staff had been directed to cover OCCC’s counselors duties as well as NCF’s duties in regards to late nights, weekends and holidays. On 18 May 2017, the CM’s had been instructed to work weekends and holidays which was not the practice for many previous years here at NCF. As CM’s we have worked our required weekly late night. This is not in accordance with PD 401.16 as it does not state CM work weekends and/or holidays. In addition to this, we accepted the CM position at NCF and in the interview we were told that we did not have to work weekends or holidays.” As relief Grievant seeks “[t]o have OCCC be self sufficient in regards to Unit team coverage, the same as Slayton Work Camp is to MOCC and Huttonsville Work Camp is to HCC, there are currently no vacancies in the programs department at OCCC. To be placed back on a Monday through Friday, weekends and Holidays off schedule. And to be made whole.”

A hearing was held at level one on June 22, 2017, and a level one decision denying the grievance was issued on July 12, 2017. Grievant appealed to level two on July 25, 2017, and a mediation session was held on September 11, 2017. Grievant appealed to level three on September 25, 2017. A level three hearing was held before the undersigned Administrative Law Judge on January 3, 2018, at the Grievance Board's Westover, West Virginia office. Grievant was represented by a co-worker, Ryan W. Adams, and Respondent was represented by John H. Boothroyd, Assistant Attorney General. This matter became mature for decision on February 20, 2018, on receipt of Respondent's Proposed Findings of Fact and Conclusions of Law. Grievant declined to submit written proposals.

Synopsis

Grievant and other Case Managers at the Northern Correctional Center have not been required to work weekends or holidays for at least eight years. In the summer of 2017, the Case Managers were told they would be required to work weekends and holidays, rotating this schedule with other members of the unit management team who had been covering weekends and holidays, and that all unit management staff at the Northern Correctional Center would also be assisting in covering weekends and holidays at the Ohio County Correctional Center. Grievant argued he was told when he interviewed for the Case Manager position eight years ago that he would not be working weekends and holidays and that his schedule could not be changed to require such work because of this representation, and because of his reading of the applicable Policy Directive. He also argued the posting for which he applied was for the Northern Correctional Center, and he

could not be required to work at the Ohio County Correctional Center because it is a separate facility. Grievant was never promised that his schedule would not be changed, nor would any such promise be binding on Respondent. Grievant's tortured reading of the applicable Policy Directive is erroneous, and the Policy Directive has since been replaced by a Protocol which makes clear that Case Managers may be required to work weekends and holidays. Finally, State agencies have the authority to transfer employees to different work sites as needed, and Grievant presented no law, rule, regulation, policy or practice which is being violated by Respondent requiring employees assigned to the Northern Correctional Center to help cover weekends and holidays at the Ohio County Correctional Center.

The following Findings of Fact are properly made from the record developed at levels one and three.

Findings of Fact

1. Grievant has been employed by the Division of Corrections ("DOC"), at the Northern Correctional Center ("NCC") for 20 years, and has been a Corrections Case Manager for 8 years. Grievant is assigned to unit management as one of the unit team members.

2. NCC is a level 5, maximum security prison, housing about 250 inmates.

3. In August 2015, the administration of NCC was combined with the administration of the Ohio County Correctional Center ("OCCC"). The Warden at NCC also became the Warden at OCCC, as did all other administrative staff at NCC. OCCC continues to be operational, with its own budget and staff, other than administrative staff.

Staff, other than administrative staff at NCC, are assigned to work at OCCC at times when OCCC is short-staffed.

4. OCCC is a minimum security facility, housing inmate work crews, and is located approximately 12 miles from NCC.

5. Grievant has been assigned to work at OCCC on one occasion to assist OCCC staff in catching up on inmate assessments when OCCC was short-staffed. He has never been assigned to work at OCCC as part of the weekend or holiday unit team coverage.

6. Grievant was a Correctional Counselor I at NCC before accepting his current position. As a Correctional Counselor I, Grievant was required to work weekends and holidays on a rotating basis.

7. The posting for the Corrections Case Manager position for which Grievant applied states as the location, "Dept Military Affairs and Public Safety, Division of Corrections, Northern Correctional Facility, Marshall [County]." It lists the schedule as "rotating shift unlimited full-time perm."

8. When Grievant interviewed for the Corrections Case Manager position he was told by the NCC Warden at that time that he would be working 8:00 a.m. to 4:00 p.m., Monday through Friday. Grievant saw this as an added benefit to accepting the position, as he preferred to not work weekends and holidays. The record does not reflect that Grievant was ever told his schedule could not be changed.

9. For several years, Grievant's work schedule has been 8:00 a.m. to 4:00 p.m. Monday through Friday, except one day each week he works noon to 8:00 p.m.

10. Correctional Counselors and Unit Managers at NCC have been required to rotate working weekends and holidays for some time prior to August 2017. Effective in approximately August 2017, all Case Managers at NCC, including Grievant, also were required to work weekends and holidays on a rotating basis. Each of these employees works one day of a weekend, one weekend each month, 8:00 a.m. to 4:00 p.m., and one holiday during the year. When there are more weekends per month than staff to cover each weekend day during a month, unit management employees may be required to work two weekend days in a month. This change was made because Warden Karen Pszczolkowski was directed by her superiors to make this change. She was also directed at some point that unit management staff would work weekends and holidays at OCCC, which had not been the case.

11. When fully staffed, there are 14 Correctional Counselors, Case Managers assigned to unit management, and Unit Managers assigned to staff NCC and OCCC. These staff members all staff both NCC and OCCC on weekends and holidays, and they are allowed to select which weekend day they will work, at which facility, and which holiday they will work during the year, by seniority. Grievant has the second most seniority of all these staff members, and chooses second. Some Correctional Counselors have often chosen to work a second week-end day in order to take two days off during the week.

12. Warden Pszczolkowski made the decision that NCC unit management staff would help cover weekends and holidays at OCCC. She believed that having NCC staff help cover OCCC was a fair way to distribute weekend and holiday coverage, as there are fewer staff assigned to OCCC, and if they had to cover all weekends and holidays at OCCC, they would be working a lot of weekends and holidays.

13. At the time this grievance was filed, DOC Policy Directive 401.16, dated July 1, 2006, was in effect, and stated that “Unit Team coverage (Unit Manager, Case Manager, and Counselor II, and Counselor I) will be provided twelve (12) hours daily (Monday through Friday) and eight (8) hours of coverage on the weekends and holidays. This Policy Directive states that “[a]t least once every week, Unit Managers, Case Managers, and Correctional Counselors shall work until 8:00 p.m.,” and that “Unit Management’s ruling principle shall be the following: the duty hours of personnel are scheduled to meet the needs of the unit, not the wishes of the staff.” This Policy Directive also states that “Unit Managers shall schedule themselves to work a weekend day and/or holiday at least once per quarter. Additionally, weekends and holidays will not be worked disproportionately by Correctional Counselors.”

14. On September 8, 2017, DOC Acting Commissioner Loita Butcher issued Instruction #17-14 regarding “Unit Management and Direct Supervision,” effective September 15, 2017, which “shall supersede and nullify any previous written instructions on this subject,” and which cancelled Policy Directive 401.16 effective September 15, 2017. This Instruction, distributed as Protocol Number ACO-3, states, among other things, that “[c]overage by non-uniformed Unit Team members (Unit Manager and other personnel assigned by the Warden), will be provided a minimum of twelve (12) hours daily (Monday through Friday) and at least eight (8) hours of coverage on the weekends and holidays . . . The schedule should be developed so that all non-uniformed members of the Unit Team share in the evening and weekend coverage fairly and equitably; so that each Unit Manager, Case Manager, and Counselor works at least one (1) weekend day per month; and so that weekends and holidays are worked proportionately by non-uniformed Unit

Team Members.” This Protocol states that “the ruling principle when developing the schedule shall be the needs of the unit and the facility.”

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 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).

Grievant argued that he could not be required to work at OCCC because the Case Manager position he holds was posted as a position at NCC, and because OCCC has its own budget. As Respondent noted, Grievant pointed to no law, rule, regulation, policy, procedure, or case law in support of this position, and the undersigned is unaware of any such legal authority. Further, it is clear that state agencies may reassign employees as needed.

The Division of Personnel's Administrative Rule states in Section 11.6(a) that "appointing authorities may transfer a permanent employee from a position in one organizational subdivision of an agency to a position in another organizational subdivision of the same or another agency at any time." The West Virginia Supreme Court of Appeals has recognized that state agencies have the right to transfer employees where there is a need, if they remain in the same classification and pay grade, and are not demoted or reduced in

pay. *Childers v. Civil Serv. Comm'n*, 155 W. Va. 69, 75, 181 S.E.2d 22 (1971).

Jordan v. Dep't of Transp., Docket No. 03-DOH-057 (Sept. 15, 2003). “Barring any impermissible motivation, [DOC’s] management may unilaterally transfer prison staff from one work unit and/or work shift to another . . . depending on circumstances and need. See *Pell v. W. Va. Dept. Of Human Svcs.*, Docket No. 91-DHS-135 (Sept. 30, 1991); *Crow v. W. Va. Dept. of Corrections*, Docket No. 89-CORR-116 (June 30, 1989).’ *Titus v. W. Va. Div’n of Corrections*, Docket No. 93-CORR-528 (Nov. 22, 1994).” *Stoneking v. W. Va. Div. of Corrections*, Docket No. 93-CORR-530 (Nov. 30, 1994).

Grievant argued his schedule could not be changed to require him to work weekends and holidays because he was told by the Warden at the time he interviewed for the position that his work hours would be 8:00 a.m. to 4:00 p.m. Monday through Friday, and, while he received an increase in pay when he accepted the position, the primary draw for him was the work hours. Grievant also argued that per DOC Policy Directive 401.06, Case Managers cannot be required to work weekends and holidays.

With regard to this last argument, Grievant pointed to the following language: “[a]dditionally, weekends and holidays will not be worked disproportionately by Correctional Counselors.” Grievant reads this as excluding Case Managers from working weekends and holidays because Case Managers are not mentioned in this sentence. This is a tortured reading of the plain language of the Policy Directive. Respondent correctly contends that the Policy Directive clearly states that Unit Managers, Counselors, **AND** Case Managers are to provide coverage on weekends and holidays. The language relied on by Grievant really confirms that NCC had been misapplying the Policy Directive by not

requiring Case Managers to work weekends and holidays, thereby causing Correctional Counselors to be scheduled disproportionately on weekends and holidays. The current schedule rotates weekends and holidays among all unit management team members so that each unit management team member works one day on the weekend each month. Grievant has also chosen to ignore the language of the Policy Directive which clearly states that the duty hours are scheduled according to the needs of the facility, not the wishes of staff. Further, as a result of this grievance, in September 2017, DOC replaced the Policy Directive with Protocol #17-14, which removes any question about whether Case Managers are to be included in the weekend and holiday rotation.

While Respondent's policies clearly provide for Grievant to be scheduled to work on weekends and holidays, nonetheless, "[m]anagement decisions related to scheduling of employees are evaluated pursuant to the arbitrary and capricious standard. *Miller v. Dep't of Health & Human Ser.*, Docket No. 07-HHR-077 (Apr. 30, 2008); *Davis et al. v. Div. of Highways*, Docket No. 2010-0462-CONS (Nov. 18, 2010)." *Daniels, et al., v. Dep't of Health and Human Res.*, Docket No. 2013-0599-CONS (Apr. 8, 2014). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). While a searching inquiry into the facts is required to determine whether an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute his or her judgment for that of the decision maker

whose action is challenged. See *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

Grievant does not dispute that Respondent needs the unit management team members to be available to inmates on weekends and holidays, rather Grievant believes he should not have to pitch in on weekends and holidays as a member of the team. Case Managers had for some reason been exempt from the requirement that unit management team members be scheduled in the rotation on weekends and holidays, while other unit management team members were being required to cover all weekends and holidays. Warden Pszczolkowski was informed that Case Managers at NCC were not exempt, and NCC began including Case Managers in the rotation, as they should have been all along. Warden Pszczolkowski also began having NCC unit team staff help with weekend and holiday coverage at OCCC, so that OCCC unit management team staff were not working a disproportionate number of weekends and holidays. The method employed by Respondent to assign these staff members to weekends and holidays is to allow the employees to choose which days they will work, by seniority, which works to Grievant's benefit since he is second in seniority. Thus, Grievant has never had to work a weekend day or holiday at OCCC, and it is highly unlikely that he will have to do so. All of this is an entirely reasonable way of handling required non-uniform staff coverage requirements at correctional facilities.

Finally, as to the argument that Grievant was told when he interviewed that he would not be working weekends or holidays, first, no one promised Grievant that his schedule would never be changed. Even if such a promise had been made, Respondent is not bound by any such representations. "A state or one of its political subdivisions is not

bound by the legally unauthorized acts of its officers and all persons must take note of the legal limitations upon their power and authority. [Citations omitted.]" Syl. Pt. 2, *W. Va. Public Employees Ins. Bd. v. Blue Cross Hosp. Serv., Inc.*, 179 W. Va. 605, 328 S.E.2d 356 (1985). "Any other rule would deprive the people of their control over the civil service, and leave the status and tenure of all employees to be governed by whatever arrangements incumbent administrators may agree to or prescribe." *Freeman v. Poling*, 175 W. Va. 814, 819, 338 S.E.2d 415, 421 (1985), citing *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983). "It is well settled that a supervisor's oral representation during an interview as to salary is not binding on an agency, where that supervisor does not possess authority to actually hire or set rates of pay." *Chapman v. Dep't of Transp.*, Docket No. 97-DOH-261 (Nov. 24, 1997), citing *Ollar v. W. Va. Dep't of Health and Human Resources/W. Va. Div. of Personnel*, Docket No. 92-HHR-186 (Jan. 22, 1993).

In effect, potential state employees are charged with knowing that the persons who interview and offer them employment are typically not authorized to make final employment decisions. The prospective employee must not rely on statements made by such individuals as to salary or rates of pay. The new hire must not rely even on official-looking documents, unless the document reviewed is the Form WV-11 by which hiring is actually approved. While this rule is unquestionably burdensome in the extreme to prospective employees, any other rule would render the State powerless before the whims of individual supervisors, and would require strained interpretations of clear precedent set by this Board and the Courts of this State.

Chapman, supra.

Grievant did not demonstrate that he could not be required to work weekends or holidays, or that he could not be required to work at OCCC, as needed.

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. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 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).

2. "The West Virginia Supreme Court of Appeals has recognized that state agencies have the right to transfer employees where there is a need, if they remain in the same classification and pay grade, and are not demoted or reduced in pay. *Childers v. Civil Serv. Comm'n*, 155 W. Va. 69, 75, 181 S.E.2d 22 (1971)." *Jordan v. Dep't of Transp.*, Docket No. 03-DOH-057 (Sept. 15, 2003).

3. Grievant did not demonstrate that Respondent violated any law, rule, regulation, policy, or practice by requiring Case Managers to work weekends and holidays, or by requiring unit team members to work at another facility to help cover weekend and holiday hours.

4. "Management decisions related to scheduling of employees are evaluated pursuant to the arbitrary and capricious standard. *Miller v. Dep't of Health & Human Ser.*, Docket No. 07-HHR-077 (Apr. 30, 2008); *Davis et al. v. Div. of Highways*, Docket No.

2010-0462-CONS (Nov. 18, 2010).” *Daniels, et al., v. Dep’t of Health and Human Res.*, Docket No. 2013-0599-CONS (Apr. 8, 2014). An action is recognized as arbitrary and capricious when “it is unreasonable, without consideration, and in disregard of facts and circumstances of the case.” *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). While a searching inquiry into the facts is required to determine whether an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute his or her judgment for that of the decision maker whose action is challenged. See *Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

5. Grievant did not demonstrate that Respondent acted in an arbitrary and capricious manner.

6. “A state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers and all persons must take note of the legal limitations upon their power and authority. [Citations omitted.]” Syl. Pt. 2, *W. Va. Public Employees Ins. Bd. v. Blue Cross Hosp. Serv., Inc.*, 179 W. Va. 605, 328 S.E.2d 356 (1985). “Any other rule would deprive the people of their control over the civil service, and leave the status and tenure of all employees to be governed by whatever arrangements incumbent administrators may agree to or prescribe.” *Freeman v. Poling*, 175 W. Va. 814, 819, 338 S.E.2d 415, 421 (1985), citing *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983). “It is well settled that a supervisor’s oral representation during an interview as to salary is not binding on an agency, where that supervisor does not possess authority to actually hire or set rates of pay.” *Chapman v. Dep’t of Transp.*, Docket No. 97-DOH-261 (Nov. 24, 1997),

citing Ollar v. W. Va. Dep't of Health and Human Resources/W. Va. Div. of Personnel,
Docket No. 92-HHR-186 (Jan. 22, 1993).

Accordingly, this 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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. See *also* 156 C.S.R. 1 § 6.20 (2008).

Date: March 13, 2018

BRENDA L. GOULD
Deputy Chief Administrative Law Judge