

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**PAULA WELCH, et al.,
Grievants,**

v.

Docket No. 2017-1870-CONS

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

DECISION

This grievance was filed on or about February 27, 2017, by Paula Welch and several other employees at the William R. Sharpe, Jr. Hospital. The Statement of Grievance read “Mandatory Flu Vaccination Policy” and Relief Sought was “To Otherwise be made whole.”

On May 4, 2017, a Level One hearing was held before Hearing Examiner Christina M. Bailey. Ms. Welch appeared in person with one other Grievant, along with their representative, Jamie Beaton. Patrick Ryan, CEO of Sharpe Hospital appeared on behalf of the Respondent. By Level One Decision dated May 25, 2017, Hearing Examiner Bailey denied the grievance. An Order of Unsuccessful Mediation was entered on August 17, 2017, and the matter was appealed to Level Three. Prior to a scheduled Level Three hearing before the undersigned, the parties requested that the case be submitted on the lower level record. This request was granted and the parties were given until March 30, 2018, to file fact/law proposals. Grievants appeared by their representative, Gordon

Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its counsel, Katherine A. Campbell, Assistant Attorney General.

Synopsis

Ms. Welch is a Food Service Worker and has been employed at Sharpe Hospital since 2006. The other Grievants in this case are employed in various classifications within Sharpe Hospital. Grievants argue that Sharpe Hospital made a flu vaccination mandatory and that they should not be required to take the vaccination or to wear a mask if they do not take the vaccination. Record established that by implementing the flu vaccination policy, or asking employees who might be infected with the flu virus to wear a mask, Respondent was attempting to protect the health and welfare of all employees, patients and the public. Grievants failed to prove by a preponderance of the evidence that Respondent's actions in this case were contrary to law, policy, rules, regulations or were otherwise arbitrary and capricious.

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

Findings of Fact

1. Ms. Welch is a Food Service Worker and has been employed at Sharpe Hospital since 2006. The other Grievants in the case are employed in various classifications within Sharpe Hospital.

2. On or about February 23, 2017, CEO Patrick Ryan sent out a memorandum to Sharpe Hospital staff members stating that influenza had been widespread in West Virginia for the week ending February 18, 2017. The memorandum explained that any

healthcare personnel who declined the flu vaccination should wear a mask at all times while on hospital property until further notice.

3. Grievants argue that Sharpe Hospital made the flu vaccination mandatory and that they should not be required to take the vaccination or to wear a mask if they do not take the vaccination. Grievants also claim that Respondent failed to apply the policy consistently across the hospital.

4. Respondent maintains that the flu vaccination policy is appropriate and is not actually mandatory. Employees may decline to take the vaccination, but they must wear a mask while they are on hospital grounds. If an employee has a health-related, religious or other issue with wearing the mask, then management would address those issues on a case-by-case basis. Respondent further contends that the policy is in the best interest of the health and welfare of its patients, staff and public.

5. The policy in question states, “The Bureau of Behavioral Health and Health Facilities recommends that all BHHF Healthcare Personnel receive the influenza vaccination before the beginning of each influenza season. In accordance with Joint Commission Standards and CDC [Center for Disease Control], a declination statement from employees not participating in the vaccination program will be provided.” Sharpe Hospital Policy 45.008. Level One Joint Exhibit 1.

6. The policy further states, “Healthcare Personnel who have declined vaccination will be required to mask at all times during the influenza season while interacting with patients. Failure to mask will result in disciplinary action, up to and including termination, in accordance with the progressive discipline policy.” *Id.*

7. Ms. Welch acknowledged at Level One that since she declined being administered the flu shot she wore a mask. Ms. Welch further recognized that she works in a state run hospital that treats mental patients, and it is in the best interest of the patients to protect them from contracting the influenza virus.

8. Ms. Welch also acknowledged that it is within the rights and responsibilities of Respondent to not only protect the patients, but the staff as well, including her, and this protection includes halting any spread of the influenza virus in Sharpe Hospital.

9. Diane Bennett, Infection Control Practitioner and Registered Nurse at Sharpe Hospital, pointed out that the above policy was instituted at all the Respondent's medical facilities.

10. Ms. Bennett explained that the influenza shot was provided free of charge to Sharpe Hospital's staff and administered at varying times in order that all staff had access to receiving it.

11. Ms. Bennett indicated that all staff were told that in the event they declined the influenza shot, then they would be required to wear a mask during the flu season. Masks were provided free of charge as well.

12. Ms. Bennett explained that there are certain percentages of compliance with the influenza vaccination that a facility such as Sharpe Hospital must achieve in order to maintain their accreditation. Ms. Bennett indicated that the policy does allow for exemptions to the flu shot as one could sign the declination and wear a mask instead. Masks are worn only when there is widespread influenza activity. Evidence supports a conclusion that wearing a mask protects others from not contracting the flu.

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).

In the instant case, Grievants have the burden of proof since there has been no disciplinary action taken against them. Ms. Welch was the only witness for the Grievants in this case. Her testimony consisted of the following exchange between herself and her representative, Jamie Beaton, after identifying her job title and years of service:

Mr. Beaton: Okay. Obviously, the issue at hand is concerning the flu vaccination policy as Mr. Ryan pointed out. So, can you tell me what your issue was with the policy, and what happened with that? About the flu shot being mandatory?

Ms. Welch: I think that it's against the right, you shouldn't have to take it, if you don't want to. A lot of people get sick with it. I just feel that it's against our rights if we don't want to take it.

Mr. Beaton: I have no further questions.

Ms. Welch acknowledged that she has previously had the flu shot and suffered no adverse reaction. Ms. Welch complied and wore a mask as required by the policy when she declined the flu shot in this matter. The record lacked any evidence that anyone's rights were negatively impacted nor any harm suffered by any Grievant by having to choose to have the flu shot or wear a mask.

The record supports a finding that Respondent has a significant interest in maintaining medical facilities free of the influenza virus. The implementation of the policy provides an alternative to those who may object on religious or medical grounds to not have the flu shot in the form of wearing a medical mask during widespread influenza activity. The undersigned has limited authority to order an agency to modify its employment policies. Even if employees find a policy to be an annoyance, the Grievance Board has regularly affirmed policies unless the policy is clearly wrong or there is a specific law, rule or regulation which would mandate policy modification. *Tuell v. Dep't of Health and Human Res./Div. of Personnel*, Docket No. 2014-1600-DHHR (Dec. 1, 2015). Grievants in the instant case have asserted no law, rule or regulation which would require Respondent to abandon or modify its Influenza Immunization Program.

Finally, Respondent's policy on influenza vaccinations cannot 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). The record supports a finding that there exists a legitimate interest in preventing an outbreak of the influenza virus at Sharpe Hospital pursuant to the recommendations of the CDC and the Joint Commission.

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: April 19, 2018

Ronald L. Reece
Administrative Law Judge