

**THE WEST VIRGINIA PUBLIC EMPLOYEES  
GRIEVANCE BOARD**

**JAMIE WORKMAN,  
Grievant,**

**v.**

**Docket No. 2018-0175-DHHR**

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

**DECISION**

Grievant, Jamie Workman, filed this action against the William R. Sharpe, Jr. Hospital, on July 17, 2017, alleging that, "Although prescheduled to work 7/31/17, Grievant called by supervisor and told not to report (8 hours overtime lost). Schedule times changed without notice, monthly schedule replaced by weekly schedule without reason. Annual leave request for Aug 4/5 denied without good reason." Grievant seeks to be made whole in every way including resumption of monthly schedule, back pay with interest, approval of annual leave properly earned and requested, and an end to arbitrary actions by supervisor.

This grievance was denied at Level One by decision dated September 15, 2017. A Level Two mediation session was conducted on November 6, 2017. Grievant perfected her appeal to Level Three on the same date. This case was scheduled for a Level Three hearing before the undersigned on February 14, 2018; however, the parties requested that the matter be submitted on the lower level record. This request was granted and the parties were given until March 15, 2018, to submit fact/law proposals. Grievant appeared

by her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its counsel, Steven R. Compton, Deputy Attorney General. This matter became mature for consideration upon receipt of the last of the parties' proposals on March 16, 2018.

### **Synopsis**

Grievant is a Health Service Worker/Programmer employed by William R. Sharpe, Jr. Hospital, a psychiatric facility operated by the West Virginia Department of Health and Human Resources. Grievant claims that Respondent improperly changed her schedule, which caused her to lose eight hours of overtime. Respondent maintains that it has discretion to set the work schedules and that it acted within the scope of its policy. The record of this case supported a finding that Grievant has failed to demonstrate by a preponderance of the evidence that Respondent's actions in this case were contrary to law, policy or regulation, or were otherwise unreasonable or arbitrary and capricious.

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

### **Findings of Fact**

1. Grievant is a Health Service Worker/Programmer employed by William R. Sharpe, Jr. Hospital, a psychiatric facility operated by the West Virginia Department of Health and Human Resources.
2. On or about July 31, 2017, Health Service Worker Amy Dillon sent Grievant a text asking Grievant to call her. Grievant called and Ms. Dillon asked Grievant if she wanted the day off, and Grievant replied that she did not. Ms. Dillon explained to Grievant that Assistant CEO Michelle Markovich had directed that Grievant should not report to work

that day. Grievant contacted Ms. Markovich who informed Grievant she should not report to work because another employee was working the shift Grievant had previously been scheduled to work. Grievant stated that she had been scheduled 31 days in advance for the shift in question. Ms. Markovich explained that shifts are subject to change at any time due to the needs of the facility, its employees and its patients.

3. Department of Health and Human Resources policy sets forth the business hours of all offices as 8:30 a.m. to 5:00 p.m. Monday through Friday. Due to the nature of operating on a 24-hour basis, additional hours and/or days may be required to meet the unique needs of each facility, such as Sharpe Hospital. Department of Health and Human Resources Policy Memorandum 2102 Hours of Work/Overtime. § VIII. C.

4. Department of Health and Human Resources Policy Memorandum 2102 further states, "Each Director, Administrator, Manager, and Supervisor shall schedule and make regular work assignments in a manner which minimizes the need for overtime . . . ." *Id.* at § IX.

### **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).

Grievant claims that Respondent improperly changed her schedule, which caused her to lose eight hours of overtime. Respondent maintains that it has discretion to set the work schedules and that it acted within the scope of its policy. The West Virginia Division of Personnel Administrative Rule provides, "[E]ach appointing authority shall establish the work schedule for the employees of his or her agency . . . The work schedule may include any work shifts the appointing authority determines to be appropriate for the efficient operation of the agency." Division of Personnel Administrative Rule, 143 C.S.R 1 § 14.2. As the Grievance Board has previously stated, "[I]t is within management's prerogative to decide what the needs of the institution are . . ." *James Sell v. W. Va. Dep't of Health & Human Res.*, Docket No. 06-HHR-444 (June 26, 2007). Likewise, the management of Sharpe Hospital has the prerogative to decide the scheduling needs of the facility.

The undersigned does not have the authority to second guess a state employer's employment policy, or to order a state agency to make a discretionary change in its policy or to substitute its judgment for agency management. *Rodeheaver v. W. Va. Dep't of Health & Human Res.*, Docket No. 00-HHR-312 (July 31, 2001). Such management decisions are evaluated pursuant to the arbitrary and capricious standard. "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 of this case supports a finding that the management of Sharpe Hospital is in the best position to decide the staffing and scheduling needs of the hospital. This action is a discretionary management decision which the undersigned does not have the authority to second-guess. Respondent directed Grievant not to report to work for the scheduled shift because Grievant had been working for eight days straight without a day off. This action minimized the need for overtime and Respondent's decision to allow another employee to cover the shift in question does not violate the above administrative rule.

Grievant also complains that she was not given enough notice for schedule change because Ms. Markovich informed her of the schedule change three hours before the shift was to begin. Due to the nature of Sharpe Hospital as a 24/7 patient care facility, the needs of the facility can change with very little notice. Grievant was not already on her way to work and three hours would allow Grievant to make any changes to her personal schedule when she was informed that she did not need to report to work. Ultimately, the schedule change was given within a reasonably sufficient time for Grievant to know that she did not need to report to work that day.

Finally, Grievant raises the issue as it relates to Grievant's request for annual leave on August 4 and August 5, 2017. Grievant's leave application reflects that Grievant's request for annual leave was neither approved nor disapproved. The Grievance Board has noted, "[A]nnual leave is a privilege, and its use cannot take priority over the needs of the agency, and the public which it serves." *Curry/Molitor v. W. Va. Dep't of Health & Human Res.*, Docket No. 98-HHR-149 (Mar. 31, 1999). Although Grievant was not granted annual leave, Grievant became ill, provided a Physician's statement, and was granted sick leave on August 4 and August 5, 2017. Grievant suffered no loss of income, and Respondent's actions were reasonable under the circumstances. Grievant has failed to demonstrate by a preponderance of the evidence that Respondent's actions in this case were contrary to law, policy or regulation, or were otherwise unreasonable or arbitrary and capricious.

The following Conclusions of Law supports 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).

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. As the Grievance Board has previously stated, "[I]t is within management's prerogative to decide what the needs of the institution are . . ." *James Sell v. W. Va. Dep't of Health & Human Res.*, Docket No. 06-HHR-444 (June 26, 2007). Likewise, the management of Sharpe Hospital has the prerogative to decide the scheduling needs of the facility.

4. "Annual leave is a privilege, and its use cannot take priority over the needs of the agency, and the public which it serves." *Curry/Molitor v. W. Va. Dep't of Health & Human Res.*, Docket No. 98-HHR-149 (Mar. 31, 1999).

5. Grievant has failed to demonstrate by a preponderance of the evidence that Respondent's actions in this case were contrary to law, policy or regulation, or were otherwise unreasonable or arbitrary and capricious.

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 *a/so* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

**Date: April 2, 2018**

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