

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**SONYA BUTCHER,
Grievant,**

v.

Docket No. 2018-1351-DHHR

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

DECISION

Grievant, Sonya Butcher, filed this action on June 18, 2018, against her employer, Department of Health and Human Resources, William R. Sharpe, Jr. Hospital. Her Statement of Grievance states that she was mandated to work over time without over time payment. Grievant seeks to be made whole in every way including back pay with interest. A Level One hearing was held on September 5, 2018, via telephone. A Level One Decision was issued by the Grievance Evaluator on September 25, 2018, denying the grievance.

A Level Two mediation session was conducted on December 4, 2018. An Order of Unsuccessful Mediation was entered on December 11, 2018. Grievant perfected her appeal to Level Three on December 18, 2018. The Grievance Board entered a Notice of Hearing scheduling a Level Three hearing for April 26, 2019. Subsequently, the parties requested that the case be submitted and decided on the lower level record. The undersigned informed the parties that a decision would be made on the record developed below, and gave leave to the parties to supplement with fact/law proposals by March 27,

2019. Grievant appeared 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 is now mature for consideration.

Synopsis

Grievant is employed as a Registered Nurse at the William R. Sharpe, Jr. Hospital. Since Grievant has been working as a Nurse, she has sometimes worked more than forty hours in a workweek. Grievant is then required to take compensatory time for the time she works over her usual hours. Grievant maintains that she is entitled to be paid at least straight-time pay for all hours she has worked in excess of forty hours. Under the Fair Labor Standards Act and applicable policy, Respondent properly compensated Grievant, an exempt employee, for her hours worked during the period in question. Grievant has not shown that Respondent has violated any law, rule, regulation or policy. Therefore, this grievance is denied.

The following Findings of Fact are based upon the lower level record.

Findings of Fact

1. Grievant began working at Sharpe Hospital in 1998 as a Health Service Worker Trainee. Grievant left work at Sharpe Hospital for some period of time, and returned later as a Licensed Practical Nurse. Grievant became a Registered Nurse, and as of September 2, 2017, Grievant became a Nurse Manager with a classification of Nurse 4. Since Grievant has been working as a Nurse 4, she has sometimes worked more than forty hours in a workweek. Grievant maintains that she is entitled to be paid at least straight-time pay for all hours she has worked in excess of forty hours in a workweek.

2. Grievant indicated that she has not been paid for more or less twenty hours total since September of 2017. Grievant felt that she should have been paid overtime for that time. Grievant indicated that the hospital had been short on Registered Nurses and that she was volunteering to cover the shortage. Grievant realized that she had to schedule-adjust and, thereafter, stopped volunteering to come to the hospital when they were short of Registered Nurses.

3. The Fair Labor Standards Act ("FLSA") sets minimum requirements for wage and overtime payments, and prohibits employment for more than a specified number of hours per week without proper overtime compensations. 29 U.S.C. §§ 201-13. Under the FLSA, an employee who works in excess of forty hours in a week must be compensated for each hour worked in excess of forty hours "at a rate not less than one and one-half times the regular rate at which he is employed." *Id.* § 207(a)(1). However, certain employees, including those who are employed in a "bona fide executive, administrative, or professional capacity," are exempt from this overtime compensation requirement. *Id.* At § 213(a)(1).

4. Grievant stipulated during the lower level proceeding that as a Nurse Manager/Nurse 4, Grievant was legitimately classified as an exempt employee.

5. Department of Health and Human Resources Memorandum 2102 provides that for the purposes of Professional Employees, a Learned Professional would qualify for the learned professional employee exemption if all of the following tests are met: 1) the employee must be compensated on a salary or fee basis at a rate not less than \$455 per week; 2) the employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character

and which includes work requiring the consistent exercise of discretion and judgement; 3) the advance knowledge must be in the field of science or learning; and, 4) the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction. Registered Nurses who are registered by the appropriate state examining board generally meet the duties requirement for the learned professional exemption, and if paid on a salary basis of at least \$455 per week, may be classified as exempt. Respondent's Exhibit No. 6.

6. In the Position Description Form completed on September 14, 2017, it indicates that the Important and Essential Duties of the Nurse Manager/Registered Nurse IV position reflect approximately 30% of the time the employee is to "Provide: Discipline to staff as needed (coordinate with HR and Charleston), coverage of the NCC office as needed, monitor attendance and performance monthly, work the unit for coverage as needed, provide a safe environment for patients and staff, assistance to other units when needed, plan for medical and community trips, coordinate with staff, interpreters and families, work on unit to cover for call-ins and to ensure excellence in patient care and safety." Respondent's Exhibit No. 1.

7. In the Functional Job Description signed by Grievant on September 5, 2017, it is stated that the classification for the job held by Grievant is Nurse IV, that her job title is Nurse Manager and that her FLSA status is "Exempt: Work overs may be required of this position per operational needs." Respondent's Exhibit No. 3.

8. The lower level record demonstrates that Grievant was and is a salaried employee. A list of exempt employees at the hospital was prepared for the time period of September 2, 2017 to August 31, 2018. The listed employees received no pay in

excess of forty hours worked in a week during the period listed. Respondent's Exhibit No. 12.

9. In the Interpretive Bulletin of the Fair Labor Standards Act, in the Frequently Asked Questions, it is asked "Must exempt employees who work overtime be paid for that overtime?" And the listed answer is "Exempt employees are not subject to the overtime provisions of the FLSA. Such workers need not be paid overtime. Employers may choose to pay overtime or compensatory time if they wish, but they are not required to do so by the FLSA." Respondent's Exhibit 7.

10. Pursuant to Department of Health and Human Resources Policy Memorandum 2102, when it is necessary for employees to work outside of their assigned hours, they are typically asked to take compensatory time. For example, if an employee is required work over one hour on Monday, the employee would be allowed to take an hour off before the end of the workweek on Friday.

11. Respondent allows Grievant to schedule adjust during weeks in which she has worked more than forty hours before the end of the workweek. For example, if Grievant is scheduled to work Monday through Friday, and at the end of her workday on Thursday, she has already accumulated thirty-eight hours, Respondent may permit Grievant to adjust her schedule to work only two hours on Friday. Grievant confirmed that she has been permitted to schedule adjust on multiple occasions.

12. Grievant failed to provide any evidence that the Department of Health and Human Resources Cabinet Secretary authorized compensation for the hours she worked in excess of forty hours during any workweek.

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 (2018); *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 must prove her claim by a preponderance of the evidence, which means she must provide enough evidence for the undersigned to decide that her claim is more likely than not. From the limited lower level record, Grievant is arguing that she is entitled to be paid at least straight-time pay for more or less twenty hours she has worked in excess of forty hours in a workweek. In essence, Grievant should not be exempt from overtime pay, and Respondent's decision to deny her overtime pay is 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). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Id.* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

The limited record supports a finding, consistent with the lower level decision, that Grievant is an exempt employee, under the Fair Labor Standards Act and the Department of Health and Human Resources Policy Memorandum 2012. In addition, Respondent properly compensated Grievant for her hours worked during the period in question, Grievant's salary compensates her for all her hours of work, and that Grievant has been permitted to schedule adjust. See *Rhodes v. Div. of Corrections*, Docket No. 2009-0014-MAPS (April 23, 2010); *Dewese v. Dep't of Health and Human Resources*, Docket No. 2009-1263-DHHR (April 28, 2010). Respondent is in compliance with the FLSA.¹ While it is understandable that Grievant would rather be paid at time and a half, Respondent is violating no law or policy by having her take compensatory time in the same week that

¹There was no evidence presented concerning the amount of compensatory time Grievant received per hour she worked outside of her regular schedule. Therefore, the undersigned will not discuss whether Respondent is in compliance with the FLSA regarding the appropriate amount of compensatory time given.

she works past her regularly scheduled hours. The record does not support a finding that the action of Respondent was arbitrary and capricious.

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 (2018); *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. With some restrictions, the FLSA permits state agencies to allow employees to take compensatory time in lieu of overtime for time worked over regular business hours.

3. Grievant did not meet her burden of proving that Respondent's policy was contrary to law, rule, regulation or policy.

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 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 (2018).

Date: April 17, 2019

Ronald L. Reece
Administrative Law Judge