THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SAMUEL CUTRIGHT, et al.,[1]

Grievant,

v. **Docket No. 2019-0193-CONS**

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

Respondent.

DECISION

Grievants, employees in various classifications at William R. Sharpe, Jr. Hospital (Sharpe), are employed by Department of Health and Human Resources, Respondent. On August 2, 2018, Grievants filed this grievance against Respondent stating, "Grievance over loss of 16 hour shifts. Mandatory 8 and 12 hour shifts." For relief, Grievants seek, "To be made whole in every way including restoration of shifts."

A level one hearing was held on December 6, 2018, and a decision denying the grievance was issued on January 2, 2019. Grievants appealed to level two on January 7, 2019, and a mediation was held on March 25, 2019. Grievants appealed to level three on April 5, 2019. On August 15, 2019, Respondent filed a motion to dismiss, arguing that the requested relief cannot be granted. On August 19, 2019, Grievants filed a response, arguing that the undersigned has the authority to restore shifts should Grievants prove

[1]Grievants include Samuel Cutright, Beth Star, Terylia Pumphrey, Lois Tenney, Marlin Tenney, Malissa Skinner, Ervin Crim, Jr., Delores McVay, Penny Peters, Gina Stanley, Aaron Ryan, Lorisa Squires, Cynthia Burwell, Brianna Miller, Christy Cooper, Tracy Burger, Sherry Dumas, Linda Carpenter, Jesse DeBarr, Carrie Thomas, Tonya Curtis, Shelly Whitehair, Cher Frashure, Leanna Thompson, Linda Hitt, Geneva Waggy, Emily Stanley, and Becky Crites. The parties stipulated at the level three hearing the withdrawal of the following Grievants: Kimberly Brady, Earl Burrows, James Dozer, Sr., Gerald Hull, and Jordan Watson.

that the discontinuation of sixteen-hour shifts by Respondent was arbitrary and capricious and in contravention of Respondent's own policy. The motion was denied.

A level three hearing was held on September 16, 2019, before the undersigned at the Grievance Board's Westover, West Virginia office. Grievants did not appear in person but by their representative, Gordon Simmons, Steward, UE Local 170, West Virginia Public Workers Union. Respondent appeared through Sharpe CEO, Patrick Ryan, and was represented by, Katherine Campbell, Assistant Attorney General. This matter became mature for decision on October 18, 2019. Each party submitted Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievants are employed by Sharpe Hospital. Sharpe had allowed Grievants to work sixteen-hour shifts in conjunction with its written policy permitting these shifts. In order to reduce employee fatigue and payroll expenses, Sharpe issued a verbal directive prohibiting employees from scheduling sixteen-hour shifts. Grievants contend that Sharpe's directive is improper because its written policy permitting sixteen-hour shifts remains unchanged. Grievants assert that Respondent also failed to follow the Administrative Rule in not submitting the modification of shift hours to the Director of Personnel. Grievants failed to prove that Sharpe's verbal directive violated either its written policy or the Administrative Rule. Accordingly, the grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievants are employed at William R. Sharpe, Jr., Hospital (Sharpe), a psychiatric facility operated by the West Virginia Department of Health and Human Resources (DHHR), Respondent.

2. Sharpe had allowed Grievants and all facility direct care employees to schedule sixteen-hour work shifts in conjunction with its written policy.

3. Sharpe's Nursing Department Staff and Acuity Policy (revised 7.10.15), reference number 03.107, states, in relevant part:

> Staff that wish to be scheduled for 16 or 12 hour shifts will be scheduled to meet the needs of the unit. Staff requesting 16 or 12 hour shifts will be asked to sign and follow the "Department of Nursing Services Extended hour work agreement) (sic) (see attached).
>
> (Respondent's Exhibit 2)

4. The "Department of Nursing Services Extended Hour Work Agreement" states, in relevant part:

> 1. **ALL SCHEDULING IS DONE BASED ON THE NEEDS OF THE HOSPITAL, AS DETERMINED BY THE NURSING DEPARTMENT.**
>
> 2. I understand that being scheduled extended shifts is a privilege, not a right, and as such may be terminated with or without notice based on the needs of the Nursing Department.
>
> (Respondent's Exhibit 2)

5. Sharpe issued a verbal directive (at an unknown date) prohibiting employees from scheduling sixteen-hour shifts but did not change its written policy which allowed sixteen-hour shifts.

6. Sharpe allowed itself an emergency exception to this verbal directive, permitting it to schedule sixteen-hour shifts to fill staffing shortages.

7. Sharpe has a high number of call-offs and must therefore mandate employees fill in past their shifts.

8. When employees work sixteen-hour shifts, Sharpe cannot mandate they work over shift due to fatigue.

9. Sharpe justified its verbal directive using the safety recommendations of the American Nursing Association linking worker fatigue to sixteen-hour shifts and through the cost savings derived from utilizing employees already on shift to fill in for call-offs. (Testimony of Sharpe CEO Pat Ryan)

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993), ***aff'd***, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

Grievants contend that Respondent must follow its written policy allowing sixteen-hour shifts until it properly modifies the policy in writing. Respondent counters that it has discretion under its written policy, the Administrative Rule, and caselaw to verbally prohibit sixteen-hour shifts. Respondent justifies this verbal directive through the cost savings gained in using employees already on shift to fill in for call-offs and through the safety

recommendations of the American Nursing Association linking worker fatigue to sixteen-hour shifts. Grievants counter that Respondent's prohibition is arbitrary and capricious because Respondent allows itself an exception to fill staffing shortages. Further, Grievants contend that Respondent failed to follow the Administrative Rule of the West Virginia Division of Personnel (Administrative Rule) because it never submitted the modification in employee work schedule to the Director of Personnel.

"A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with the employee's effective job performance or health and safety." *Ball v. Dep't of Transportation/Division of Highways and Division of Personnel*, Docket No. 96-DOH-141 (July 31, 1997). Grievants argue that sixteen-hour shifts are necessary to provide them the time to pursue higher education. They failed, however, to show that Respondent's directive prohibiting these shifts interfered with their work performance or affected their health and safety.

Sharpe's actions are also governed by its internal policy and the Administrative Rule. Sharpe's pertinent internal policy is the Nursing Department Staff and Acuity Policy (revised 7.10.15), reference number 03.107. This policy states, in relevant part: "Staff that wish to be scheduled for 16 or 12 hour shifts will be scheduled to meet the needs of the unit. Staff requesting 16 or 12 hour shifts will be asked to sign and follow the 'Department of Nursing Services Extended hour work agreement) (sic) (see attached)." The "Department of Nursing Services Extended Hour Work Agreement" states, in relevant part: "1. ALL SCHEDULING IS DONE BASED ON THE NEEDS OF THE HOSPITAL, AS DETERMINED BY THE NURSING DEPARTMENT. 2. I understand that being

scheduled extended shifts is a privilege, not a right, and as such may be terminated with or without notice based on the needs of the Nursing Department."

Nothing in this internal policy gives employees an unfettered right to work sixteen-hour shifts. Rather, the policy allows Sharpe to terminate extended shifts without notice based on need. "The Grievance Board does not have authority to substitute its judgment for agency management in such matters as determining the work schedule for employees assigned to a particular department. *See Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997) (*per curiam*); *Board v. Dep't of Health and Human Resources/Lakin Hospital*, Docket No. 99-HHR-329 (Feb. 2, 2000)." *Rodeheaver v. Dep't of Health and Human Res*., Docket No. 00-HHR-312 (July 31, 2001). Sharpe justifies its prohibition of sixteen-hour shifts on the cost savings incurred in being able to utilize employees to work over shift as fill ins for call-offs and in the increased safety from less fatigued employees. "Such management decisions are evaluated pursuant to the arbitrary and capricious standard." *Miller v. Dep't of Health and Human Resources/Welch Community Hospital*, Docket No. 07-HHR-077 (Apr. 30, 2008). 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)). Sharpe made a well-reasoned showing of need for its prohibition of sixteen-hour shifts and its emergency exception thereto. The undersigned will therefore not second guess Respondent's managerial judgment.

Each party also cites the Administrative Rule in support of their position. Grievants assert that Sharpe must submit any changes in work schedules to the Director of

Personnel at the Division of Personnel.[2] Respondent asserts that Sharpe has much leeway in determining work schedules to ensure the efficient operation of the facility. The Administrative Rule, states, in relevant part:

> Agency Work Schedules. – Each appointing authority shall establish the work schedule for the employees of his or her agency. The work schedule shall specify the number of hours of actual attendance on duty for full-time employees during a workweek, the day and time the workweek begins and ends, and the time that each work shift begins and ends. The work schedule may include any work shifts the appointing authority determines to be appropriate for the efficient operation of the agency, including work shifts comprising work days of more than eight (8) hours and/or weeks of less than five (5) days. The work schedules and changes must be submitted to the Director within fifteen (15) days after employees commence work under the schedule.

W. VA. CODE ST. R. § 143-14.2 (2016).

While Grievants accurately point out that the Administrative Rule mandates submission of schedules to the Director, Grievants did not present any evidence showing that Sharpe failed to submit new work schedules to the Director.[3] They thus failed to prove that Respondent violated the Administrative Rule.

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. W. VA. CODE ST. R. § 156-1-3 (2018). "The preponderance standard generally requires proof that a

[2]The Administrative Rule defines "Director" as "The Director of Personnel, as provided in W.Va. Code § 29-6-7 and § 29-6-9, who serves as the executive head of the Division of Personnel, or his or her designee." W. VA. CODE ST. R. § 143-14.2 (2016).
[3]Further, nothing in the Administrative Rule requires that the Director approve the work schedules in order for an agency to implement them.

reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993), ***aff'd***, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

2. "A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with the employee's effective job performance or health and safety." *Ball v. Dep't of Transportation/Division of Highways and Division of Personnel*, Docket No. 96-DOH-141 (July 31, 1997).

3. Sharpe's actions are governed by the Administrative Rule, which states, in relevant part:

> Agency Work Schedules. – Each appointing authority shall establish the work schedule for the employees of his or her agency. The work schedule shall specify the number of hours of actual attendance on duty for full-time employees during a workweek, the day and time the workweek begins and ends, and the time that each work shift begins and ends. The work schedule may include any work shifts the appointing authority determines to be appropriate for the efficient operation of the agency, including work shifts comprising work days of more than eight (8) hours and/or weeks of less than five (5) days. The work schedules and changes must be submitted to the Director within fifteen (15) days after employees commence work under the schedule.
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> W. VA. CODE ST. R. § 143-14.2 (2016).

4. "The Grievance Board does not have authority to substitute its judgment for agency management in such matters as determining the work schedule for employees assigned to a particular department. *See Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997) (*per curiam*); *Board v. Dep t of Health and Human Resources/Lakin Hospital*,

Docket No. 99-HHR-329 (Feb. 2, 2000)." *Rodeheaver v. Dep't of Health and Human Res*., Docket No. 00-HHR-312 (July 31, 2001). "Such management decisions are evaluated pursuant to the arbitrary and capricious standard." *Miller v. Dep't of Health and Human Resources/Welch Community Hospital*, Docket No. 07-HHR-077 (Apr. 30, 2008).

5. 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)). "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 Res*., Docket No. 93-HHR-322 (June 27, 1997), ***aff'd*** Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998).

6. "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of [the employer]." *Trimboli v. Dep't of Health and Human Res*., Docket No. 93-HHR-322 (June 27, 1997), ***aff'd*** Mercer Cnty. Cir. Ct. Docket No. 97-CV-374-K (Oct. 16, 1998); *Blake v. Kanawha County Bd. of Educ*., Docket No. 01-20-470 (Oct. 29, 2001), ***aff'd*** Kanawha Cnty. Cir. Ct. Docket No. 01-AA-161 (July 2, 2002), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 022387 (Apr. 10, 2003).

7. Grievants did not prove by a preponderance of the evidence that Respondent's verbal directive prohibiting them from scheduling sixteen-hour shifts was arbitrary and capricious or violative of any rule, policy, or statute.

Accordingly, 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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: November 22, 2019

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Joshua S. Fraenkel
Administrative Law Judge