

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**BARBARA KEESLER, et al.,
Grievants,**

v.

Docket No. 2017-2465-CONS

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

DECISION

Grievants, Barbara Keesler, Charles Ross, Doug Kraus and Harold Lovett filed this grievance on June 19, 2017, asserting that shift schedules changed in such a way as to deprive them of one hour of shift differential pay per shift. The relief sought was to be made whole in every way including restoration of original shift and/or lost pay plus back pay with interest. On July 24, 2017, the Respondent's Grievance Management Unit issued a Level One Dismissal Order. A Level Two mediation session was conducted on October 18, 2017. The matter was placed in abeyance to allow time for settlement negotiations. A Level Three evidentiary hearing was conducted before the undersigned on August 12, 2019, at the Grievance Board's Westover office. Grievants appeared in person and by their 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 became mature for consideration upon receipt of the last of the parties' fact/law proposals on September 25, 2019.

Synopsis

The Enterprise Resource Planning Board changed the workweek for all state employees effective January 1, 2016, to begin on Saturday morning at 12:00 a.m. Previously, the workweek began on Sunday morning at 12:00 a.m. This change resulted in Grievants losing one hour of shift differential pay per shift. Respondent was not responsible for the change in the Grievants' schedule, nor did it have authority to refuse to implement the change put in place by the State's new timekeeping and payroll system. Grievants understandably did not like the loss of their shift differential pay due to the change in their work schedules; however, the undersigned does not have the authority to change the Enterprise Resource Planning Board's or Respondent's policies, absent some violation of statute, rule, regulation, or policy.

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

Findings of Fact

1. Grievants are employed at the William R. Sharpe, Jr. Hospital, and are direct care staff at the Transitional Living Facility.
2. Barbara Keesler is employed at the facility as a Licensed Practical Nurse. Ms. Keesler and the other Grievants worked 11 p.m. to 7 a.m. shifts which were changed to 12 a.m. to 8 a.m. shifts.
3. The Enterprise Resource Planning Board is comprised of the Governor, the State Auditor, and the State Treasurer, and a 16-member steering committee. See, *WVOASIS website, Frequently Asked Questions*.

4. None of the Grievants are employed by the Enterprise Resource Planning Board, the West Virginia Governor's Office, the West Virginia State Auditor's Office, or the West Virginia State Treasurer's Office.

5. The Governor, the West Virginia State Auditor and the West Virginia State Treasurer are Constitutional Officers.

6. The State of West Virginia has changed its payroll system to a system referred to as OASIS. With this change, the workweek has been set for all state employees by the Enterprise Resource Planning Board to begin on Saturday morning at 12:00 a.m., and end on Friday at 11:59 p.m., effective January 1, 2016. Prior to this change the workweek was from Sunday morning at 12:00 a.m. to Saturday at 11:59 p.m.

7. Respondent notified the Division of Personnel that it had standardized its workweeks into one workweek that runs from Saturday at 12:00 a.m. through Friday at 11:59 p.m. to be in compliance with wvOasis and the change to one standardized workweek.

8. Respondent initially implemented a shift differential policy for its Bureau for Behavioral Health and Health Facilities on December 19, 2002.

9. Ms. Keesler, for the past few years, was assigned to work the night shift at the Transitional Living Facility, which was scheduled from 11:00 p.m. until 7:00 a.m. Ms. Keesler, while working night shift, received differential pay.

10. Respondent changed its workweek to one that began at 12:00 a.m. Saturdays through 11:59 p.m. Fridays in order to comply with the KRONOS/wvOasis payroll program.

11. With the shift changes, Ms. Keesler's night shift was altered to 12-8 a.m. each day, and she was no longer paid the one hour shift differential.

12. Respondent makes shift assignments based on the needs of the facility, the level of care and the use of a staffing matrix. Facility Administrators determine the needs of the facility and the patients for the purpose of setting shifts at the hospital. Shifts are based on the best interests of the facility and the patients.

13. Grievants claim that Respondent improperly changed their schedules which caused them to lose one hour of shift differential pay per shift.

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 Bd. 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).

Grievants asserted at the evidentiary hearing that the workweek was changed in order to avoid paying them one hour of shift differential pay per shift. Respondent pointed

out, at the hearing and in a pre-hearing motion, that the change in the day the workweek begins was not a decision made by Respondent, but rather, the decision was made by the Enterprise Resource Planning Board. In addition, the undersigned does not have authority to order Respondent to make discretionary change in its policy or to substitute his management philosophy for the management of the facility.

Respondent was not responsible for the change in the workweek, nor do they have the authority to not implement the change put in place by the Enterprise Resource Planning Board. An employee may only file a grievance against his or her employer. WEST VIRGINIA CODE § 6C-2-2(g) defines “employer” for the purposes of the grievance procedure, as follows:

[A] state agency, department, board, commission, college, university, institution, State Board of Education, Department of Education, county board of education, regional educational service agency or multicounty vocational center, or agent thereof, **using the services of an employee** as defined in this section. (Emphasis added.)

In turn, the same statute, in subsection (e)(1), defines “[e]mployee” as “any person hired for permanent employment by an employer for a probationary, full- or part-time position.” A “Grievance” is “a claim by an employee.” W. VA. CODE § 6C-2-2(i). Only an employee may file a grievance. W. VA. CODE § 6C-2-2(a)(1). As established by statute, any matter in which authority to act is not vested with the state department, board, commission, or agency utilizing the services of the grievant is not grievable. *Rainey v. Div. of Motor Vehicles*, Docket No. 2008-0278-DOT (Mar. 11, 2008).

The Public Employees Grievance Board is an administrative agency, established by the Legislature, to allow a public *employee* and his or her *employer* to reach solutions to problems which arise within the scope of their employment relationship. W. VA. CODE

§ 6C-2-1(a); *See Farley v. Morgan County Bd. of Educ.*, Docket No. 01-32-615D (April 30, 2002). "An administrative agency is but a creature of statute, and has no greater authority than conferred under the governing statutes." *Monongahela Power Co. v. Chief, Office of Water Res., Div. of Env'tl. Prot.*, 211 W.Va. 619, 567 S.E.2d 629, 637 (2002)(citing *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 16, 483 S.E.2d 12, 16 (1996)). Consequently, the jurisdiction of the Public Employees Grievance Board is limited to the grant of authority provided in WEST VIRGINIA CODE §§ 6C-2-1, *et seq.* The grievance procedure is only available to the grievant to challenge the actions taken by his employer. *Posey v. W. Va. Univ.*, Docket No. 2009-0745-WVU (Apr. 10, 2009); *Narkevic v. Div. of Corr. and Dep't of Health & Human Res.*, Docket No. 2009-0846-MAPS (Apr. 29, 2009).

Since none of the Grievants is an employee of the Enterprise Resource Planning Board, the Office of the Governor, the Office of the Treasurer or the Office of the Auditor, and Grievants' employer is not vested with the authority to change Grievants' workweek, to the extent this grievance challenges the change in the workweek, the Grievance Board does not have jurisdiction to adjudicate this dispute. *Price, et al., v. Dep't of Health and Human Res., et al.*, Docket No. 2016-0653-CONS (Aug. 16, 2016); *Thompson v. Div. of Corr.*, Docket No. 2014-0386-MAPS (Dec. 3, 2014); *Monroe v. Dep't of Admin./Real Estate Div. and Legislative Servs./Employee Suggestion Award Bd.*, Docket No. 2012-0873-DOA (May 14, 2012); *Clutter v. Dep't of Agric.*, Docket No. 2009-1372-AGR (May 28, 2009); *Rainey, supra*.

Grievants understandably do not like Respondent's new work schedule. However, the undersigned has no authority to change Respondent's policies or practices, absent some violation of a statute, rule, regulation, or policy, nor does the undersigned have the

authority to set Grievants' weekly work schedules. Grievants did not demonstrate that Respondent has violated any statute, rule, regulation or policy. See *Harper, et al. v. Div. of Corr.*, Docket No. 2016-1113-CONS (Feb. 1, 2017).

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 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 undersigned has no authority to require an agency to adopt a policy or to make a specific change in a policy, absent some law, rule or regulation which mandates such a policy be developed or changed. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997); *Olson v. Bd. of Trustees*, Docket No. 99-BOT-513 (Apr. 5, 2000); *Gary and Gillespie v. Dep't of Health and Human Resources*, Docket No. 97-HHR-461 (June 9, 1999)." *Frame v. Dep't of Health and Human Res.*, Docket No. 00-HHR-240/330 (April 20, 2001).

3. Grievants failed to meet their burden of proof and demonstrate that Respondent has violated any statute, rule, regulation or policy.

4. The record established that Respondent's workweek was set by the Enterprise Resource Planning Board, and that the shifts were set due to managerial discretion based upon the needs of the facility and the patients.

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 (eff. July 7, 2018).

Date: November 4, 2019

Ronald L. Reece
Administrative Law Judge