

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

**NOLA LILLY, et al.,
Grievants,**

v.

Docket No. 2018-0951-DHHR

**DEPARTMENT OF HEALTH AND HUMAN RESOURCES/
JACKIE WITHROW HOSPITAL,
Respondent.**

DECISION

Grievants, Penney Burleson, Tuana E. Clark, Robin Guill, Nola Lilly, Carleys McKinney, Danny Summers, Virginia Lynn Welch, and Dennis Ray Workman are employed by Respondent, Department of Health and Human Resources at Jackie Withrow Hospital. On February 8, 2018, Grievants filed this grievance against Respondent stating, "Shift changes and loss of one hour in work schedule." For relief, Grievants seek "[t]o be made whole in every way including back pay with interest and correction of schedule going forward."

Following the March 28, 2018 level one hearing, a level one decision was rendered on April 11, 2018, denying the grievance. Grievant appealed to level two on April 18, 2018. Following mediation, Grievant appealed to level three of the grievance process on August 18, 2018. A level three hearing was held on August 5, 2019, before the undersigned at the office of the Raleigh County Commission on Aging in Beckley, West Virginia. Grievants appeared by Nola Lilly and were represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its Chief Executive Officer, Angela Booker, and was represented by counsel, Mindy M. Parsley, Assistant Attorney General. This matter became mature for decision on September 13, 2019, upon final receipt of the parties' written Proposed Findings of Fact

and Conclusions of Law after Grievant's request for an extension of time to file was granted without objection by Respondent.

Synopsis

Grievants are employed by Respondent, Department of Health and Human Resources within the Bureau for Behavioral Health and Health Facilities at Jackie Withrow Hospital. Grievants protest Respondent's decision to change the hospital's work shifts alleging the decision to be arbitrary and capricious and discriminatory. Respondent asserts it was within its discretion to change the shifts and it violated no law or rule in doing so. Grievants failed to prove Respondent's decision to change its work shifts was arbitrary and capricious or discriminatory. 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 by Respondent, Department of Health and Human Resources within the Bureau for Behavioral Health and Health Facilities at Jackie Withrow Hospital.

2. Historically, Jackie Withrow Hospital shifts were as follows: day from 7:00 a.m. to 3:00 p.m., evening from 3:00 p.m. to 11:00 p.m., and night from 11:00 p.m. to 7:00 a.m.

3. Per the Bureau for Behavioral Health and Health Facilities *Shift Differential/Holiday Pay* policy, a shift differential of \$1.00 per hour is paid to employees who work during certain hours to compensate them for less convenient hours of work

and to attract qualified candidates to those schedules. The policy states, in relevant part, "A shift beginning at 3:00 p.m. or later is eligible for shift differential. Shift Differential will end at 7 a.m."

4. On an unspecified date, Jackie Withrow Hospital converted to the KRONOS pay system as mandated by the State of West Virginia. Under this system, the workweek for all State agencies is standardized to Saturday at 12:00 a.m. through Friday at 11:59 p.m.

5. The new system created difficulties in accounting for hours worked and holiday time for night shift workers because their shift includes one hour on one date and seven hours on the next date.

6. After meeting with employees, Jackie Withrow Hospital Chief Executive Officer Angela Booker decided the best solution for the difficulties was to change the hospital's shifts.

7. Effective February 17, 2018, after a more than thirty-day notice to employees, Jackie Withrow Hospital shifts changed to the following: day from 8:00 a.m. to 4:00 p.m., evening from 4:00 p.m. to 12:00 p.m., and night from 12:00 p.m. to 8:00 a.m.

8. As a result of this change, night shift workers lost one hour pay differential per shift.

9. Other State hospitals still have employees who work an 11:00 p.m. to 6:59 a.m. shift.

10. Respondent contacted the Division of Personnel regarding any requirement to notify the Division of Personnel of the change in Jackie Withrow

Hospital's work shifts and received an opinion from Deputy Director Joe F. Thomas on March 29, 2018, that Respondent was not required to notify the Division of Personnel of the change.

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 assert that the decision to change the shifts was both arbitrary and capricious and discriminatory. Grievants assert that the change to the KRONOS system did not require the shift change and that other hospitals did not change their shifts upon adoption of the KRONOS system. Additionally, Grievants argue that the change was improper because Respondent did not submit notice of the change to the Division of Personnel. Respondent asserts the shift changes were within its discretion and that it was not required to provide notice of the shift changes to the Division 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 Transp.*, Docket No. 96-DOH-141

(July 31, 1997). “Management decisions are to be judged by the arbitrary and capricious standard.” *Adams v. Reg’l Jail and Corr. Facility Auth.*, Docket No. 06-RJA-147 (Sept. 29, 2006).

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, 614, 474 S.E.2d 534, 544 (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). “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 Resources*, Docket No. 93-HHR-322 (June 27, 1997); *Blake v. Kanawha County Bd. of Educ.*, Docket No. 01-20-470 (Oct. 29, 2001).

The West Virginia Supreme Court of Appeals’ opinion in *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997) is instructive. In *Skaff*, firefighters were placed under the authority of a new agency that implemented significant changes in their work schedules. Firefighters’ shifts were changed, they were no longer eligible for paid time

off, and they were no longer permitted to trade shifts with each other in order to arrange for time off when otherwise scheduled for work. The Grievance Board ordered the employer to adopt a shift-trading policy and the Circuit Court affirmed. In reversing, the Court explained as follows:

We find that the grievance board does not have jurisdiction to order the appellant to implement shift trading policies. The jurisdiction of the Education and State Employees Grievance Board is limited to the resolution of grievances as defined by W.Va. Code § 29-6A-2(i) (1988) and W.Va. Code § 18-29-2(a) (1992) so that its "authority extends only to resolving grievances made cognizable by its authorizing legislation." *Vest v. Bd. of Educ.*, 193 W.Va. 222, 225, 455 S.E.2d 781, 784 (1995). The grievance board simply does not have the authority to second guess a state employer's employment policy. The grievance board's discussion of this issue in its final decision and the appellees' brief to this Court fail to cite any rule or regulation that mandates that the appellant adopt a shift trading policy. In the absence of such, the grievance board has no jurisdiction to order the appellant to adopt a shift trading policy, and it exceeded its statutory authority when it did so. This Court agrees with the grievance board that the adoption of a shift trading policy would probably be a good idea. However, as asserted by the appellant, the grievance board, the circuit court and this Court simply do not have the authority to substitute our management philosophy for that of the appellant in this instance.

Skaff v. Pridemore, 200 W. Va. 700, 709, 490 S.E.2d 787, 796 (1997).

Grievants cite no rule or regulation that requires Respondent to maintain particular work shifts. The only regulation Grievants allege has been violated is the Division of Personnel's administrative rule, which states as follows:

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 that 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 work 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. § 143-1-14.2 (2016).

In fact, this rule supports Respondent's authority to change the shifts as it sees fit as it vests the authority to establish work schedules with the appointing authority - not the Division of Personnel - and specifically states that "[t]he work schedule may include *any* work shifts the appointing authority determines to be appropriate for the efficient operation of the agency. . . ." (emphasis added). The appointing authority is only required to notify the Division of Personnel upon making a change, not to seek approval for the change. Although the rule clearly requires the work schedule to include "the time that each work shift begins and ends" and that the appointing authority notify the Division of Personnel of the work schedules, Respondent reasonably relied on the opinion of Division of Personnel administration that told them they were not required to notify the Division of Personnel of the change. Regardless, as the rule does not require the approval of the Division of Personnel for work schedule changes, failure to notify the Division of Personnel does not invalidate the decision to change the shifts.

Although Grievants disagree with it, Respondent's decision to change the shifts was not unreasonable or without consideration. The implementation of the KRONOS system caused complications with payroll due to the night shift starting on one date and ending on the next. To simplify their processes, Respondent decided to change the shifts so this would not occur. This is reasonable. That other hospitals made a different decision does not invalidate Respondent's decision.

Grievants also failed to prove the change in the shifts was discriminatory. “‘Discrimination’ means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees.” W. VA. CODE § 6C-2-2(d). Grievants assert the shift changes were discriminatory because other hospitals did not change their shifts. Grievants are not similarly situated to employees working in another hospital.

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 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 Transp.*, Docket No. 96-DOH-141 (July 31, 1997). “Management decisions are to be judged by the arbitrary and capricious standard.” *Adams v. Reg’l Jail and Corr. Facility Auth.*, Docket No. 06-RJA-147 (Sept. 29, 2006).

3. “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 that 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 work 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. § 143-1-14.2 (2016).

4. “‘Discrimination’ means any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees.” W. VA. CODE § 6C-2-2(d).

5. Grievants failed to prove Respondent’s decision to change its work shifts was arbitrary and capricious or discriminatory.

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: October 25, 2019

Billie Thacker Catlett
Chief Administrative Law Judge