

DAVID J. GRIFFIN,

Grievant,

v.

Docket No. 00-HHR-260

DEPARTMENT OF HEALTH & HUMAN RESOURCES/

BUREAU FOR CHILD SUPPORT ENFORCEMENT,

Respondent.

DECISION

David J. Griffin, employed by the Department of Health and Human Resources as a Child Advocate Team Leader in the Bureau for Child Support Enforcement (BCSE or Respondent), complains that his request to use flex-time two and one-half hours per week was improperly denied. The parties agreed to waive consideration at level one. Director of Field Operations Larry LeFevre denied the grievance at level two, noting that Grievant's requested schedule amendment would not be considered flex-time as defined by policy. He further stated that the request would be denied under the Adjusted Work Week Policy, which was to be used to adjust time when a worker travels, works over, etc., in lieu of overtime compensation. Mr. LeFevre noted that even if the request should properly be considered under either policy, flex-time is a privilege, not a right. Since Grievant's primary responsibility is to be available to the staff he supervises, and his request would result in his not being available on a regular basis, the request would be denied.

Following an evidentiary hearing, the grievance was denied at level three, and was advanced to level four on August 7, 2000. A hearing to supplement the record was conducted in the Grievance Board's Wheeling office on October 3, 2000, at which time Grievant represented himself, and BCSE was represented by Anthony D. Eates II, Assistant Attorney General. Both parties waived the opportunity to file proposed findings of fact and conclusions of law, and the matter became mature for decision at the conclusion of the hearing.

The essential facts of this matter are undisputed and are set forth as the following formal findings of fact.

Findings of Fact

1. Grievant held the position of Child Advocate Team Leader for the Bureau for Child Support

Enforcement at all times pertinent to this decision.

2. By memorandum dated December 10, 1999, and sent by e-mail to Sarah Montello, Regional Manager, Grievant requested that his work schedule be changed from 8:30 a.m. to 4:30 p.m., Monday through Friday (regular office hours), to 8:00 a.m. to 4:30 p.m. Monday, Wednesday, Thursday, and Friday, and from 8:00 to 2:00 on Tuesday. The reason given for the request was to provide child care for his three children since his spouse had returned to work.

3. Ms. Montello denied the request, stating that Team Leaders need to be available for work during regular office hours, and it is not good management practice to permit a line supervisor to be out of the office every week for 2.5 hours.

4. Grievant requested, and was granted, annual leave on Tuesdays, from 2:00 p.m. to 4:30 p.m. from January through May, 2000. [\(See footnote 1\)](#)

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); W. Va. Code §29-6A- 6; Howell v. W. Va. Dept. of Health & Human Resources, Docket No.89-DHS-72 (Nov. 29, 1990). A preponderance of the evidence is defined as "evidence which is 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." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Heath & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

Grievant argues that flex-time is a benefit provided by DHHR Policy Memorandum 2102, which states that a request for such time "will be granted . . . based upon the guidelines expressed in this document." Although he opines that Policy 2102 superceded a February 24, 1992, memorandum issued by the Director of the Child Advocate Office, which addressed flex-time, Grievant asserts that his request falls within the time schedule set forth in that document. Grievant notes that there is not always a supervisor present in the office, for example, when annual or sick leave is being used, and suggests that it was inconsistent to allow him to use annual leave, since either way he is out of the office. Addressing the Grievance Board's decision in the matter of Tracewell v. West Virginia Division of Human Services, Docket No. 91-DHS-022 (Apr. 30, 1991), Grievant argued that his situation is

distinguishable, and that Ms. Tracewell's request for flex-time was appropriately denied because she was a Reception Social Worker who necessarily provided services during regular working hours.

Respondent also relies upon the Policy 2102, "Guidelines for Flextime Policy", Section A (1), which provides: Flextime requests will be granted at the discretion of the Director, Administrator, Manager or their designee, based upon the guidelines expressed in this document. If such requests create scheduling problems or interfere with the workload commitments of the unit, the requests may be denied.

Respondent does not concede that the 1992 memorandum was superceded by Policy 2102. The earlier document provided that flex-time could be used between the hours of 7:30 to 5:00 as follows:

7:30 - 3:30

8:00 - 4:00

8:30 - 4:30

9:00 - 5:00

Respondent asserts that Grievant's request does not fall within any of the options provided by the memorandum.

Noting that flex-time is to be implemented for the benefit of the agency, to increase productivity and better customer service, Respondent continues to assert that it is not an entitlement, and that the long-term practice has been to not grant flex-time to supervisory personnel. Contrary to Grievant's interpretation of Tracewell, Respondent states that as a Team Leader, Grievant is a "key person" whose presence is required during regular business hours. Finally, Respondent denies that it acted inconsistently by allowing Grievant to use annual leave on Tuesdays for a period of time, because any request for annual leave may be denied, and it did not create a situation in which Grievant was out of the office on a regular basis.

Grievant's reading of Policy 2102 is erroneous because it is based upon only a portion of the applicable section. A policy must be read and applied in its entirety, and Policy 2102 unequivocally states that flex-time is not suitable for all jobs, and may be denied within the discretion of the administrator. As a Team Leader, Respondent's determination that Grievant is a key person who must be present during regular business hours is not unreasonable. While it is accurate that there

may be no team leader present at all times due to annual or sick leave, these occurrences are random or brief in duration, unlike a weekly scheduled absence.

An employer's right to deny a requested flex-time has been upheld not only in Tracewell, supra, but also in Keys v. Division of Environmental Protection/Office of Mining and Reclamation, Docket No.97-DEP-425 (Apr. 7, 1998), in which "the efficient and effective operation of the Work Unit [was] the primary consideration." In Headley v. Board of Trustees/West Virginia University, Docket No. 98-BOT-015 (June 15, 1998), the employer operated under a statutory mandate to consider flexibility in employee scheduling; however, a denial of flex-time was upheld based upon the operational needs of the institution. Although Grievant's situation regarding child care is understandable, and shared by many individuals, Respondent's decision to deny his request for an amended work schedule has not been shown to have been improper in any respect.

In addition to the foregoing findings of fact and narration, the following conclusions of law are appropriate.

Conclusions of Law

1. Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); W. Va. Code §29-6A-6; Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990).
2. Respondent's Policy 2102 does not create an entitlement to flex-time, which is awarded within the discretion of the administrator.
3. Grievant failed to prove by a preponderance of the evidence that Respondent's determination that his presence as a team leader is necessary during regular business hours was contrary to policy, or was otherwise incorrect.

Accordingly, the grievance is **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7 (1998). Neither the West Virginia Education and State 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 §29- 5A-4(b) to serve a copy of the appeal petition upon

the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: October 16, 2000 _____

Sue Keller

Senior Administrative Law Judge

[Footnote: 1](#)

Grievant stated that he has employed child care since May.