THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

GLENNA K. THORNQUEST,
Grievant,

v. **Docket No. 2009-1070-DHHR**

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/PINECREST HOSPITAL,
Respondent.

DECISION

Grievant Glenna K. Thornquest filed this grievance on February 23, 2009, against her employer, Pinecrest Hospital/Department of Health and Human Resources, alleging that "I filed a grievance and we were having a conference to try and releive [sic] this matter February 3 at 1:00 pm 2009, at Pinecrest Hospital, to my understanding I was scheduled off and was supposed to get paid for being here for this." Grievant's relief sought states that, "I Glenna Thornquest am wanting to be paid for the time I was here Feb. 3 2009 which was 1.25 for grievance conference if this is in rules to be paid to me, rules are allowed up to 4 hrs for grievance."

This grievance was denied at level one by decision of Respondent's designee dated April 9, 2009. A level two mediation session was conducted on August 12, 2009. Appeal to level three was perfected on September 8, 2009. The parties made a joint request on February 23, 2010, that the grievance be submitted on the level one record, with leave to file proposed findings of fact and conclusions of law. This request was granted and an April 5, 2010, cut off for proposals was established. This grievance became mature for consideration upon receipt of the last of the parties' proposals on April 6, 2010. Grievant

was represented by Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent was represented by Jennifer K. Akers, Esquire, Assistant Attorney General. This grievance was reassigned to the undersigned Administrative Law Judge on July 28, 2010, for administrative reasons.

Synopsis

Grievant challenges Respondent's disapproval of her request to be paid for the time she spent at a level one grievance conference related to a previous grievance. Grievant argues that in order to accommodate the work schedules of parties and to hold level one hearings and conferences in a timely fashion, a fair and expedient solution would be to pay all employees for any and all time spent participating in a hearing or conference. Respondent's policy makes clear that grievance hearings scheduled outside the employee's normal scheduled work hours are not compensable work time. The proceeding was scheduled by Respondent's level one designee during regular business hours. In addition, Grievant suffered no loss of pay to attend her conference. Accordingly, this grievance is denied.

The following findings of fact are based upon the record developed at level one.

Findings of Fact

1. Grievant is employed as a cook at Jackie Withrow Hospital, formerly Pinecrest Hospital, by the Department of Health and Human Resources.

2. This grievance arises out of a level one conference that was conducted on February 3, 2009, on a previous grievance.

3. Grievant appeared at the conference with her representative as scheduled. Subsequently, Grievant requested to be compensated for the time spent at the conference. Grievant was informed that she would not be compensated for the time spent in her grievance conference because she was not scheduled to work on that day. Grievant's work hours for that pay period were from noon to eight p.m.

4. The conference was scheduled during regular work hours and Grievant suffered no loss of pay.

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 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).

This grievance arises out of a level one grievance conference that was conducted on February 3, 2009. Grievant was off work on that day, but appeared at the conference with her representative as scheduled. Grievant was subsequently informed that she would not be compensated for the time spent in the grievance conference. Grievant then initiated the present action.

Grievant argues the contract principle of *mutatis mutandis* in light of the statutory changes in 2007 which she characterizes as "intended to expand the grievance rights of public employees, as well as enhance the fairness of the grievance procedure."[1] Specifically, Grievant suggests that the most fair and expedient solution would be to pay any and all employees for any and all time spent participating in a hearing. While this must certainly sound good to the rank and file, it is not supported by the very same statutory provisions relied upon.

Respondent's Policy Memorandum 2110 governs hours of work and overtime. Section Z of this policy is entitled "Adjusting Grievances" and provides that:

> Time spent by employees in adjusting grievances between the employer and the employee during the time the employee is required to be in grievance conferences and hearings is hours worked. However, where grievance hearings are scheduled outside the employee/grievant's normal scheduled work hours, the time is not compensable worktime [sic].

WEST VIRGINIA CODE § 6C-2-3(o) states, in pertinent part, that "all proceedings shall be scheduled during regular work hours in a convenient location accessible to all parties." Respondent's Policy Memorandum 2102 defines business hours as 8:30 a.m. through 5:00 p.m., Monday through Friday. Additionally, WEST VIRGINIA CODE § 6C-2-3(p)(1) provides that "the grievant, witnesses, and an employee representive shall be granted reasonable and necessary time off during the working hours to attend grievance proceedings without loss of pay and without charge to annual or compensatory leave credits."

An agency's 'interpretation of the provisions in its own internal policy is entitled to some deference by this Grievance Board, unless it is contrary to the plain meaning of the

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[1]Grievant's Proposed Findings of Fact and Conclusions of Law, page 5.

language, or is inherently unreasonable.' *Dyer, et al., v. Lincoln County Bd. of Educ.*, Docket No. 95-22-494 (June 28, 1996) (citations omitted)." *Frame, et al., v. Dep't of Health and Human Res.*, Docket No. 00-HHR-240/330 (April 20, 2001). The quoted provision of the cited Policy 2101 requires little to no interpretation in that the language of the policy follows the statutory citations above concerning scheduling and attendance of grievance proceedings without loss of pay, and Respondent's interpretation is entitled to deference.

Grievant's contention that Respondent must pay her for the 1.25 hours claimed on her pay request form for the first week of February 2009 is not in keeping with any applicable law; nor did Grievant show that Respondent somehow abused its discretion by not compensating her for attendance at the level one conference. Grievant's situation could have been avoided had the Respondent's designee been notified prior to the time of the level one conference that the day and time scheduled occurred when the employee was not working. In fact, the level one decision makes this same point very clear. It appears from the record that Grievant's representative was consulted regarding the date and time of Grievant's conference. By way of a request for a continuance, Grievant could have asked that the conference be held on a day that she was scheduled to work.

The record also establishes Grievant was paid for the total amount of hours which she worked that week and suffered no loss of pay to attend her grievance conference. It was Grievant's choice to pursue this matter, and her right to do so is recognized and not criticized in the least; however, she and Respondent must bear their relative burdens of scheduling involvement. Within the context of this case, that means, at least in part, that Grievant's participation in the level one conference occurred, and not inappropriately so, on her personal time.

Finally, the undersigned cannot change Respondent's policy which is the subject of Grievant's objection. "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).

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant has the burden of proving her 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).

2. An agency's 'interpretation of the provisions in its own internal policy is entitled to some deference by this Grievance Board, unless it is contrary to the plain meaning of the language, or is inherently unreasonable.' *Dyer, et al., v. Lincoln County Bd. of Educ.*, Docket No. 95-22-494 (June 28, 1996) (citations omitted)." *Frame, et al., v. Dep't of Health and Human Res.*, Docket No. 00-HHR-240/330 (April 20, 2001).

3. "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).

4. Grievant has not established that she is entitled to compensation for time spent attending the February 2009 level one conference.

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 (2008).

Date: August 24, 2010

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Ronald L. Reece
Administrative Law Judge