THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DANNY A. WHITE,

Grievant,

v. **Docket No. 2011-0417-MAPS**

DIVISION OF JUVENILE SERVICES/
DONALD R. KUHN JUVENILE DIAGNOSTIC
AND DETENTION CENTER and
DIVISION OF PERSONNEL,

Respondents.

DECISION

Danny A. White ("Grievant") is a Correctional Officer 3 ("CO3") employed by the Division of Juvenile Services at the Donald R. Kuhn Juvenile Diagnostic and Detention Center. He has been employed at that location for ten years. Mr. White filed a level one grievance form dated September 8, 2010 alleging the following:

> On August 28, 2010, a State Primary Election was held. State Code Number (2-2-1 #13), (7-14B-18a) makes this Day a Legal State Holiday. The state only recognized employees who had been scheduled to work on this date to be eligible for compensation. This was a legal state holiday and all employees should receive the same compensation.

As relief Grievant seeks:

> All State Employees eligible to receive legal state holiday compensation be equally compensated, like any other Legal State Holiday.[1]

A level one decision was rendered on September 21, 2010 and Grievant appealed to level two. The DOP was joined as a party in an Order dated September 24, 2010. A level two mediation was held on November 16, 2010 and an Order was entered related to

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[1] The statements of the grievance and the relief sought are reproduced herein as they were written on the level one grievance form.

the mediation on that date. Grievant filed a timely appeal to level three and a level three hearing was conducted in the Charleston office of the West Virginia Public Employees Grievance Board on March 17, 2011. Grievant appeared *pro se.* Respondent DJS was represented by Steven J. Compton, Assistant Attorney General and Respondent DOP was represented by Karen O'Sullivan Thornton, Assistant Attorney General. At the close of the hearing, the parties waived their right to submit proposed findings of facts and conclusions of law. The grievance became mature for decision at the close of the hearing on March 17, 2011.

Synopsis

A special election was held on Saturday, August 28, 2010. State employees who worked on that day received a compensatory day off on a different day. Grievant did not work on the Saturday of the special election and argues that he should receive a day off as well. Grievant argues that the special election was a State holiday which requires all State employees to receive additional compensation. Respondent relied upon an official Opinion of the Attorney General to compensate only those employees who actually worked on the Saturday when the special election was held. Grievant did not prove that decision was arbitrary and capricious or in violation of the law.

After a thorough review of the entire record in this matter, the following facts are found to have been proven by a preponderance of the evidence.

Findings of Fact

1. Danny A. White ("Grievant") is a Correctional Officer 3 ("CO3") employed by the Division of Juvenile Services at the Donald R. Kuhn Juvenile Diagnostic and Detention Center. He has been employed at that location for ten years.

2. Grievant works four ten-hour shifts each week at the Juvenile Center. His days for work are Sunday through Wednesday and he gets Thursday through Saturday off.

3. A special election was scheduled for Saturday, August 28, 2010, to fill the unexpired term of United States Senator for West Virginia that became vacant upon the death of Robert C. Byrd.

4. The Governor sought the opinion of the attorney general on three specific questions related to the special election:

- Will Saturday, August 28, 2010 be a legal holiday for State employees?
- If Saturday, August 28, 2010, is a legal holiday for all State employees, will it be observed the preceding Friday?
- If Saturday, August 28, 2010, is a legal holiday, will all State employees receive credit for holiday or just those scheduled to work on Saturday, August 28, 2010? [2]

5. The short answers to these questions provided by the West Virginia Attorney General were the following:

> (1) Saturday, August 28, 2010, is a legal holiday for state employees; (2) The Saturday, August 28, 2010, holiday is not transferred to Friday, August, 27, 2010; and (3) employees scheduled to work on Saturday, August 28, 2010, are entitled to three hours of paid leave time to vote as long as these employees properly request such time. [3]

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[2] West Virginia Opinion of the Attorney General, August 24, 2010.

[3] West Virginia Opinion of the Attorney General, August 24, 2010.

6. Upon receipt of the first opinion from the West Virginia Attorney General, the Governor posed a follow-up question:

> [Do] State employees scheduled to work on Saturday, [August 28, 2010,] have an entitlement to a comparable day off or only the 3 hours to vote?

7. A second Attorney General Opinion was issued on August 25, 2010, stating that "State employees scheduled to work and working on Saturday, August 28, 2010, are entitled to a comparable day off..." [4] The Opinion went on to state that any time off taken by a State employee to vote should be deducted from the compensatory time for the holiday.

8. On August 26, 2010, Sara Walker, Director of the West Virginia Division of Personnel, issued a memorandum to all State Cabinet Secretaries, Bureau Chiefs and Agency Heads which summarized the two Attorney General Opinions. A copy of the opinions was attached to the memorandum. Joint Exhibit 1.

9. Consistent with Grievant's usual shift, he did not work on Saturday, August 28, 2010. Grievant did not receive any additional compensation for that legal holiday.

10. Other employees at the Donald R. Kuhn Juvenile Diagnostic and Detention Center were required to work on Saturday, August 28, 2010. Those employees who were required to work on the special election day received a comparable day off consistent with the Opinion of the Attorney General.

Discussion

As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the

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[4] West Virginia Opinion of the Attorney General, August 25, 2010.

W. Va. 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). 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).

Grievant notes that the special election was a legal holiday. He argues that, pursuant to state law and policies, all state employees should receive the same compensation for the holiday, not just those who were required to work on the Saturday of the special election.

Respondents counter that they relied upon the Attorney General Opinions written in response to the Governor's inquiry. Respondent asserts that the compensation method utilized for the special election was legal and appropriate.

The Attorney General is the legal representative of the state and its agencies unless specifically exempted from this duty by statute. *State ex rel. Battle v. Baltimore & Ohio Railroad Company,* 149 W. Va. 810, 143 S.E.2d 331 (1965). Consequently, the Attorney General has a statutory obligation to give written opinions and advice upon questions of law to the Governor and other specified State officials when requested to do so. *See* W. VA. CODE § 5-3-1. Two such written opinions were issued at the request of the Governor regarding whether the Saturday special election was a legal holiday and how State employees should be compensated for that day. Joint Exhibit 1. It is undisputed that Respondent DJS followed those opinions as provided by the Division of Personnel with the August 26, 2010 memorandum from Sara Walker.

The West Virginia Supreme Court of Appeals has consistently held that opinions of the Attorney General are not precedential or binding. The court has noted that such opinions are entitled to weight and consideration, but are ultimately just the individual official view of the State's legal advisor and are not binding upon that Court. *See, Matter of Vandelinde,* 179 W. Va. 183, 366 S.E.2d 631 (1988); *Hoover v. Blankenship*, 199 W. Va. 670, 487 S.E.2d 328 (1997). On the other hand, the Supreme Court has also noted that:

> Although an opinion of the attorney general is not binding upon this Court it is persuasive when it is issued rather contemporaneous with the adoption of the statute in question.

Walter v. Ritchie, 156 W. Va. 98, 191 S.E.2d 275 (1972).

In the 2010 second special session, the West Virginia Legislature passed House Bill 201 which was codified at W. VA. CODE § 3-10-4a. This legislation directed the Governor to proclaim a special election and general election to fill the Senate seat vacated by the death of Senator Byrd. Subsection W. VA. CODE § 3-10-4a(b)(2)(A) required the special general election be held on Saturday August 28, 2010. Since the Attorney General opinions relied upon by Respondents for the implementation of this statutory requirement were issued rather contemporaneous with the adoption of the statute, they are not binding but must be viewed as persuasive. *Id.*

In the first opinion of the Attorney General, it is noted that legal holidays in West Virginia are listed in W. VA. CODE § 2-2-1. This provision provides, in part, the following:

> Any day on which a general, primary or special election is held is a holiday throughout the state, a political subdivision of the state, a district or an incorporated city, town or village in which the election is conducted.

W. VA. CODE § 2-2-1(a)(13). Clearly, Saturday, August 28, 2010, was a legal holiday since it was a special election day as set out in the Code. With regard to the observance of legal holidays, W. VA. CODE § 2-1-1(b) states:

> If a holiday otherwise described in subsection (a) of this section falls on a Sunday, then the following Monday is the legal holiday. If a holiday otherwise described in subsection (a) of this section falls on a Saturday, then the preceding Friday is the legal holiday: *Provided,* That this subsection (b) shall not apply to subdivisions (13), (14) and (15), subsection (a) of this section.

Pursuant to the foregoing provision, most legal holidays which fall on a weekend are observed either on the preceding Friday or the following Monday. However, the statute specifically excludes special elections from the application of this subsection, so the special election held on Saturday, August 28, 2010, could not be transferred to the preceding Friday.

The Attorney General noted that the West Virginia Division of Personnel adopted an administrative rule implementing W. VA. CODE § 2-1-1. *See,*143 C.S.R. 1 § 14.1 Official Holidays. That rule does not exclude election days from the transfer rule. Under the DOP rule it appears that the special election day scheduled for Saturday would be transferred to the previous Friday. This is in stark contrast to the clear statement in the statute that election days are not subject to the transfer rule.[5]

The West Virginia Supreme Court has provided guidance for resolving conflict between an Agency rule and the statute it is meant to implement:

> Rules and Regulations of … [an agency] must faithfully reflect the intention of the legislature; when there is clear and unambiguous language in a statute, that language must be given the same clear and unambiguous force and effect

[5] W. VA. CODE § 2-1-1(b)

> in the … [agency's] Rules and Regulations that it has in the statute. (citations omitted).
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> We underline today, that any rules or regulations drafted by an agency must faithfully reflect the intention of the Legislature, as expressed in the controlling legislation. Where a statute contains clear and unambiguous language, an agency's rules or regulations must give that language the same clear and unambiguous force and effect that the language commands in the statute.

Maikotter v. University of W. Va. Bd. of Trustees/West Va. Univ., 206 W. Va. 691, 696, 527 S.E.2d 802, 807 (W. Va. 1999).

The legislature clearly exempted special elections from the transfer provisions of W. VA. CODE § 2-2-1(b). The obvious reason for that exemption is to reduce the cost of special elections since the majority of State employees and county school employees do not work on the weekend and therefore would not need to be compensated for the holiday. The lack of the exemption from the DOP rule cannot be given the effect of thwarting the clear and unambiguous language of the statute that excludes the special election from the transfer exception. The legal holiday created by the special election on Saturday, August 28, 2010, could not be legally transferred to the preceding Friday.

The DOP rule states that "Employees shall be released from work with pay in observance of the following official holidays:. . . any day on which a Primary or General election is held throughout the State." 143 C.S.R. 1 § 14.1(a). It goes on to provide:

> (d) To receive pay for any holiday, an employee must, at a minimum, work or be on approved paid leave for his or her full scheduled workday immediately preceding the holiday and at least one quarter hour of his or her scheduled workday immediately following the holiday or vice versa.

Grievant did not work on Saturday, August 28, 2010, nor on the Friday immediately preceding that day. Consequently, he was not entitled to compensation for that day. Only State employees who actually worked on the special election day were entitled to the

comparable day off. Grievant failed to prove that he was legally entitled to be paid for the legal holiday that resulted from the special election held on Saturday, August 28, 2010. Accordingly, the grievance is denied.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. 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). 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. Saturday, August 28, 2010, was a legal holiday in the State of West Virginia due to the fact that it was the day that a special state-wide election was held. W. VA. CODE § 2-1-1(a)(13).

3. The legal holiday created by the special election which occurred on Saturday, August 28, 2010, could not be transferred to the preceding Friday because the clear and unambiguous language of W. VA. CODE § 2-1-1 specifically excluded legal holidays resulting from special elections from the statutes transfer provision. W. VA. CODE § 2-1-1(b).

4. Since Grievant did not work on Saturday, August 28, 2010, or the day immediately preceding that day he was not entitled to compensation for the legal holiday occurring on that day. 143 C.S.R. 1 § 14.1(d).

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* 156 C.S.R. 1 § 6.20 (2008).

DATE: JULY 28, 2011

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE