THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

NELLIE LOUISE QUINN,
Grievant,

v. **Docket No. 2011-1654-CONS**

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

DECISION

Grievant, Nellie Louise Quinn, filed this consolidated grievance at level one on September 27, 2010, and October 18, 2010. Her unedited grievance forms read as follows:

> Statement of Grievance: Workers in Dietary only get paid for 15 minutes if we have to work through our lunch The hand book says we get a 30 minute lunch so if we work it we should get paid for 30 minutes
>
> Relief Sought: Labor laws require staff be paid for 30 minute lunch break
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> Statement of Grievance: We have a food service workers coming in at least 5 days a week at 5:AM every morning working as a cook we have 2 cooks coming in at 7:AM the same days working as food service worker cook's are paid more then food service workers
>
> Relief Sought: I want the cooks to come in and do there own job food service workers do thier job or pay food service workers cooks wages.
>
> Statement of Grievance: We have a snack bar and a potato bar our food service workers are pulled to fill in for both places because these are the places the cooks and a food service worker are off Every Holiday and weekends
>
> Relief Sought: Close snack bar or potato bar we do not have coverage for both food service workers can not do the job they are hired to do for patient when we are pulled to serve employes

This grievance was denied at level one following a hearing on April 12, 2011. A level two mediation session was conducted on December 2, 2011. The parties agreed to submit the matter based upon the record developed at level one. Thereafter, the parties were provided with a cut off date to submit proposed findings of fact and conclusions of law. Grievant appeared by her representative, Gordon Simmons, UE Local 170, West Virginia Public Workers Union. Respondent appeared by its counsel, Harry C. Bruner, Jr., Assistant Attorney General. The matter became mature for consideration upon receipt of the Grievant's fact/law proposals on February 6, 2013. Respondent did not file fact/law proposals.

Synopsis

Grievant is employed as a Food Service Worker at the William R. Sharpe, Jr. Hospital. She challenges the payment method used by Respondent concerning her lunch break. She challenges the use of Food Service Workers as Cooks, arguing that she is working out of her classification. Finally, she complains that Respondent is short-staffing in the Dietary Department at the hospital. Grievant did not establish by a preponderance of the evidence that Respondent's management decisions were clearly wrong or the result of an abuse of discretion. In addition, Grievant did not demonstrate by a preponderance of the evidence that Respondent's lunch break payment method was a violation of any statute, policy, or rule.

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

Findings of Fact

1. Grievant is employed as a Food Service Worker at the William R. Sharpe, Jr. Hospital operated by the West Virginia Department of Health and Human Resources.

2. Respondent's Dietary Department has adopted a policy wherein Food Service Workers are occasionally given the duties of cooks.

3. When a Food Service Worker is designated as a "cold" cook, some assignments involved limited food preparation. Grievant was assigned to be "cold" cook two or three times a week until she filed this grievance.

4. Director of Respondent's Dietary Department, Kathy Marsh, explained that the assignment of a "cold" cook was primarily serving the food.

5. Ms. Marsh indicated that the Food Service Worker is expected to perform other duties as assigned and that they are to be cross-trained in all the areas of the kitchen and they must be able to fill in as needed.

6. Ms. Marsh opined that when Food Service Workers perform cooking duties, as needed, that did not justify a temporary upgrade because they are not really performing cooking duties. In essence, Food Service Workers may be assisting the cooks, but they are not actually working as a cook all day long.

7. The position of staffing the potato bar is filled Monday through Friday and the staff hired for that position is not required to work weekends.

8. Employees of Respondent's Dietary Department are required to relieve snack bar staff for breaks taken by that staff.

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).

Grievant has been employed full-time at the hospital as a Food Service Worker for approximately six years. Grievant maintains that Respondent is required to pay workers in Respondent's Dietary Department for thirty minutes, rather than fifteen minutes, when the employees work through their lunch break. Grievant works an eight hour and fifteen minute work day from 6:00 a.m. to 2:15 p.m., with a forty-five minute lunch break. Grievant's lunch is scheduled for 10:30 a.m. until 11:15 a.m. Grievant asserts that at times she has missed part or all of her lunch because she had to relieve workers at the snack bar so those workers can take their breaks.

West Virginia Division of Personnel Administrative Rule 143 C.S.R. 1 § 14.2 provides that, "Each appointing authority shall establish the work schedule for the employees of his or her agency . . . The work schedule may include any work shifts the appointing authority determines to be appropriate for the efficient operation of the agency."

Respondent's Policy Memorandum 2102 provides that the workday "shall consist of 8 hours, including a 30 minute paid meal period and two rest periods, when practical." The Policy also permits employees, with the supervisor's approval, to add additional minutes to their meal period by extending their work time accordingly.

In the instant case, Respondent pays Grievant for a thirty minute lunch break, whether or not Grievant takes that break or not. The record did not establish that Respondent routinely required Grievant to miss her entire lunch break. Respondent extends Grievant's workday fifteen minutes to enable Grievant to have a forty-five minute lunch break. When Grievant works through a period of her lunch she is paid for fifteen extra minutes, as she is actually working eight hours and fifteen minutes. Grievant did not assert that Respondent failed to pay her overtime for any week in which she worked over forty hours. The record appears to support a finding that Respondent does, in fact, pay Grievant overtime compensation for any hours worked in excess of forty hours per week, all in compliance with the Fair Labor Standards Act, 29 U.S.C. 201, *et seq*.

Grievant alleges that employees are being worked outside of their classifications in that Food Service Workers are being worked as cooks. Grievant did not identify any specific dates and times that she was called upon to perform duties outside of her classification. Ms. Marsh confirmed that Respondent ensured that its employees perform duties according to their job descriptions within their assigned classification. Grievant's job description for Food Service Worker requires that they cross-train in all dietary areas and perform other duties as assigned. Respondent's Exhibit No. 2. Grievant did not identify a specific grievable event, such as dates and times that she was called upon to work out

outside of her job classification. In any event, the record seemed to establish that Grievant's predominate duties involved assignments within the Food Service Classification.

Grievant also complained of short-staffing in the Dietary Department at the hospital. Grievant attributes part of the short-staffing to the need for dietary workers to service the snack bar and potato bar. The snack bar is open to hospital staff and patients 9:00 a.m. to 4:20 p.m., seven days a week. The potato bar is open from 9:00 a.m. to 4:20 p.m., Monday through Friday. Respondent acknowledged that they are currently using three temporary Food Service Workers to perform the snack bar and potato bar maintenance due to two vacant positions.

Grievant requests that Respondent be ordered to close either the snack bar or the potato bar. Decisions about operating the snack bar, potato bar, and staffing of those areas are management decisions. As noted in *Bennett v. W. Va. Dep't of Health and Human Resources/Bureau for Children and Families*, Docket No. 99-HHR-517 (Apr. 26, 2000), the undersigned does not have authority to second guess a state employer's employment policy, to order a state agency to make a discretionary change in its policy, or to substitute his management philosophy for that of the Department of Health and Human Resources. *Skaff v. Pridemore*, 200 W. Va. 700, 490 S.E.2d 787 (1997), *Kincaid v. W. Va. Div. of Corrections*, Docket No. 98-CORR-144 (Nov. 23, 1998). An agency's determination of matters within its expertise is entitled to substantial weight. *Princeton Community Hosp. v. State Health Planning*, 174 W. Va. 558, 328 S.E.2d 164 (1985).

The undersigned is without authority to order additional employees be hired or that the snack and potato bar be closed. The creation and posting of a position is a

management decision that rests with the employer and the Division of Personnel. The record did reflect that Respondent was in the process of hiring additional staff members to better serve the needs of the hospital. Respondent has two Food Service Workers who cover the snack bar and one Food Service Worker who works the potato bar. Whenever these workers are not available, one of the three temporary Food Service Workers or one of the full-time Food Service Workers is able to fill those positions as needed. No coverage is needed on Saturday and Sunday for the potato bar because that is closed on the weekends. Respondent acknowledged at level one that it is taking steps to add additional staff members to improve coverage in the dietary stations. Nothing about this scheme can be said to be unreasonable or viewed as an arbitrary and capricious act.[1]

The following conclusions of law support the decision reached.

Conclusions of Law

1. 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*

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[1]"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). A [g]rievant's belief that his supervisor's management decisions are incorrect is not a grievable event unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with his effective job performance or health and safety." *Ball v. Dep't of Highways*, Docket No. 96-DOH-141 (July 31, 1997); *Rice v. Dep't of Transp./Div. of Highways*, Docket No. 96-DOH-247 (Aug. 29, 1997).

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. Unless the Grievant presents sufficient evidence to demonstrate that Respondent's management decisions are clearly wrong, inappropriate, or the result of an abuse of discretion, the undersigned must give deference to Respondent and uphold the actions. *Smith v. Parkways Economic Development and Tourism Auth.*, Docket No. 97-PEDTA-484 (Apr. 17,1998); *O'Connell v. Dep't of Health and Human Resources*, Docket No. 95-HHR-251 (Oct. 13, 1995); *Farber v. Dep't of Health and Human Resources*, Docket No. 95-HHR-052 (July 10, 1995).

3. Grievant did not establish by a preponderance of the evidence that Respondent's management decisions were clearly wrong or the result of an abuse of discretion.

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: March 15, 2013

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Ronald L. Reece
Administrative Law Judge