WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

BONNIE PUCKETT, et al,

Grievant,

v. **Docket No. 2010-1575-CONS**

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES/ BUREAU FOR CHILDREN AND FAMILIES,

Respondent.

DECISION

Grievants Bonnie Puckett, Alice Akers, Melissa Ammons, Melanie Minnix, Cynthia Mays and James McPeak were employed by the West Virginia Department of Health and Human Resources ("DHHR")/Bureau for Children and Families ("BCF") in the Child Protective Services ("CPS") unit of the Mercer County office of DHHR. These CPS employees ("Grievants") filed individual grievances on June 14, 2010, styled *Bonnie Puckett v. Dep't of Health and Human Res.*, Docket No. 2010-1569-DHHR; *Alice Akers v. Dep't of Health and Human Res.*, Docket No. 2010-1570-DHHR; *Melissa Ammons v. Dep't of Health and Human Res.,* Docket No. 2010-1571-DHHR; *Melanie Minnix v. Dep't of Health and Human Res.,* Docket No. 2010-1572-DHHR; *Cynthia C. Mays v. Dep't of Health and Human Res.,* Docket No. 2010-1573-DHHR; and *James McPeak v. Dep't of Health and Human Res.,* Docket No. 2010-1574-DHHR. The statement of grievance in each of the foregoing grievances read, "CPS Intake workers mandated to work non-emergency overtime." The relief sought in these grievances was,

"To be made whole, including making overtime optional rather than mandatory." Mr. Gordon Simmons, representative for Grievants, filed a motion to consolidate the foregoing grievances. Accordingly, said grievances were consolidated by the Public Employees Grievance Board at *Bonnie Puckett, et al v. Department of Health and Human Res.,* Docket No. 2010-1575-CONS. The relief requested remained the same following consolidation.

DHHR convened a level one hearing on August 31, 2010. Mr. Gordon Simmons represented Grievants at that hearing. BCF Regional Director, Mr. Joe Bullington, and BCF Community Services Manager, Mr. James Bradley, represented BCF. On September 2, 2010, DHHR issued its decision denying the grievance.[1] In the past, a "crisis team" had been dispatched from the State to assist the Mercer County CPS office with its backlog. Management requested assistance from the crisis team and the instant grievance was placed in abeyance in April 2011, “pending outcome of staffing changes which will potentially resolve the issue in dispute." The crisis team was not made available to assist with the backlog and this grievance was, therefore, taken out of abeyance.

Grievants appealed to level two and a mediation session was held on December 6, 2010, at the Public Employees Grievance Board office in Charleston, West Virginia. The parties agreed to submit the grievance for decision based upon the lower level record and their proposed findings of fact and conclusions of law. Respondent and Grievants submitted their Proposed Findings of Fact and Conclusions of Law, received

[1] Grievant, Ms. Cynthia Mays, resigned her position with DHHR before the level one hearing. Therefore, the level one decision did not encompass her grievance.

by the Grievance Board respectively on March 1, 2013 and March 4, 2013. This matter became mature for decision on March 4, 2013.

Synopsis

Grievants are social workers with CPS in the Mercer County DHHR office who investigate referrals of child abuse and neglect. Grievants were assigned mandatory overtime for an extended time period, in order to process a backlog of initial case assessments. Grievants aver that it is a violation of the FLSA and DHHR policies for Respondent to mandate its employees to work in excess of 40 hours per week, absent an emergency. Grievants further assert that Respondent is required to formulate overtime policies that provide a "distinction between scheduled, preplanned [non-emergency] and emergency overtime." Grievants assert that they can refuse requests for any non-emergency overtime without sanction. Grievants failed to prove that Respondent is prohibited from mandating overtime by its employees absent an emergency or that Respondent must formulate distinct policies for nonemergency and emergency overtime. Additionally, Grievants have failed to prove that they can refuse mandated overtime without facing disciplinary action.

Grievants further assert that Respondent should submit a change of their work schedule to the Director of Personnel for the Division of Personnel ("DOP") to reflect the regular assignment of Saturday overtime to them, pursuant to 143 C.S.R. 1 § 14.2. Grievants have proven that Respondent has violated that rule by failing to submit their habitual overtime as a "change" in Grievants' schedules. The grievance is DENIED in part and GRANTED in part.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

Findings of Fact

1. Grievants are all certified social workers, in the same job classification, employed by CPS in the Mercer County DHHR office.[2] Their main duty is to investigate referrals of child abuse and neglect. As a part of this investigation, they complete initial case assessments.

2. In approximately June of 2010, the Mercer County office of CPS began mandating overtime hours by Grievants, requiring them to work on occasional Saturdays, to address the backlog of initial case assessments in that office. This overtime work was assigned on a rotating basis and was not optional. This mandatory overtime has continued from June of 2010 to the present.

3. Mr. James Bradley, Community Services Manager for the Mercer County BCF Office, (Community Services Manager Bradley) explained the circumstances surrounding Grievants' mandatory overtime. The Intake Unit, in which Grievants work, interviews clients and completes an initial assessment or evaluation of the case. CPS cannot take further action on the referrals until the initial assessment is complete.

4. Mr. Joe Bullington, Regional Director for BCF (Regional Director Bullington), explained that DHHR has the obligation to ensure that overdue

[2] Grievants' Proposed Findings of Facts and Conclusions of Law stated that all of the Grievants, except Ms. Puckett, have resigned or transferred out of CPS since the filing of their grievance.

assessments are completed, particularly for families who are in critical situations. Grievants' overtime has been restricted to completing these overdue assessments.[3]

5. Grievant Puckett testified that she and the other Grievants have been required to work on occasional Saturdays to complete overdue initial assessments. On those Saturdays, Grievants have worked eight hours per day, beginning at 8:30 AM.[4] Grievants have been asked to complete two to three initial assessments on those Saturdays to alleviate the afore-described backlog.[5]

6. In the past, a "crisis team" had been dispatched by the State to assist the Mercer County CPS with its backlog. Management requested assistance from the crisis team, but it was not made available.

7. Community Services Manager Bradley explained that CPS does not lightly require mandated overtime and attempts to be fair and flexible in scheduling overtime. He described the backlog as a continuing problem for CPS, which CPS addresses as efficiently and fairly as it possibly can.

8. Respondent pays its CPS workers at the rate of one and a half times the hourly rate for hours worked over 40.

---

[3] Level one testimony of Community Services Manager Bradley and Regional Director Bullington.

[4] Ms. Puckett was the only Grievant who testified at the level one hearing, as she was in the same classification as the other Grievants and they were all grieving their mandatory overtime.

[5] There was no testimony concerning the total number of hours that Grievants were required to work in any one week during this period of mandated overtime. In addition, there was no testimony offered concerning how frequently the individual Grievants were called upon to work on Saturdays.

Discussion

As this grievance does not involve a disciplinary matter, Grievants bear the burden of proving their case 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).

Grievants assert that DHHR is required by the FLSA, which established 40 hours as the legal workweek, to provide a "distinction between scheduled, preplanned [non-emergency] and emergency overtime." In failing to distinguish between non-emergency and emergency overtime in DHHR's "Policy Memorandum 2102: Hours of Work/Overtime," Grievants assert that "Respondent has enacted a[n] [overtime] practice that is unreasonable, arbitrary and capricious, which nullifies the clear legislative intent of the FLSA to establish forty hours as the legal workweek. The FLSA generally requires covered employers to pay the minimum wage and to pay non-exempt employees overtime wages for hours worked in excess of 40 hours a week. The FLSA does not limit the number of hours in a day or days in a week an employee may be required or scheduled to work, including overtime hours, if the employee is at least 16

years of age.[6] By making this unsupported assertion concerning the legislative intent of the FLSA, Grievants have not proven that Respondent's overtime policy violates the FLSA because the policy fails to distinguish between emergency and nonemergency overtime.

In further support of their contention that emergency and regular overtime should be governed by distinct policies, Grievants assert that the policy and practice of the West Virginia Department of Highways ("DOH") for dealing with employee overtime is "reasonable and elsewhere recognized as relevant." Therefore, Grievants urge Respondents to adopt a policy similar to that of DOH. As noted by Grievants, the DOH and State correctional facilities and hospitals, for example, have elected to establish "emergency" or unplanned overtime policies to ensure adequate staffing for the safety of the public and their patients, clients, inmates and staff. In addition, they have nonemergency, preplanned overtime policies. Respondent, probably due to the nature of the work of its employees, has not established specific emergency overtime policies. Therefore, it is neither arbitrary nor capricious that Respondent does not have separate overtime policies governing emergency and non-emergency work. Moreover, Grievants have not demonstrated any requirement under West Virginia law that Respondent must do so.

Grievants further aver that Respondent cannot schedule overtime work by them, absent an emergency or disaster, without their consent. Respondents are justified in mandating Grievants' non-emergency, preplanned overtime under 143 C.S.R. 1 § 14.2 which provides, in pertinent part:

---

[6] See the Department of Labor, Wage and Hour Division, Compliance Assistance, website: http://www.dol.gov/whd/regs/compliance/hrg.htm

> "Agency Work Schedules - 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 the 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 workdays of more than eight hours* … " *(Emphasis added.)*

DHHR/CPS has the obligation to ensure that assessments are completed with as little delay as possible, particularly given that it serves families who may be in very critical situations. As such, Respondent is specifically permitted to assign overtime to assure efficient operation of CPS, pursuant to 143 C.S.R. 1 § 14.2. Moreover, this rule does not contravene the FLSA.

Grievants also cite to *Chaney v. W.V. Dept. of Transportation*, Docket No. 99-DOH-301 (December 20, 1999) in support of their assertion that employees "may refuse to work overtime at their option," unless that overtime is required due to some type of emergency situation. Grievants' reliance on *Chaney* is misplaced. In *Chaney*, grievant was actually competing for planned, non-emergency overtime, rather than asserting that Respondent/Department of Transportation could not require him to work that overtime, and/or discipline him for refusing to accept that overtime. Interestingly, the relevant DOH overtime policy in *Chaney* provided, "This [p]olicy in no way precludes the Agency from requiring employees to work overtime as needed, or in situations which affect the public interest." Grievant Chaney did not challenge this portion of the policy and the Board did not address whether it violated the FLSA or West Virginia law.

Moreover, in numerous cases, the Grievance Board has determined that state employees must work overtime upon the request of their employers or be subject to disciplinary action pursuant to the various proper policies of the state agencies/entities involved. *See, Arbogast v. Division of Corrections/Huttonsville Correctional Center,* Docket No. 2008-1758-CONS (Jan. 30, 2009)*; Hill v. Division of Corrections/Huttonsville Correctional Center,* Docket No. 2010-0113-MAPS (Jan. 6, 2010); *Stewart v. Dep't of Health and Human Services/Colin Anderson Center,* Docket Nos. 97-HHR-210, 211, 215, 221, 222, 223 (October 1, 1997); *Dulaney v. Division of Corrections/Mount Olive Correctional Center,* Docket No. 05-CORR-325 (October 21, 2005). In *Dulaney*, in addressing the grievants' challenges to their suspensions imposed after they refused to accept mandated overtime, the Grievance Board reasoned that, "Grievants obviously do not wish to be mandated; however, the probability that it will occur exists, and it is their responsibility as Health Service Workers to provide patient care when needed." Likewise, in the present grievance, it is the responsibility of Grievants to work some overtime hours to provide an assessment, as promptly as possible, of their case referrals involving the welfare of children who may be subject to abuse or neglect.

In the instant grievance, DHHR's "Policy Memorandum 2102 Hours of Work/Overtime" at "B. Management Responsibility Disciplinary Action" mandates acceptance of nonemergency overtime work by Grievants, stating that, " … [A]ny employee who refuses to work overtime and/or additional straight-time when specifically directed or who works extra hours without approval may be subject to disciplinary action." In summary, Grievants have not pointed to any provision of the FLSA, or to any rule, regulation, statute, or policy at West Virginia law which either compels Respondent

to establish separate overtime policies for mandated “emergency” overtime and mandated “regular” overtime or which prohibits Respondent from requiring overtime of Grievants in nonemergency situations.

Grievants further contend that Respondent violated 143 C.S.R. 1 § 14.2 when it did not submit a change in their work hours to the Director of Personnel of the DOP to reflect their occasional Saturday overtime, which has been assigned to them for approximately two years and ten months. That rule provides, in pertinent part, that:

> “ … work schedules and changes must be submitted to the Director within fifteen (15) calendar days after employees commence work under the schedule."

Respondent requested and hoped to obtain some assistance from the “crisis team” for the State to handle its continued backlog. However, Grievants have been working on occasional Saturdays, without any relief from the “crisis team,” from June of 2010, to the present. This is quite an extended period of time. To ensure the efficient operation of CPS in the Mercer County office, Respondent has found it necessary for the last two years and ten months to “change” the work schedule of Grievants to include some Saturday overtime. Moreover, it appears that this overtime work will continue to be necessary for the foreseeable future. Under these circumstances, C.S.R. 1 § 14.2 dictates that Respondent should submit Grievants’ schedules, including mandatory Saturday overtime, to the Director of Personnel for the DOP. [7]

[7] It is difficult to determine when this overtime work schedule should initially been submitted to the DOP, as Respondent reasonably believed for a time that the crisis team would assist CPS and eliminate the need for Saturday overtime. But it is certainly required by this time.

CONCLUSIONS OF LAW

1. As this grievance does not involve a disciplinary matter, Grievants bear the burden of proving their case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Hanshaw v. McDowell County Bd. of Educ.,* Docket No. 33-88-130 (Aug. 19, 1988); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-174 (Dec. 14, 1989). "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. Health and Human Res.,* Docket No 92-HHR-486 (May 17, 1993). A preponderance, "is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it." *Petry v. Kanawha County Bd. Of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

2. The FLSA generally requires covered employers to pay the minimum wage and to pay non-exempt employees overtime wages for hours worked in excess of 40 hours a week. The FLSA does not limit the number of hours in a day or days in a week an employee may be required or scheduled to work, including overtime hours, if the employee is at least 16 years of age.

3. Respondent did not violate the FLSA in assigning overtime to Grievants.

4. Grievants have failed to demonstrate that Respondent's overtime policy is arbitrary or capricious because it does not distinguish between nonemergency, preplanned over time and emergency overtime.

5. DHHR's "Policy Memorandum 2102 Hours of Work/Overtime" at "B. Management Responsibility Disciplinary Action" mandates acceptance of overtime work

stating that, " … [A]ny employee who refuses to work overtime and/or additional straight-time when specifically directed or who works extra hours without approval may be subject to disciplinary action."

6. State employees must work overtime upon the request of their employers or be subject to disciplinary action pursuant to the various proper policies of the state agencies/entities involved. *See, Arbogast v. Division of Corrections/Huttonsville Correctional Center,* Docket No. 2008-1758-CONS (Jan. 30, 2009)*; Hill v. Division of Corrections/Huttonsville Correctional Center,* Docket No. 2010-0113-MAPS (Jan. 6, 2010); *Stewart v. Dep't of Health and Human Services/Colin Anderson Center,* Docket Nos. 97-HHR-210, 211, 215, 221, 222, 223 (October 1, 1997); *Dulaney v. Division of Corrections/Mount Olive Correctional Center,* Docket No. 05-CORR-325 (October 21, 2005).

7. Grievants have failed to meet their burden of proving, by a preponderance of the evidence, that Respondent is prohibited from assigning mandatory overtime to them or that they can refuse to work mandatory overtime without facing disciplinary measures.

8. The Division of Personnel's Administrative Rule, at "Agency Work Schedules'" 143 C.S.R. 1 § 14.2, addresses when a change in work schedule must be submitted to the Director of Personnel for the DOP and states, in pertinent part, that :

> "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 the 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 workdays of more than eight hours* … " *(Emphasis added.)*

9. Grievants proved that Respondent violated 143 C.S.R. 1 § 14.2, related to agency work schedules, when Respondent did not submit the change in Grievants' work schedules to the Director of Personnel for the DOP to include Grievants' occasional mandatory Saturday overtime.

Accordingly, the Grievance is DENIED in part and GRANTED in part. The grievance is denied, except that Respondent is ordered to submit Grievants' schedules, including mandatory overtime, to the Director of Personnel for the DOP, pursuant to the requirements of 143 C.S.R. 1 § 14.2.

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 (eff. July 7, 2008).

DATE: APRIL 15, 2013

_____

SUSAN L. BASILE
ADMINISTRATIVE LAW JUDGE