WEST VIRGINIA
PUBLIC EMPLOYEES GRIEVANCE BOARD

DONALD MATNEY,
Grievant,

v. **DOCKET NO. 2012-1099-DHHR**

DEPARTMENT OF HEALTH & HUMAN RESOURCES/
WELCH COMMUNITY HOSPITAL,
Respondent.

DECISION

Donald Matney ("Grievant") filed this grievance on April 14, 2012, against his employer, the Department of Health & Human Resources, Welch Community Hospital ("Respondent" or "DHHR"), alleging that he was retaliated against at the time he returned to his previous position following a Grievance Board decision which overturned the termination of his employment. More specifically, Grievant complained that his work schedule was changed upon being reinstated to his former position as a Storekeeper 3.

A Level One hearing in this matter was held on May 17, 2012. Respondent denied the grievance at Level One in a decision issued by Christina M. Bailey on June 6, 2012. Grievant appealed to Level Two on June 7, 2012. Following mediation at Level Two on January 7, 2013, Grievant appealed to Level Three on January 11, 2013. Following a continuance for good cause shown, a Level Three hearing was held before the undersigned Administrative Law Judge on September 6, 2013, in Beckley, West Virginia. Grievant was represented at the hearing by Gordon Simmons with UE Local 170 of the West Virginia Public Workers Union. DHHR was represented by Assistant Attorney

General Michael Bevers. This matter became mature for decision on November 4, 2013, upon receipt of the last of the parties' post-hearing arguments.

Synopsis

In April 2012, Grievant was reinstated to his former position as a Storekeeper 3 at DHHR's Welch Community Hospital by a Grievance Board decision issued on March 30, 2012. However, DHHR assigned Grievant to a new 8:00 AM to 4:00 PM shift in place of the 6:30 AM to 2:30 PM shift he had worked for over 20 years prior to his termination. DHHR asserted that this shift change was intended solely to improve agency efficiency. In accordance with the legal standards for analyzing a claim asserting prohibited retaliation under the grievance statute, Grievant established by a preponderance of the evidence that DHHR's justification for the shift adjustment involved a pretext for prohibited retaliation, and DHHR failed to provide the full make-whole remedy ordered by the Grievance Board. Accordingly, Grievant's previous work schedule must be restored.

The undersigned Administrative Law Judge makes the following Findings of Fact based upon the record developed at the Level One and Level Three hearings.

Findings of Fact

1. Grievant is employed by the Department of Health and Human Resources as a Storekeeper 3 at Welch Community Hospital.

2. Hazel Addair is employed by Welch Community Hospital as its Procurement Officer. Ms. Addair is Grievant's immediate supervisor.

3. Johnny Brant is employed by Welch Community Hospital as its Chief Financial Officer ("CFO").

4. Walter Garrett is employed by Welch Community Hospital as its Chief Executive Officer ("CEO").

5. Grievant's employment was terminated in January 2011. His reinstatement was ordered in a Grievance Board decision in March 2012. Tr. at 6;[1] G Ex 1 at Level One. *See Matney v. Dep't of Health & Human Res.*, Docket No. 2011-0972-DHHR (Mar. 30, 2012).

6. Prior to his termination, Grievant was employed at Welch Community Hospital for over 25 years.

7. At the time Grievant's employment was terminated, he was assigned to the Central Warehouse[2], where his normal work schedule was 6:30 AM to 2:30 PM, Monday through Friday. Grievant had been working this same schedule for approximately 23 years.

8. Following Grievant's termination, his position was not filled by another employee.

9. During Grievant's absence, two employees in the Central Warehouse, each of whom was classified as a Storekeeper 2, worked 10-hour days, from either 7:00 AM to 5:00 PM, or 8:00 AM to 6:00 PM[3], rather than their regular 8:00 AM to 4:00 PM shifts.

10. Grievant was reinstated as a Storekeeper 3 at Welch Community Hospital, effective April 16, 2012. Tr. at 6.

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[1] The Level One hearing transcript will be cited as "Tr at ___."
[2] Also referred to at times in the Level One and Level Three testimony as "Central Stores."
[3] Despite Ms. Addair's clear and uncontradicted Level Three testimony that the Storekeeper 2 employees worked 10-hour days in Grievant's absence, DHHR incorrectly asserted in its post-hearing argument that these employees worked from 8:00 AM to 4:00 PM during Grievant's absence.

11. Prior to Grievant's reinstatement, Grievant's immediate supervisor, Hazel Addair, discussed Grievant's work schedule with Chief Financial Officer ("CFO") Johnny Brant. Ms. Addair testified that she recommended that Grievant's schedule be changed upon his return to the same 8:00 AM to 4:00 PM shift the other Storekeepers were then working.

12. CFO Brant testified that he discovered a problem when deliveries are made after 3:00 PM on a Friday, and determined it would be more efficient to have Grievant working until 4:00 PM each day. However, CFO Brant was unable to state whether the deliveries which generated his concern were made after 4:00 PM.

13. CFO Brant discussed this proposed change with Welch Community Hospital CEO Walter Garrett, who approved the schedule change as proposed.

14. Upon reinstatement, Grievant was notified by CFO Brant that he would henceforth be working from 8:00 AM to 4:00 PM Monday through Friday. Tr. at 7.

15. Other than the change in Grievant's schedule, Grievant's job duties remained substantially the same as before his termination.

16. Ms. Addair justified the change in Grievant's working hours on the basis that the she was not aware of any truck deliveries to the Central Warehouse as early as 6:30 AM, and she anticipated that a Storekeeper 2, Lee Bellomy, who was already eligible for retirement, would begin taking more annual leave in the immediate future before he retired.

17. Prior to Grievant's termination, Grievant had been making a mail run at 2:30 PM to get outgoing mail to the mail truck. During his absence, the mail truck schedule

changed so that the mail truck did not depart from Welch before 5:00 PM. Ms. Addair stated that this was another basis for changing Grievant's schedule.

18. Neither CFO Brant nor CEO Garrett discussed the mail truck in response to questions probing the reasons for Grievant's shift change.

19. Grievant provided documentary evidence and testimony indicating that some truck deliveries arrive at the Central Warehouse on a regular basis before 8:00 AM, and that Mr. Bellomy has not taken any more leave than usual during the year since Grievant returned to duty.

20. The Administrative Rule of the West Virginia Division of Personnel authorizes each appointing authority to set the work schedule for the employees of his or her agency. *See* 143 C.S.R. 1 § 14.2 (2012).

21. Ms. Addair has permitted Storekeepers, including Grievant, to come to work early and leave early to accommodate some unspecified personal situation. There was no evidence that Ms. Addair, CFO Brant or CEO Garrett considered asking Grievant to come in late and stay late on those days, particularly Fridays, when one of the other Storekeepers was scheduled off, and would not be available to process a late afternoon delivery.

Discussion

Because this matter does not involve an adverse disciplinary action, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Burkhart v. Ins. Comm'n*, Docket No. 2010-1303-DOR (Dec. 7, 2011); *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). Where the evidence equally supports both sides, Grievant has not met his burden. *Id*.

Grievant asserts that his work schedule was changed at the time he was reinstated to his former position in retaliation for filing a successful grievance against his employer. W. Va. Code § 6C-2-2(o) defines "reprisal" as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." In general, a grievant alleging reprisal or retaliation in violation of W. Va. Code § 6C-2-2(o), in order to establish a *prima facie* case, must establish by a preponderance of the evidence:

> (1) that he was engaged in activity protected by the statute (*e.g*., filing a grievance);
>
> (2) that his employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;
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> (3) that, thereafter, an adverse employment action was taken by the employer; and
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> (4) that the adverse action was the result of retaliatory motivation or the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

See Coddington v. W. Va. Dep't of Health & Human Res., Docket Nos. 93-HHR-265/266/267 (May 19, 1994); *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth*., Docket No. 91-PEDTA-225 (Dec. 23, 1991). *See generally Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). Once a

prima facie case of retaliation has been established, the inquiry shifts to determining whether the employer has shown legitimate, non-retaliatory reasons for its actions. *Graley*, *supra*. *See Mace v. Pizza Hut, Inc*., 180 W. Va. 469, 377 S.E.2d 461 (1989).

Grievant clearly established a *prima facie* case of retaliation in that he engaged in activity protected by the statute by filing a grievance successfully challenging his termination, the employer was well aware of this activity, acknowledged that the proposed shift change would likely be considered adverse, and the change was made within a time frame that raises a strong inference of retaliation. Thus, the employer must show legitimate, non-retaliatory reasons for its actions. *See Frank's Shoe Store*, *supra*; *Graley*, *supra*. *See generally McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1972).

While the employer may ordinarily change an employee's work schedule for any reason, whether a good reason or a bad reason, the employer may not change an employee's work schedule for a prohibited reason, such as in retaliation for the employee's participation in the grievance procedure. In this regard, it is noted that a change in working hours can represent a signal to the employee that he may have won a battle, but the employer remains in charge, and intends to win the war. In this matter, Grievant received the same pay and benefits upon reinstatement that he had been receiving prior to his termination. Nonetheless, he was required to report to work and maintain a daily schedule different from the hours he enjoyed before he was wrongfully terminated. Absent adequate justification, a change in working hours may be construed as improper conduct by an employer. *See generally Providence Med. Ctr*., 243 NLRB No.

61 (1979). Accordingly, Respondent's contention that this grievance fails to state a proper claim for relief under the grievance procedure for state employees is rejected.

In addition, Grievant's reinstatement by the Grievance Board is ordinarily intended to represent a make-whole remedy, restoring Grievant to his rightful place in the work force. *See Barker v. Lincoln County Bd. of Educ*., Docket No. 98-22-496 (Mar. 30, 1999); *Sanders v. Putnam County Bd. of Educ*., Docket No. 97-40-459 (Dec. 3, 1997). In other words, there is a presumption that Grievant will be returned to the *status quo* as it existed at the time of his termination, which presumption may be rebutted by the employer demonstrating that there was some change in the operation while he was absent, or the employer has a *bona fide* business reason for changing his working conditions in some significant aspect. *See generally David R. Webb Co. v. NLRB*, 888 F.2d 501 (1989).

In analyzing Respondent's justification for adjusting Grievant's work schedule, it is noted that there was no evidence that there was some significant change in Respondent's business operation that took place while Grievant was absent, which development warranted the schedule change in question. Had Grievant been temporarily replaced, and his replacement assigned to an 8:00 AM to 4:00 PM shift, Respondent's explanation would be easier to swallow. The only thing that changed externally was the time of the local mail truck departure from Welch, and this was not even mentioned by two witnesses who reviewed the decision to adjust Grievant's hours. Otherwise, the employer conducted business as usual during Grievant's absence, with two Storekeeper 2 employees working 10-hour shifts between 7:00 AM and 5:00 PM or 8:00 AM and 6:00

PM. Upon Grievant's return, these employees reverted to the same 8:00 AM to 4:00 PM shifts they had been working before Grievant was terminated.

The requirement to have someone working later in the day when trucks make deliveries late in the afternoon, particularly on Fridays, was supposedly recognized while Grievant was absent. However, there was no cogent explanation for why Grievant was the only person who could process these deliveries. Grievant's job duties as a Storekeeper 3 involve working in a "Lead Storekeeper" role. That does not equate to needing to be present when a truck makes a delivery to Central Stores after 2:30 PM. Thus, there was no persuasive explanation by the employer why Grievant needed to adjust his hours to accommodate afternoon deliveries, rather than require either or both of the Storekeeper 2 employees to cover this requirement.

According to CFO Brant, only one Storekeeper needed to be present to process a delivery between 2:30 PM and 4:00 PM. Further, CFO Brant conceded that the shipments, which arrived on Friday and sat in the hallway over the weekend, might have arrived after 4:00 PM. In other words, changing Grievant's work schedule would not necessarily cure the problem identified by the employer.

Finally, there was no suggestion that Grievant was not occupied performing meaningful duties between 6:30 AM and 8:00 AM when the two other Storekeepers reported for duty. There were undertones, however, that during these early morning hours he previously left his personal computer unattended, and someone used it to access pornographic websites, suggesting that the underlying reason for this shift change

represented a vestige from the employer's earlier unsuccessful effort to fire him for this activity.

Ultimately, the undersigned Administrative Law Judge must conclude that DHHR was more interested in finding reasons to justify changing the Grievant's work schedule than in conducting its operations in an efficient manner. There was no consideration given to asking Grievant to adjust his work schedule on those days that one of his Storekeeper 2 co-workers was on leave, so that someone would be on duty until 4:00 PM each day, particularly on a Friday when a delivery might sit in the locked hallway until the next regular work day, usually a Monday.

On the other hand, there was evidence that Mr. Bellomy, who has not filed a grievance, was accommodated by being allowed to report for work as early as 2:45 AM, so that he could get off work earlier in the day. *See* G Exs 5 & 6. While this may be good for employee morale, it is hard to understand how this accommodation makes the operation more efficient, unless it really does not matter what time of day Storekeepers perform their assigned duties. Additionally, the information on which DHHR based its decision was largely anecdotal. Thus, Ms. Addair was not aware that there were regular shipments which arrived before 7:00 AM nearly every week, and CFO Brant was unable to state whether certain shipments that sat over a weekend arrived at the hospital after 4:00 PM. What this all boils down to is that the reasons given for changing Grievant's work hours were merely a pretext for retaliation, and the non-retaliatory reasons given by DHHR's witnesses are not worthy of belief. Grievant has therefore demonstrated that his

work schedule was changed for improper, retaliatory reasons, and he is entitled to reinstatement of the work schedule he enjoyed prior to termination.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Because this grievance does not involve a disciplinary matter, Grievant bears the burden of proving his grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008); *Burkhart v. Ins. Comm'n*, Docket No. 2010-1303-DOR (Dec. 7, 2011); *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). Where the evidence equally supports both sides, Grievant has not met his burden. *Id*.

2. W. Va. Code § 6C-2-2(o) defines "reprisal" as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." In general, a grievant alleging reprisal or retaliation in violation of W. Va. Code § 6C-2-2(o), in order to establish a *prima facie* case, must establish by a preponderance of the evidence:

> (1) that he was engaged in activity protected by the statute (*e.g.*, filing a grievance);
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> (4) that the adverse action was the result of retaliatory motivation or the adverse action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

See Coddington v. W. Va. Dep't of Health & Human Res., Docket Nos. 93-HHR-265/266/267 (May 19, 1994); *Graley v. W. Va. Parkways Economic Dev. & Tourism Auth*., Docket No. 91-PEDTA-225 (Dec. 23, 1991). *See generally Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986). Once a *prima facie* case of retaliation has been established, the inquiry shifts to determining whether the employer has shown legitimate, non-retaliatory reasons for its actions. *Graley*, *supra*. *See Mace v. Pizza Hut, Inc*., 180 W. Va. 469, 377 S.E.2d 461 (1989).

3. Ordinarily, the relief provided to a grieving employee under the grievance procedure involves a "make-whole" remedy, intended to restore the grievant to his or her rightful place as an employee. *Barker v. Lincoln County Bd. of Educ*., Docket No. 98-22-496 (Mar 30, 1999). *See Graf v. W. Va. Univ*., 189 W. Va. 214, 429 S.E.2d 496 (1992); *Gillispie v. Kanawha County Bd. of Educ*., Docket No. 98-20-216 (Aug. 26, 1998); *Sanders v. Putnam County Bd. of Educ*., Docket No. 97-40-459 (Dec. 3, 1997).

4. Grievant established by a preponderance of the evidence that the reasons given by his employer for changing his work schedule upon his reinstatement after successfully challenging his termination through the grievance procedure were merely a pretext for prohibited retaliation. *See generally W. Va. Dep't of Natural Res. v. Myers*, 191 W. Va. 72, 443 S.E.2d 229 (1994).

Accordingly, this grievance is **GRANTED.** Respondent DHHR is hereby **ORDERED** to immediately return Grievant to the same work shift he held at the time of his termination.

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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: November 12, 2013

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LEWIS G. BREWER
Administrative Law Judge