WEST VIRGINIA
PUBLIC EMPLOYEES GRIEVANCE BOARD

RICK PRINGLE,
Grievant,

v. **DOCKET NO. 2012-1424-DHHR**

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

DECISION

Grievant, Rick Pringle, filed this grievance on June 18, 2012, against Respondent, Department of Health and Human Resources ("DHHR"), contesting the "unfair distribution of mandatory overtime" at William R. Sharpe, Jr., Hospital ("Sharpe Hospital"). More specifically, Grievant contended that he was unfairly mandated to work overtime on June 1, 2012, when another employee called in sick due to a car accident. As a remedy, Grievant seeks "to be made whole, including a formal policy addressing mandation."

Following a Level One grievance hearing on September 16, 2012, Respondent denied the grievance on October 4, 2012. Grievant appealed to Level Two of the grievance procedure on October 9, 2012. After mediation was completed at Level Two on April 2, 2013, Grievant appealed to Level Three on April 4, 2013, and a Level Three hearing was set for September 19, 2013. After the matter was set for hearing, it was reassigned to the undersigned Administrative Law Judge for administrative reasons. On September 12, 2013, the parties agreed to waive the Level Three hearing, and submit the matter on the record developed at Level One. A briefing schedule was then established

and this matter became mature for decision upon receipt of the Grievant's post-hearing argument on October 16, 2013.[1]

Synopsis

Grievant is employed by Respondent DHHR as a Health Service Worker assigned to William R. Sharpe, Jr., Hospital. Grievant complains that he was unfairly mandated to work overtime to take the place of an evening shift Health Service Worker in his unit who had been previously identified to work on a separate unit, in exchange for a Licensed Practical Nurse from that other unit working the evening shift in Grievant's unit. Grievant failed to establish that this involuntary assignment involved prohibited discrimination, was made in an arbitrary and capricious manner, or otherwise violated any identified law, rule, policy, or regulation. Accordingly, this grievance must be denied.

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

Findings of Fact

1. Grievant is employed by the Department of Health and Human Resources ("DHHR") as a Health Service Assistant ("HSA"). He has worked at Sharpe Hospital for over 11 years. Tr at 5.[2]

2. At the time giving rise to this grievance, Grievant was assigned to day shift on unit G2.

3. At an unspecified date prior to June 1, 2012, the managers for Units G2 and E1 agreed that Unit E1 would provide a Licensed Practical Nurse ("LPN") to Unit G2 on

[1] Respondent did not submit a post-hearing argument.
[2] The Level One hearing transcript in this matter will be cited as "Tr at ___."

the evening shift for June 1, 2012, and that Unit G2 would provide a Health Service Worker ("HSW") to Unit E1 to work that same shift.

4. On June 1, 2012, the HSW from Unit G2 who had been identified to work on Unit E1 called off work due to an auto accident.

5. Grievant, who was already working a day shift, was assigned to fill in for the absent HSW, working the evening shift on Unit E1, and thereby mandated to work overtime.

6. There was at least one LPN working on the day shift in Unit G2 who could have been mandatorily held over to work the evening shift in that unit. This would allow Unit E1 to keep the LPN who had been scheduled to work in G2.

7. Sharpe Hospital has an unwritten policy that when a worker involved in a pre-arranged trade calls in sick, the unit in which the call-in occurred must nonetheless provide a suitable substitute to fulfill the trade agreement. This unwritten policy was followed as the basis for mandating Grievant to work overtime in Unit E1 to fill in for the absent HSW.

Discussion

Because this grievance does not involve a disciplinary matter, 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 has asserted that his assignment to work mandatory overtime on June 1, 2012 was discriminatory. The grievance procedure for public employees defines "discrimination" as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. Va. Code § 6C-2-2(d). In order to establish a *prima facie* claim of discrimination under the grievance statute, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employees;
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> (b) that the different treatment is not related to the actual job responsibilities of the employees; and
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> (c) that the difference in treatment was not agreed to in writing by the employee.

Simons v. W. Va. Div. of Highways, Docket No. 2012-0864-DOT (Jan. 31, 2013). *See Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004). *See also Hammond v. W. Va. Dep't of Transp.*, 229 W. Va. 108, 727 S.E.2d 652 (2012) (*per curiam*).

In this case, Grievant was assigned to replace a Health Service Worker ("HSW") regularly assigned to Unit G2 who called in sick due to a car accident. Coincidentally, the managers for Units G2 and E1 had previously made arrangements for the same HSW who called in sick to fill in on Unit E1 on June 1 in exchange for a Licensed Practical Nurse ("LPN") from Unit E1 who would work in Unit G2, which was then experiencing a shortage of LPNs. Upon learning that the HSW was no longer available to work on E1, Grievant

was mandated to work overtime on E1, and the LPN from E1 proceeded to work the evening shift in G2, so that both units were adequately staffed. Apparently, Sharpe Hospital makes a distinction between para-professionals, including Health Service Workers and Health Service Assistants, such as Grievant, and licensed staff, including the LPNs, in making assignments. Inasmuch as Grievant has not established that he was treated differently from any other similarly situated employee in the circumstances presented, he has failed to establish a *prima facie* case of discrimination. Even if Grievant did establish a *prima facie* case of discrimination, DHHR established that Grievant was mandated to work for an absent HSW in order to adequately staff both units in the hospital. This represents a proper, job-related reason for the action taken.

Grievant points out that there were other alternatives to backfill for the absent HSW, such as allowing the LPN from E1 to proceed to G2, and then mandating an HSW from E1 to remain on duty in that unit for another shift. However, the mere fact that the employer has multiple options does not establish that exercise of its discretion to select the option which was adverse to Grievant was improper, or an abuse of discretion. DHHR managers have broad discretion in making staffing decisions, subject to established law, policy and procedure. Grievant has not established how Respondent's decision to mandate him to fill in for the absent HSW violated any statute, policy, rule, or written

agreement under which he works.[3] *See Straughn v. Dep't of Health & Human Res.*, Docket No. 2011-0054-CONS (May 6, 2011).

Therefore, the only remaining basis for review of the challenged decision involves a determination of whether it represented an arbitrary and capricious exercise of the employer's broad discretion to make staffing decisions. *See Mikles v. Dep't of Envtl. Prot.*, Docket No. 06-DEP-320 (Mar. 30, 2007); *Hamilton v. W. Va. Human Rights Comm'n*, Docket No. 91-HRC-446 (Feb. 28, 1992). *See also Law v. W. Va. Dep't of Health & Human Res.*, Docket No. 95-HHR-452 (July 17, 1997); *Roberts v. W. Va. Div. of Highways*, Docket No. 90-DOH-378 (Feb. 26, 1992). "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." *Mikles*, *supra*; *Forth v. W. Va. Dep't of Transp.*, Docket No. 98-DOH-433 (July 22, 1999). *See Bedford County Mem. Hosp. v. Health & Human Serv.*, 769 F.2d 1017, 1022 (4th Cir. 1985).

Although a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute his judgment for that of the employer. *Trimboli v. Dep't of*

[3] In his post-hearing argument Grievant asserts, for the first time, that this assignment violated the terms of a court order issued by the Circuit Court of Kanawha County enjoining Respondent from using full time employees to work involuntary overtime except in exceptional circumstances. This Order was not made a part of the lower level record, nor was Respondent provided an opportunity to address this contention at Level One. Therefore, the application of any such Order to the circumstances presented in this grievance is not properly before the undersigned Administrative Law Judge, and will not be considered in this decision. *See W. Va. Dep't of Health & Human Res. v. Hess*, 189 W. Va. 357, 432 S.E.2d 27 (1993); *Scurlock v. Fayette County Bd. of Educ.*, Docket No. 93-10-164 (Aug. 3, 1993); *Rader v. W. Va. Dep't of Health & Human Res.*, Docket No. 91-ES-317 (Sept. 22, 1992); *Moore v. Mason County Bd. of Educ.*, Docket No. 92-26-093 (Sept. 17, 1992).

Health & Human Res., Docket No. 93-HHR-322 (June 27, 1997). Ultimately, the arbitrary and capricious standard of review is a deferential one which presumes an agency's actions are valid, as long as the decision is supported by substantial evidence, or by a rational basis. *Adkins v. W. Va. Dep't of Educ*., 210 W. Va. 105, 556 S.E.2d 72 (2001); *In Re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996). In this matter, the manager's practice involving prearranged trades of staff between units[4] whereby the sending unit remains responsible for providing an acceptable replacement, on those occasions when the previously identified employee expected to fulfill the trade calls off work, provides a rational basis for the action taken here. It is not necessary that this be the best decision, or the least inconvenient to the employees involved.

Accordingly, Grievant failed to demonstrate that his superiors' actions in mandating him to work a second consecutive shift on Unit E1 after completing his regularly assigned shift on Unit G2 represented an arbitrary and capricious exercise of the employer's authority to make staffing decisions and assignments. Likewise, Grievant failed to establish that his mandatory assignment to work a second consecutive shift on June 1, 2012 violated the prohibition against discrimination in the public employee grievance procedure.

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.

[4] Although the policy described was not in writing, there was no evidence of any conflicting policy or practice being applied at Sharpe Hospital. Nonetheless, the employer should seriously consider reducing such policies to writing so that everyone is on notice as to what to expect when such events occur.

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. The grievance procedure for public employees defines "discrimination" as "any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees." W. Va. Code § 6C-2-2(d). In order to establish a *prima facie* claim of discrimination under the grievance statute, an employee must prove:

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Simons v. W. Va. Div. of Highways, Docket No. 2012-0864-DOT (Jan. 31, 2013). *See Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004). *See also Hammond v. W. Va. Dep't of Transp.*, 229 W. Va. 108, 727 S.E.2d 652 (2012) (*per curiam*).

3. Grievant failed to establish that any other employee at Sharpe Hospital had been treated differently in regard to being mandated to work overtime in circumstances

similar to those presented by this grievance. Consequently, Grievant failed to establish a *prima facie* case of discrimination under the grievance statute.

4. The "arbitrary and capricious" standard of review is a deferential one which presumes an agency's actions are valid as long as the decision is supported by substantial evidence or a rational basis. *See* Syl. Pt. 3, *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996). 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 & Human Serv*., 769 F.2d 1017, 1022 (4th Cir. 1985).

5. Grievant failed to establish by a preponderance of the evidence that the decision to mandate overtime, requiring him to work an extra shift in place of a Health Service Worker who had been previously identified to work a regularly scheduled evening shift in another unit, as a result of a pre-arranged "trade" of employees between unit managers, represented arbitrary and capricious decision making by his superiors. *See Hurst v. W. Va. Dep't of Transp*., Docket No. 91-DOH-326 (Feb. 27, 1992).

6. A grievant may not raise new claims or assert a new basis for relief in his Level Three post-hearing proposals, because the employer has not had an opportunity to defend against them. *See W. Va. Dep't of Health & Human Res. v. Hess*, 189 W. Va. 357, 432 S.E.2d 27 (1993); *Scurlock v. Fayette County Bd. of Educ*., Docket No. 93-10-164 (Aug. 3, 1993); *Rader v. W. Va. Dep't of Health & Human Res*., Docket No. 91-ES-317

(Sept. 22, 1992); *Moore v. Mason County Bd. of Educ*., Docket No. 92-26-093 (Sept. 17, 1992).

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 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: October 22, 2013

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LEWIS G. BREWER
Administrative Law Judge