STARLA BOND-DAVIS and

GUY GALIANO, et al.

v. Docket Nos.93-HHR-390, 445

WEST VIRGINIA DEPARTMENT OF

HEALTH AND HUMAN RESOURCES

DECISION

Grievants, Starla Bond-Davis and Guy Galiano, are employed by the West Virginia Department of Health and Human Resources (Respondent or DHHR) and are assigned to the Region I office in Clarksburg. (See footnote 1) Grievants filed separate appeals to level four in October 1993 alleging a violation of W.Va. Code §29-6A-2(d) when they were required to take annual leave on March 15, 1993, when they did not report to work due to inclement weather, while Respondent's Region IV offices were closed and employees excused from work, with pay. The grievances were consolidated for hearing held on December 2, 1993; proposed findings of fact and conclusions of law were submitted on or before January 20, 1994. (See footnote 2) The facts of this matter are as follows:

1. A severe snow storm occurred in West Virginia on March 13, 1993. The magnitude of this blizzard was such that Governor Gaston Caperton declared a state of emergency beginning March 13 and lasting through March 16, 1993. Governor Caperton additionally imposed a travel ban beginning at 4:45 p.m., Saturday, March 13, and ending at 3:00 p.m., Sunday, March 14, 1993, when all primary roads were open for travel.

2. State offices were open on Monday, March 15, subject to a two-hour delay.

3. Several offices of DHHR were officially closed on Monday, March 15, pursuant to decisions made by Regional Administrators or other local officials of those offices.

4. Regional Administrator Ron Patteson determined that the Clarksburg office would be open on Monday, March 15.

5. In those offices which were closed the employees were "on-call," that is they were to remain

available for work during normal work hours to respond to calls or return to the worksite if directed.

6. The "on-call" employees received their regular salary and were not required to use annual leave for March 15, 1993. 7. Grievants did not report to work on March 15 and were required to use six hours of annual leave.

Grievants argue that the inclement weather policy was applied in a discriminatory manner because the weather conditions were uniform throughout the state and because the state of emergency remained in effect. Allowing some employees to remain home “on call” with pay while requiring others to take annual leave also constitutes favoritism, Grievants assert. Grievants, who both live on secondary roads, testified that they were unable to leave their homes on March 15 because or the vast amount of snow which remained uncleared, leaving the roads impassable. Other witnesses testified as to the poor street conditions in downtown Clarksburg and the lack of available parking at the DHHR offices.

Respondent argues that the inclement weather policy was applied consistently, i.e., the decision whether or not to close offices was within the discretion of the local administrators. It further asserts that the placement of employees assigned to closed offices “on-call” and charging annual leave to employees who did not report for work at those offices which remained open was also consistent with policy.

Region I Administrator John Kaltenecker stated that he conferred with the administrators in two other regions and Operations Supervisors to gather as much information aspossible and to ensure that all areas acted consistently. After learning that Governor Caperton had declared state offices would be open Monday, there appeared to be no decision to be made. The administrator stated that he found a “couple” of offices in Regions I, II, and III were closed for water problems or for some particular reason, but otherwise all offices were open.

West Virginia Division of Personnel's Emergency Situations/Inclement Weather Policy states that: a) absences due to emergency situations or inclement weather conditions which make traveling to and from work hazardous may be charged to accrued annual leave; and b) employees may be released from work without loss of pay or charge to annual leave by Executive Declaration or by the Governor's designee as a result of emergency situations and/or inclement weather conditions.

Respondent's Policy 2103 provides that “employees will not generally be released from work except as the result of an officially declared weather or other emergency resulting in the partial or

total shutdown of state government." Additionally, employees who are sent away from the worksite, are on call during normal work hours when their office is closed, unless it is an officially declared weather or other emergency resulting in the partial or total shutdown of state government.

Some confusion has apparently resulted from the Governor's imposition of both a state of emergency and atravel ban. Although the travel ban was lifted on Sunday, March 14, the record does not clearly establish whether this applied to both primary and secondary roads. Reasonably, it must have been intended to lift the travel ban on all roads since state offices were open on Monday. The evidence in its entirety establishes that Respondent acted in compliance with Governor Caperton's directive that state offices be open on March 15. Furthermore, Respondent properly followed Personnel's Inclement Weather Policy by allowing those employees who could not get to work to take annual leave.

Grievants are correct that in this instance the storm was relatively uniform throughout the state; however, the effects on the individual structures was not. Respondent's policy which allows designated office closing based upon unique circumstances is not discriminatory. Neither is it discriminatory to allow employees assigned to closed offices to be placed "on call." The difference in the two situations is easily defined. In Grievants' case the office was open but they could not, or did not wish to, travel under adverse road conditions. In the second case, the employees would be at work but for structural or other problems which caused the buildings to be closed. Therefore, no finding of discrimination or favoritism may be made.

In addition to the foregoing facts and narration it is appropriate to make the following formal conclusions of law.

CONCLUSIONS OF LAW

1. Discrimination is defined as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." W.Va. Code §18- 29-2(m).

2. Favoritism is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." W.Va. Code §18-29-2(o).

3. Differences in worksites can justify differences in the treatment of employees assigned to

those sites. Such disparate treatment is “related to the actual job responsibilities of the employees.” Rotenberry v. McDowell Co. Bd. of Educ., Docket No. 93-55-102 (Sept. 22, 1993); Hayes v. Employment Security, Docket Nos. 91-ES-505, 92-ES- 003 (December 31, 1992).

4. Respondent acted in compliance with Division of Personnel Policy which requires that employees who do not report to work due to inclement weather when the office is open be allowed to use annual leave.

5. Respondent's policy which allows employees sent home from offices which are closed to be “on call” and not required to use annual leave does not result in discrimination or favoritism.

Accordingly, the grievance is Denied.

Any party or the West Virginia Division of Personnel may appeal this decision to the “circuit court of the county in which the grievance occurred,” and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

DATED July 26, 1994 _____

SUE KELLER

SENIOR ADMINISTRATIVE

LAW JUDGE

Footnote: 1

It appears that the only remaining grievant in Galiano, et al. is Mona Cumberledge.

Footnote: 2

Prior to advancing their grievances to level four Ms. Bond- Davis' immediate supervisor had responded that he lacked authority to grant the requested relief, the level two decisionwas not made a part of the record, and the grievance was denied at level three. Grievant Galiano did not submit any lower-level decisions; however, other documentation indicates that the matter was considered at levels one and three.