MARIAN EDWARDS,

Grievant,

v. **Docket No. 97-PEDTA-426**

WEST VIRGINIA PARKWAYS ECONOMIC DEVELOPMENT AND TOURISM AUTHORITY,

Respondent.

D E C I S I O N

Marian Edwards (Grievant) filed this grievance pursuant to W. Va. Code §§ 29-6A-1, et seq., on January 30, 1997, alleging that Respondent West Virginia Parkways Economic Development and Tourism Authority (Parkways) had violated its nepotism policy when it selected James Bostic for a Foreman position. Following denial of her grievance at Levels I and II, Grievant appealed to Level III on February 21, 1997. A hearing was conducted on April 24, and August 13, 1997, and a Level III decision denying the grievance was issued by Grievance Evaluator Donald L. Lake on September 30, 1997. Grievant appealed to Level IV on October 3, 1997. A Level IV hearing was conducted in the Grievance Board's office in Charleston, West Virginia, on December 15, 1997. The parties agreedto a briefing schedule at the close of the hearing, and this matter became mature for decision upon receipt of the parties' written submissions on March 3, 1998. (See footnote 1)

The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record, including the transcripts of the Level III hearing, as well as the testimony and evidence presented at Level IV.

FINDINGS OF FACT

1. Grievant is employed by the West Virginia Parkways Economic Development and Tourism Authority (Parkways) as a Toll Collector, currently assigned to Toll Barrier C.

2. In December 1996, Grievant applied for one of three vacant Foreman positions.

3. Grievant was one of twenty-four applicants interviewed for the three Foreman vacancies, but was not selected.

4. The successful applicant for a Foreman vacancy at Toll Barrier C was James Bostic.

5. Mr. Bostic's wife, Judy Bostic, is employed by Parkways as a Toll Collector assigned to Toll Barrier C. The Bostics have been married since September 1992.

6. Prior to the Bostics' marriage, on June 15, 1992, Parkways adopted Personnel Policy I-7, which contains the following provision regarding nepotism:

A. Policy

The Purpose of this policy is to detail Parkways Authority guidelines concerning the employment of family members.

Definitions: **NEPOTISM** _ the act of showing favoritism to family members, especially by employing them in desirable positions; _ the bestowal of patronage by public officers in appointing others to positions by reason of blood or marital relationships to the appointing authority.

FAMILY MEMBERS _ father, mother, grandfather, grandmother, spouse, child, brother, sister, father-in-law, mother-in-law, brother-in-law, sister-in-law, son-in-law, daughter-in-law, grandson, granddaughter, step father, step mother, step children.

It is the policy of the Parkways Authority to prohibit the employment or transfer of family members into the same organizational units where they would be under the direct or indirect supervision of an individual whose relationship to them would fall within the family member's definition. Policy is hereby established to prevent one marriage partner or relative to use his or her position to secure a job for another at the expense of a more qualified applicant. Such policy also prevents the problems that could arise if relatives or spouses worked together and one were to be promoted to a supervisory position.

B. Procedure

No appointing authority shall influence or attempt to influence the working conditions of his/her relatives. It is the responsibility of the appointing authority to administer the employment of relatives of any applicant or employee in a consistent and impartial manner. Specifically, a management employee may not use undue

> influence in recommending his family members for employment.
>
> No employee shall supervise a relative, either directly or indirectly. More specifically, no employee shall review or audit the work of a relative, take part in any discussion concerning employment, assignment, compensation, discipline or related matters involving a relative. In the event that an individual, through marriage, adoption, etcetera, is placed in a prohibited work relationship with a relative, the situation must be resolved within thirty calendar days. Resolution may be made by transfer, reassignment, resignation, etc., of one of the affected employees.
>
> Current full-time employee exemption _ Exempt from the "transfer" portion of this policy are current "Full-time Permanent" employees who may be working in the same organizational unit as a relative, or who may be under the direct or indirect supervision of a relative.
>
> Also exempt from this policy, for the same reasons of exemption stated above, are those "Temporary Status" employees who are currently employed as of the date of this policy. The exemption for such "Temporary Status" employees shall expire upon the termination of the temporary employment term. This exemption <u>will not</u> be reinstated in subsequent periods of temporary hiring.

G Ex B at LIII (emphasis in original).

7. Policy I-7 was prepared at the direction of Parkways General Manager William Gavan. Because Foremen assigned to Toll Barriers are first-level supervisors, they do not "indirectly" supervise any Parkways employees within the meaning of Policy I-7. 8. Parkways assigned Mr. Bostic to the midnight shift at Toll Barrier C, while Mrs. Bostic remained on the day shift at that location. There is some overlap between the end of the midnight shift and the beginning of the day shift, usually less than thirty minutes. During that time period, Mrs. Bostic is under the direct supervision of a Foreman other than her husband.

9. In addition to assuring that Mrs. Bostic is under the supervision of another Foreman, Parkways management has directed that Mr. Bostic will not supervise his wife under any foreseeable circumstances.

10. On a number of occasions since January 1997, Mr. Bostic has been assigned to work the day shift at Toll Barrier C, primarily for training purposes. On none of those occasions has he directly or indirectly supervised his wife or engaged in any conduct prohibited under Personnel Policy I-7.

11. When Mr. Bostic works on the day shift, at least one other Foreman and Toll Barrier C Supervisor William Bell, are normally present to supervise Mrs. Bostic. 12. Mr. Bostic has

recently been reassigned to the evening shift at Toll Barrier C. While this may result in additional overlap between Mr. and Mrs. Bostic's working hours, their working relationship otherwise remains the same as described in Findings of Fact Numbered 8 through 11.

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 W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29- 6A-6.

Policy I-7 is an administrative regulation which Parkways is obligated to follow. See Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977); Parsons v. W. Va. Dept. of Transp., Docket No. 97-DOH-289 (Oct. 30, 1997); Graham v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 94-PEDTA-448 (Mar. 31, 1995); Bailey v. W. Va. Dept. of Transp., Docket No. 94-DOH-389 (Dec. 20, 1994). James Bostic, the successful applicant for a Foreman position at Toll Barrier C, is covered by Policy I-7 to the extent that he is specifically prohibited from directly or indirectly supervising a close relative or family member, in this case, his wife, who is employed as a Toll Collector at Toll Barrier C.

Although Policy I-7 defines “nepotism” generally and “family members” specifically, it does not further define “direct” and “indirect” supervision in explicit terms. These relationships were explained by Parkways General Manager William Gavan, who participated in developing Policy I-7, and whose signature appears on the document as having approved its issuance. See G Ex B at L III. According to his testimony, a Foremanat a Toll Barrier is a first-level supervisor who directly supervises only those employees under his immediate supervision. Further, unlike Mr. Bostic's immediate supervisor, William Bell, who directly supervises all Foremen at Toll Barrier C, and indirectly supervises all employees under the supervision of those Foremen, Mr. Bostic, as a first-level supervisor, does not provide indirect supervision to any employees. Only managers or supervisors who supervise personnel with direct supervisory authority over subordinate employees have “indirect” supervisory authority. Mr. Bostic, as a first-level supervisor, has no such authority. This interpretation of Policy I-7 is not inconsistent with the common meaning of the language in that document. See Watts v. W. Va. Dept. of Health & Human Resources, 195 W. Va. 430, 465 S.E.2d 877 (1995). Moreover, where the plain language of the rule does not compel a different result, some deference must be extended to

the agency in interpreting its own policy. See Dyer v. Lincoln County Bd. of Educ., Docket No. 95-22-494 (June 28, 1996). See generally W. Va. Dept. of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); Princeton Community Hosp. v. State Health Planning & Dev. Agency, 174 W. Va. 558, 328 S.E.2d 164 (1985); Jones v. Bd. of Trustees, Docket No. 94-MBOT-978 (Feb. 29, 1996); Foss v. Concord College, Docket No. 91-BOD-351 (Feb. 19, 1993).

Given this reasonable explanation of the arguably ambiguous language in Policy I-7, Mr. Bostic could not be in violation of the nepotism prohibition by indirectly supervising his wife, since he does not have indirect supervisory authority over any Parkways employees. Although Mr. Bostic could violate the policy by directly supervising his wife, or engaging in other actions specifically prohibited by the policy, the evidence indicates that Parkways placed him on a separate shift so that another Foreman directly supervises Mrs. Bostic. Moreover, Mr. Bostic's supervisors have issued explicit directions that prohibit him from making employment decisions in regard to his wife. He is not her supervisor, and he is not permitted to become her supervisor in the absence of her regular Foreman, or any other foreseeable happenstance.

Policy I-7 only compels reassignment of an employee when they are in a prohibited work relationship with a relative. (See footnote 2) Mr. Bostic's duties do not inevitably require that he take actions which would directly impact on his wife's conditions of employment. The fact that Mr. Bostic, like any Parkways employee, could hypothetically engage in conduct which could benefit his wife to the detriment of other employees can be dealt with through appropriate disciplinary action, if, and when, such an event actually transpires. Accordingly, Grievant has not demonstrated that Parkways' placement of Mr. Bostic as a Foreman at Toll Barrier C violated Policy I-7.

Beyond her contention that Mr. Bostic's disqualification from consideration for the Foreman vacancy could have theoretically led to her selection, assuming that the fifteen applicants ranked ahead of her by the selection board all declined assignment to the remaining vacancy at Toll Barrier C, Grievant presented no probative evidence to indicate that the selection process was otherwise flawed in any regard. (See footnote 3) Accordingly, given thatMr. Bostic was properly assigned as a Foreman on a separate shift at Barrier C, Grievant has not demonstrated any entitlement to relief in regard to her nonselection for Foreman. In addition to the foregoing, the following conclusions of law are appropriate in this matter.

CONCLUSIONS OF LAW

1. In a grievance which does not involve a disciplinary matter, the grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. "An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). See Parsons v. W. Va. Dept. of Transp., Docket No. 97-DOH-289 (Oct. 30, 1997); Graham v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 94-PEDTA-448 (Mar. 31, 1995); Bailey v. W. Va. Dept. of Transp., Div. of Highways, Docket No. 94-DOH-389 (Dec. 20, 1994).

3. An agency may not interpret its policies in a manner which is inconsistent with the common meaning of the language contained therein. See Watts v. W. Va. Dept. of Health & Human Resources, 195 W. Va. 430, 465 S.E.2d 877 (1995). However, where the language in a policy is either ambiguous or susceptible to varying interpretations, thisGrievance Board will give reasonable deference to the agency's interpretation of its own policy. See Dyer v. Lincoln County Bd. of Educ., Docket No. 95-22-494 (June 28, 1996). See generally W. Va. Dept. of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); Princeton Community Hosp. v. State Health Planning & Dev. Agency, 174 W. Va. 558, 328 S.E.2d 164 (1985); Jones v. Bd. of Trustees, Docket No. 94-MBOT-978 (Feb. 29, 1996); Foss v. Concord College, Docket No. 91-BOD-351 (Feb. 19, 1993).

4. Parkways did not violate Personnel Policy I-7 prohibiting certain forms of nepotism by employing James Bostic as a Foreman at Toll Barrier C, primarily assigned to the midnight or evening shifts, while his wife was employed at Toll Barrier C as a Toll Collector on the day shift, under the circumstances presented in this grievance.

Accordingly, this grievance is **DENIED**.

Any party 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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: May 7, 1998

Footnote: 1

Grievant was represented by Lynn Belcher, with the West Virginia State Employees Union. Respondent was represented by its General Counsel, A. David Abrams, Jr.

Footnote: 2

In order to avoid conflict with Title VII of the Civil Rights Act of 1964, such anti- nepotism rules must be written and applied in a gender-neutral manner. See, e.g., Harper v. Trans World Airlines, Inc., 525 F.2d 409 (8th Cir. 1975); Fitzpatrick v. Duquesne Light Co., 601 F. Supp. 160 (W.D. Pa. 1985), aff'd, 779 F.2d 42 (3d Cir. 1985); Tuck v. McGraw-Hill, Inc., 421 F. Supp. 39 (S.D.N.Y. 1976).

Footnote: 3

Even if Mr. Bostic's assignment to Toll Barrier C on a shift separate from his wife had been found to constitute nepotism prohibited by Policy I-7, one of the appropriate remedies available to the employer would be to transfer either of the related employees to anothertoll plaza. In such circumstances, Grievant's nonselection for a Foreman position would not be affected.