MELANIE VICKERS,

Grievant,

v. **Docket No. 97-BOD-112A**

BOARD OF DIRECTORS/

WEST VIRGINIA STATE COLLEGE,

Respondent.

D E C I S I O N

Grievant, Melanie Vickers, alleges she has been treated in a discriminatory manner because of her gender and alleges the following specifics: (See footnote 1)

1. The duties of the position of Sergeant differ for Sergeant Melanie Vickers that (sic) those duties of previous Sergeant(s).

2. Sergeant Vickers is the only person to be required to take a test for a promotion into or within the Department of Public Safety at West Virginia State College for officers of the Department of [Public] Safety at West Virginia State College.

3. Sergeant Vickers was is (sic) not permitted the discretion in performing her duties as a Sergeant as previous Sergeants were or that person[s] of equal or higher rank are permitted to exercise.

4. Sergeant Vickers was not permitted the discretion in performing her duties as a Sergeant that others of lower rank

were permitted.

5. Sergeant Vickers has been on administrative leave in circumstances where other officers of the Department of Public Safety would not have been on administrative leave. (See footnote 2)

6. A difference was made between Melanie Vickers and others in a qualification with weapons.

7. The departmental policies and procedures have been applied differently to Melanie Vickers than to other officers.

8. Melanie Vickers' request for supplies and/or safety equipment has unreasonably been turned down.

9. Training requirements have differed between Melanie Vickers and other officers.

Gr. Exh. 6, Level IV. (See footnote 3)

The parties agreed to waive Level I and proceed directly to Level II. There were numerous hearings at Level II. The Level II Grievance Evaluator found no evidence of sexual discrimination, and this grievance was denied at Level II. Grievant appealed to Level IV, and a hearing was held on April 23, 1997. The original due date for the parties' proposed findings of fact and conclusions of law was in June and then changed to late August 1997. This date was changed at the request of Grievant's counsel, Ms. Ellen

Golden. The parties were to set a new due date. After many months without response from the parties, the undersigned Administrative Law Judge wrote the parties asking if they still intended to submit additional arguments, and if so, a date certain should be set forthese proposals. Eventually, this case became mature for decision on May 28, 1998, the deadline for the parties' final proposed findings of fact and conclusions of law. (See footnote 4)

After a detailed review of the record in its entirety the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed in the Department of Public Safety ("DPS" or "Department") at West Virginia State College ("WVSC") for at least eleven years.

2. Grievant began her employment as an Officer and was later promoted to Corporal and then to Sergeant.

3. Grievant attended many in-service programs during her employment at WVSC. (See footnote 5)

4. In approximately 1992, Gilbert Flores, Director of Public Safety, did not select Grievant, as one of only three people, to attend an in-service on dispatching, but stated Grievant could attend if she wished to pay her own way. Grievant viewed this event as an example of gender discrimination because Director Flores did not give her a reason for his failure to let her attend.

5. While Grievant was an Officer, the then-Sergeant asked Director Flores to buy Grievant a jacket that was on sale, because Grievant's jacket that DPS had bought her was too big. Director Flores did not want to purchase another jacket for Grievant, as hehad bought one for her in the past. Grievant bought the jacket, and later was reimbursed by DPS.

6. In 1993, an opening for the Sergeant's position was posted, and the interested

applicants were required to take a qualifying test. Grievant received the position because she received the highest score on the test. She was not the applicant with the most seniority.

7. The two other individuals, who applied for the position and who were not selected, were males.

8. This was the first time a test was required for promotion within DPS. This change was instituted because DPS wanted to upgrade its system and was in the process of doing so. DPS had also started requiring its officers to qualify with their weapons, and the Department had begun to perform more complex investigations instead of just being a security force.

9. Some of the duties previously assigned to a prior Sergeant were not assigned to Grievant when she started in the position in 1993. These duties were assigned to a variety of other officers. It was Director Flores' decision to reassign these duties for a variety of reasons.

10. As a Sergeant, Grievant had difficulty delegating work and had problems completing her work. She frequently found it necessary to work extra hours to complete the paper work Director Flores assigned her. Director Flores worked with Grievant to assist her in learning to delegate work instead of doing it all herself. 11. In order to be paid for a piece of equipment, a Department employee is to receive prior approval, and then purchase the article.

12. Grievant was not reimbursed for her Sergeant stripes, certain patches, a phone in her office, a Maglite, and a nameplate, because she never submitted the proper request to Director Flores, and/or had not requested or received proper approval.

13. Director Flores directed all DPS employees to qualify with their weapons. Grievant elected to attempt to qualify with two different types of hand guns. She did not qualify with the weapon she usually wore on duty, but she did qualify with another weapon. Director Flores told Grievant she could no longer wear the weapon she had

failed to qualify with at work.

14. Other Officers chose to qualify with only one weapon and passed their qualifying test. (See footnote 6)

15. No other Officer was allowed to wear a hand gun with which they had failed to qualify.

16. During the time Grievant worked for DPS, the Department moved from larger to smaller quarters. (See footnote 7) Grievant did not have an office for some time after the move, although she had two desks, one of which was in Director Flores' office. Director Flores gave Grievant this desk and a key to his office so she would have a place to complete her paperwork. There were offices upstairs in their building, but Director Flores did not havepermission to use these offices. Grievant frequently complained about not having an office, as the previous Sergeant had an office when DPS was in larger quarters. Later Grievant was given an office.

17. Grievant was known to be a "by the book" type of person, and she complained frequently about the other Officers' failure to follow all the rules and regulations, both when she was an Officer and after she became a Sergeant. Grievant also complained Director Flores would not make the Officers follow all these rules and regulations. Grievant complained Officers were not filling in their log books in a complete fashion, Director Flores did not listen to her all the time or take her complaints seriously, Director Flores was "stealing her work" and taking credit for it, Director Flores did not require Captain Joe Brown to follow the rules, Director Flores did not punish Captain Brown for inappropriately speaking rudely to her, (See footnote 8) and Captain Brown was not required to go to mandatory training.

18. Grievant made these complaints to a variety of people at WVSC. She complained to then Sergeant Michael Scraggs; Director Flores; Nick Wounaris, Vice-President for Administrative Affairs, Director of Support Services, and Director Flores' supervisor; Dr. Steven Batson, Vice-President for Planning and Advancement; (See

footnote 9) and Dr. Cassandra Whyte, Director of Academic Affairs and Mr. Wounaris' supervisor. She was directed by Mr. Wounaris, Dr. Batson, and Dr. Whyte to talk to Director Flores. Dr. Whyteviewed these complaints as "growing pains" of an individual who was learning to be a supervisor.

19. The only proven example of Captain Brown not attending mandatory training was a Pressure Point Training class dealing with how to control violent individuals. This training occurred shortly after he had returned from medical leave for heart problems.

20. No evidence was presented to demonstrate whether Captain Brown was or was not spoken to about his treatment of Grievant.

21. Grievant frequently completed reports for Director Flores to which Director Flores signed his name.

22. Contrary to Grievant's testimony, other male officers and supervisors had their memos checked and/or initialed by Director Flores before they were sent.

23. Director Flores, until the time of her termination, found Grievant to be a competent employee and "held her in high esteem."

24. Grievant filed a complaint with the Human Rights Commission in 1993 stating she had been discriminated against by DPS because of her sex. Some of the complaints alleged in this grievance were a part of that complaint, especially the areas dealing with the removal of duties from the Sergeant's position and her treatment by Captain Brown. (See footnote 10) She later withdrew this complaint because she believed Director Flores would treat her fairly. 25. On October 16, 1996, Grievant was placed on administrative leave with pay while WVSC investigated complaints that she had physically attacked another employee while on duty as the shift supervisor. (See footnote 11)

26. Grievant filed this grievance alleging gender discrimination while she was on this administrative leave with pay. (See footnote 12)

27. Grievant stated she did not file another complaint about gender discrimination

until she was placed on administrative leave because she "never had any reason to."

Issues

Grievant alleges DPS has engaged in gender discrimination for many years. (See footnote 13) Respondent argues DPS has not engaged in gender discrimination, and the events Grievant complains about had nothing to do with Grievant's gender. Specifically, Respondent argues Grievant was treated differently in some minor respects because she had different abilities than the prior Sergeant, and Director Flores was attempting to train Grievant in the areas where she was deficient and to utilize Grievant in the areas whereshe had the greatest strengths and abilities. Additionally, Respondent agrees Director Flores did change some assignments around after the prior Sergeant was terminated for cause, but this was his management decision, and there is no evidence to demonstrate his decisions were arbitrary and capricious. Respondent notes Grievant was an excellent employee, but at times created problems for herself with others in the Department because of her rule oriented and unyielding manner and her numerous complaints about the behavior of other officers and supervisors.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of 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); 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). See W. Va. Code § 18-29-6.

Due to the broader definition of discrimination contained in W. Va. Code § 18-29-2(m) it is not necessary to analyze Grievant's claim of gender discrimination under the Human Rights Act, as such claims are subsumed by the W. Va. Code § 18-29-2(m)

claim. See Vest v. Bd. of Educ., 193 W. Va. 227, 455 S.E.2d 781 (1995). It is noted these are statutes under which Grievant works as defined in the grievance procedure for education employees. W. Va. Code §18-29-2(m). Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R- 215 (Sept. 24, 1996). See generally Belcher v. W. Va. Dept. of Transp., Docket No. 94-DOH-341 (Apr. 27, 1995). Grievant alleges discrimination saying she was treated differently because of her gender. W. Va. Code §18-29-2(m) defines discrimination as "differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing."

To prove discrimination a grievant must establish a prima facie case which consists of demonstrating:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;
>
> and,
>
> (c) that such differences were unrelated [to] actual job responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

If a grievant establishes a prima facie case, a presumption of discrimination exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, a grievant may still prevail if she can demonstrate the reason given by the respondent was pretextual. Steele v. Wayne County Bd. of Educ., Docket No. 89-50- 260 (Oct. 19, 1989).

Although Grievant voiced many complaints and recounted many stories or incidents she viewed as gender discrimination, these events do not add up to a pattern of discrimination, as Grievant failed to prove she was treated differently than her co-workers. Mere allegations alone without substantiating facts are insufficient to prove a grievance. Baker v. Bd. of Directors/W. Va. Univ. at Parkersburg, Docket No. 97-BOT-359 (Apr. 30,1998); See Harrison v. W. Va. Bd. of Directors/Bluefield State College, Docket No. 93- BOD-400 (Apr. 11, 1995).

For example, not choosing Grievant as one of three people to attend one workshop or training class when she had been routinely allowed to attend all other in-services she wanted both before and after this incident, does not demonstrate discrimination. There were many other male DPS employees who were also not chosen to attend the training. The issue of not having an office for a time is clearly and easily explained. There was no office for Grievant to occupy. The fact that there were vacant offices in Grievant's building does not demonstrate discrimination, as these offices were not under Director Flores' control. Grievant later received an office.

In terms of changing the duties between Sergeants, this was within Director Flores discretion. It is noted the former Sergeant had served in DPS for many years and assumed his duties over the course of his employment. It was also noted that he was fired for cause. There was no evidence presented to show that Director Flores' decision to reassign duties was arbitrary and capricious or clearly wrong, especially in light of Grievant's continuing inability to complete the assignments she was given without spending additional time in the office.

As for the various pieces of equipment for which Grievant states she was not reimbursed, Director Flores says no prior approval was given by him for these purchases nor had he seen receipts for these articles. However, since it appears Grievant was required to pay for articles other officers did not, such an outcome would be incorrect. See generally W. Va. Code § 18B-4-5. Respondent is directed to reimburse

Grievant for thisneeded equipment. These articles are the following: Maglite, uniform stripes and patches, name plate, ball cap, and the telephone in her office unless she took that item with her when she was terminated. See Grt. Ex. XIII, Level II. (See footnote 14) Although Grievant has proven she should be reimbursed for these items, she did not prove the failure to pay for this equipment was the result of gender or any other form of discrimination; according to Director Flores he never gave prior approval and/or saw a request for reimbursement.

It is not necessary to discuss in detail each and every example Grievant gave as proof of gender discrimination, as Grievant has not shown a pattern of discrimination. Many of the incidents Grievant presented were easily explained, were not confirmed by the testimony of other witnesses, were the result of Grievant's misperception of events, and/or revealed Grievant was treated the same as other DPS employees.

Further, it must be remembered that DPS, as a police agency, is run as a paramilitary type unit. Orders do not have to be explained by supervisors, the supervisor in charge has the right to define the duties of others, a chain of command is in place, and it should be followed. Director Flores has the right to act on the complaints of others, or not act on them, to assess the impact of possible infractions, and to decide whether action is required, and if so, what corrective action to take. Grievant may certainly complain to Director Flores about others' behavior, but she does not have the right to require him to act when she thinks he should. Further, Grievant did not demonstrate that any of Director Flores' management decisions violated any rule, regulation, or statute, or constituted a substantial detriment to or interference with her effective job performance or the health and safety of students or employees. W. Va. Code § 18-29-2(a). See Ball v. Dept. of Highways, Docket No. 96- DOH-141 (July 31, 1997).

It is also clear Grievant brought some of the reactions from others upon herself. As previously stated, Grievant complained frequently to Director Flores about the perceived

shortcomings of all other Officers, including Director Flores. No evidence was presented to demonstrate Director Flores did not allow Grievant to discuss her multiple concerns with him on a frequent basis. It must be noted that it is human nature to decrease the attention paid to complaints when they are frequently made, and when many of the actions complained of are of a minor nature. It is clear from the record that Grievant complained frequently, outside the proper chain of command, to numerous people about her assessment that Director Flores did not manage DPS correctly. Many of these people were administrators who were in a supervisory relationship to Director Flores. No testimony was elicited to demonstrate Grievant had permission to speak to these supervisors.

It is also clear from a review of these administrators' testimony, that they did not perceive problems with Director Flores' work or his leadership. In fact, Dr. Whyte viewed Grievant's complaints as "growing pains" and believed Grievant did not understand the chain of command structure or Director Flores' purpose in assigning Grievant's work as he did. Grievant did not appear to understand the fact that Director Flores was her boss, theindividual in charge, and as such it was his responsibility to decide what was important and what actions should be taken. Further, it also was not always necessary, or at times even appropriate, to tell Grievant what course of action he had chosen to follow in regards to Grievant's complaints.

As far as Director Flores' decision to assign Grievant certain tasks, this was his right and responsibility. No claim was made at hearing that Grievant was working out of classification. (See footnote 15) Director Flores explained Grievant excelled at certain tasks and was not as competent in other areas. He noted he was trying to utilize Grievant's strengths as well as to improve her areas of weakness.

Although the standard definition of discrimination utilized by this Grievance Board is not easily applicable to Grievant's situation, it will be discussed. Grievant did not make a prima facie case of discrimination. Grievant did not demonstrate she was treated

differently from the other employees of DPS. Grievant did not demonstrate she was treated differently from the former Sergeant at DPS. A management decision to realign duties when a troubled employee is fired does not mean the next employee to fill the position is being discriminated against when the duties are realigned. Grievant was chosen to fill the Sergeant's position over two male employees, one of whom had more seniority than she. Additionally, others had to have their memos signed or approved, other male employees were not chosen to attend the dispatchers' class, and Grievant did notreceive an office not because she was female, but because the higher ranking officers received the offices, and there were no more offices to go around.

Overall, Grievant's most telling statement during the grievance proceedings was in response to a question from Respondent's counsel about why she did not file this grievance sooner, "I never had any reason to."

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of 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); 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). See W. Va. Code § 18-29-6.

2. W. Va. Code §18-29-2(m) defines discrimination as "differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing."

3. To prove discrimination a grievant must establish a prima facie case which consists of demonstrating:

(a) that she is similarly situated, in a pertinent way, to one or more other

employee(s);

(b) that she has, to his detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated [to] actual job responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

If a grievant establishes a prima facie case, a presumption of discrimination exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, a grievant may still prevail if she can demonstrate the reason given by the respondent was pretextual. Steele v. Wayne County Bd. of Educ., Docket No. 89-50- 260 (Oct. 19, 1989).

4. Grievant has failed to prove a case of discrimination as defined in W. Va. Code § 18-29-2(m).

5. Grievant did demonstrate she was not paid for certain supplies that are usually provided by DPS, but she did not demonstrate this failure was the result of any type of discrimination as Respondent gave a valid explanation for these actions. See generally W. Va. Code § 18B-4-5.

Accordingly, this grievance is **DENIED**. However, Respondent is directed to reimburse Grievant for the items specifically mentioned in this decision for which she submitted receipts at Level II.

Any party may appeal this decision to the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-

29-7. 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.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: June 26, 1998

Footnote: 1

Grievant also filed another grievance upon her discharge from her employment, approximately one month after this one. These two grievances were heard together, both at Levels II and IV at the parties' request. However, these were viewed as two separate grievances throughout the proceedings, they have differing burdens of proof, and they will be ruled on separately.

Footnote: 2

See n. 1, supra.

Footnote: 3

The above statement was not meant to be all inclusive, but to identify some examples of the type of gender discrimination to which Grievant believes she was subjected.

Footnote: 4

Respondent was represented by Assistant Attorney General Andrew Dimlich.

Footnote: 5

One witness testified Grievant was allowed to attend almost every seminar she asked to attend, and he felt that she was shown favoritism in this regard.

Footnote: 6

Testimony was unclear whether other Officers, at times, wore hand guns with which they had not attempted to qualify.

Footnote: 7

The time when this move occurred was not specified in the record, but it was probably in 1993 or 1994.

Footnote: 8

It is unclear when this incident occurred, but it appears to have been shortly after Grievant joined DPS or at least before she was promoted to Corporal.

Footnote: 9

It is unknown where Dr. Batson fits into the hierarchy of DPS at WVSC, or if he had any role in its duties and activities.

Footnote: 10

Respondent did not raise the issue of timeliness on these issues.

Footnote: 11

This area and all allegations surrounding Grievant's termination are the subject of Grievant's dismissal grievance filed subsequent to this grievance.

Footnote: 12

Grievant at one time indicated she had filed another complaint with the Human Rights Commission at the same time she filed this grievance with the Grievance Board. Later, she stated she was going to file this complaint but had not yet done so.

Footnote: 13

In this grievance, Grievant cited to Code Sections dealing with W. Va. Code §§ 5- 11-2,3(h), & 9(1) (Statutes pertaining to the Human Rights Commission) as law pertaining to her grievance. At Level IV, the undersigned Administrative Law Judge clarified that the only issues that could be dealt with in the grievance procedure were the ones which fell under this Board's statutory jurisdiction. Thus, the issue of discrimination could be grieved, but relief available through the Human Rights Commission would not be available in the grievance procedure.

Footnote: 14

At Level II, Grievant submitted receipts for many of these articles, some dating back as far as 1991. It was unclear why Grievant did not complain sooner about DPS's failure to reimburse her.

Footnote: 15

Grievant did state to Dr. Whyte that she thought at times the duties assigned to her such as paperwork, were not within her Job Description. This issue was not pursued at hearing, and no Job Descriptions were submitted into evidence.