JOYCE PRISTAVEC,

Grievant,

v. DOCKET NO. 99-HHR-328

WEST VIRGINIA DEPARTMENT OF HEALTH AND

HUMAN RESOURCES/BUREAU FOR CHILDREN AND FAMILIES,

Respondent.

D E C I S I O N

This grievance was filed by Grievant Joyce Pristavec, against Respondent West Virginia Department of Health and Human Resources/Bureau for Children and Families ("HHR"), on May 10, 1999. After amending the statement of grievance on May 24, 1999, her grievance statement was:

> **Unfair work assignments and gender bias. Job description states "duties include taking applications, completing reviews and doing maintenance work on active cases." For several months, workers have been separated into application and review workers. Two male workers have consistently been on reviews. Neither male in unit has been assigned to applications except in unavoidable circumstances, example: illness, shortage of workers or excessive number of applications. Females have been rotated on a month-by-month basis or less, but never on a permanent basis as two males. The practice of assigning work is arbitrary and unfair. Management of work or direction should not supercede [sic] the intent of Civil Service, Division of Personnel Job Classification and are not intended for personnel to change.**

She sought as relief:

> **Males assigned to applications on a rotating basis as females are or everyone in unit are assigned customers on a rotating basis as in other unit; all people do the same work; and to be made whole in all ways.** (See footnote 1)

The following Findings of Fact are made based upon the record developed at Level III.

Findings of Fact

1. Grievant has been employed by HHR as an Economic Service Worker in Harrison County for two years.

2. Among other duties, Economic Service Workers process applications for assistance and conduct periodic reviews to determine if clients are still eligible for services. The same questions are asked of clients when their review is conducted as when the application for assistance is first taken.

3. Grievant's supervisor, Thomas Brown (Economic Service Supervisor), decided the best way to manage his unit was to divide the workers so that one group handles reviews, and another group handles applications. On November 30, 1998, he assigned Fred Coffindaffer, Gary Farnsworth, Susan Davidson, and Jennifer Jones to handle all reviews. He assigned the remaining workers, including Grievant, all ofwhom are female, to handle applications. All workers handle applications and reviews when they have time to assist other workers. Those handling reviews assist with applications when there is a backlog.

4. Some changes in personnel on the review team occurred, with some of these changes necessitated by personnel being on sick leave. In January 1999, Mr. Brown assigned Sharry Dennison and a West Virginia Works trainee to the review team, in place of Ms. Davidson and Ms. Jones. On March 22, 1999, he assigned Bonnie Helmick to reviews in place of Ms. Dennison. In June 1999, he assigned Charla Owens to reviews in place of Ms. Helmick. At some point during this period, all employees handled reviews and applications due to a shortage of personnel. Also, when Grievant returned from sick leave, she was assigned to reviews for a half day and case maintenance for a half day, as she was to be on light duty.

5. Mr. Brown's unit now employs a third male. He worked on the review team for some period of time for training purposes, but is now assigned to the applications team.

6. Mr. Brown's unit processes 500 reviews a month on average, with most of those being processed during the first two weeks of each month. Mr. Brown assigned Mr. Coffindaffer, Mr. Farnsworth, and Ms. Owens to the review team because he believes they are the most organized and fastest workers in his unit. Since he has organized his unit in this fashion, clients have been seen in a more timely fashion and have registered fewer complaints with the receptionist regarding the amount of time they have to wait.

Discussion

Respondent argued at Level III that the issue presented by Grievant is not grievable, as

management decisions are not grievable, citing W. Va. Code § 29-6A- 2(i). That Code Section defines "Grievance" as:

> any claim by one or more affected state employees alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of their employer; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective job performance or the health and safety of the employees.
>
> Any pension matter or other issue relating to public employees insurance in accordance with article sixteen, chapter five of this code, retirement, or any other matter in which authority to act is not vested with the employer shall not be the subject of any grievance filed in accordance with the provisions of this article.

A philosophical disagreement with a policy does not in and of itself equate to an adverse impact. McDonald, et al., v. Hancock County Bd. of Educ., Docket No. 15- 88-055-3 (Sept. 30, 1988). "A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with the employee's effective job performance or health and safety." Ball v. Dep't of Transp., Docket No. 96-DOH-141 (July 31, 1997).

In this case, Grievant's claim that her supervisor's choices regarding work assignments are unfair is not grievable unless she can show an effect on her jobperformance or health and safety. In this regard, Grievant bears the burden of proving her allegations by a preponderance of the evidence. W. Va. Code § 29-6A-6. Mowery v. W. Va. Dep't of Nat. Resources, Docket No. 96-DNR-218 (May 30, 1997). "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 and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employee has not met her burden. Id.

Grievant stated that taking applications was more stressful than doing reviews, because clients who are denied benefits when their application is taken are more likely to become irate than clients who are denied benefits during a review. While Grievant's testimony and that of

other witnesses she presented supported this, the testimony of several witnesses was that taking applications was no more stressful than doing reviews, and it was no more likely that application clients would become irate than that review clients would. Grievant produced no evidence that any difference in the stress levels, if such existed, was so significant that it affected her health or job performance. Grievant has not proven it is more likely than not that taking applications is more stressful than conducting reviews. She also stated she has to walk more when she takes applications than when she does reviews, but did not indicate this had a negative impact on her health. (See footnote 2) Grievant's supervisor has the right to decide the best way to divide his unit's workload in order to achieve the agency's goals. Grievant's claim that her supervisor is not being fair is not grievable, as it simply represents a philosophical disagreement with the way her supervisor has decided to divide the workload. Although not entirely clear, it appears Grievant is claiming the manner in which work is assigned will affect her evaluation, as generally, it takes longer to take an application than to conduct a review, and a memorandum will be sent to the Regional Director and placed in the employee's administrative file if an application is not processed within 30 days as is required. Mr. Brown pointed out that this memorandum could apply to any employee, as all employees take applications during each month. The parties indicated, however, that Grievant is a good employee. No evidence was produced that her evaluation has, in fact, been affected by Mr. Brown's allocation of the workload to different teams, or that she has not been able to process all her applications within 30 days. Grievant's claim that her evaluation may be impacted is speculative. This Grievance Board does not address speculative claims. Pascoli/Kriner v. Ohio County Bd. of Educ., Docket No. 91-35-229/239 (Nov. 27, 1991). It further appears Grievant is claiming employees taking applications are held to a different standard than those taking reviews when decisions are made on annual leave requests. Grievant presented a memorandum from Mr. Brown which indicates annual leave requests will not be granted to employees who have applications pending which are nearing the 30 day time limit for completion. Again, Mr. Brown pointed out all employees take applications as part of their job duties, and the memorandum applies equally to any employee's application workload. Grievant did not indicate she has, in fact, ever been denied annual leave due to the application of this policy. Grievant's claim, again, is speculative in nature, and will not be

addressed.

Grievant also alleged gender bias. W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, 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.

This definition encompasses all types of discrimination, including discrimination based upon gender. It is not necessary to analyze Grievant's claims under the West Virginia Human Rights Act, as such claims are subsumed by Code § 29-6A-2(d). Clark v. Kanawha County Bd. of Educ., Docket No. 99-20-088 (Aug. 19, 1999). See Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995); Hendricks v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); and Aglinsky v. Bd. of Trustees, W. Va. Univ., Docket No. 95-BOT-387 (Jan. 31, 1995). A grievant alleging discrimination must establish a prima facie case by 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 the other employee(s), and were not agreed to by the grievant in writing.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once a prima facie case has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. Grievant may still prevail by establishing that the rationale given by the employer is "mere pretext". Id.

Grievant did not prove her claim of discrimination, as she failed to demonstrate she had suffered any detriment from her assignment to take applications and not conduct reviews. Further, Respondent demonstrated the reason for the assignments was that Grievant's supervisor believed those employees assigned to conduct reviews were the fastest workers,

and he was trying to assure his group processed the reviews in a timely manner. He stated the current work assignments are resulting in a more smooth flow of client traffic.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant bears the burden of proving her allegations by a preponderance of the evidence. W. Va. Code § 29-6A-6. Mowery v. W. Va. Dep't of Nat. Resources, Docket No. 96-DNR-218 (May 30, 1997).
2. "A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to or interference with the employee's effective job performance or health and safety." Ball v. Dep't of Transp., Docket No. 96-DOH-141 (July 31, 1997).
4. Grievant's claim that her supervisor's choices regarding work assignments are unfair is not grievable as she failed to demonstrate an effect on her job performance or health and safety.
5. Grievant did not assert or prove a violation of any law, rule, or policy.
6. Grievant failed to prove she was the victim of discrimination.

Accordingly, this grievance is DENIED.

Any party or the Division of Personnel may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. W. Va. Code § 29-6A-7 (1998). 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. 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: October 27, 1999

Footnote: 1

Grievant's supervisor responded on May 17, 1999, denying the grievance. Appeal was made to Level II, where the grievance was denied on June 23, 1999. Grievant appealed to Level III, a Level III hearing was held on July 30, 1999, and the grievance was denied on August 6, 1999. Grievant appealed to Level IV on August 13, 1999. The parties agreed to submit this matter for decision based upon the record developed at Level III, and this matter became mature for decision on October 15, 1999, upon receipt of the Level III exhibits. Grievant was represented by Chris Wolford, and Respondent was represented by Tiffany Bost, Esquire. The parties declined to submit written argument.

Footnote: 2

Although Grievant was assigned to reviews for half a day when she wasrequired to be on light duty, no one offered any explanation of this. The undersigned cannot conclude from this that reviews are significantly less stressful, or somehow easier than applications. It is just as likely that the light duty part was that she only worked on applications or reviews for a half day, rather than a full day, and that it was more manageable for everyone if she was only available for half a day, that she do reviews.