JARMILA VAGOUN,

Grievant,

v v.

Docket No. 99-BOT-062

BOARD OF TRUSTEES/WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Grievant, Jarmila Vagoun, employed by the Board of Trustees (BOT) as a Lead Worker in West Virginia University's (WVU) Dining Services division, filed a level one grievance on August 21, 1998, as a result of changes made to her work schedule. The grievance was denied at levels one and two. Grievant elected to by-pass consideration at level three, as is permitted by W. Va. Code §18-29-4(c), and advanced the complaint to level four on February 11, 1999. An evidentiary hearing was conducted in the Grievance Board's Morgantown office on April 6, 1999, supplementing the lower-level record. The matter became mature for decision with the submission of Grievant's response to Respondent's proposed findings of fact and conclusions of law on May 17, 1999. At level four, Grievant was represented by Larry Harless, Esq., and Respondent was represented by Samuel R. Spatafore, Assistant Attorney General.

The following findings of fact are derived from the record in its entirety, including the level two transcript, with exhibits, the level four hearing, level four exhibits, and briefs.

Findings of Fact

1. Grievant is a 54 year old female who emigrated from Czechoslovakia as a political refugee to north central West Virginia approximately fifteen years ago. She did not speak English upon her arrival. While her understanding and use of English now appearsto be adequate, she does at times hesitate, and it is clear that she still does not feel comfortable with her command of the language.

2. Grievant was first employed by Respondent in January 1987, as a cook at the Mountainlair. She later transferred to Towers Residence Hall (now referred to as the Evansdale Residential Complex, or ERC), where she held the position of Supervisor II since 1993.

3. While she was classified as a Supervisor II, Grievant's work schedule was from 6:00 a.m. to 2:00 p.m., Monday through Friday.

4. During the Spring and Summer of 1998, WVU's food service units reorganized into one division now referred to as Dining Services. As a result of the reorganization, Grievant's classification was changed to Lead Worker. Eight additional Lead Workers were hired, with two new Leads assigned to each of the four residence halls, i.e., ERC, Stalnaker Hall, Boreman Hall, and Arnold Hall.

5. The new Lead positions were filled after they were internally posted, and the applicants interviewed.

6. In Spring 1998, Grievant inquired of Larry Koay, Manager of Dining Services at ERC, whether she needed to apply for any of the Lead positions which were being posted. He advised that she did not need to apply because her own classification was being changed to Lead Worker.

___7. In Spring and Summer 1998, Mr. Koay advised Grievant that her assignment would likely be subject to change with the employment of two additional Lead Workers. The advisory was very general in nature, and offered no specific information relating to thechanges.

8. On August 6, 1998, Mr. Koay notified Grievant that her schedule would be changed, effective August 21, 1998, and would require that she work Wednesdays and Thursdays from 11:30 a.m. to 7:30 p.m., and Fridays, Saturdays, and Sundays, from 8:00 a.m. to 4:00 p.m. Mondays and Tuesdays would be her regular days off.

9. By early August many of the new Lead positions in the other residence halls had been filled. Grievant did apply for a transfer to Boreman Hall, but found the schedule for that position to be no more satisfactory.

10. Dining Services fills the Lead positions based upon overall seniority; however, the schedules are chosen by the employees based upon unit seniority. If Grievant were to transfer to another residence hall at this time, she would hold the least unit seniority, and would likely be assigned the most undesirable work schedule, generally considered to be evenings and weekends.

___11. Sharon McCord, the Lead Worker with the most unit seniority at ERC, was given first selection of the schedules, and works Monday through Friday, either from 6:00 a.m. to 2:00 p.m., or from 5:00 a.m. to 1:00 p.m.

12. Dan Thomas, the Lead Worker with the least seniority at ERC, works Fridays through Tuesdays from 11:30 a.m. to 7:30 p.m.

13. Two other employees at ERC are classified as Lead Workers; however, they are pastry chefs in the bakery, which is considered separate from the dining hall. Grievant was previously assigned to the bakery, but by mutual agreement, will not be reassigned to that area. 14. Management philosophy mandates that a Lead Worker be present at all times.

15. Lead Workers assigned to Stalnaker Hall never work weekends because meals are not served at that location on Saturdays or Sundays.

16. Schedules at Boreman and Arnold Halls differ in that the Leads are required to work only one weekend day, either Saturday or Sunday, but not both.

17. Ten of the approximately forty-one Dining Service employees at ERC are assigned to work every weekend.

18. Of the fourteen Lead Worker positions in Dining Services, only five have more seniority than Grievant, yet four or more Lead Workers with less seniority have a more desirable schedule than Grievant.

Argument

Grievant argues that the change in her schedule was improperly implemented for the following reasons.

1. It was in violation of W. Va. Code §18B-7-9, which provides in pertinent part:

Before the first day of January, one thousand nine hundred ninety-four, each governing board, with the advice and assistance of the staff councils and other groups representing classified employees, shall establish a policy pursuant to the provisions of article three-a [§29A-3A-1, et seq.], chapter twenty-nine-a of this code that discourages temporary, nonemergency, institutionally-imposed changes in an employee's work schedule; that maintains reasonable continuity in working schedules and conditions for employees . . . .

Grievant asserts that BOT failed to develop a policy, as directed by statute, and simply issued a procedural rule directing each institution to establish a policy, omitting any reference to “maintain[ing] reasonable continuity in working schedules and conditions foremployees”. See128 C.S.R. 31, § 4.1(Oct. 28, 1996). (See footnote 1) Respondent WVU did not issue this policy, and Grievant argues that the change in a schedule she had maintained for 12 years deprived her of reasonable continuity.

2. The change was in violation of BOT Procedural Rule, §128-31-8(1), which provides, “[e]ach institution shall develop a policy for posting of classified positions both internally and externally in

order to provide employees adequate time to make application for positions. Institutions shall develop such policy within 90 days of the effective date of this rule." Grievant argues that WVU failed to issue this policy, and that she was not allowed adequate time to apply for the new positions in late July and early August 1998.

3. Respondents' failure to issue the mandated policies, together with the change of schedule which was so radical, and the related postings so prejudicially effected, renders the action arbitrary and capricious.

4. Grievant was denied due process when Mr. Koay indicated that she did not need to apply for any of the new positions. She asserts that in an attempt to obtain necessary information relating to the upcoming changes she asked, and relied, to her detriment, on hermanager's representation, resulting in the current situation.

5. The schedule changes were due at least in part to Grievant's national origin and age. Grievant argues that Mr. Koay was aware of her relative lack of proficiency with the language, and should have taken the time to ensure that she understood her predicament, and the fact that he did not is an indicator that her national origin, with a non-English background, was a factor in the schedule change. Grievant also argues that the placement of an onerous work schedule on an older employee, who would be far less likely than younger employees to quit their jobs, constitutes age discrimination, per se.

6. The imposition of unit seniority yields unjust, unreasonable, arbitrary and capricious results, and lacks a rational basis, with no compelling or legitimate purpose. Grievant notes that hardly any public or private employer requires employees to work every weekend, or bases such schedules solely on such a limited definition of seniority. Grievant notes that other types of time off work, such as lunch breaks, coffee breaks, holidays, and vacations, are granted without consideration of seniority, with the possible exception that an employee with more years of service may be granted a somewhat longer vacation period.

7. The use of unit seniority to determine work schedules in the Dining Services division, while employees in other departments are subject to overall seniority, or to no standards at all, in similar situations, results in discrimination and favoritism.

8. The change in schedule, and treatment of Grievant throughout the process was in violation of the Classified Employee Handbook (1996), which requires that "[m]anagers and supervisors should

treat employees with respect and dignity."

In response, WVU argues that the schedules for the three Lead Workers at ERC weredeveloped to meet the unit's operational need, i.e., coverage seven days a week, and that Grievant's assignment to the second most favorable schedule was consistent with the long- standing practice of using unit seniority. Addressing Grievant's personal situation, Respondent asserts that Mr. Koay provided her with the information he had, at the time he had it, and that Grievant did not adequately express her fears and concerns regarding her future schedule.

Respondent notes that as a long-term employee, Grievant was well aware that schedules were assigned based on seniority, and that the ERC required weekend work, while Stalnaker Hall did not. She could have taken the initiative and applied for a position at that unit to insure a weekend-free schedule, Respondent suggests. Respondent further asserts that the new positions were properly posted, and that Grievant had adequate time to apply.

Respondent claims that it acted in compliance with W. Va. Code §18B-1-8(11), and "utilize[d] faculty, students and classified staff in institutional level planning and decision making when those groups are affected", by employing the Strategic Planning Committee during the reorganization of Dining Services. Respondent also asserts that Grievant was provided a 15 day notice of the change in her schedule, as is required by W. Va. Code §18B- 7-9, and that Grievant would have still been assigned her current schedule had a seniority scheduling policy been in writing. Respondent argues that Grievant produced no evidence to support the allegations of discrimination.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden ofproving 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.

Grievant's claim that BOT violated Code §18B-7-9 when it failed to establish a policy requiring a reasonable continuity in employee work schedules, is undisputed. However, the failure to develop the policy is not controlling in this matter, because even if said policy did exist, it would not prohibit any changes to Grievant's schedule. Further, the requirement to maintain a reasonable continuity in an employee's working schedule cannot be interpreted to prohibit any changes, ever, in an employees

schedule.

The claim that WVU violated BOT Procedural Rule, §128-31-8(1) by not allowing her adequate time to apply for the new position, is also unsupported by the evidence. It appears that the positions were posted, Grievant was aware of the postings, and had adequate time to apply, but did not do so based upon her understanding that it was unnecessary.

There is no evidence that Grievant's schedule change was due to her national origin or her age. It is accepted that due to the fact Grievant was born and lived in Eastern Europe for most of her life, and that she has learned to speak English relatively recently, and experiences some difficulty with the language. While these circumstances may have impaired her ability to question and/or understand the situation, it does not constitute discrimination on Respondent's part. Grievant suggests that Mr. Koay should have taken additional time and care explaining the situation, and possible consequences to her sincehe was aware of her linguistic limitations. This suggestion is not feasible since Mr. Koay could not be held accountable for Grievant's understanding, particularly in light of the fact that she had not asked any further questions.

The claim that Grievant's schedule was imposed upon her due to her age is also unsupported by the evidence. Data provided by WVU establishes that, with one exception, all the Lead Workers in Dining Services are age 39, or older. The sole exception is Grievant's co-worker, Mr. Thomas, who at age 35 has the least desirable of schedules, working evenings and weekends.

Grievant's claim of discrimination relating to WVU's use of unit seniority for schedule selection is more troublesome. While the concept of unit seniority may not be unfair when viewed from within the unit, its negative impact is very apparent when an employee wants to transfer elsewhere. If Grievant now wishes to transfer to Boreman or Arnold Halls, she would be the least senior employee in that unit, and most likely be assigned the schedule all other employees rejected. This practice effectually denies employees the ability to improve their assignment by transferring to another location. Since one's seniority within the unit is upgraded only when an employee with more seniority leaves his or her employment, employees are locked into their status, and schedules, for potentially their entire work life.

"Discrimination" is defined by W. Va. Code §18-29-2(m) 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." (See footnote 2) An employee seeking to establish unlawful

discrimination must first establish a prima facie case by demonstrating the following:

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

(b)that she has, to her 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 the other employee(s) and were not agreed to by the grievant in writing.

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

Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason to substantiate its actions. Thereafter, a grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

There is no evidence that any other departments or divisions at WVU use unit seniority to determine schedule selection. Therefore, Grievant has established a prima facie case of discrimination by showing that she is similarly situated to other institution employees, and has been treated, to her detriment, in a manner that other employees have not, and that the difference in treatment is unrelated to her job responsibilities. At level two, David Master, Assistant Director of Housing Food Services, testified that unit seniority is used by Dining Services because the employees prefer to work at the smaller, downtown locations. If overall seniority was applied, he explained, the very large, very busy, ERC would be left with a staff of the least experienced workers. This explanation constitutes a practical, and beneficial, reason for Respondent to apply unit seniority to Dining Services employees, but does not constitute a legitimate, non-discriminatory reason for imposing a practice on employees which effectually holds them in limbo so far as scheduling is concerned. Certainly, Respondent could entice more experienced workers to the ERC with informal perquisites, such as more desirable schedules, rather than force employees to stay at that location by stripping of them of their seniority for scheduling purposes.

Although it has been previously determined that Respondent properly posted the new Lead Worker positions for the required period of time, as a separate matter, Grievant was not given a

meaningful opportunity to apply for most of the positions because they were filled, or were in the interviewing process, by the time she was advised of her revised work schedule. Mr. Koay correctly advised Grievant that she did not have to apply for one of the new positions because she already held the Lead Worker classification. However, she obviously would have applied for other positions had she been aware of the upcoming change in her current assignment.

Mr. Koay testified that he could not inform Grievant of the specific changes in her schedule until he knew who the two new Lead Workers would be. That explanation is illogical and contradictory to his statement that the schedules were developed to provide full coverage on a seven day a week basis. If coverage was his concern, the schedules couldhave been developed and the employees simply plugged in later, on the basis of their seniority. As the situation developed, Mr. Koay produced three schedules knowing the identities of the employees who would be working them. At the least, this provided the opportunity for him to develop a significantly more desirable schedule for the most senior employee. Most importantly, his delay in developing the schedules deprived Grievant of the opportunity to transfer to another location and obtain a more desirable work schedule.

Finally, the undersigned finds it unusual that while Respondent made decisions based on overall seniority, and unit seniority, an individual's seniority within a classification was given no consideration. Specifically, a document produced by Respondent (Level II, Grievant Exhibit 9) indicates that as of June 1998, Grievant had worked four years and ten months as a Lead Worker. Ms. McCord, who has more overall seniority than Grievant, had only been classified as a Lead Worker for two months. So, overall seniority in another classification allowed an employee with no experience as a Lead Worker, to displace an employee with nearly five years experience in that classification.

An action is arbitrary and capricious if the agency making the decision 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 is so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Watts v. Lincoln County Bd. of Educ. Docket No. 98- 22-348 (Nov. 16, 1998), Yokum v. W. Va. Schools for the Deaf and Blind, Docket No. 96-DOE-081 (Oct 16, 1996). An action may also be arbitrary and capricious if it is willful and unreasonable without consideration of facts. Black's Law Dictionary, at 55 (3d Ed. 1985). Arbitrary is further defined as being “synonymous with bad faith or failure to exercise honest judgment.” Id, Trimboli v. W. Va. Dept. of Health and Human Servs./Div. of

Personnel, Docket No. 93-HHR-322 (June 27, 1997).

The failure to provide Grievant with her new schedule in time to apply for other positions, and the failure to consider time in classification for scheduling purposes, were arbitrary and capricious actions, and renders Grievant's current schedule void. Because the Lead Worker positions are filled, the only relief which can be granted is to reinstate Grievant's prior schedule.

In addition to the foregoing findings of fact and discussion, it is appropriate to make 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. "Discrimination" is defined by W. Va. Code §18-29-2(m) 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."

3. An employee seeking to establish unlawful discrimination must first establish a prima facie case by demonstrating the following:(a)that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b)that she has, to her 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 the other employee(s) and were not agreed to by the grievant in writing.

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

4. Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason to substantiate its actions. Thereafter, a grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dept. of Community Affairs v. Burdine, 450

U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

5. Grievant has established a prima facie of discrimination by showing that Dining Service employees are treated differently in that their schedules are determined by unit seniority.

6. Respondent failed to provide a legitimate, non-discriminatory reason for the difference in treatment.

7. An action is arbitrary and capricious if the agency making the decision 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 is so implausible that it cannotbe ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Watts v. Lincoln County Bd. of Educ. Docket No. 98- 22-348 (Nov. 16, 1998), Yokum v. W. Va. Schools for the Deaf and Blind, Docket No. 96-DOE-081 (Oct 16, 1996). An action may also be arbitrary and capricious if it is willful and unreasonable without consideration of facts. Black's Law Dictionary, at 55 (3d Ed. 1985). Arbitrary is further defined as being “synonymous with bad faith or failure to exercise honest judgment.” Id, Trimboli v. W. Va. Dept. of Health and Human Servs./Div. of Personnel, Docket No. 93-HHR-322 (June 27, 1997).

8. The failure to provide Grievant with her new schedule in time to apply for other positions, and the failure to consider time in classification for scheduling purposes, were arbitrary and capricious actions.

___Accordingly, the grievance is **GRANTED**, and Respondent Ordered to reinstate Grievant's pre-August 21, 1998, work schedule.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia County. Any 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. 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 record can be prepared and properly transmitted to the appropriate circuit court.

Date: June 10, 1999 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

This Section states:

Each institution shall establish a policy, with the advice and assistance of staff council and other groups representing classified employees, which shall: address any institution- specific procedures concerning the use of flexible work schedule, job sharing, and four-day work weeks: discourage temporary, non-emergency changes in an employee's work schedule; and provide a mechanism for changes in, and notification of changes in work schedules. This policy shall also provide that, where possible, the institution shall provide the employee with a fifteen (15) day notice of such changes. Institutions shall develop such policies within 90 days of the effective date of this rule.

Footnote: 2

"Favoritism", defined by W. Va. Code §18-29-2(o) as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees", is simply the reverse of discrimination, and does not requireseparate consideration.