CANDY EDDY,

Grievant,

v v.

Docket No. 98-DJS-520

DIVISION OF JUVENILE SERVICES,

Respondent.

D E C I S I O N

Grievant, Candy Eddy, employed by the Division of Juvenile Services (Respondent) as a Correctional Officer II at the West Virginia Industrial Home for Youth, filed a level one grievance on October 5, 1998, after she was reprimanded for calling off work on September 27, 1998, when she did not have a babysitter for her sick infant son, and was sent home on September 28, 1998, for unauthorized dress. Grievant requested that she be allowed to use sick leave for September 27, and be compensated for September 28, 1998. Grievant's request that she be allowed to use sick leave for September 27 was granted at levels one, and two, and was confirmed in the level three decision. This issue having been resolved, was not addressed at level four. The claim that she was subject to discrimination because other officers reported to work out of uniform, and were not sent home, was denied at levels one, two, and three.

A level four appeal was filed on December 30, 1998, and was scheduled for hearing on February 23, 1999. That hearing was continued at the parties' request, and rescheduled for May 4, 1999. Grievant failed to appear at that hearing, stating that she believed it was scheduled for another day. The hearing was conducted on July 13, 1999, in the Grievance Board's Morgantown office. Grievant appeared pro se, and Respondent was represented by C. Scott McKinney, Assistant Attorney General. Both parties waived the opportunity to submit proposed findings of fact and conclusions of law, and the grievance became maturefor decision at the conclusion of the hearing.

On September 28, 1998, Chief Correctional Officer, Captain Roger Elder, issued a memorandum to Grievant regarding “work attendance”. That memorandum stated:

It has been brought to my attention that on 27 September 1998 you reported off for duty. You

reported off for not having a baby sitter for your children. This is an un-excused (unauthorized) absence from work.

During the week of 14-18 September 1998, we had a discussion concerning your correctional officer uniforms. Due to your pregnancy, you stated that your pants were to [sic] tight and that you need new larger sized. You were given permission to wear blue jean style, stretch waist banded material to assist in your comfort, but informed that you must still wear a correctional officer shirt at all times during work.

On 28 September 1998, you reported for duty wearing sweat pants and a tee shirt. This was unauthorized dress.

During the week of 20-26 September 1998, you received new uniforms. As you indicated to me, you only had to re-hem the pants and there was nothing wrong with the shirts.

On 28 September 1998 I met with you to discuss these issues. As you acknowledged you have reported off in the past for the same reason. You further acknowledged understanding what was expected of you regarding uniforms.

I view the above noted behavior as unsatisfactory attendance and inadequate job performance, violations of Policy Directive #400.00, Section 3.01, supervising for Better Work Performance, I am advising you that this type of performance will not be tolerated and future violations could lead to more severe disciplinary actions being requested by me, pursuant to Policy Directive #400.00. (See footnote 1)

Grievant argues that Respondent engaged in discrimination by sending her home onSeptember 28, 1998, because other correctional officers had reported for work out of uniform, and were not sent home. At hearing, Grievant explained that she did not pick up her new, larger-sized uniform shirts until Friday, September 25, and the new patches had not yet been attached on September 28. Grievant also stated that she had gained approximately twenty (20) pounds during the first two (2) months of her pregnancy, and she was unable to button her pre-pregnancy uniform shirts. Respondent denies that it engaged in discrimination because other officers were sent home for reporting out of uniform, and other officers were given permission to wear neat and clean blue jeans

and a dress or sports-style shirts, upon request. Respondent asserts that Grievant did not seek prior approval to wear civilian attire, and that sweat pants and a tee shirt would not have been approved in any event. Finally, Respondent notes that Grievant took a Holiday on September 28, and was paid for the day.

Discussion

In disciplinary matters, the employer has the burden of proving each element of the charges by a preponderance of the evidence. W. Va. Code §29-6A-6; Miller v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

In the present matter, notwithstanding her argument, Grievant admits that she did not seek permission from anyone to wear civilian clothes to work, and that other officers werelater sent home for reporting out of uniform. Her recollection is the same as Captain Elder's regarding her pregnancy attire, that she was to wear blue jeans and a uniform shirt. Clearly, she was not wearing blue jeans. Apparently, Grievant did not have any uniform shirts to wear while her larger ones were having the patches applied; however, she did not advise her supervisor of this situation in advance. Correctional Officers must maintain a certain appearance, and Captain Elder's determination that sweat pants and a tee shirt were too casual for work was not unreasonable.

W. Va. Code §29-6A-2(d) defines discrimination 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.” An employee alleging discrimination must first establish a prima facie case of discrimination under W. Va. Code §29-6A-2(d) 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. ofCommunity 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).

Although Grievant was similarly situated to other employees, she has failed to establish that she was treated differently. By her own admission, other correctional officers were sent home for reporting to work out of uniform, and she did not obtain permission to wear civilian clothes while her uniform shirts were being prepared.

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

Findings of Fact

1. Grievant is employed by the Division of Juvenile Services as a Correctional Officer II at the West Virginia Industrial Home for Youth (WVIHY).

2. In September 1998, the staff at WVIHY was in the process of implementing a transition from the Division of Corrections to the Division of Juvenile Services. This transition included the replacement of the arm patches on uniform shirts which identified the correctional officers' employer.

3. Correctional Officers were initially directed to have the patches replaced by September 18, 1998; however, due to area seamstresses being unable to meet that deadline, the effective date was extended to September 30, 1998.

4. Grievant reported to work on September 28, and prior days, in civilian attire, specifically, sweat pants and a tee shirt.

5. Grievant was approximately ten (10) weeks pregnant, and her regular uniformshirts no longer fit her at the end of September.

6. Grievant did not make her supervisor aware of the fact that her shirts no longer fit, and did not request advance permission to report to work in civilian clothing.

7. Other correctional officers were sent home for reporting to work out of uniform. Upon advanced request, some officers were allowed to wear approved civilian clothing to work during this

period.

8. Grievant was allowed to take a Holiday on September 28, 1998, and lost no wages for that day.

Conclusions of Law

1. In disciplinary matters, the employer has the burden of proving each element of the charges by a preponderance of the evidence. W. Va. Code §29-6A-6; Miller v. W. Va. Dept. of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997); Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992).

2. Respondent has proven that Grievant reported to work wearing unacceptable civilian clothing on September 28, 1998, without obtaining prior approval from her supervising officer.

3. W. Va. Code §29-6A-2(d) defines discrimination 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."

4. Grievant failed to establish a prima facie case of discrimination by proving that she had been treated differently than other similarly-situated employees.

Accordingly, the grievance is **DENIED.**

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance occurred. 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 §29-5A- 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.

Date: August 3, 1999 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

The policy cited by Captain Elder was not made a part of the record.