MARK SMITH,

Grievant,

v. **Docket No. 99-VA-450**

DIVISION OF VETERAN'S AFFAIRS/

WEST VIRGINIA VETERANS HOME,

Respondent.

DECISION

Grievant Mark Smith, employed by the Division of Veteran's Affairs ("VA") at the West Virginia Veterans Home ("WVVH"), filed this grievance on or about September 15, 1999. His statement of grievance reads:

> I believe that I was discriminated against. Opal Byrd should have been suspended for her violation of health codes. I was suspended 3 days for the same violation.

During the Level IV hearing, Grievant brought up two incidents involving another co- worker, Delores Thaxton, and alleged these incidents also supported his claim of discriminatory treatment. Respondent agreed to take up these incidents in this grievance, rather than requiring Grievant to go through the lower levels of the grievance procedure with these additional allegations. Grievant sought as relief:

> 1. suspension reduced to verbal warning, 2. back wages for those days, 3. increment pay back lost due to suspension.With regard to the increment pay, Grievant explained his employment date is July 1, 1995. When he was suspended for three days without pay in the spring of 1998, this caused him to miss having three years of service on July 1, 1998, by those three days, and he did not receive the $150.00 increment check he otherwise would have received in 1998. (See footnote 1)

The following Findings of Fact are made based upon the record developed at Levels III and IV.

Findings of Fact

1. Grievant has been employed by the VA at the WVVH since July 1, 1995, as a Cook.

2. Cooks employed at the WVVH receive training in proper food handling.

3. On March 17, 1998, ham casserole had been served for breakfast. The ham used to make the casserole was left out on the counter for more than an hour. Grievant saw the ham on the counter and asked the other cooks who were present, Theresa McKinney and Kim Barbour, if they were going to use it. Ms. Barbourresponded that it had been out too long and to throw it away. Grievant did not respond, but put the ham in the refrigerator, and added it to the potato soup he made the following morning. Ms. Barbour did not see Grievant put the ham in the refrigerator.

4. On March 18, 1998, Grievant's supervisor, Kathy Gibson, (See footnote 2) was checking the food on the serving line and inquired about the ham in the potato soup. She was informed by Ms. Barbour that it appeared to be the ham from breakfast the previous day, which should have been discarded. She threw the potato soup out before it was served. (See footnote 3)

5. Ms. Gibson reported the March 17 and 18 incident to her supervisors. Gail Harper, Director, decided Grievant should be suspended for three days, without pay, for this incident. Grievant did not grieve the suspension. The suspension letter states in the section outlining the reasons for the suspension that he had been told to throw the ham away.

6. On February 4, 1998, Grievant was given a verbal warning by Ms. Gibson for putting chicken in the refrigerator which had been in the hot box overnight. The chicken should have been discarded, and Grievant knew this and intended to throw it away, but he wanted Ms. Gibson to see it. However, he did notlabel the chicken to be discarded, and it could have been used by one of the cooks in meal preparation.

7. On August 12, 1999, Grievant reported to Ms. Gibson that Opal Byrd had put ham in the refrigerator which had sat out too long and should have been thrown away. Ms. Gibson told Ms. Byrd to throw the ham away, and she did so. It was not used in food preparation. Ms. Byrd was given a verbal warning. She had no prior disciplinary record.

8. On October 1, 1999, Grievant filed an incident report with Ms. Gibson because Delores Thaxton, a co-worker, had left chicken out on the counter for an extended period of time. Ms. Gibson checked the temperature of the chicken with a thermometer and found it to be safe. She gave Ms. Thaxton a verbal reprimand, and told her to put the chicken in the refrigerator immediately, which she did.

9. Sometime after October 1, 1999, Grievant reported to Ms. Gibson that Ms. Thaxton had put

turkey in the hot box to warm. Ms. Gibson told Ms. Thaxton to warm the turkey in the steamer, because the hot box would heat it so slowly that it would not be safe to serve it, and Ms. Thaxton did so. Ms. Gibson did not consider this to be a serious enough incident to discipline Ms. Thaxton.

10. Ms. Thaxton had previously received a five day suspension for bringing containers of potato salad from the trash room to the kitchen, and serving the potato salad. The potato salad was more than three days old, and had been taken to the trash room for disposal. Ms. Thaxton was upset that the potato salad had been thrown away, as potato salad was on the menu that night, and she would have tomake it. Ms. Gibson felt Ms. Thaxton should have received a more severe penalty for this action.

Discussion

Grievant did not challenge the charges against him from 1998, and admitted he had improperly handled food. He argued Respondent had been more lenient with fellow employees who had committed the same act as he. He argued he had been discriminated against in the punishment he received for his infraction, a three day suspension without pay, when compared to the punishment recently received by Opal Byrd and Delores Thaxton for what he perceived as the very same act. Grievant bears the burden of proving his allegations by a preponderance of the evidence. W. Va. Code § 29-6A-6. Mowery v. W. Va. Dep't of Natural Resources, Docket No. 96- DNR-218 (May 30, 1997). (See footnote 4)

Respondent argued Grievant was not similarly situated to Ms. Byrd, as he had already received a verbal warning for a previous act, which she had not. It also argued there was more food waste and preparation time waste with regard to the incident involving Grievant, as the soup he had made, which included ingredients other than ham, had to be discarded.

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.

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 testified he was not aware the February 4, 1998 discussion with his supervisor was a written warning. Ms. Gibson stated, however, that she told Grievant what he had done was dangerous, and not to let it happen again. She stated she considered it to be a verbal warning, as is indicated on the incident report, and felt sure she had told Grievant she considered it a verbal warning. Further, Grievant's suspension letter specifically references this incident as one of the reasons for the suspension, stating Grievant was cautioned "about the dangers of serving meat which had not been properly stored." Whether Grievant knew he had received a verbal warning for the February 4, 1998 incident is not relevant to the issues in this grievance. In comparing Grievant to Ms. Byrd, it is readily apparent that the February 4, 1998 incident is nearly identical to the August 12, 1999 incident with Ms. Byrd. In both cases, food was placed in the refrigerator when it should not have been, albeit for differing reasons. In both instances, the food could have been served to the residents. In neither instance was the employee suspended, rather both were given the same discipline for a first violation. A significant difference, of course, between the March 18, 1999 incident involving Grievant, and the August 12, 1999 incident involving Ms. Byrd, as explained by Respondent is that this was the second time Grievant had mishandled food, and he was given a more severe penalty.

Grievant's case is also not the same as the two incidents involving Ms. Thaxton as described in finding of fact numbers 8 and 9. Ms. Thaxton apparently mishandled food in both instances, and her actions could have resulted in food being served which should have been thrown away. (See footnote 5) However, in both instances, the food which Ms. Thaxton improperly handled was still safe, and the problem was corrected. Ms. Gibson did not consider the turkey incident to be serious enough that any discipline was called for. No danger to the residents materialized, and, although aminor point in

the scheme of things, there was no food or preparation time wasted, as there was in the incident involving Grievant.

The more significant difference, however, between the March 17, 1998 incident involving Grievant, and the three incidents involving Ms. Byrd and Ms. Thaxton, is that one of the conclusions reached by Respondent regarding the March 17, 1998 incident, was that Grievant had been told the ham had been out too long and to throw it away, but disregarded this advice. Thus, in determining the appropriate penalty for Grievant, Respondent considered that Grievant had knowledge that the ham was not safe to use, but chose to use it anyway. This is more similar to the Thaxton potato salad incident, which resulted in a longer period of suspension than Grievant received, than the other Thaxton incidents and the Byrd incident.

Grievant testified he did not hear Ms. Barbour tell him to throw the ham out. This is entirely possible, as Ms. Barbour's testimony at Level IV was difficult to hear at times, due to her soft voice. At the time the exchange occurred between Ms. Barbour and Grievant, the kitchen was being cleaned up from breakfast, and Grievant was apparently some distance from Ms. Barbour, as Ms. Barbour continued her clean- up duties and did not see Grievant put the ham in the refrigerator. However, whether Grievant heard Ms. Barbour tell him to throw the ham out is not relevant to the issue presented here, as Grievant is not challenging the charges against him, but rather the severity of the penalty as compared to that imposed upon other employees more recently. The undersigned cannot, in this grievance, revisit whether the facts upon which Respondent relied in imposing the penalty were erroneous. The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. Grievant bears the burden of proving his allegations by a preponderance of the evidence. W. Va. Code § 29-6A-6. Mowery v. W. Va. Dep't of Natural Resources, Docket No. 96-DNR-218 (May 30, 1997).

2. 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).

3. Grievant was treated the same as Opal Byrd, as he also received a verbal warning for his first offense of improper food handling.

4. In determining the appropriate penalty for Grievant, Respondent considered that Grievant had knowledge that the ham had been on the counter too long and should be thrown away, but chose to use the ham anyway, which was a much more serious infraction than the two recent instances of improper food handling by Ms. Thaxton, and more similar to the incident which resulted in Ms. Thaxton's five day suspension without pay. Grievant was not treated differently than Ms. Thaxton.

Accordingly, this grievance is **DENIED**.

Any party 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.

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BRENDA L. GOULD

Administrative Law Judge

Date: December 17, 1999

Footnote: 1

Grievant's supervisor responded at Level I on September 22, 1999, that she could not grant the relief sought. Grievant appealed to Level II. Charles Draper, WVVH Administrator, responded on October 1, 1999, that he also could not grant

the relief sought. Grievant appealed to Level III, where a hearing was held on October 13, 1999. The grievance was denied at Level III on October 18, 1999, and Grievant appealed to Level IV on October 22, 1999. A Level IV hearing was held on November 22, 1999. Grievant appeared pro se, and Respondent was represented by Robert D. Williams, Esquire. The parties elected not to submit written argument, and this grievance became mature for decision at the conclusion of the Level IV hearing.

The parties did not address whether Grievant should have received increment pay in these circumstances.

Footnote: 2

Ms. Gibson's last name was Ferguson until March 1999.

Footnote: 3

Grievant pointed out that the Level III decision erroneously stated that "grievant was told by his supervisor not to serve the food and he ignored that order." The testimony of Grievant and his supervisor demonstrated this statement is wrong.

Footnote: 4

Respondent did not raise a timeliness defense, or otherwise question whether Grievant could challenge the propriety of his discipline after a year. Accordingly, it is not appropriate for the undersigned to address this area.

Footnote: 5

The undersigned is unclear as to why Grievant did not tell Ms. Thaxton the chicken should not be out, or put it away himself, and why he did not remind Ms. Thaxton that turkey should be warmed in the steamer, not the hot box, rather than letting these potentially dangerous situations continue, and then reporting Ms. Thaxton to their supervisor. It is possible Ms. Gibson was likewise perplexed, and this may have played a role in her response to these situations.