GUY HALE,

Grievant,

v. Docket No. 98-HHR-130

WEST VIRGINIA DEPARTMENT OF

HEALTH AND HUMAN RESOURCES/

OFFICE OF DONATED FOODS,

Respondent.

D E C I S I O N

Grievant, Guy Hale, filed this grievance on September 25, 1997, alleging discrimination in hiring. The issues involved in this grievance have increased during the grievance process. Originally Grievant stated: "Discrimination, offered job as field rep but below minimum salary." The original relief sought was: "Made whole[,] everyone treated the same, field rep at same salary as others." At later hearings, Grievant cited several examples of what he believed to be racial discrimination and complained about them apparently as individual portions of his discrimination grievance. Later, at Level IV, Grievant stated these events had created a hostile work environment. This grievance was denied at all lower levels, and appealed to Level IV where a hearing was held on November 12, 1998. This case became mature for decision on December 30, 1998, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

Grievant alleged he was offered the permanent duties of an Inspector II (See footnote 2) **at a lower rate of pay because he is an African-American. He noted a white employee was offeredthe position for more money shortly after he turned it down. He also maintained there is a hostile work environment fostered by the Director Delores Phillips, specifically as it relates to African-Americans.**

Respondent explained the position offered to Grievant was a temporary upgrade, and the salary offered to Grievant was based on the Division of Personnel's ("DOP") rules on the compensation for employees who are temporarily upgraded. The compensation for a temporary upgrade is to be a percentage of the current salary. The salary offered to the second employee was also based on his rate of pay, and since that employee made more money than Grievant, the salary offered to the second employee was greater. Respondent denied there is a hostile work environment and noted Grievant had never complained about any problems prior to filing this grievance.

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 as a permanent employee with the Office of Donated Foods ("ODF") for approximately three years. Before that time he worked at ODF through an arrangement with Shawnee Hills, and was not an employee of the State.

2. Grievant is an Equipment Operator and as such his duties are stated in his class specification. ODF has further defined and clarified the duties expected of Equipment Operators in its facility.

3. At one point in time all the Equipment Operators were African-Americans; now there is one white Equipment Operator.

4. During the first of August 1997, Ms. Phillips offered Grievant the opportunityto be temporarily upgraded to an Inspector II. Two of the three regular Inspector II's were out sick, and it was unclear when and whether they could return. Since the busy time of the year was fast approaching, Ms. Phillips decided ODF could use the services of another Inspector II. (See footnote 3) **At the time of the offer, Ms. Phillips did not know what the exact salary would be, but she knew it would be a percentage increase of Grievant's current salary, as decided by DOP.**

5. Ms. Phillips offered Grievant this position because she believed Grievant had "people skills" and would make a good Inspector II. She believed one of the Inspector II's would be retiring soon, and the temporary experience would benefit Grievant when the job was posted.

6. At the time Ms. Phillips offered Grievant the temporary position, there was no vacant position, and there was no posting of a vacant position.

7. Grievant went to his direct supervisor and asked the salary of an Inspector II and was quoted the salary.

8. When Ms. Phillips found out what Grievant's salary would be in the upgraded position, she wrote it on a piece of paper and handed it to him, as it was private information.

9. When Grievant saw the offered salary, he believed he was being discriminated against and decided to file a grievance at that time, but wanted to wait until Ms. Phillips had offered the position to a white employee for more money. When he foundout the second employee was offered more money, he filed this grievance.

10. Grievant never told Ms. Phillips that he was displeased with the offered salary or that he thought the offer was unfair. He told Ms. Phillips he would not take the position because he had accepted employment with the Kanawha County Board of Education as a custodian. Ms. Phillips did not find out Grievant thought the salary offered was an act of discrimination until this grievance was filed.

11. In May 1995, a white employee called an African-American employee, Redman Alston, a "nigger". This remark was not made to Mr. Alston's face, but Mr. Alston later found out about the remark and went to Ms. Phillips. Ms. Phillips held a conference between the two employees, indicated to the white employee that this behavior was unacceptable, and issued a verbal reprimand, the first step in the progressive discipline policy. This behavior has not been repeated since that conference. Mr. Alston stated he was satisfied with the results of this conference at the time it occurred.

12. Equipment Operators were required in 1995 and 1996 to mow a small section of grass and to take out the trash. (See footnote 4) **Since that time, either temporary employees or the custodian has performed these duties.** (See footnote 5) **Using the lawn mower is one of the duties specified in the list of responsibilities for ODF Equipment Operators. The Equipment Operator class specification indicates Equipment Operators are to run a variety ofequipment and are responsible for maintaining the cleanliness of the work area.**

13. For several years, the employees at ODF had a "joke" where they would place female undergarments on or in the vehicles of other employees. Ms. Phillips told the employees that

this horseplay must stop. The behavior continued. Finally, in approximately 1995, an employee found a bra on his car and reported it to the police. Because the employees had not paid attention to the directive she had given them, and because no one would confess to the inappropriate behavior, Ms. Phillips called an employee from the EEO to explain sexual harassment to the employees, and why this behavior should not and could not continue. If Ms. Phillips had known who had engaged in the behavior, she would have disciplined him or them in a meeting similar to the one she had with Mr. Alston. After the employee discussion group on the underwear behavior, Mr. Alston was upset that Ms. Phillips had not had a conference on the language issue. There have been no further incidents of "undergarment placing" after this conference.

14. Grievant had never told Ms. Phillips, prior to the filing of this grievance, that he believed there was a hostile work environment against African-Americans at the ODF.

15. Mr. Alston filed a grievance alleging racial discrimination on the exact same day Grievant filed this grievance. He stated he was being worked out of classification and was not being treated the same as employees who were white. At the time Mr. Alston filed this grievance, Ms. Phillips had already sent a request to the Division of Personnel to reallocate Mr. Alston's position and had explained the process to Mr. Alston. Other than the complaint about the racial remark in 1995, Mr. Alston had not complained to Ms. Phillips about a hostile work environment until she discussed the grievance at Level II.

16. After these grievances were filed, an Inspector II retired, and the position wasposted. Grievant did not apply for the position and stated at Level IV that he was not qualified for the position. **(See footnote 6)**

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his 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); Howell v. W. Va. Dept. of Health & Human Resources, Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6. See also 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). The

multiple issues raised by the parties will be discussed separately.

1. Timeliness

HHR contends this grievance is untimely as it was not initiated within the timelines contained in W. Va. Code § 29-6A-4(a). Where an employer seeks to have a grievance dismissed on the basis it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018 (Mar. 31, 1997);Sayre v. Mason County Health Dept., Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Services, Docket No. 90-DHS-524 (May 14, 1991).

The timeliness issue is governed by the timelines set out in W. Va. Code § 29-6A- 4(a), which states a grievance must be filed:

> **Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance. . . .**

The relevant time period is ordinarily deemed to begin to run when the employee is unequivocally notified of the decision. See Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989); Rose v. Raleigh County Bd. of Educ., Docket Nos. 94- 41-246/314 (Nov. 29, 1994), aff'd, 199 W. Va. 220, 483 S.E.2d 566 (1997).

Respondent's argument centers around the fact that Grievant did not file when he originally turned down the position, and avers this is the date from which the statute begins to run. Grievant argues the time began to run when he found out a white employee was offered more money to accept the same position. While the date for filing a grievance could start on the date Grievant turned down the position, it is also possible that the date for a similar grievance could also run from the date another employee was offered the position for greater compensation.

"Spahr [v. Preston County Bd. of Educ., 182 W. Va. 203, 382 S.E.2d 40 (1989)] and Duryutta [sic][v. Bd. of Educ. of County of Mingo, 382 S.E.2d 40, 181 W. Va. 203 (1989)],teach that the timeliness of a grievance claim is not necessarily a cut-and-dried issue because a tribunal must apply to the timeliness determination the principles of substantial compliance and flexible interpretation to achieve the legislative intent of a simple and fair grievance process, as free as possible from unreasonable procedural obstacles and traps." Hale v. Mingo County Bd. of Educ., 199 W. Va. 387, 484 S.E.2d 640 (1997), n. 11. Given that standard, Grievant's claim of discrimination is found to be timely.

2. Failure to state a cognizable claim

Respondent also argued in its Motion to Dismiss that Grievant had not stated a cognizable claim under the grievance statute. Specifically, Respondent states the name- calling did not happen to Grievant, and the work Grievant was asked to perform was listed in his job description.

The fact that Grievant's claim was poorly pled below, does not mean that the issues raised are not grievable. At Level IV, this claim was more succinctly stated as a hostile work environment. The grievance statute states that favoritism, harassment, and policies or practices that substantially interfere with effective job performance are grievable events. The claims stated by Grievant fall into those categories.

3. Discrimination in job offer

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." W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential,exceptional or advantageous treatment of another or other employees." (See footnote 7)

To prove discrimination or favoritism 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 or favoritism exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, a grievant may still prevail if he 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).

Grievant has failed to establish a prima facie case of either discrimination or favoritism. Grievant was offered a temporary upgrade in the proper manner. The salary he would have been paid was based on his current salary. Although he believes the position offered to him was a permanent position, all the evidence indicates Grievant was mistaken in this belief. There was no opening, there was no posting, and for Ms. Phillips to have offered Grievant a permanent position in the manner which Grievant described would have violated DOP rules for filling a position. The testimony of Ms. Phillips revealedthat she is very familiar with the rules both for the posting of a vacant position and for applying for a temporary upgrade.

It is unfortunate that Grievant did not ask Ms. Phillips when he received the potential salary for the position why it was so much lower than the one he expected. If Grievant had only asked, the situation could have been clarified, and he would then be able to see that no discrimination had occurred, and that he was being treated the same way as all other employees. For Ms. Phillips, it appears that the old adage that, "No good deed goes unpunished" was particularly true in this situation. She believed she would be helping Grievant when she offered him this temporary upgrade, and that having the Inspector II experience would be useful to Grievant if he wished to apply for the position when it eventually came open. There is no evidence of discrimination in this situation.

4. Hostile work environment

No evidence was found to support Grievant's claim of a hostile work environment. The

incident of name-calling, while egregious, occurred in 1995, and Ms. Phillips took quick and decisive action, including issuing a verbal reprimand, to resolve the situation. The evidence she was successful is indicated by the fact that no further incidents have occurred.

As for the divergence in the way in which she handled the undergarment situation, this difference was related to the difference in the two situations. She did not know who had committed the undergarment offense, had instructed employees to stop the offending behavior, the activity was engaged in by more than one individual, and some type of corrective action was required. The undersigned Administrative Law Judge is at a loss to know how Grievant wished Ms. Phillips to handle the situation differently. Ms. Phillips'actions did not create or contribute to a hostile work environment.

As for whether it created a hostile work environment for Grievant to carry out his assigned duties as specified by his Job Description, again the undersigned Administrative Law Judge is at a loss to understand why this requirement was discriminatory or created a hostile work environment. Grievant's Job Description stated Equipment Operators were to mow the grass. This Job Description had been in place for some time and Grievant was aware of it. Additionally, Grievant had not been required to mow the grass or empty trash since 1996, and he filed this grievance in September of 1997.

Although Grievant voiced other complaints and recounted other stories or incidents he viewed as racial discrimination, these events did not add up to a pattern of discrimination, as Grievant failed to prove he was treated differently than his co-workers, or that African-Americans were treated differently than white employees. 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).

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 his 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). SeeW. Va. Code § 18-29-6.

2. W. Va. Code § 29-6A-2(d) 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. W. Va. Code § 29-6A-2(h) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

4. To prove discrimination or favoritism 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;**

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If a grievant establishes a prima facie case, a presumption of discrimination or favoritism exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, a grievant may still prevail if he 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).

5. Grievant has failed to prove that the offer he received and the stated salary for the temporary upgrade was incorrectly done or evidenced discrimination.

6. Grievant has failed to prove a case of discrimination or favoritism as definedin W. Va. Code §§ 29-6A-2(d) and 29-6A-2(h).

7. Grievant has failed to prove that a hostile work environment for African- Americans

existed at ODF.

Accordingly, this 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. 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: January 29, 1999

Footnote: 1

Grievant was represented by Marilyn Kendall of AFSCME/WVSEU, and Respondent was represented by Assistant Attorney General Meredith Harron.

Footnote: 2

The parties referred to the position in question as both an Inspector II and a field rep position.

Footnote: 3

Grievant testified Ms. Phillips initially offered him the position in May 1997. Ms. Phillips testified she initially offered him the position in August 1997. The testimony of Ms. Phillips is believed because the summer is the slack time of year at ODF, and there would be no need to fill the position then.

Footnote: 4

Although it was unclear whether the white Equipment Operator was an HHR or Shawnee Hills employee during the entire time referred to in this grievance, he did not mow the grass because of allergy problems. Grievant indicated it would be wrong to require this employee to mow the grass, but indicated the Truck Drivers should be required to mow the grass. Grass mowing is not an identified duty for Truck Drivers.

Footnote: 5

ODF did not have a custodian until 1996 or 1997.

Footnote: 6

Grievant also indicated he thought he must be qualified for the position because one time about one or two years ago during the summer when things were slow, he and Mr. Alston had done two inspections. Grievant did not file a grievance over this occurrence. In fact, Mr. Alston did not appear to mind the opportunity to work outside the warehouse and to do something different.

Footnote: 7

Although Grievant did not utilize the word favoritism, this word is inherent in his description of events.