PATRICIA LOVE,

Grievant,

v. **Docket No. 00-HHR-108**

DEPARTMENT OF HEALTH AND

HUMAN RESOURCES/BUREAU FOR

CHILDREN AND FAMILIES,

Respondent.

D E C I S I O N

Grievant, Patricia Love, is employed by the Department of Health and Human Resources ("HHR") as an Office Assistant II/Receptionist in the Roane County office. Grievant filed this grievance on December 7, 2000. Her Statement of Grievance reads:

> 1. Rights have been violated 2. Corrective Action Plan and all that it contains. 3. Being discriminated Against.

The relief sought:

> 1. Disciplinary Action taken and put in Supervisor's files. 2. Remove from my files and do the original discussion of goals we want to set. 3. DO and enforce to ALL (Supervisors co-workers, etc.) what you are expecting of me. (See footnote 1)

This grievance was denied at Level I by Grievant's supervisor, Pamela Williams, on December 7, 2000. Community Services Manager ("CSM"), Larry Tucker, met with Grievant for a Level II conference on February 7, 2001. He asked Grievant to clarify her grievance as he was unsure what rights had been violated. On February 20, 2001, Mr. Tucker issued a Level II Decision and granted the grievance, in part, and denied the grievance, in part. He found some parts of the Corrective Action Plan would be difficult to attain on a regular basis and directed it be removed from her file. Ms. Williams was toschedule an individual conference with Grievant to establish goals and consider

Grievant's input. (See footnote 2) Grievant appealed to Level III, and a Level III hearing was held on March 7, 2001, with a Decision denying the grievance issued March 14, 2001.

Grievant appealed to Level IV on March 23, 2001, and a phone conference was held on April 25, 2001, in response to Respondent's Motion to Dismiss or in the alternative to clarify the grievance. At this phone conference, the parties agreed the Corrective Action Plan issue had been resolved, but Grievant stated the discussion of goals had not been held. Respondent believed a discussion had been held. Grievant indicated she wished to be treated the same as everyone else and have more flexibility in her schedule, and this was the crux of her grievance. Grievant also maintained she was not allowed to call witnesses at Level III, and Respondent agreed Grievant was not allowed to call witnesseson the discipline issue, as discipline of her supervisor was not relief available to Grievant. (See footnote 3) This issue was explained to Grievant. (See footnote 4)

A Level IV hearing on the merits of the case was held on Mary 4, 2001, and this case became mature for decision on that date as the parties elected not to submit proposed findings of fact and conclusions of law. (See footnote 5)

Issues and Arguments

Grievant argues her "rights have been violated", and she has been discriminated against because other employees are allowed to take longer than thirty minutes for lunch. Grievant points to the log she has maintained for approximately four years to support thisallegation. (See footnote 6) She also asserts these employees are able to take time from their desk to chat with other employees, and engage in other social activities such as playing cards. She maintains other employees are allowed to adjust their time, while she is not. Grievant also argued the discussion she had after the Level III hearing was not a discussion of goals, but rather a request for her to sign her evaluation. She still wishes to have a discussion to set goals to improve her job situation and to identify her supervisor's expectations. Grievant also wants her supervisor to enforce the time rules in the office and insure all employees are strictly limited to two fifteen minute breaks and only thirty minutes for lunch. (See footnote 7)

Respondent maintains that although there may be occasional breaches of the rules, in general, the employees Ms. Williams and Mr. Tucker supervise follow the time rules. Respondent notes the log maintained by Grievant contains the names of many employees Ms. Williams and Mr. Tucker do

not supervise, whom they have no control over, nor do they have information about the schedule these employees have arranged with their supervisors. Respondent also notes Grievant's job duties require her to be in one place throughout the day while other employees are required by their job duties to move throughout the office; thus, Grievant is not similarly situated to other employees. Additionally, since Grievant is a receptionist, it is not feasible for her to adjust her schedule, as there are set times she needs to be at her station.

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 is employed as an Office Assistant II/Receptionist in HHR's Roane County office. Her duties are to register clients, answer the phone, sort the mail, and file. Because of her duties, she is required to remain at her desk throughout the day.

2. Grievant's supervisor, Ms. Williams, supervises three employees, including Grievant. Grievant's next level supervisor is Mr. Tucker. In the Roane County office, there are many other employees who are supervised by people other than Ms. Williams and Mr. Tucker, and these employees' behavior is not controlled or evaluated by them.

3. Grievant has complained to her supervisor that she is required to work while other employees sit around and socialize.

4. At times, the employees who are supervised by Ms. Williams and Mr. Tucker make prior arrangements to take a longer lunch. Grievant would not have any knowledge of these prior arrangements. At times, the employees supervised by Ms. Williams and Mr. Tucker adjust their time when they come in a little late or need to take a longer lunch. This adjustment was not seen as problem. At times, the employees supervised by Ms. Williams and Mr. Tucker will use vacation time to cover lunch, if they took longer than the allowed time. Grievant would have no knowledge of this adjustment. At times, the employeessupervised by Ms. Williams and Mr. Tucker will combine work out of the office with their lunch time. Again, Grievant would not be aware of these arrangements.

5. Infrequently the staff has a breakfast for all employees as a fund raiser. Mr. Tucker sees these events as morale builders, and he supports them. Contrary to Grievant's assertion, Mr. Tucker asked Grievant if she wanted to attend while he watched the front desk for her. (See footnote 8)

6. For more than four years, Grievant has kept a personal record of the time employees leave for lunch, and when they return to work. She does not ask these employees if they have made special arrangements if they are late. The employees Grievant pointed out as abusing their lunch time are not supervised by Ms. Williams. Mr. Tucker does not supervise the majority of these employees either, and he has no knowledge of the time arrangements these employees may have made with their supervisors. (See footnote 9)

7. Mr. Tucker sent out a memo on February 20, 2001, noting the allotted time for lunch and breaks. He asked the employees he did not supervise to abide by these time frames, but he cannot force these employees to do so.

8. On November 15, 2000, Ms. Williams gave Grievant the Corrective Action Plan they had discussed developing on October 2, 2000. This plan discussed Grievant'swork time, duties, and work area. This Corrective Action Plan indicated Grievant's failure to follow it would result in disciplinary action. (See footnote 10) This Corrective Action Plan was shredded as the result of the Level II Decision.

9. HHR policy provides for a thirty minute meal time and two fifteen minute breaks. Grievant routinely receives a thirty minute meal time and two fifteen breaks each day.

10. After the Level III hearing and prior to the Level IV hearing, on March 26, 2001, pursuant to the directions in the Level II Decision, Ms. Williams met with Grievant to discuss her evaluation and goals for her position. The duties and expectations of the position have changed little over the years. Grievant did not have prior notice of this meeting other than Ms. Williams stating she would like to meet with Grievant that morning. During this meeting, Grievant was given her evaluation from October 2000, and the duties of the position were listed on this form. Grievant was given a few minutes to look it over, and Ms. Williams asked Grievant several times if she had any comments or input she wanted to add, or changes she wanted to make. Grievant reported the form looked "fine" to her. The meeting concluded with Grievant signing the evaluation. Ms. Williams believed Grievant was given a sufficient opportunity to discuss goals. Grievant did not see this conversation as an opportunity to discuss goals. Grievant did not inform Ms. Williams that she did not believe this meeting was sufficient.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2001); Howell v. W. Va. Dep't 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 issues raised by Grievant will be discussed one at a time.

A. Corrective Action Plan

Because Grievant continued to raise the issue even after she agreed it had been resolved, it must be stated the issue of the Corrective Action Plan was resolved by the action taken at Level II by Mr. Tucker. The Corrective Action Plan was shredded, and it clearly is not in effect. There is no other action that can be taken on that issue. While Grievant clearly feels she was mistreated by her placement on this Corrective Action Plan and continues to feel her rights have been violated, this issue is concluded.

B. Discrimination

Grievant argues she is treated differently from other employees as they are allowed to take greater time for their lunch, and they are allowed to adjust their time as needed. She also asserts other employees socialize in the office, and she is not allowed to do so. Discrimination is defined in W. Va. Code § 29-6A-2(d), as "any differences in the treatmentof employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

This Grievance Board has determined that a grievant, seeking to establish a prima facie case (See footnote 11) of discrimination under W. Va. Code § 29-6A-2(d) must demonstrate the fol lowing:

(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.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

Once a grievant establishes a prima facie case of discrimination or favoritism, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hickman, supra. See Tex. Dep't 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); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995). Grievant has not met her burden of proof and established a prima facie case of discrimination. She has not demonstrated she is similarly situated to the employees to whom she compares herself. Additionally, any differences in treatment are related "to actual job responsibilities of the grievant." W. Va. Code § 29-6A-2(d). The nature of the duties of a receptionist requires her to be in one place during the day and during specified time periods. The front desk is where her duties are, and where Grievant must remain. If Grievant is not at her post, there is no one to cover her essential activities.

Additionally, many of the employees Grievant complained about not following the proper time schedule are not under the control and supervision of Ms. Williams or Mr. Tucker. It appears from looking Grievant's logs, that some individuals take longer than thirty minutes for lunch on some occasions, and some employees do adjust their time when they are late. However, there is no clear evidence to prove this behavior is not approved by their supervisors, or that these employees were not performing some job duties while they were out. Without further data, there is no proof these employees are violating the stated time limits. Furthermore, many of the lunch infractions identified by Grievant are approximately ten minutes in length. Additionally, some of the social conversations Grievant complains about are a normal part of office camaraderie and interaction that takes place in all offices and should not be seen as negative occurrences. Of course, if these social interactions are of great length or frequency, then a supervisor would be expected to intervene. Grievant did not meet her burden of proof and demonstrate Ms. Williams and Mr. Tucker are treating Grievant differently from the other workers they supervise on the issues of meal time and breaks. The time

limits are the same for everyone, and these rules have been pointed out in memos. Indeed, Mr. Tucker related an incident where he saw two employees having lunch after one o'clock, and he believed there was an infraction of the rules. When he questioned these employees' supervisor, he found out the employees in question were working with a client during the normal work time, and consequently were eating a late lunch. As he stated, the situation "looked wrong, but it wasn't." It also appears that at one time there were problems with employees exceeding the allotted time prior to Mr. Tucker assuming the Community Services Manager position. He has taken steps to correct these problems through memos, and observation. At this point in time he does not see a consistent problem with the employees he supervises.

Grievant is treated differently than some employees on the issue of adjusting her schedule. She is not allowed to adjust her schedule, and this is because of the duties she performs. HHR needs Grievant to be at her station during set hours. This is the time when clients are coming in and phone calls are being received, and these matters need Grievant's attention. (See footnote 12) Given the duties of the position, it is not discriminatory to not allow Grievant to adjust her schedule.

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 her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2001); Howell v. W. Va. Dep't 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).

2. Discrimination is defined in W. Va. Code § 29-6A-2(d), 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. This Grievance Board has determined that a grievant, seeking to establish a prima facie case of discrimination and favoritism under W. Va. Code §§ 29-6A-2(d) & (h), must demonstrate the following:

(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.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992). Once a grievant establishes a prima facie case of discrimination or favoritism, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievant may show the offered reasons are pretextual. Hickman, supra. See Tex. Dep't 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); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

4. Grievant has not met her burden of proof and established a prima facie case of discrimination, as any differences in her treatment are related to the duties of her position.

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. 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: July 11, 2001

Footnote: 1

Numbers 1 and 3 refer to Grievant's belief her supervisor discussed her position and duties with other staff members.

Footnote: 2

Mr. Tucker also discussed the possible breach of confidentiality by Grievant's supervisor, and he indicated he would not discuss any disciplinary action that may have been taken against another employee. It appears Grievant wanted assurances her supervisor was punished for her alleged inappropriate behavior.

Footnote: 3

Grievant continued to argue at Level IV that she was not allowed to call her witnesses and place documents into evidence at Level III. Grievant was again informed she could call who she wanted at the Level IV hearing, and all documents she wished to place into evidence, that were within the time frames of the grievance, were accepted. Near the end of the hearing, Grievant indicated one of the witnesses she had subpoenaed had informed Grievant she refused to attend. Mr. Tucker did not know of this response to the subpoena. Grievant was informed this response was inappropriate. However, since the testimony Grievant wished to elicit from this witness dealt with the request for disciplinary action against her supervisor, this testimony was viewed as unnecessary to the evidence needed to resolve this grievance.

Footnote: 4

Grievant continued to complain about her placement on a Corrective Action Plan at the Level IV hearing. Since this Improvement Plan had been shredded at Mr. Tucker's direction, and the parties had agreed at the phone conference that this issue was resolved, the undersigned Administrative Law Judge asked Grievant what further action she wanted on this issue. Grievant did not seem to understand she had "won" on this issue, and frequently stated she had been discriminated against by the development of the Corrective Action Plan.

Footnote: 5

Grievant represented herself, and Respondent was represented Assistant Attorney General Anthony Eates.

Footnote: 6

It appears that in 1998, shortly before Grievant began her log entries, the employees in her office were told they were no longer allowed to take an hour for lunch.

Footnote: 7

Grievant requested that disciplinary action be taken against her supervisor. At the Level IV hearing the undersigned Administrative Law Judge informed Grievant the Grievance Board was not authorized to discipline employees.

Footnote: 8

Grievant complained Mr. Tucker only asked her if she wanted to get a plate.

Footnote: 9

Mr. Tucker has been CSM of Roane County since February 2001, but he has at times in the past served as acting CSM. With the number of log entries recorded by Grievant since 1998, some of these employees may have been supervised by him.

Footnote: 10

There was no evidence in the record to indicate why Grievant had been placed on a Corrective Action Plan in the first place other than the requirements of the plan that Grievant be at her work station, that her work area be uncluttered, and no leisure time activities should be conducted.

Footnote: 11

A prima facie case generally refers to a set of facts which, if not rebutted or contradicted by other evidence, would be sufficient to support a ruling in favor of the party establishing such facts. See Black's Law Dictionary 1353 (4th ed. 1968).

Footnote: 12

Ms. Williams also noted she did not recall Grievant ever asking to adjust her schedule.