LARRY DILLON, et al.,

Grievants,

v.

DOCKET NO. 00-HHR-257

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU OF CHILD SUPPORT ENFORCEMENT,

Respondent.

D E C I S I O N

Grievants, Larry K. Dillon, Marva J. Martin, and Gladine T. White, filed this grievance against their employer, the West Virginia Department of Health and Human Resources/Bureau of Child Support Enforcement ("DHHR") on or about June 14, 2000:

> State Civil Service laws, employment law, (job description) discriminate practice of requiring "quotas" that no other state agencies are required to do nor does job description call for this. Targeting Legal Assistants for punitive action for not meeting 15 complaints quotas per month and other employees within agency performing their jobs in satisfactory manner. These other staff members not receiving punitive action. (Understaffed).
>
> Relief sought: Request letter of reprimand be removed from personnel record and discriminate practice of requiring quotas to be ceased.

The grievance was denied on June 15, 2000, by Grievants' supervisor, Ivan C. Newberry, Jr., and at level two on June 16, 2000, by Porter Stanley. A level three hearing was held on July 18, 2000, and the grievance was denied on July 27, 2000, by Lena S. Hill, Commissioner. Grievants appealed to level four on August 8, 2000, and a hearing was held on October 26, 2000. The record was left open at Grievants' request untilDecember 7, 2000, and this matter became mature for decision on March 5, 2001, the deadline for the parties' proposed findings of fact and conclusions of law.

Grievants appeared pro se at Level III, and were represented by Steve Rutledge, AFSCME, at Level IV. DHHR was represented by David Alter, Esq., at Level III, and by B. Allen Campbell, Esq., Assistant Attorney General, at Level IV.

SUMMARY OF EVIDENCE

Grievants' LIII Exhibits

Ex. 1 -

June 9, 2000 e-mail from Porter Stanley to team leaders.

Ex. 2 -

June 2, 2000 memorandum from Ivan C. Newberry, Jr. to Larry Dillon.

DHHR's LIII Exhibits

Ex. 1 -

Chart depicting legal referrals from Greenbrier, Monroe and Pocahontas Counties, January - June 2000.

Ex. 2 -

Legal referrals for McDowell County, February 2000; February 24, 2000 e- mail from Ivan Newberry re: FSU referrals; undated memorandum from Ivan Newberry; level 1 grievance decision for Marva Martin; level 1 grievance decision for Gladine White; May 31, 2000 e-mail from Ivan Newberry to Porter Stanley; level 1 grievance decision for Larry Dillon; Management Report for Supervisor, July 7, 2000; Chart depicting legal action referrals by month; June 2, 2000 memorandum from Ivan Newberry to Larry Dillon; May 3, 2000 memorandum from Ivan Newberry; May 16, 2000 e-mail from Ivan Newberry to Cathy Estep, Gladine White, Larry Dillon, Marva Martin, and Thomas Bailey.

Ex. 3 -

Charts depicting performance statistics and productivity establishment activity, Region 6, December 31, 1999.

Ex. 4 -

Expected Performance Measures.

Ex. 5 -

July 5, 2000 memorandum from Betty Justice to RAMS, Larry LeFevre, David Alter re: Civil Actions Filed 1999.

Grievants' Level IV Exhibits

Ex. 1 -

Region 6, Racial Make-Up of Staff.

Ex. 2 -

Total Legal Assistants “On Board” monthly and by county, from July 1995 through September 2000.

Ex. 3 -

Total Caseload by Worker and by County, Region 6.Ex. 4 -
October 5, 2000 memorandum from Betty Justice to Porter Stanley re: Statistics.

Ex. 5 -

June 9, 2000 e-mail from Porter Stanley to Team Leaders (same as G LIII Ex. 1.)

Ex. 6 -

June 23, 1999 e-mail from Ivan Newberry to Larry Dillon.

Ex. 7 -

June 9, 2000 letter of recommendation from Ivan C. Newberry for Larry Dillon.

Ex. 8 -

July 31, 2000 memorandum from Ivan Newberry to Brenda Sturgell, Cathy Estep, Drema Johnson.

Ex. 9 -

August 9, 2000 memorandum from Ivan Newberry to Cathy Estep, Gladine White, Larry Dillon, Marva Martin.

Ex. 10 -

September 27, 2000 memorandum from Marva Martin to Steve Rutledge.

Ex. 11 -

Monthly Reports of Marva Martin, January through August 2000.

Ex. 12 -

June 21, 2000 letter from Grievants to Director, Division of Personnel.

DHHR Level IV Exhibits

Ex. 1 -

June 2, 2000 memorandum from Ivan Newberry to Marva Martin.

Ex. 2 -

June 2, 2000 memorandum from Ivan Newberry to Gladine White.

Ex. 3 -

June 2, 2000 memorandum from Ivan Newberry to Thomas Bailey.

Ex. 4 -

June 2, 2000 memorandum from Ivan Newberry to Larry Dillon.

Ex. 5 -

Legal Action Referrals by Month, January through October, 2000.

Testimony

Grievants testified in their own behalf, and presented the testimony of Porter Stanley, Curtis Reed, Ivan Newberry, and Sophia Clark. DHHR presented the testimony of Curtis Reed, Ivan Newberry, Porter Stanley, and Betty Justice.

FINDINGS OF FACT

I find the following facts have been established by a preponderance of the evidence.

1. Grievants are all employed as Legal Assistants with DHHR in the McDowell County office of the Bureau of Child Support Enforcement ("BCSE").

2. In December 1998, Ivan Newberry became the team leader for the McDowell County BCSE office. At that time Porter Stanley, Regional Area Administrator told Mr. Newberry that the McDowell County office was experiencing productivity problems. 3. For some time, the McDowell County BCSE office had been less productive than all other comparable offices in Region VI.

4. In December 1999, Mr. Newberry personally completed all of the outstanding legal referrals for Grievant Dillon and another employee so they could start fresh for the new year.

5. In February 2000, Mr. Newberry told Grievant Dillon that he had to start producing more legal referrals and had to start managing his time better.

6. On February 28, 2000, Mr. Newberry sent all the Legal Assistants an e-mail requesting them to produce more legal referrals.

7. At a unit staff meeting on May 3, 2000, Mr. Newberry informed all the Legal Assistants they would be required to complete fifteen (15) legal referrals per month.

8. On May 16, 2000, Mr. Newberry sent all the Legal Assistants an e-mail reminding them that the “quota” requirement was still in place and that most of the Legal Assistants were falling short of that requirement. Mr. Newberry also informed them that a letter of written reprimand would be issued if they fell short of the quota requirement.

9. At the end of May 2000, none of the Legal Assistants had completed fifteen (15) legal referrals.

10. On June 2, 2000, Mr. Newberry issued written reprimands to all the Legal Assistants in the McDowell County BCSE office who did not complete fifteen (15) legal referrals during May.

DISCUSSION

The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Ramey v. W. Va. Dept. of Health, Docket No. H-88-005 (Dec. 6, 1988). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not. Leichliter v. W. Va. Dept. of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993).

DHHR supports Mr. Newberry's decision to issue written reprimands to Grievants based upon a

supervisor's inherent discretion to assign tasks to employees that the supervisor deems appropriate. In this case, Mr. Newberry, at the direction of his supervisor, Mr. Stanley, admonished Grievants that they needed to spend more time on legal referrals, and when they did not meet the standards set by Mr. Newberry, he issued written reprimands.

Grievants assert Mr. Newberry had no authority to impose a quota requirement, and that the requirement of completing fifteen (15) legal referrals per month is too high, given their other responsibilities and the lack of staff in the office. In addition, Grievants assert the requirement is discriminatory because similarly situated Legal Assistants in other offices who have more legal assistants and lower case loads are not given quota requirements. At level four Grievants expanded their discrimination defense to claim the reason they are subject to a quota is simply because some of them are black. Grievants' argument that Mr. Newberry had no authority to establish a quota requirement is without merit. A supervisor has the inherent discretion to assign tasks to an employee that the supervisor deems appropriate. If a supervisor thinks the employee should spend more time on legal referrals, then the employee must do so. Absent a directive to do something illegal, an employee must follow a supervisor's direction or be insubordinate. The evidence shows that Mr. Newberry initially wanted to make the quota requirement twenty (20) legal referrals a month, but Mr. Stanley convinced him that number was too high, and they agreed on fifteen (15). Grievants have presented no law, rule, regulation or policy that prohibits BCSE from instituting a minimum number of referrals to be completed in a month. Furthermore, the evidence shows that after receiving the reprimand in May, Grievants have consistently succeeded in making the quota requirement of fifteen (15) legal referrals a month.

BCSE and Mr. Newberry had the discretion to set goals for his employees in order to assist them in increasing their productivity. It was neither arbitrary or capricious, or an abuse of discretion, to then issue written reprimands when those goals were not met.

Grievants' second defense is that they are victims of discrimination because theirs was the only office which was given a “quota”, and because some of them are black. 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.” In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the

Grievants must show: (a)

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

(b)

that they have, to their detriment, been treated by their 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 Grievants and/or the other employee(s) and were not agreed to by the Grievants in writing.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once a grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Grievants have failed to establish a prima facie case of discrimination with regard to the establishment of the quota in the McDowell County office. Grievants' supervisor, Mr. Newberry, with the approval of Mr. Stanley, imposed the quota on the Legal Assistants in the McDowell County office. Mr. Newberry has no authority over any other county offices, and it is up to the team leaders in those counties to determine what methods, if any, to use to enhance employee productivity. Furthermore, the establishment of the quota in McDowell County was related to the actual job responsibilities of the Grievants. Grievants have failed to establish they are similarly situated to any other BCSE employees with regard to the quota requirement established by Mr. Newberry.

With regard to Grievants' racial discrimination claim, they again have failed to establish a prima facie case of discrimination. Of the four Legal Assistants in the McDowellCounty office, two are black, and two are white, and all received written reprimands. It is simply not conceivable that Mr. Newberry or Mr. Stanley undertook the quota requirement simply to discriminate against the two black employees in the McDowell County office. The overwhelming evidence demonstrates that ALL of the employees in that office were under- producing, and the sole, legitimate reason for instituting the

quota system was to improve productivity.

CONCLUSIONS OF LAW

1. DHHR has proved by a preponderance of the evidence that Grievants failed to successfully reach their quota requirement of fifteen (15) legal referrals for the month of May 2000, thus warranting a written reprimand.

2. Grievants have failed to establish DHHR violated any law, policy, regulation, or statute in setting a quota requirement in the McDowell County office.

3. Grievants have failed to establish a prima facie case of discrimination with regard to establishment of the quota requirement, as they have failed to establish they are similarly-situated to Legal Assistants in other counties.

4. Grievants have failed to establish a prima facie case of discrimination with regard to race, as two of the four Legal Assistants in McDowell County who received written reprimands are white, and all received written reprimands for under-producing for the month of May 2000.

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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: March 20, 2001