KELLY FRENCH,

Grievant,

v. **Docket No. 03-C&H-229**

WEST VIRGINIA DIVISION OF

CULTURE AND HISTORY,

Respondent.

D E C I S I O N

Grievant, Kelly French, filed this grievance against her employer, the Division of Culture and History ("C&H"), and her Statement of Grievance alleges, "UNEQUAL TREATMENT / UNJUSTIFIED REPRIMAND." The relief sought was, "CORRECTION OF WORK RECORD / FAIR AND EQUAL TREATMENT OF ALL STAFF."

This grievance was denied at Levels I and II and granted, in part, at Level III. (See footnote 1) **Grievant appealed to Level IV on July 31, 2003. The parties agree to submit the case on the record, and this case became mature for decision on September 15, 2003, after receipt of the parties' proposed findings of fact and conclusions of law.** (See footnote 2) (See footnote 3)

Issues and Arguments

Grievant asserts she should not have received a written reprimand, and she has been treated unfairly. This portion of the complaint was viewed as discrimination and favoritism. Respondent maintains Grievant's supervisor repeatedly counseled her abouther poor interpersonal communication, inattentive job performance, and excessive personal phone usage without any change in her efficiency or behavior, so he decided a written reprimand was in order.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed by C&H as a Secretary I since February of 2002.

2. On August 13, 2002, Grievant's supervisor, Richard Ressmeyer, Director of Arts at C&H, evaluated Grievant, and while she was rated as "Meets Expectations," Mr. Ressmeyer noted many areas that needed improvement. The general areas in which Grievant needed to improve were: 1) difficulty cooperating with other staff members; (See footnote 4) 2) errors in work product and poor attention to detail; and 3) a pattern of being absent when Mr. Ressmeyer was out of the office, and this pattern affected her dependability. Grievant was directed to inform Mr. Ressmeyer if she needed assistance, and Grievant was told to stop relying on one of the coordinators for assistance.

3. Grievant did not grieve this evaluation, but did turn in an attachment dated August 19, 2002. In this statement Grievant asserted Mr. Ressmeyer's evaluation was not supported by examples, she did make errors, and Grievant noted she had never received "such a low and inaccurate appraisal of [her] work abilities. . . ." Resp. No. 4, at Level III. Grievant also complained because the problems were not brought to her attention sooner. 4. Subsequently Mr. Ressmeyer counseled Grievant several times about her tardiness, and her excessive use of the work phone and her cell phone for personal calls at work. Mr. Ressmeyer also discussed Grievant's job performance with her several times including her keyboarding mistakes.

5. Grievant asked for and received permission to change her schedule from 8:30 a.m. to 5:00 p.m. to 8:00 a.m. to 4:30 p.m.

6. This schedule did not work well for Grievant, as she was frequently late. Mr. Ressmeyer informed Grievant through an e-mail dated January 9, 2003, that the change did not appear to be working, and he wanted to talk to her "again" about changes to her work schedule and personal phone calls. Resp. No. 5, at Level III.

7. Grievant responded to the above-cited e-mail by identifying all the sick people in her family and apologizing about all the phone calls, but then said, "I don't have a lot of choice right now." Grievant also indicated these calls had not interfered with her work. (See footnote 5) Resp. No. 5, at Level III.

8. Through an e-mail dated February 6, 2003, Mr. Ressmeyer noted Grievant was not properly recording her time on her time sheets.

9. By e-mail dated March 6, 2003, Mr. Ressmeyer reminded Grievant her flexible schedule would be reviewed in two weeks, it did not appear the schedule was working, and it probably would not be continued. Mr. Ressmeyer also noted Grievant was not accounting for her tardiness properly on her time sheets. He informed Grievant they would talk about her deficiencies that afternoon. 10. On March 13, 2003, Mr. Ressmeyer again e-mailed Grievant and noted she was not calling in properly when she needed time off. Apparently, Grievant had called a friend at the office and had expected him to tell Mr. Ressmeyer, but Grievant had neglected to call either the receptionist or Mr. Ressmeyer's voice mail.

11. Grievant's job performance difficulties continued as she made numerous errors while compiling a database, frequently needed retraining on computer skills, and failed to copy materials correctly for a printer's dummy, which resulted in a several day increase in work for her section. Test. Mr. Ressmeyer and Ms. Debbie Rainey-Haught, Level IV Hearing.

12. Seeing no improvement in Grievant's behavior, Mr. Ressmeyer decided a written reprimand was in order.

13. On May 15, 2003, before issuing the written reprimand, Mr. Ressmeyer talked briefly with Grievant and told her he was considering a written reprimand and his reasons for this disciplinary action. Grievant reacted to this news in an angry manner, raised her voice, and said, "Jesus Christ, you are not going to do this to me."

14. Grievant received the written reprimand that afternoon detailing reasons for the action. Mr. Ressmeyer identified the problem areas as: 1) poor work performance characterized by lack of attention to and accuracy in assigned duties; 2) an excessive number of non-emergency personal phone calls; and 3) inability to cooperate with co- workers. Grievant's behavior when she was notified of the written reprimand was noted, and specific examples of her problematic behavior were given that occurred during recent months.

15. The written reprimand contained an Improvement Plan, but Mr. Ressmeyer decided to not implement it until this grievance was resolved.

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. W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't 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. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id. Respondent has the burden of proof on the issue of the written reprimand.

On the issue of the unequal treatment, this is not a disciplinary matter, and Grievant has the burden of proving this portion of 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 (2000); 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). Where the evidence equally supports both sides, the employer has not met its burden. Id.

I. Credibility An issue that must be addressed is credibility. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Resources, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993). "The fact that [some of] this testimony is offered in written form does not alter this responsibility." Browning v. Mingo County Bd. of Educ., Docket No. 96-29-154 (Sept. 30, 1996).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or

motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. **(See footnote 6)** **See Holmes v. Bd. of Directors/W.Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra. In assessing the testimony presented, the undersigned Administrative Law Judge finds Mr. Ressmeyer's testimony to be consistent and plausible. Grievant stated she found Mr. Ressmeyer to be fair, and it was clear from the record that Mr. Ressmeyer tried to accommodate Grievant and counsel her before he decided a written reprimand was needed to get her attention because her behavior had not changed. His testimony is deemed truthful. Grievant makes much of the fact that Mr. Ressmeyer relied on input from others about Grievant's behavior. Since Mr. Ressmeyer was frequently out of the office because of his job duties, it was not inappropriate for him to listen to concerns from Grievant's co-workers, especially when the reported behaviors dovetailed with similar behavior he had himself observed.**

As for Grievant's testimony, it mainly consisted of saying she had not done any of the things she was accused of, and it was her co-workers' fault that they did not get along. She complained her co-workers talked down to her and did not respect her. When repeatedly asked to give examples to support this assertion, Grievant was unable to give even one illustration to support this belief. As previously stated by the Grievance Board, "a [f]actor to be considered in making and explaining credibility determinations is [the] possibility that [the] witness is biased and may consciously or unconsciously shade his or her testimony for or against one of the other witnesses or parties." Chin v. Dep't of Treasury, 44 M.S.P.R. 201 (1990). See Loundman-Clay v. Higher Educ. Policy Comm'n, Docket No. 02-HEPC-013 (Aug. 29, 2002).

Grievant also called into question the testimony of Debbie Rainey-Haught, stating in her submissions that she and Mr. Ressmeyer maintained a friendship outside the workplace, and this caused him to be predisposed to believe what she said aboutGrievant's job performance and behavior. This assertion is not borne out by the evidence as the testimony revealed Mr. Ressmeyer and his wife once attended a Christmas party Ms. Rainey-Haught had, to which all the staff was invited. Since Ms. Rainey-Haught did not exhibit any bias or motive, her statements were consistent with other testimony, and her answers did not appear evasive,

and were plausible, her testimony is accepted as true. II. Merits

A. Written reprimand

The testimony is clear that Grievant was repeatedly counseled about her excessive personal phone use. Grievant's responses were her phone use was not excessive and these calls were necessary because of sickness in her family. Mr. Ressmeyer was understanding of Grievant's emergency phone calls, but heard many phone calls that did not appear to be emergencies. While the undersigned Administrative Law Judge understands there will be the need for some emergency phone calls at work, Grievant did not explain why some of these phone calls could not be made or received during lunch or breaks, after Grievant was off work, or on weekends. While she felt these were not excessive, Mr. Ressmeyer did and repeatedly told her so. When she did not correct her behavior, a written reprimand was given.

Grievant asserted the interpersonal communication problems were due to others' treatment of her; however, she was unable to give even one example of disrespectful treatment or "talking down to her" by her co-workers. Additionally, Grievant stated Mr. Ressmeyer treated her fairly. While it is understood that interpersonal communication problems are frequently a two-way street, it should be noted that co-workers do not have to like each other, they only have to do the work assigned. While Grievant appears todislike doing the work of the support staff and repeatedly feels "put upon," this still does not mean she is not expected to perform her assigned duties. While Grievant denied she has a volatile temper, her response to Mr. Ressmeyer's discussion before he gave her the written reprimand demonstrates the opposite. Accordingly, Respondent has met its burden of proof on this issue.

As for Grievant's poor job performance, she agrees that at times her work has obvious mistakes. Additionally, the evidence demonstrated Grievant made mistakes in copying the printer's dummy that resulted in several days of increased work for her co- workers. As far as Grievant's failure to be at her desk during work hours, she testified these absences were necessary. Since she did not inform her supervisor when and where she was going, and when she would be back, this statement appears to be an excuse. This conclusion is supported by the evidence given about Grievant's frequent absences from her desk on May 7, 2003. When confronted by Mr. Ressmeyer about these absences her response was, "Well, sorry, I had a

birthday." Obviously, this time away from her desk was not work related.

B. Discrimination and favoritism

Grievant has asserted she has been unfairly treated. The undersigned Administrative Law Judge will examine this assertion as discrimination and/or favoritism. 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." 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." This Grievance Board has determined that a grievant, seeking to establish a prima facie case (See footnote 7) of discrimination and/or 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 and/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, 179 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 and/or favoritism. Grievant presented little evidence of unfair treatment, and the treatment she did assert was by coworkers. No examples to support this contentionwere given, although Grievant was asked repeatedly to supply this information. Additionally, Grievant stated Mr. Ressmeyer, her supervisor, treated her fairly and had tried to work out the problems she had with another coworker. Accordingly, there is no finding of unfair treatment.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. 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. W. Va. Code § 29-6A-6; Ramey v. W. Va. Dep't 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. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

2. Respondent has met its burden of proof and demonstrated Grievant did engage in the behavior cited in her written reprimand.

3. 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."

4. 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." 5. A grievant, seeking to establish a prima facie case of discrimination and/or 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).

6. 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, 179 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).

7. Grievant has not met her burden of proof and established a prima facie case of discrimination and/or favoritism.

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 grievanceoccurred. 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: October 28, 2003

Footnote: 1

The Grievance Evaluator directed that certain portions of the written reprimand be deleted and this was done; however, the written reprimand was upheld.

Footnote: 2

Grievant was represented by Gordon Simmons of the West Virginia State Employees Union, and the Division of Culture and History was represented by Christine Utt, Assistant Attorney General.

Footnote: 3

This case was assigned to the undersigned Administrative Law Judge on October 2, 2003.

Footnote: 4

To work around this problem, employees give the work that needs to be done to Mr. Ressmeyer to give to Grievant.

Footnote: 5

Grievant asserted she was the only one who was told not to bring her cell phone to meetings; however, other employees testified they were sent a memo stating this point.

Footnote: 6

The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984).

Footnote: 7

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).