JANET BUTLER,

Grievant,

v.

DOCKET NO. 02-DOH-344

WEST VIRGINIA DEPARTMENT OF

TRANSPORTATION/DIVISION OF HIGHWAYS,

Respondent.

D E C I S I O N

Grievant, Janet Butler, filed this grievance against her employer, the West Virginia Department of Transportation/Division of Highways ("DOH") on December 13, 2001, alleging she had been discriminated against when she had not been given the "proper protective apparel." Grievant seeks the discrimination to stop and to be made whole. During the Level III hearing, when asked to clarify her grievance, Grievant indicated the actual relief she sought was to be assured DOH "would do everything in their power" that Grievant would always have coveralls when she needed them. Test. Level III Hearing. The grievance was denied at all lower levels. Grievant appealed to Level IV on October 24, 2002. The grievance was set for hearing, but after several continuances, the parties agreed to submit the case on the record developed at the lower levels of the grievance procedure, and this matter became mature for decision on May 12, 2003. Grievant was represented by Mr. Kelly Rice, and DOH was represented at Level III by Carrie Dysart, Esq. Based upon a careful review of all of the testimony and evidence of record, the undersigned finds the following facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant is employed by DOH as a Transportation Worker I Craftsworker in District Three, Calhoun County, West Virginia.

2. The employees in District Three are usually provided disposable coveralls to protect their clothing while working on the roads. DOH is not required to furnish coveralls to employees. The major purpose is to protect employees' clothing when they are spraying tar.

3. William Watkins wears coveralls when he sprays tar. He wears a large and Grievant wears a medium.

4. At times the storeroom runs out of the coveralls, and it may take as much as two weeks to obtain more.

5. Grievant is the only employee who consistently uses the coveralls no matter what type of work she is performing.

6. On the morning of November 21, 2001, Grievant asked Rebecca Johnson, the District Three Storekeeper, for a pair of coveralls. Ms. Johnson told Grievant there had been some previously, but when they looked there were none in the storeroom. Grievant was not working in tar that day.

7. Grievant's crew leader, Ron Kerby, told Grievant she had left some coveralls in his truck, and Grievant went to get them saying to Mr. Kerby, "You'd better hope there are some in there," and then stated she needed grievance papers. 8. Grievant found a pair of her coveralls in Mr. Kirby's truck and used them that day.

9. Later that day, when the crew returned to the office, Grievant informed Mr. Kirby and Ms. Johnson she was going to file a grievance every day she did not have coveralls and she was going to put Ms. Johnson's name on them.

10. On January 15, 2002, District 3 instituted a check out policy requiring employees to sign out items such as coveralls, hard hats, vests, and flags. (See footnote 1)

11. From January 15, 2002 to July 31, 2002, Grievant received 76 different pairs of disposable coveralls. During this same time frame all other employees in Calhoun County have received 42 pairs of coveralls.

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 (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). "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 (May17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.

Grievant contends she is being discriminated against. Additionally although not clearly pled, it appears Grievant is also asserting other employees are treated more favorably. 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 2) 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, as she has failed to establish a prima facie case of discrimination or favoritism. There was no evidence that anyone did anything that could even remotely be considered discriminatory to Grievant. The Storeroom ran out of coveralls that they are not required to provide to Grievant on a daily basis. In fact, the undersigned Administrative Law Judge finds the filing of this grievance borders on harassment, especially when Grievant's behavior toward Ms. Johnson and Mr. Kirby is examined. While Grievant certainly has the right to file a grievance over problems at work, the grievance process is not to be used by employees to threaten supervisors and co- workers. Grievant's comments to Ms. Johnson and her Crew Leader were inappropriate. 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 (2000); Howellv. 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 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. 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. 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. 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). 5. 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).

6. 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 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: June 24, 2003

Footnote: 1

Grievant asserted she was the only one who had to sign out items. This is incorrect. See Exhibit 5.

Footnote: 2

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).