GREGORY YAHNKE,
Grievant,

v. **Docket No. 05-CORR-346**

DIVISION OF CORRECTIONS,
Respondent.

D E C I S I O N

Gregory Yahnke ("Grievant"), employed by the Division of Corrections ("DOC") as a Corrections Program Specialist at the Northern Correctional Facility ("NCF"), filed a level one grievance on August 9, 2005, in which he stated:

> On 8 Aug 2005, I was informed to stop wearing jeans to work based on a memo, sent on 7 June 2005, [from] Commissioner Jim Rubenstein. This memo is too vague, open to interpretation, discriminatory, and violates DOP-P3.

For relief, Grievant requested the memo be rescinded or that DOC compensate all non-uniformed staff with a clothing allowance or provide a uniform standard of dress clothes/clothing allowance.

NCF Warden Evelyn Seifert denied the grievance at level one. Jan Chamberlain, Assistant Commissioner, denied the grievance at level two, and Commissioner Rubenstein denied the matter at level three. Appeal was made to level four on September 21, 2005. Grievant, representing himself, and Assistant Attorney General John H. Boothroyd, representing DOC, agreed to submit the grievance for decision based on the lower-level record. The grievance became mature for decision upon receipt of supplemental proposals and arguments filed by the parties on or before December 9, 2005.

The following facts have been derived from a preponderance of the evidence made part of the level three record.

Findings of Fact

1. Grievant is employed at NCF as a Corrections Program Specialist. As a member of NCF's non-uniformed staff, Grievant's duties involve the implementation of a service program for inmates, and involves little or no contact with the general public.

2. DOC provides correctional officers at all the facilities, including NCF, with uniforms. The purpose of this is to make them easily identifiable to inmates and other staff, and to give them the appropriate appearance of authority to inmates.

3. Program employees are not provided with uniforms because it is not necessitated by their job duties. In fact, uniforms could be a detriment to the personal, one-on-one relationships that program staff must maintain with the inmates to whom they provide services.

4. On June 7, 2005, DOC Commissioner Jim Rubenstein issued a memo titled "MANNER OF DRESS—'*Dress for Success,'*" in which he noted that it had come to his attention that some employees were reporting to work dressed rather casually. He advised that work place attire should be "Business Appropriate," which would not include the wearing of flip-flops, denim materials, tee shirts and "any other garment, that when worn, may provide for a less than professional image on the public's perception of who it is we are and the State for which we work."

5. The memorandum does not specify any enforcement mechanism, but is in effect, an order from the Commissioner, who concluded the memo by stating, "I thank you for your understanding and compliance."

6. Several DOC institutions, including Lakin, St. Marys and Huttonsville Correctional Centers, subsequently issued memoranda regarding a dress code. NCF Warden Seifert has not issued an additional memorandum, but has applied the

Commissioner's prohibition of flip-flops, denim materials, and tee shirts, but not to any other form of dress. However, as part of his duties, Grievant travels to the other institutions and could be subject to their dress codes which prohibit the wearing of denim clothing of any kind, shorts, stretch pants (or any tightly fitting pants of any kind), tank tops (or any type of sleeveless shirt), halter tops, short skirts (in excess of two inches above the knees) tee shirts, sweatshirts, sandals (flip flops, backless shoes, sport sandals) including shoes or boots with heels or soles more than 2" high, spandex clothing, capri pants, any clothing made out of translucent material, and tennis shoes (black athletic is acceptable). Hats are not to be worn inside the building

7. After receiving the "Dress for Success" memorandum, Grievant was counseled once for wearing jeans to work.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Howell v. W. Va. Dep't of Health & Human Res., 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 & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

Grievant argues that the Commissioner's memorandum is vague, and open to interpretation, as evidenced by the differences in the various wardens' memoranda. He

further argues that the requirements are in violation of Division of Personnel's Policy "Agency Dress Codes," which states that dress standards should be clear, unambiguous, consistently enforced, and reasonably related to a legitimate business need. Finally, Grievant argues the dress code results in discrimination/favoritism as some employees are provided uniforms while others are not.

NCF asserts that the employees are the inmates' primary, if not only, role models as to how to dress at work. Second, appropriate attire reflects a respect for the employer/institution, which may in turn influence the attitudes of the inmates. Third, professional dress projects greater authority than casual dress, all of which furthers the mission of DOC to provide quality correctional services. NCF declines to provide non-security staff with uniforms/clothing allowance because their duties do not require uniforms, and it would be fiscally impossible to do so. NCF denies the violation of any policies, stating that the restrictions are designed only to eliminate attire which is unprofessional and not business appropriate.

The Grievance Board has previously addressed the issue of whether dress codes which ban the wearing of jeans may be imposed upon state employees. In Burdette v. West Virginia Public Service Commission, Docket No. 93-PSC-132 (Nov. 16, 1993), the grievant, a Utility Financial Analyst, was required to dress "professionally" by wearing dress pants, a dress shirt and a tie. He was not permitted to wear jeans to work because he was sometimes required to visit the worksites of various businesses which are regulated by the PSC, and/or might be required to attend one of the PSC's public hearings. While acknowledging that Grievant might be correct in asserting that his noncompliance with the dress code would not have a disruptive effect to the employer on a majority of occasions,

the dress code was upheld as the employer had established a rational basis for the policy in that it has an interest in promoting professionalism within its offices and in exhibiting professionalism to the public.

In Jenkins, et al. v. West Virginia Department of Health & Human Resources/Mildred Mitchell-Bateman Hospital, Docket No. 00-HHR-334 (Apr. 13, 2001), health services workers argued that a policy which allowed some employees, but not the nursing staff, to wear jeans was discriminatory. It was held that grievants had failed to make a prima facie case of discrimination as they were not similarly situated to those employees who were allowed to wear jeans, i.e., those routinely involved in "physically intensive positions" including maintenance and laundry employees. Because DHHR instituted its dress standards policy to promote "safety, image, and role modeling for the patients and image of the organization to the public that it strives to serve," it established a rational basis for the policy, which was upheld.

Recently, in Shreve v. Division of Corrections/Huttonsville Correctional Center, Docket No. 05-CORR-155 (Sept. 12, 2005) the Grievance Board held that the DOC dress code, and its implementation at that facility, did not result in discrimination/favoritism because "[t]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]" Bd. of Educ. v. White, 605 S.E.2d 814, 818 (W. Va. 2004). In denying the grievance, it was held that administrators are not similarly situated to correctional officers who are provided with uniforms out of necessity, so that they are easily identifiable and can provide control over the inmates.

For the same reasons set forth in Shreve, supra, Grievant has failed to establish discrimination/favoritism by DOC regarding the dress policy. "'Discrimination' means 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(d). "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." W. Va. Code § 29-6A-2(h). In The Board of Education of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004), the West Virginia Supreme Court of Appeals clarified the legal test for discrimination claims raised under the grievance procedure definition. A grievant must establish a case of discrimination by showing:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Chaddock v. Div. of Corrections, Docket No. 04-CORR-278 (2005); Frymier v. Glenville State College, Docket No. 03-HE-217R (2004). An employee claiming favoritism must also show he is similarly-situated to another employee. Kincaid v. Div. of Corrections, Docket No. 98-CORR-144 (1998); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (1990).

While correctional officers are responsible for maintaining safety and control of the inmates, program staff work to assist inmates in learning appropriate behavior, both while incarcerated and upon their release. As DOC has argued, the wearing of a uniform by these employees is not only unnecessary to assist them in performing their duties, but could serve as an impediment to the somewhat personal and confidential relationship

which the program staff must foster with inmates in order to accomplish their goals. Grievant has not proven that he is similarly situated to correctional officers, or that DOC's decision not to provide him with a uniform/clothing allowance is discrimination/favoritism.[1]

The West Virginia Division of Personnel ("DOP") has adopted a policy entitled "Agency Dress Codes," the purpose of which is "to communicate basic principles regarding written standards of dress and to establish appropriate guidelines" for agencies adopting such policies. DOP's policy provides, in pertinent part:

> Generally, dress standards should address issues regarding clothing, . . . safety, public images, productivity, and be job-related. Written [dress codes] should be clear, unambiguous, consistently enforced, non-discriminatory (sex, race, or religion) and must be reasonably related to a legitimate business need such as interference with job performance, the disruption of the workplace, or workplace safety. Restrictions on dress and grooming that cannot be shown as having a direct effect on production, safety considerations, or relationships with the public, generally will not be upheld. . . . [The rationale for dress restrictions] should be based on the legitimate business necessity and obligation of maintaining a professional and safe working environment.

While Grievant contends that DOC's dress code is vague, he has not specifically explained the basis for this contention. Certainly, it is not vague as to the wearing of denim, which is the basis of his complaint. Nevertheless, as discussed in previous Grievance Board decisions, the United States Supreme Court has ruled that dress codes should be judged pursuant to a rational basis analysis. In Burdette v. W. Va. Public Service Commission, Docket No. 93-PSC-132 (Nov. 16, 1993), it was stated that:

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[1]Grievant has established that the Commissioner's memorandum has been interpreted differently at the various institutions. However, it was indicated that a policy would be forthcoming, and hopefully it will provide consistency throughout the agency.

> Because the right to dress as one sees fit is not a fundamental right, any restrictions placed upon one's choice of dress are to be judged under a "rational basis" test to determine if the regulation can be branded as arbitrary. The Employer may defeat the challenge to its dress code by showing that it has a reasonable and rational basis for restricting Grievant's manner of dress in order to meet a legitimate end.

(citing Kelly v. Johnson, 425 U.S. 238, 96 S.Ct. 1440, 47 L.Ed. 2d 708 (1976)).

Under the circumstances presented here, DOC has established a legitimate, rational justification for its dress policy. Program employees are specifically charged with the responsibility of serving as role models for inmates, both through their actions and appearance. One of the roles of these employees is to assist inmates in gathering and developing skills and abilities which will serve them upon their release from incarceration. Dressing in a professional manner, and refraining from wearing the prohibited items listed by Commissioner Rubenstein, provides a positive image for inmates as to appropriate behavior for responsible and respectful employees. In conclusion, Grievant has failed to prove that the dress code memorandum should be rescinded for vagueness, or that DOC has engaged in favoritism/discrimination.

The following conclusions of law support this decision.

Conclusions of Law

_____1. In a non-disciplinary matter, Grievant has the burden of proving his claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); Howell v. W. Va. Dep't of Health & Human Res., 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 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(d).

3. “‘Favoritism’ means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.” W. Va. Code § 29-6A-2(h).

4. Grievant failed to prove that he is similarly situated to correctional officers, or that the provision of uniforms to those employees resulted in discrimination/favoritism. Shreve v. Div. of Corr./Huttonsville Corr. Center, Docket No. 05-CORR-155 (Sept. 12, 2005).

5. To withstand Constitutional scrutiny, an employer must show a rational basis between a legitimate business decision and the implementation of a dress code. Burdette v. W. Va. Pub. Serv. Comm., Docket No. 93-PSC-132 (Nov. 16, 1993); See also Jenkins v. W. Va. Dep't of Health & Human Res., Docket No. 00-HHR-334 (Apr. 13, 2001).

6. Respondent has shown a rational basis for the dress code implemented, as it applies to Grievant.

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.

DATE: DECEMBER 22, 2005

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SUE KELLER
SENIOR ADMINISTRATIVE LAW JUDGE