NOLA LILLY, et al.,

Grievants,

v. **Docket No. 05-HHR-419**

DEPARTMENT OF HEALTH AND

HUMAN RESOURCES/PINECREST

HOSPITAL,

Respondent.

DECISION

Grievants initiated this proceeding on October 12, 2005, against their employer Department of Health and Human Resources ("HHR"). Grievants are employees at Pinecrest Hospital, and their Statement of Grievance reads:

> New dress code policy. We were exempt and allowed to wear blue jeans until Oct 6 2005. We were then told we were not exempt from DHHR['s] new policy.
>
> Relief Sought: Housekeepers to be allowed to wear blue jeans or provide clothing allowances for 5 outfits a year.

Grievants accompanied their Statement of Grievance with additional contentions, which said denim was "a reasonable and rational choice of clothing" and "wearing denim while performing our jobs would maintain our level of productivity. . . ."

This grievance was denied at Levels I and II and dismissed at Level III as a non- grievable. Grievants appealed to Level IV on November 14, 2005. A Level IV hearing was held in Beckley, West Virginia, on January 30, 2006. Grievant Sharon Johnson represented Grievants, and Respondent was represented by B. Allen Campbell, Senior Assistant Attorney General. At this hearing, Grievants also asserted they should be able to wear hats inside at work, and the dress code should be enforced for all employees. This matter became mature for consideration on that date, January 30, 2005, as the parties elected not to submit proposed Findings of Fact and Conclusions of Law.

The following material facts have been proven by a preponderance of the credible evidence of

record.

Findings of Fact

1. Grievants are employed at Pinecrest Hospital as housekeeping, dietary, and maintenance workers. Their duties require them to work with cleaning agents and other chemicals.

2. On August 31, 2005, HHR implemented a Dress Code Policy. This Policy was revised on October 1, 2005. The purpose of the Dress Code Policy is "to establish a statewide expectation for employees that emphasizes professionalism and portrays a positive image of our state and our agency to the public . . . conducive to the responsibilities of the agency." The Policy applies to all employees, volunteers, and contract workers. Grievant's Exh. 1 at Level IV.

3. The Dress Code Policy prohibits the wearing of blue jeans, but not denim of other colors. Hats may not be worn in the building unless they are required by the work to be performed, such as food preparation. Grievant's Exh. 1 at Level IV. The rationale for this rule is that Pinecrest Hospital is the home of the residents who live there, and it is disrespectful to wear a hat in the house. Test. Booker, Level IV Hearing.

4. The manager of a facility or offices has the authority to make exceptions based on a variety of issues, but these exceptions must be documented and are to be considered on an individual basis. Blue denim pants may be worn if determined to be appropriate to the work site and job function. (See footnote 1) 5. Angela Booker is the manager and CEO of Pinecrest Hospital. She notified all employees of the Dress Code Policy, and that it would now be in effect for all employees. Because some employees asserted the change would create financial hardship, she allowed these employees to turn in requests to delay the enforcement of the Policy, and she gave these employees until January 1, 2006, for them to be in compliance. 6. Ms. Booker has had several discussions with Grievants and listened to their complaints about the cost of the change. Grievants asserted they did not have money to buy new work clothes. She recommended looking at yard sales and the Salvation Army, and Grievants took great offense at this statement.

Issues and Arguments

Grievants assert they cannot afford to buy new clothes for work and maintain it was important that they wear blue jeans because of the damage to their clothing. They assert they cannot go out and

buy new clothing every two to three weeks. They also asserted some employees have not been disciplined for their failure to follow the Policy while others have.

Respondent asserts the Dress Code Policy has a rational basis as expressed in the purpose section of the Policy, and is to be enforced equally. Respondent note Ms. Booker cannot be in all places at all times, and recommend employees report violations of the Dress Code Policy if they want it to be equally enforced. Additionally, Respondent notes employees can wear denim jeans, just not blue ones. Further, Respondent notesGrievants' argument about damage to their clothing does not make sense, as this damage can occur to blue jeans just as easily as black, brown, or khaki jeans.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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).

While the theories to support Grievants' arguments have changed over time, Grievants' key assertion is they should be allowed to wear blue denim. Grievants are requesting to wear denim as denim is clothing they have, and it is comfortable, protective, and cost-effective. As clearly stated by the Policy, Grievants are allowed to wear denim, just not blue denim. At Level IV, Grievants also asserted they should be allowed to wear blue jeans because no one sees them while they are at work.

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.

(Emphasis added).

In previous decisions, the Grievance Board noted, the United States Supreme Court ruled dress codes should be judged pursuant to a rational basis analysis. In Burdette v. West Virginia Public Service Commission, Docket No. 93-PSC-132 (November 16, 1993)(citing Kelly v. Johnson, 425 U.S. 238, 96 S.Ct. 1440, 47 L.Ed. 2d 708 (1976)), it was stated that:

> 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.

The HHR's Dress Code Policy specifically prohibits the wearing of "[b]lue denim jean- style pants" but not "non-blue denim pants." It is unclear why green, red, purple, pink, and black denim are acceptable, but blue is not. The Dress Code Policy gives no explanation for this difference, and a prohibition against denim entirely would seem more sensible. The requirement to meet the rational basis test is to establish the restrictions on dress "hav[e] a direct effect on production, safety considerations, or relationships with the public," have "a reasonable and rational basis . . . to meet a legitimate end." Division ofPersonnel Policy, supra; Burdette, supra. Under the circumstances presented here, HHR has failed to establish a legitimate, rational justification for this portion of its Policy. However, the requirement employees not wear their caps inside the facility is a normally expected and recognized courtesy and HHR has shown a reasonable and rational basis for this rule.

Grievants also maintain the Dress Code Policy is not uniformly enforced, and this is unfair. Ms. Booker was clear, any person she saw in violation of the Dress Code Policy was properly dealt with, whether they were sent home or disciplined. It is certainly possible she does not see all workers every day, as she has many duties to perform, and should not have to spend her time serving as the dress code police. It would appear to be helpful for Ms. Booker to discuss the Dress Code Policy and its importance with her supervisors again, and if the supervisors will not enforce the Policy, they would themselves then be subject to discipline. Grievants can have a part in the enforcement of the

Policy by notifying these supervisors and/or Ms. Booker of violations. Even with these precautions, it is still possible that from time to time an employee will sneak around and think it is permissible to violate this Policy.

In addition, at the Level IV hearing, Grievants noted some male employees are wearing shirts with cut off sleeves and showing their armpit hairs. Respondent believed this type of dress was not prohibited by the Dress Code Policy as these shirts were not "muscle" shirts. The undersigned Administrative Law Judge points Respondent to Section 4.1 which prohibits clothing that is ragged or torn, and Section 4.8 which states sleeveless tops may be worn if they are not too revealing. If it is considered rude to wear your cap inthe residents' house, it is also rude to walk around in a shirt with the sleeves cut off and have your armpit hair hanging out. (See footnote 2)

As for a clothing allowance, Grievants have not met their burden of proof on this issue and established HHR is required to provide this benefit. Additionally, Grievants did not demonstrate any employee is provided this benefit.

The above discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. In a non-disciplinary matter, Grievants have the burden of proving their 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. 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'n, 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).

3. 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). 4. Respondent has not shown a rational

basis for the rule restricting the wearing of blue denim.

5. Grievants have not met their burden of proof and established HHR is required to provide the benefit of a clothing allowance.

Accordingly, this grievance is **GRANTED**.

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

SENIOR ADMINISTRATIVE LAW JUDGE

Date: April 27, 2006

Footnote: 1

Grievants indicated some offices and facilities in HHR are not following the Dress Code Policy, and this lack of consistency is not fair to them. While there may be amisunderstanding by Grievants, it is noted it is not within a manager's authority to allow his staff to just ignore the Dress Code Policy, and any exceptions must be on an individual basis, individually documented, and apply "to specific requirements related directly to their job duties." Grievant No. 1 at Level IV.

Footnote: 2

It is noted the Dress Code Policy appears to place many restrictions on women's clothing. While the undersigned Administrative Law Judge does not disagree with these restrictions, it would only be fair for men to dress appropriately as well.