THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

FRANK CIORDIA,

Grievant,

v. **Docket No. 06-C&H-191**

Janis I. Reynolds

Senior Administrative Law Judge

WEST VIRGINIA DIVISION OF

CULTURE and HISTORY,

Respondent.

D E C I S I O N

Grievant, Frank Ciordia, filed this grievance against his employer, the Division of Culture and History ("C&H"), on March 20, 2006. His Statement of Grievance states:

> The Division refuses to reimburse the employee for meal expenses incurred while performing a temporary assignment on behalf of the agency. This refusal constitutes discrimination against the employee.
>
> Relief sought: Payment in full for meal expenses (per diem) as submitted by the employee for the assignment in question.

This grievance was denied at all lower levels. Grievant appealed to Level IV on June 5, 2006, and a Level IV hearing was held on September 7, 2006, in the Grievance Board's Charleston office. Grievant was represented by Gordon Simmons, AFCSME Representative, and C&H was represented by Gregory Skinner, Assistant Attorney General. This case became mature for decision on October 13, 2006, after receipt of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant asserts he is entitled to full, per diem, meal expenses for the time he was at Camp Washington Carver ("CWC") on temporary assignment. Grievant also asserts heis being discriminated against, as other employees on long-term, temporary assignments are allowed these meal expenses.

Respondent argues Grievant's headquarters were changed during this temporary assignment, and Grievant was aware of this change as demonstrated by the travel forms he submitted during his time at CWC. Respondent also avers he was not similarly situated to the employees to whom he compares himself, and Grievant's credibility should be an issue.

Respondent established Grievant was aware his headquarters had changed, and he was not entitled to a meal allowance. Grievant did not meet his burden of proof and establish he had been discriminated against. Additionally, the undersigned Administrative Law Judge finds Grievant to have been less than truthful in his testimony.

After a thorough review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is currently employed as an Accountant Auditor 3 in Respondent's Charleston office.

2. In early January 2005, the Building Maintenance Supervisor at CWC resigned his position. C&H needed to have someone at this facility immediately for security and upkeep purposes and asked Grievant to fill this vacancy until it could be posted and filled. He agreed, and Grievant was assigned to fill this position on a temporary basis on January 7, 2005.

3. While CWC's lodging was by no means ideal, Grievant did have a place to sleep and access to kitchen facilities. 4. Grievant continued to be paid his Accountant Auditor 3 salary and did perform some of these duties while he was at CWC.

5. On or about January 11, 2005, Grievant submitted a travel expense form requesting meal reimbursement for January 7, 2005, to January 11, 2005. Grievant was reimbursed for this expense, but shortly thereafter, Grievant's supervisor, Jenny Boggess discussed his placement with Grievant and informed him he could no longer claim these expenses, as his current place of assignment or headquarters was CWC.

6. During the conversation referred to in Finding of Fact 5, Grievant was also told he would receive overtime pay for his weekend days. Previously, the employee stationed at CWC only received overtime pay on weekends when he actually performed duties.

7. After that discussion with Ms. Boggess, Grievant did not claim meal reimbursement while he stayed at CWC. He did ask for and receive meal reimbursement when he traveled to Charleston for business reasons on March 30 - 31, 2005, as Charleston was no longer considered his headquarters.

8. During his stay at CWC, Grievant continued to submit his requests for mileage reimbursement on a regular basis. The majority of these forms

stated Grievant's headquarters was "Carver." It is unclear who wrote this information in the travel forms, but this information was required before the request could be processed.

9. Grievant filled the CWC position from January 7, 2005 to June 16, 2005.

10. Grievant has no idea how much he spent on food on a daily basis, but testified, "I hardly ate on a standard day." Grievant lost 35 pounds during his six-monthstay at CWC, made only sandwiches to eat, and did not eat much while he was at CWC. Test. Grievant, Level III Hearing.

11. Contrary to Grievant's assertion, there are no employees who are away on temporary assignment for four to six weeks at a time. There are employees who travel on a fairly regular basis to put up and take down traveling exhibits, and who assist during special festivals and events. These responsibilities are part of the normal duties of these employees, and are not temporary assignments.

12. Approximately eight months after Grievant completed this temporary assignment, on February 23, 2006, Grievant submitted 17 travel expense forms for meal expenses from January 7, 2005 to June 16, 2005. (See footnote 1) Grievant requested the full $31.00 a day allowance permitted by the state.

13. When asked if he actually spent $31.00 a day on meals Grievant replied, "I didn't have any extra money to spend on the meals. . . .", but then stated, "I do know that I am entitled to $31.00." Test. Grievant, Level III Hearing.

14. Each expense form states, right above the place where a preparer is to sign, "I certify that these costs incurred were in connection with my assigned duties, are true, accurate, and actual, and do not reflect any costs or

expenses reimbursed or to be reimbursed from any other source."

15. While the state does not require an employee to submit receipts with his request for the repayment of meal expenses, the employee is expected to complete the form with the actual amount spent. Test. DeMarco, Level IV Hearing.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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 (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).

I. Credibility

An issue to address is credibility, as Grievant stated he was never told his headquarters were changed, and his supervisor testified this issue was discussed with Grievant shortly after he accepted the temporary position. Additionally, although Grievant's Statement of Grievance requested, and Grievant testified he was entitled to the full per diem of $31.00, his testimony at Level III conflicts with this assertion.

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 Res., Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Res., 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 Res./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 2) See Holmes v. Bd. of Directors/W.Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.

The undersigned Administrative Law Judge finds Grievant has been less than honest in his testimony. First, it is clear from Grievant's subsequent behavior that he was aware his place of assignment had changed. This understanding is clearly demonstrated by two actions: 1) his failure to file any more request for meals after his discussion with his supervisor on, or about, January 11, 2005; and 2) his request for meals when he was in Charleston in March 2005. Second, while Grievant testified he was entitled to the full amount for his meals and repeatedly signed statements which stated he certified the meal costs he incurred were "true, accurate, and actual . . . ," it

is clear from Grievant's owntestimony that he did not spend $31.00 dollars a day on meals, and he was well aware of this fact. See Findings of Fact 10 and 13. Because of Grievant's attitude that he was entitled to the meal reimbursement, and his inconsistent statements and subsequent actions which make his assertions implausible, the undersigned Administrative Law Judge finds Grievant has been untruthful.

II. Discrimination

Grievant also asserted he was treated differently than other employees. W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, 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." Administrative notice is taken that the West Virginia Supreme Court of Appeals has revised the legal test for discrimination claims raised under the grievance procedure statutes. In The Board of Education of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004), the West Virginia Supreme Court of Appeals held a grievant must establish a case of discrimination by showing: (See footnote 3)

> (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.

Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

Grievant did not identify any similarly situated employees. Although he asserted there were other employees who were gone for four to eight weeks

at a time, and they received meal reimbursement, this assertion proved to be incorrect as demonstrated by Grievant's own exhibits. These identified employees, as a part of their job duties, are sent throughout the state to set up and remove exhibits, but they are still headquartered in Charleston. These assignments are intermittent and do not last a continuous four to eight weeks. That set of circumstances is very different from Grievant's situation. He agreed to accept a temporary assignment, with different job duties, to fill a vacancy created by a resignation. Grievant has not met his burden of proof and demonstrated he was treated differently than similarly situated employees.

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 his 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 (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 reasonableperson 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).

2. 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."

3. In The Board of Education of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004), the West Virginia Supreme Court of Appeals revised the legal test for discrimination claims raised under the grievance procedure statutes. 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);
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> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).

4. Grievant has failed to establish he has been discriminated against. He did not identify any similarly situated employees who were treated differently.

Accordingly, this grievance is **DENIED**.

Any party 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 itsAdministrative 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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Janis I. Reynolds

Senior Administrative Law Judge

Date: December 29, 2006

Footnote: 1

Grievant did redo some of these forms in March 2006, as it was clear he had already been paid for some for the January 2005 days.

Footnote: 2

The undersigned Administrative Law Judge originally obtained this list of factors to use when assessing credibility from The United States Merit System Protection Board Handbook. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984).

Footnote: 3

In this case, the Court distinguished claims of discrimination/favoritism filed under the State's Human Rights Act, in which the employer's motive for the conduct, i.e., treating an employee differently based on one of the impermissible factors stated in the Act (race, religion, color, national origin, ancestry, sex, age, blindness, handicap) is decisive, and those brought under the more general definitions set forth in grievance statutes, W. Va. Code §§ 18-29-1, et seq. and 29-6A-1, et seq. Employees filing discrimination/favoritism claims under the grievance procedures need only meet the legal test as stated above, and employers may no longer present a justification for the difference in treatment. Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004).