THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

DARLENA LILLY,

Grievant,

v. **Docket No. 06-TD-153**

Janis I. Reynolds

Senior Administrative Law Judge

WEST VIRGINIA DEPARTMENT OF REVENUE/

STATE TAX DEPARTMENT,

Respondent.

D E C I S I O N

Grievant, Darlena Lilly, filed this grievance against her employer the State Tax Department ("Tax") on March 29, 2006, over the institution of a Dress Code Policy which she asserts violates the Division of Personnel's ("DOP") Dress Code Policy and is unenforceable. The relief sought is to rescind the new policy, and more clearly define what clothing materials are not allowed.

The grievance was denied at all lower levels. Grievant appealed to Level IV on May 15, 2006, and on July 6, 2006, a Level IV hearing was held in the Grievance Board's office in Charleston. Grievant represented herself, and Tax was represented by Wayne Williams, Assistant Attorney General. This case became mature for decision on that date, as the parties elected not to submit proposed findings of fact and conclusions of law.

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

Findings of Fact

1. Grievant is employed by Tax in the Internal Auditing Division, as a Tax Audit Clerk Senior. She does no maintenance work.

2. On March 14, 2006, Acting Cabinet Secretary of the Department of Revenue, John Musgrave, sent a memorandum to Acting Tax Commissioner Virgil Helton stating:

> Each of you probably have instituted your own Dress Code, however, in order that all agencies in State government be consistent, the Administration is requesting that your dress code policy should state that Friday should be considered the same as each day of the week, and your employees should dress appropriately. In addition they should not wear denim jeans, dresses or skirts or any other attire not suitable for their position.
>
> If the job description of certain staff in your agency requires the necessity of "work" clothes, then an exception may be made. Or, your agency may consider purchasing uniforms for your maintenance staff.

3. On March 24, 2006, Deputy Commissioner Christopher Morris issued a Memorandum to all Tax Department Division Directors requesting they advise their employees of the March 14, 2006 memo and requesting a list of employees who would be exempt from the policy due to their job duties.

4. On March 28, 2006, Linda Bennett, Director of the Internal Auditing Division, sent notice to her employees that the new policy would not go into effect until May 1, 2006, to give employees additional time to purchase clothing. (See footnote 1)

5. On April 18, 2006, Grievant asked to be exempt from the policy, stating she saw only two or three customers, face-to-face, a year. This request was denied by LindaColeman, Human Resources Administrator, on April 28, 2006, noting that customers "everyday see [Grievant] coming and going."

Synopsis

Grievant asserts Tax's Dress Code Policy violates DOP's Dress Code Policy because: 1) it is an interference with her dress without a good reason; 2) the Dress Code Policy is not reasonably related to a legitimate business need; 3) she does not interact with customers on a face-to-face basis; 4) there was no dress code when she was hired; (See footnote 2) and 5) it is unclear what denim is. (See footnote 3) Grievant also asserts it is discrimination for the ban to not apply to temporary employees.

(See footnote 4)

Tax asserts it is within its authority to prevent its non-maintenance employees from wearing denim in the workplace; there is no violation of the DOP's Dress Code Policy; and notes bans on the wearing of denim in the workplace have generally been upheld by the Grievance Board, as long as the policy passes the rational basis test.

Grievant has not met her burden of proof and demonstrated Tax's Dress Code Policy violates any statute, policy, rule, or regulation.

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 theW. 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 asserts Tax's Dress Code Policy violates the DOP's Dress Code Policy. 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.

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)), the United States Supreme Court stated:

> 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 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, supra, 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 work sites 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 the grievant might be correct in asserting 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 as it had an interest in promoting professionalism within its offices and in exhibiting professionalism to the public. See Yahnke v. Div. of Corr., Docket No. 05-CORR-346 (Dec. 22, 2005).

In Jenkins v. West Virginia Department of Health & Human Resources/Mildred Mitchell-Bateman Hospital, Docket No. 00-HHR-334 (Apr. 13, 2001), health services workers argued a policy which allowed some employees, but not the nursing staff, to wear jeans was discriminatory. The Grievance Board held grievants had failed to make a prima facie case of discrimination as they were not similarly situated to those employees whowere allowed to wear jeans. These positions routinely involved "physically intensive positions" such as maintenance and laundry employees. Because the Department of Health and Human Resources instituted its dress standard 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, and the Dress Code Policy was upheld.

Under the circumstances presented here, Tax has established a legitimate, rational justification for its dress policy. As stated by Mr. Musgrave's letter: 1) the dress of all agencies in state government should be consistent, and 2) employees should dress appropriately in attire suitable for their positions. Grievant, like the employee in the Burdette Decision, works in an office, and, as a Tax Audit Clerk Senior, occasionally assists customers personally. Tax may require Grievant to refrain

from wearing jeans and other inappropriate clothing in order to provide a positive image to the taxpayers Respondent serves. See Burdette, supra.

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

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving her 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 basisbetween 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).

3. Respondent has shown a rational basis for its dress code, 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. 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: August 31, 2006

Footnote: 1

Respondent had argued at Level III hearing held on April 18, 2006, that the grievance was not ripe as the policy was not yet implemented. At the time of the Level IV hearing, the policy was in effect.

Footnote: 2

Because an employer has a right to change policies over time, this issue will not be addressed further.

Footnote: 3

As the definition of denim is readily available in any standard dictionary, this issue will not be addressed further. Needless to say, not all cotton clothing is denim.

Footnote: 4

Since temporary employees are not similarly situated to Grievant, this issue will not be addressed further.