THE EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

DOROTHY SHAW,

Grievant,

v. **Docket No. 06-CORR-244**

Sue Keller

Senior Administrative Law Judge

DIVISION OF CORRECTIONS/

HUTTONSVILLE CORRECTIONAL CENTER,

Respondent.

D E C I S I O N

___Dorothy Shaw ("Grievant"), employed by the Division of Corrections ("DOC") as an Office Assistant 2 at the Huttonsville Correctional Center, filed a level one grievance on June 1, 2006, alleging discrimination after she was counseled regarding a dress code violation. For relief, Grievant requests that all documentation relating to a counseling session be removed from the administrative file, reimbursement of attorney fees, and a ruling that blue jeans be deemed acceptable work attire. (See footnote 1) In the alternative, Grievant requests that DOC provide employee uniforms or a clothing allowance. The grievance was denied at the lower levels, and appeal to level four was filed on July 25, 2006. Grievant, appearing *pro se,* and DOC counsel Charles D. Houdyschell, agreed to submit the matter for a decision based on the lower-level record. The grievance became mature for decision upon receipt of final written statements filed by the parties on or before October 10, 2006. The following facts have been derived from a preponderance of the credible evidence admitted during the level three hearing.

Findings of Fact

___1. Grievant has been employed by DOC as an Office Assistant 2 at the Huttonsville Correctional Center ("HCC") at all times pertinent to this grievance.

2. On May 19, 2006, Grievant reported for work wearing denim jeans, contrary to a March 1, 2005, memorandum issued by HCC Warden William S. Haines. (See footnote 2)

3. Grievant received a verbal counseling from Acting Unit Manager Sherri Davis regarding her inappropriate attire. Additionally, Ms. Davis issued a memorandum documenting the counseling session, placing a copy in the administrative file.

4. DOC raised the issue of whether the grievance was timely filed at levels two and three.

Discussion

Initially, DOC argues that the grievance was not timely filed because the memorandum in question had been in effect for over a year prior to Grievant's challenge. Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Kessler v. W. Va. Dep't of Transp*., Docket No. 96-DOH-445 (July 28, 1997). *W. Va. Code* § 29-6A-4(a) provides:

Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant.

Grievant offered no response to this argument. To the extent that Grievant is challenging the dress code imposed by Warden Haines in March 2005, it is untimely filed. In any event, the memorandum directing employees to maintain a "business casual attire," with a number of items being prohibited, including denim clothing of any kind, has previously been upheld by the Grievance Board. *Shreve v. Div. of Corr./HCC*, Docket No. 05-CORR-155 (Sept. 12, 2005). (See footnote 3)

However, Grievant's claim that the dress code is applied unevenly, resulting in discrimination, is timely filed. Grievant has the burden of proving this claim 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. "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).

"'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 inwriting by the employees." *W. Va. Code* § 29-6A-2(d). 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.

The Bd. of Educ. of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004); *Lusher v. Dep't of Transp./Div. of Highways*, Docket No. 05-DOH-157 (June 15, 2005). Because Grievant declined to provide any specific examples of employees who were allowed to work in attire prohibited by the dress code, and were not counseled, she has failed to establish discrimination.

The following conclusions of law support this decision.

Conclusions of Law

1. Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Once the employer has demonstrated a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. *Kessler v. W. Va. Dep't of Transp*., Docket No. 96-DOH-445 (July 28, 1997).

2. DOC has proven that the challenge to the dress code, issued more than a year earlier, was untimely filed. 3. Grievant has the burden of proving a claim of discrimination 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.

4. 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).

5. To establish a case of discrimination a grievant must show:

(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.

The Bd. of Educ. of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004);

6. Grievant has failed to prove that HCC has applied the dress code in a discriminatory manner.

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: OCTOBER 30, 2006

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Grievant has been self-represented throughout these proceedings, and has accrued no attorney fees.

Footnote: 2

The March 1, 2005, memo was implemented to serve as a dress code policy until DOC formally adopts a written policy. Apparently this policy has yet to be issued.

Footnote: 3

Grievant relies primarily on the fact that her garment was made of 100% cotton; however, it is the specific coarse, heavy-duty, fabric denim, not the cotton from which it is made, that is prohibited.