THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

PEGGY MCCALL,

Grievant,

v. **Docket No. 06-CORR-473**

Denise M. Spatafore

Administrative Law Judge

DIVISION OF CORRECTIONS/

DENMAR CORRECTIONAL CENTER,

Respondent.

DECISION

Peggy McCall ("Grievant") initiated this grievance on November 8, 2006, alleging a violation of the nepotism policy. She seeks "to see the unfair treatment and preferential treatment in this institution stop." After denials at the lower levels, Grievant appealed to level four on December 18, 2006. During a prehearing telephone conference conducted on February 12, 2007, the parties agreed to submit this grievance for a decision based upon the record developed below. Grievant represented herself, and Respondent was represented at level four by John H. Boothroyd, Assistant Attorney General. This matter became mature for consideration upon receipt of the parties' fact/law proposals on March 13, 2007.

Synopsis

Grievant contends that a violation of the nepotism policy occurred when another correctional officer, Stephanie Wiley, was placed on day shift, where her husband is a corporal. Respondent argues that Corporal Wiley is in charge of the post office andvisitation, rarely works as a shift supervisor, and has no involvement with scheduling, leave or other personnel issues of subordinate employees. In addition, Grievant has not been selected for day shift due to job performance issues, specifically having been placed on leave restriction.

Findings of Fact

1. Grievant is employed at Denmar Correctional Center as a Correctional Officer II ("CO II"). She has been assigned to evening shift for the past several years.
2. Grievant has requested to be reassigned to day shift in the past, and those requests have been refused.
3. On November 5, 2006, Stephanie Wiley, also a CO II, was assigned to day shift.
4. Ms. Wiley's husband, Mark, is a CO III (Corporal) on the day shift, and is referred to as a "utility officer," meaning that he does not normally work as a shift commander. He is assigned to visitation and the post office.
5. Since Ms. Wiley has been assigned to day shift, Corporal Wiley has not served as her supervisor, either directly or indirectly.
6. In recent years, Grievant has been responsible for caring for her grandchildren and relatives who have had health problems. As a result, she has used a large amount of leave, and has been placed on leave restriction.
7. Due to Grievant's placement on leave restriction, and the administration's perception that her work performance is not ideal, she has not been chosen to work day shift.

Discussion

Since this grievance is not about discipline, Grievant must prove all of her claims by a preponderance of the evidence, which means she must provide enough evidence for the undersigned Administrative Law Judge to decide that her claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met her burden. *Id.*

Although Grievant's argument is somewhat unclear, as evidenced by discussion that took place during the level three hearing, it appears that she believes that the nepotism policy has been violated. In addition, she contends that it is unfair for Ms. Wiley to receive a placement on day shift under these circumstances, when Grievant has been asking for such an assignment for several years. Respondent counters that, because Ms. Wiley is not in Corporal Wiley's chain of command, the nepotism policy has not been violated, and Grievant has no entitlement to a day shift position.

Both the Division of Corrections ("DOC") and the Division of Personnel ("DOP") have adopted anti-nepotism policies. DOC Policy Directive 141.01 provides as follows:

> B. No Division of Corrections' employee shall directly supervise a member of his/her immediate family.
>
> C. More specifically, no Division of Corrections' employee shall review or audit the work of a member of his/her immediate family, or take part in discussions concerning employment, assignment, compensation, discipline, or related matters involving a member of his/her immediate family.

The DOP adopted a Nepotism Policy in its Administrative Rule, (See footnote 1) which contains similar provisions:

> No appointing authority shall influence or attempt to influence the employment or working conditions of his or her immediate family. It is the responsibility of the appointing authority to administer the employment of relatives of any agency employee in a consistent and impartial manner.
>
> No employee shall directly supervise a member of his or her immediate family. More specifically, no employee shall review or audit the work of a member of his or her immediate family, or take part in discussions concerning employment, assignment, compensation, discipline or related matters involving a member of his or her immediate family. In the event that an individual, through marriage, adoption, etc. is placed in a prohibited business relationship with a member of his or her immediate family, the situation shall be resolved within thirty calendar days. Resolution may be made by transfer, reassignment, resignation, etc. of one of the involved employees or by other accommodation which protects the interests of the public.

The evidence in this case provides no indication that these policies have been violated. It is undisputed that Corporal Wiley does not serve as a shift supervisor, and has had no involvement whatsoever with his wife's work since she has been assigned to day shift. Since Ms. Wiley is not in

her husband's chain of command, no nepotism violation has occurred.

Grievant also alleges that Ms. Wiley has received unfair, preferential treatment, which is tantamount to a claim of favoritism. *W. Va. Code* § 29-6A-2 (h) defines "favoritism" as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." To prevail in a claim for favoritism under *W. Va. Code* § 29-6A-2(h), a grievant must show by a preponderance of the evidence that:

(a) one or more appositely similarly-situated employee(s) have been granted preferential, exceptional or advantageous treatment that the grievant has not; and,

(b) that the different treatment is not related to the actual job responsibilities of the employees; *The Bd. of Educ. of the County of Tyler v. White*, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

Grievant's claims on this issue must also fail. Respondent has demonstrated that, due to her leave restriction, it has not chosen to place Grievant on day shift. Apparently, there are no such issues with Ms. Wiley's employment or performance. Moreover, Grievant has established no entitlement, by law, rule, or policy, to a specific work shift.

The following conclusions of law support this decision.

Conclusions of Law

1. Grievant must prove all of her claims by a preponderance of the evidence, which means she must provide enough evidence to prove that her claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. Anti-nepotism policies of the DOC and DOP provide that no employee may directly supervise a member of his or her immediate family, and that they also may not review or audit that person's work, or take part in discussions concerning employment, assignment, compensation, discipline, or related matters for an immediate family member.

3. Grievant has failed to prove by a preponderance of the evidence that nepotism policies were violated when Stephanie Wiley was placed on day shift as a correctional officer, because her husband does not work as a shift supervisor and has no involvement with her work. 4. To

prevail in a claim for favoritism under W. Va. Code § 29-6A-2(h), a grievant must show by a preponderance of the evidence that:

(a) one or more appositely similarly-situated employee(s) have been granted preferential, exceptional or advantageous treatment that the grievant has not; and,

(b) that the different treatment is not related to the actual job responsibilities of the employees;

The Bd. of Educ. of the County of Tyler v. White, 216 W. Va. 242, 605 S.E.2d 814, 818 (2004); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004).

5. Grievant has failed to prove favoritism in this case.

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: April 10, 2007

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

143 W. Va. C.S.R. 1.