WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

ROGER HOLLEY,

Grievant,

v. **Docket No. 07-HHR-317**

DEPARTMENT OF HEALTH AND

HUMAN RESOURCES/MILDRED

MITCHELL-BATEMAN HOSPITAL,

Respondent.

DECISION

Roger Holley ("Grievant") initiated this proceeding on April 20, 2007, alleging Respondent's prohibition against camouflage clothing is improper and applied in a discriminatory manner. He requests permission to wear camouflage coats and jackets while at work. The grievance was denied at all lower levels and appealed to level four of the grievance procedure on December 10, 2007. A hearing was held in the Grievance Board's office in Charleston, West Virginia, on May 15, 2008, before Administrative Law Judge Thomas Gillooly. Grievant was represented by Ritchie Kingery, and Respondent was represented by Jennifer K. Akers, Assistant Attorney General. Respondent's post-hearing proposals were received on June 16, 2008. (See footnote 1) This matter was reassigned to the undersigned administrative law judge on August 26, 2008. (See footnote 2)

Synopsis

Grievant contends that Mildred Mitchell-Bateman Hospital's prohibition on the wearing of

camouflage clothing by employees is improper. However, Respondent justified its policy, due to concerns regarding the effect which such clothing may have on the hospital's psychiatric patients and its responsibility to provide a therapeutic environment for them. Grievant also argues that the same policy should be applied to patients. While generally discouraging patients from wearing camouflage, Respondent does not have the same authority over patients as it does over employees, and different laws and considerations govern. Nevertheless, it is not discriminatory to apply a policy to employees that is not applicable to patients. The grievance is denied.

Findings of Fact

1. Grievant is employed at Mildred Mitchell-Bateman Hospital ("MMB") as a plumber. He has been employed by Respondent for approximately 31 years.

2. MMB is an acute care psychiatric hospital, housing mostly patients who have been involuntarily committed for psychiatric assessment and treatment.

3. On December 6, 2000, the administrator of MMB, Carol Wellman, issued a memorandum to all employees entitled "Clarification of Dress Standards." This memo discussed the wearing of camouflage by employees, stating that camouflage material may have a negative connotation for some patients and did not promote a soothing and therapeutic environment. Employees were advised that wearing it was not appropriate.

4. On March 15, 2006, the issue of employees wearing camouflage was discussed at a meeting of the MMB Management Team. Following this meeting, on April28, 2006, a memorandum was issued to all employees, advising them that camouflage clothing would not be allowed, due to the "potentially negative effects such clothing may have upon mentally ill patients," along with the belief that it did not promote a "peaceful and tranquil habitat" for these patients.

5. Because employees were occasionally reported to be wearing camouflage, the April 28, 2006, memorandum was reissued to all employees on March 28, 2007.

6. Patients at MMB are discouraged from wearing camouflage, also. However, due to numerous laws and regulations regarding patient rights, no formal prohibition has been issued for patients at MMB regarding this issue.

7. The Department of Health and Human Resources adopted a Dress Code Policy (Policy Memorandum 2101) on October 1, 2005, which does not specifically prohibit camouflage clothing.

However, it states that the policy is “not all inclusive” and that the agency may address other situations not specifically set forth in the policy “in a manner consistent with the stated purpose” of the policy. The policy's stated purpose is to emphasize “professionalism and portray . . . a positive image” and is based upon “legitimate business necessity and the agency's obligation to maintain a safe and professional working environment conducive to the responsibilities of the agency.”

Discussion

Because this grievance does not involve a disciplinary matter, Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *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 footnote 3) *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 contends that the restriction on the wearing of camouflage clothing is unnecessary and discriminatory. The focus of his presentation at level four centered upon the fact that patients may still wear camouflage, although they are generally discouraged from doing so. Grievant believes that, if camouflage has a potentially negative impact for psychiatric patients, no one at the facility should be allowed to wear it. Conversely, he argues that he and others only want to wear camouflage outerwear, such as coats and hats, which would only be seen by patients on a limited basis.

In general, dress codes have been assessed pursuant to a “rational basis” analysis. As discussed by the United States Supreme Court, an employer must have “a reasonable and rational basis for restricting [employee dress] in order to meet a legitimate end.” *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)). In addition, the West Virginia Division of Personnel has adopted an “Agency Dress Codes” policy, which provides that such restrictions “should be based on the legitimate business necessity and obligation of maintaining a professional and safe working environment.”

As explained at length by Kieth Ann Worden, MMB's Human Resources Director, the camouflage

prohibition is based upon the facility's objective of providing a nurturing, healing environment for its psychiatric patients. Throughout the many discussions the administration has had regarding the issue, it has been the consensus that camouflage has a negative connotation which is not conducive to a therapeutic environment, which should be calm and soothing. Although Grievant repeatedly asserted that there is no evidence a psychiatric patient might “go off” because of camouflage, Ms. Worden explained that the concern is not that the patient would become violent or aggressive, but that it is inconsistent with the overall objective of the facility's purpose. She noted that only food service and security employees wear uniforms, because there is a goal of “normalization” for the patients, meaning that the environment should be similar to that to which they will be returned upon their release from the hospital.

Grievant's allegation that employees should be allowed to wear camouflage because patients sometimes are is tantamount to a claim of discrimination. Under the grievance statute applicable to this case, “'discrimination'” was 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). In order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

> (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. Higher Education Policy Comm., 655 S.E.2d 52, 221 W. Va. 306 (2007); *See Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.,* Docket No. 04-CORR-278 (2005).

There is no evidence in this case that the camouflage dress restriction has not been applied uniformly to all employees at MMB. Obviously, patients are not employees of the State of West Virginia, so any differentiation in standards for patients does not establish discrimination against employees. Moreover, as explained by MMB witnesses in this grievance, numerous considerations

govern the rights of the psychiatric patients housed at the facility, which to date has precluded any "official" dress code policies for patients.

Accordingly, the undersigned concludes that Respondent has provided legitimate, rational justifications for the restriction on camouflage clothing, due to concerns for the care of psychiatric patients. Additionally, Grievant has failed to prove discrimination, or that Respondent is required to have a similar policy for patients. The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving his case by a preponderance of the evidence. Procedural Rules of the Public Employees GrievanceBoard, 156 C.S.R. 1 § 3 (2008); *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.

2. Employee dress codes must have a rational basis related to legitimate business concerns. *Lilly v. Dep't of Health & Human* Res., Docket No. 05-HHR-419 (Apr. 27, 2006); *Burdette v. West Virginia Public Service Commission*, Docket No. 93-PSC-132 (November 16, 1993); *Kelly v. Johnson*, 425 U.S. 238, 96 S.Ct. 1440, 47 L.Ed. 2d 708 (1976).

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4. Respondent's restriction on camouflage clothing is based upon rational, legitimate concerns for the welfare of psychiatric patients in its care and is not discriminatory.

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 thegrievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. *See* W. Va. Code § 29-6A-7 *(repealed*, *See footnote 3, supra*). Neither the West Public 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: September 15, 2008

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

No submission from Grievant was found in the record.

Footnote: 2

The grievance was reassigned because Mr. Gillooly is no longer an employee of the Grievance Board.

Footnote: 3

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.