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SCELENE HARTMAN

v.

DOCKET NO. DHS-88-033

W.VA. DEPARTMENT OF HUMAN SERVICES

DECISION

Grievant, Scelene Hartman, is employed as a paralegal assigned to the Child Advocate Office of the Department of Human Services (Department) in Moorefield, West Virginia. Ms. Hartman filed a level one grievance on August 10, 1988 in which she alleged that the smoking policy implemented in the Moorefield office was a misinterpretation and/or misapplication of Department of Human Services Policy Manual 13,020. The grievance was denied at levels one through three and the matter was appealed to level four on October 3, 1988. A level four hearing was conducted on December 2, 1988 and a briefing period was concluded on January 12, 1989.

Evidence submitted at the level four hearing establishes that the Department adopted a smoking policy in 1986 published as Personnel Policy 13,020. The stated purpose of the policy is to insure each employee the right to a healthful, smoke-free environment. The policy provides that

reasonable accommodations be made for smokers, wherever possible, but that smoking will be prohibited if such accommodations cannot be made without exposing individuals to the effects of secondhand or sidestream smoke. Each office may establish a smoking area so long as employees and clientele have a smoke-free environment. The responsibility for implementing this policy was placed upon the appointing authority in each area office although they could request assistance from their personnel committee if they so desired.

In December 1987 John Hammer, Area 11 Administrator for Grant, Hardy and Pendleton Counties, requested that the personnel action committee consider the smoking policy in effect at that time¹. The committee solicited input from remaining office personnel prior to making recommended changes in the policy.² A memorandum dated June 27, 1988 was issued by Mr. Hammer advising all staff members that effective July 5 each county office would have a designated

¹At that time smoking was permitted in the kitchen, conference room and private offices. Mr. Hammer and another employee testified that this policy was not effective and that complaints were being made regarding exposure to smoke.

²The grievant submitted the following recommendation to the committee: "Our office...is so designed that a specific smoking area could be designated. One room with a window is available...where other non-smokers do not have to enter...this appears to be a compromise which works well for both smokers and non-smokers." Thus it was the grievant's recommendation which was implemented and which she now grieves.

smoking area and that no smoking would be permitted in any other areas, including private offices.³ The grievant testified that she continued to smoke in her office with the knowledge that she was acting in violation of the smoking policy. She spoke with Mr. Hammer on August 5 at which time he advised her that the policy would not be changed. She continued to smoke in her office for approximately a month until she was directed to stop or be subjected to discipline.

The grievant first argues that the agency smoking policy has been misinterpreted and misapplied by Mr. Hammer and second that it is not enforced on an equal or consistent basis throughout the state. Third, that the committee which assisted in the formulation of the policy consisted exclusively of non-smokers which she concludes to be discrimination against smokers. Fourth, that the policy is used and abused by Mr. Hammer, a non-smoker, who indulges in smokeless tobacco, as a tool for discrimination against smokers. The grievant asserts that the policy imposes terms and conditions on her employment which adversely affects her job performance, productivity and morale and she argues that a less adverse policy could achieve her employer's legitimate business interest. Specifically, she is now

³The designated smoking room was equipped with an exhaust fan and the heating/cooling ducts were closed to prevent smoke from escaping into the remaining office space.

located in a private office with a window and requests that she be allowed to smoke in her office so long as she keeps her door shut, closes the heat/cooling system ducts while smoking and installs a window fan for ventilation. She argues that this arrangement would prevent employees or clients from being subjected to smoke and is required by Policy 13,020 which provides that reasonable accommodations be made for smokers whenever possible.⁴

The Department denies the grievant has been subjected to any discrimination but, on the contrary, she appears to want to be treated differently and to be granted special, not just reasonable, accommodations for the activity. The Department argues that the smoking policy must be flexible to allow for its implementation in the various office settings and that the policy adopted by the Area 11 offices is within the requirements of 13,020. The Department further argues that the grievance was untimely filed as the revised policy was effective July 5 but a level one grievance was not filled until August 10.⁵

⁴The grievant also relies upon a Title VII claim of discrimination. The Education and State Employees Grievance Board does not have jurisdiction for a Title VII claim and the underlying argument is not persuasive as that statute prohibits discrimination on the basis of race, color, religion, sex and national origin.

⁵After the policy became effective July 5 the grievant
(Footnote Continued)

The designation of a smoking area while prohibiting smoking in offices and reception areas is in compliance with Policy 13,020. Requiring that the grievant smoke within a designated area is not discriminatory as defined by W.Va. Code §29-6A-2(d). Neither the grievant nor any of the other employees who smoke are prohibited from engaging in the activity; they are merely required to do so in such a way that nonsmoking employees are not affected by it. The establishment of a smoking area equipped with an exhaust fan and closed-off ventilation system fully meets the requirement that whenever possible reasonable accommodations be made for smokers.

The policy does not require or permit an employee to make adjustments in his work environment to facilitate smoking at his work station. That such a situation is not feasible is easily illustrated by the present case. Although the grievant assures us that she would close the ventilation system to her office and purchase an exhaust fan for her office window, if necessary, it seems incredible that an individual would be able to tolerate working in an office

(Footnote Continued)

began to seek a resolution by exchanging offices so that she would have a window within her workspace and later discussed the smoking issue with the area administrator. As she had attempted to seek an informal resolution to the matter she has acted in substantial compliance of the time lines set forth in W.Va. Code §29-6A-4.

devoid of heat and with the window open in mid-winter.⁶

In addition to the foregoing narration it is appropriate to make the following specific findings of fact and conclusions of law.

Findings of Fact

1. Grievant is employed by the Department of Human Services as a paralegal assigned to the Child Advocate Office in Moorefield.

2. In December 1987 a personnel action committee comprised of employees from the three offices in Area 11 (Grant, Hardy and Pendleton Counties) reviewed the smoking policies in their offices. At that time smoking was permitted in the kitchen, conference room and private offices.

3. Complaints had been made previously regarding enforcement of the policy including that individuals would not turn the fan on, ashtrays were left around and the odor of smoke escaped through the ventilation system and when office doors were opened.

⁶The grievant testified that she smokes approximately two packs of cigarettes per day which would lead to a conclusion that the vent would be shut and the window open for the better part of the day.

4. The personnel action committee solicited suggestions and comments regarding the smoking policy from all employees.

5. A new smoking policy recommended by the committee became effective July 5 which prohibited smoking everywhere except the designated smoking area which had been modified to contain the smoke. This was essentially the suggestion made by the grievant.

6. Smoking is permitted in the private offices at other Department locations where the physical plant is equipped with ventilation systems which exhaust rather than recirculate the air. Alterations are not made to a building in order to accommodate individual smokers.

Conclusions of Law

1. The smoking policy implemented by the Area 11 office of the Department of Human Services is in compliance with the Department's Personnel Manual Section 13,020 "Smoking Policy".

2. Restricting smoking to a specified area does not constitute discrimination as defined by W.Va. Code §29-6A-2(d) as the activity is not prohibited but is simply regulated for the good of the entire population.

3. The implementation of smoking policies in other offices which may have differing standards based upon the accommodations of the physical plant but which are still within the parameters of the agency policy does not constitute discrimination.

4. There is no legal basis upon which to require an agency make accommodations or exceptions to an employee who finds compliance with a policy to be an annoyance.

Accordingly, the grievance is DENIED.

Either party or the West Virginia Civil Service Commission may appeal this decision to the Circuit Court of Hardy County and such appeal must be filed within thirty (30) days of receipt of this decision. (W.Va. Code §29-6A-7) Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate Court.

DATED

February 22, 1989

Sue Keller

SUE KELLER

HEARING EXAMINER