SANDRA PARKER,

Grievant,

v. **Docket No. 97-HHR-042A**

WELCH EMERGENCY HOSPITAL/WEST

VIRGINIA DEPARTMENT OF HEALTH

AND HUMAN RESOURCES,

Respondents.

___

D E C I S I O N

Grievant, Sandra Parker, filed this grievance on November 8, 1995, alleging her "Adm[inistrative] Supervisor is showing Partiality, Favor[i]tism, and unfair treatment concerning scheduling." (See footnote 1) Relief sought was "to be made whole in every way and to be treated equally as other employees in every way." Thisgrievance was denied at all lower levels. Grievant appealed to Level IV, and a hearing was held on March 23, 1997. (See footnote 2) This case became mature for decision on April 25, 1997, the date of the Respondent's final submissions. Grievant did not submit any final written arguments.

After a review of the complete record, the Undersigned makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed as a switchboard operator by Welch Emergency Hospital ("WEH") for many years. At her request, she is allowed to work one 32 hour weekend shift a month instead of working every other weekend like the majority of the employees in the Admissions Department. (See footnote 3)

2. In 1991, WEH combined its switchboard and admissions employees into one department to help alleviate staffing problems. 3. Ms. Donna Harmon has been Grievant's supervisor since August 1995. Prior to that time Ms. Ruth Mullens was the

Admissions Supervisor.

4. Not all of the days listed as holidays on the Admission's employees' schedule are considered actual holidays by the state,but it is recognized by the Undersigned and the parties to this grievance, that there are certain other days, such as the day after Thanksgiving and Christmas Eve, that employees prize as holidays, and seek to have off. These days are considered as holidays by Ms. Harmon when she prepares the schedule.

5. Grievant worked five holidays out of eighteen in 1994, and no Admission employee worked fewer holidays than Grievant. The other employees in Grievant's section worked the following number of holidays: Carolyn Gillispie - 6; Marcia Wyatt - 7; and Izalliar Dalton - 8. Resp. Exh. 1, Level IV Hrg.

6. Grievant worked five holidays out of ten from January 1, 1995, to November 8, 1995, the day she filed her grievance. The other employees in Grievant's section worked the following number of holidays: Marcia Wyatt - 2; Izalliar Dalton - 4; and Carolyn Gillispie - 5. Thus, for the two year time in question, Grievant worked ten days; Marcia Wyatt worked nine; Carolyn Gillispie worked eleven; and Izalliar Dalton worked twelve. Resp. Exh. 1, Level IV Hrg.

Discussion

During the discussion at Level IV, it became clear Grievant's actual complaint was she had been required to work more "major" holidays for the past several years, than the other admissions employees because of discrimination and favoritism. She believed she was treated differently than all other employees in her department in this regard. The "major" holidays, as defined by Grievant, are New Year's Day, Memorial Day, Fourth of July, LaborDay, Thanksgiving, the day after Thanksgiving, Christmas Eve, and Christmas. For the purpose of this grievance the Undersigned Administrative Law Judge accepts that these are the holidays that most employees want to have off, and that failure to schedule these days in an equitable manner could be a form of discrimination and favoritism.

The schedule for the major holidays revealed Grievant had worked a total of two major holidays through 1994 and 1995, up until November 8, 1995. The other employees on the day shift had worked more major holidays than Grievant. Ms. Wyatt had worked three major

holidays; Ms. Dalton had worked three major holidays, and Ms. Gillispie had worked eight major holidays.

W. Va. Code § 29-6A-2(d) defines discrimination 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." 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 prove discrimination or favoritism a grievant must establish a prima facie case which consists of demonstrating:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

> (c) that such differences were unrelated [to] actual jobresponsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

If a grievant establishes a prima facie case, a presumption of discrimination or favoritism exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, a grievant may still prevail if he can demonstrate the reason given by the respondent was pretextual. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievant has failed to establish a prima facie case of discrimination and/or favoritism, as she did not demonstrate she had worked more major holidays than the other day shift admissions employees. In fact, Grievant worked fewer major holidays than the other employees to whom she is similarly situated, the day shift employees in the Admissions Department. As far as holidays generally, only one other Admission employee, of the three to which she compared herself, has worked less holidays than she has, and this was only one

day less. Thus, the evidence of record demonstrates just the opposite of what Grievant has alleged. (See footnote 4) It appears Grievant has been treated either the same or better thanher peers in the Admissions Department. Additionally, Grievant did not demonstrate Ms. Harmon's management decisions on holiday assignments violated any rule, regulation, or statute, or constituted a substantial detriment to or interference with her effective job performance or health and safety. See W. Va Code § 29-6A-2(i), Ball v. Dept. of Highways, Docket No. 96-DOH-141 (July 31, 1997).

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

Conclusions of Law

1. In a non-disciplinary grievance, the grievant has the burden of proving her case by a preponderance of the evidence. W. Va. Code § 29-6A-6.
2. Grievant failed to establish a prima facie case of discrimination or favoritism in the scheduling of either holidays in general or major holidays at WEH.
3. Grievant did not demonstrate Ms. Harmon's management decisions on holiday assignments violated any rule, regulation, or statute, or constitute a substantial detriment to or interference with her effective job performance or health and safety. See W. Va. Code § 29-6A-2(i), Ball v. Dept. of Highways, Docket No. 96- DOH-141 (July 31, 1997).

Accordingly, this grievance is DENIED.

Any party or the West Virginia Division of Personnel mayappeal this decision to the circuit court of the county in which the grievance occurred, 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 Administrative Law Judges is a party to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

_____

JANIS I. REYNOLDS

Administrative Law Judge

Dated: September 15, 1997

Footnote: 1

During the presentation of the grievance at Level IV, Grievant indicated that she thought the treatment she had received was "a black thing." The West Virginia Supreme Court indicated in Vest v. Bd. of Educ. of Nicholas County, 193 W. Va. 222, 455 S.E.2d 781 (1995), that if a grievant chooses to bring racial allegations of discrimination and/or favoritism, to this Grievance Board in the context of her employment, these issues may be decided by this Board.

Grievant also attempted to discuss examples of discrimination after the date of filing this grievance. Respondent objected to this additional evidence as outside the scope of the grievance. These additional incidences are not addressed in this Decision as they are not within the time frame identified by Grievant in her Statement of Grievance.

Footnote: 2

On that same date, two other grievances dealing with disciplinary actions were also heard. These grievances were separated after hearing to decrease the confusion which occurred at the Level IV hearing. See Parker v. Welch Emergency Hosp./W. Va. Dept. of Health and Human Resources, Docket No. 97-HHR-042B (Sept., 1997)(This grievance will be issued by the end of September, 1997).

Footnote: 3

Grievant works a sixteen hour shift on Saturday and returns the following Sunday and works another sixteen hours to obtain the 32 hours.

Footnote: 4

It is noted that Grievant presented evidence of the employees' schedule that differed from Ms. Harmon's schedule (Respondent 's Exhibit 1 at the Level IV Hearing) in an attempt to prove Ms. Harmon's schedule was wrong. During the Level IV hearing, it became clear that Grievant's records were based on what people were scheduled to work, not what they actually worked, and that some of her data was incomplete or perhaps based on her memory of what days other people worked. The Undersigned Administrative Law Judge accepted the business records formulated by Ms. Harmon to be the accurate reflection of days worked by the employees in the Admissions Department.