PATRICIA KENT,

Grievant,

v. Docket No. 98-HHR-253

DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU OF PUBLIC HEALTH, and, DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

This grievance was filed on or about July 11, 1997, by Grievant Patricia Kent against the Department of Health and Human Resources/Bureau of Public Health ("HHR"). The Division of Personnel ("DOP") was made a party at Level III. The grievance was initiated when a vacancy was posted for a Health and Human Resources Specialist, Senior, pay grade 13, and Grievant was informed that the person placed in this position would supervise her at times. Grievant is classified as a Health and Human Resources Program Manager I, pay grade 16, and stated in her grievance that, "it is not appropriate for" the position of Health and Human Resources Specialist, Senior, to supervise her. She further stated in her grievance statement, "I also feel that there are issues of equity with the supervisory structure of other OMCH program directors and [an] issue of multiple supervisors to whom I must report." As relief Grievant seeks "that the functional job duties of the Health and Human ResourcesSpecialist Senior be revised to reflect that the position is that of a staff assistant which does not have supervisory responsibility for program directors." (See footnote 1)

The following findings of fact necessary to the Decision reached are made based upon the record developed at Level IV.

FINDINGS OF FACT

1. Grievant is employed as a Health and Human Resources Program Manager I, pay grade 16, and works in the Office of Maternal and Child Health. She holds a Masters Degree in Social Work,

and has 28 years of experience.

2. At the time she filed her grievance, Grievant was supervised by Tonya Cyrus, Director of Children's Specialty Care, who was classified as a Nurse III, pay grade 15. 3. On or about June 23, 1997, HHR posted a vacancy for a Health and Human Resources Specialist, Senior, pay grade 13, who would be Ms. Cyrus' assistant, and supervise Grievant as necessary as part of assisting Ms. Cyrus. The minimum qualifications for the position are a Bachelors Degree, for which experience may be substituted, and six years of experience, for which a post-graduate degree may be substituted.

4. As of the time this grievance was filed, this position had not been filled. It still had not been filled as of the date of the Level IV hearing, Ms. Cyrus had left her position, and Grievant was being supervised on a temporary basis by Pat Moss, the Director of the Office of Maternal and Child Health (HHR Office Director III), pay grade 21. (See footnote 2)

5. Grievant supervises persons classified as Health and Human Resources Specialists, Health and Human Resources Specialists, Senior, and a Nurse Director II, pay grade 19.

6. Within the Office of Maternal and Child Health, many employees report to an employee who is in a lower pay grade than their positions.

7. Grievant presented no evidence of any detriment to herself, her work, or the agency in general, caused by her being supervised by someone in a lower pay grade than she.

8. The division in which Grievant works is housed in a separate building from the other divisions of the Office of Maternal and Child Health, some distance away. 9. The decision to have Ms. Cyrus' assistant supervise Grievant in Ms. Cyrus' absence was based upon the location of the division in which Grievant works in relation to other divisions. It would be difficult for someone from another location to supervise this division.

10. Once the posted position is filled, and Ms. Cyrus' position is filled, Grievant will have to report to two supervisors. (See footnote 3) No other employee in the Office of Maternal and Child Health is required to report to this many supervisors, and no other person in Grievant's classification within the Office reports to an assistant to the Division Director, although they may do so in the absence of the Division Director.

11. Grievant presented no evidence of any detriment to herself, her work, or the agency in general, as a result of the requirement that she report to two supervisors.

DISCUSSION

In nondisciplinary matters, the grievant has the burden of proving her case by a preponderance of the evidence. Tucci v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 94-DOH-592 (Feb. 28, 1995). A grievant must also demonstrate she has been adversely affected. See Shobe v. Latimer, 162 W. Va. 779, 253 S.E.2d 54 (1979); Pomphrey v. Monroe County Bd. of Educ., Docket No. 94-31-183 (July 1, 1994).

There is no dispute among the parties regarding the facts. Further, Grievant admitted that Respondents had not violated any statute, regulation, rule or policy when it was decided that a position in a lower pay grade than hers would supervise her. She just didn't like it and thought it was "not appropriate." She noted that the classification specification for a Health and Human Resources Specialist, Senior, indicates that position is to be a staff position. The classification specification states, however, under the Examples of Work Section, that this position, "[m]ay lead or supervise professional and support staff." Grievant's Exhibit 1.

It is understandable that Grievant would not like it that someone in a classification which is not as advanced as hers is supervising her, and the agency admits that it would prefer not to have this situation. However, Grievant had been supervised by someone in a lower pay grade for some time prior to the posting of the new position, yet failed to identify how this situation had harmed her or the agency itself in any way, or how it would harm her or the agency in the future. In fact, Grievant supervises someone who is a Nurse Director II, and is in a higher pay grade than Grievant. One of Grievant's co-workers supervises a number of employees in a lesser pay grade than himself. The testimony offered by the Associate Director of the Office of Maternal and Child Health, Sterling Smith, was that Grievant's employer would prefer not to place an employee in this position, but the needs of the agency sometimes require it, because of the expertise required in some positions. The only example of a problem with this situation was when supervisees have failed to accord the supervisor proper respect. Mr. Smith stated the employees sometimes rub their higher salaries in their supervisor's face, and slack in their work performance. Obviously, this problem will not exist in Grievant's case as long as she chooses not to engage in such pettiness. Further, Mr. Smith testified that when this has occurred, he has stepped in and corrected the attitudes of the employees, and gotten them back on task.

Mr. Smith testified the reason it was decided that the posted position would supervise Grievant

was that the division in which Grievant works is in a separate building some distance away from the rest of the Office, and when the person in charge of that division was away, there was no one from another division who could step in easily, because of the location of the division. It was decided that the best person to supervise the division in Ms. Cyrus' absence would be her assistant. He stated a job description for the position was prepared, based upon the duties of the position. The job description was sent to DOP, and DOP assigned the title to the position. W. Va. Code §29-6-10 authorizes Personnel to establish and maintain a position classification plan for all positions in the classified service. State agencies, such as HHR, which utilize such positions must adhere to that plan in making assignments to their employees. Toney v. W. Va. Dep't of Health & Human Resources, Docket No. 93-HHR-460 (June 17, 1994), at 12. Lowell D. Basford, DOP's Assistant Director, testified that the classification system was not meant to be a procedure which dictates how agencies organize their work. He pointed out that DOP has no authority to tell an agency how to organize its work. He concluded it is not improper for HHR to organize its work so that a Health and Human Resources Specialist, Senior, supervises a Health and Human Resources Program Manager I, or to require an employee to report to more than one supervisor.

As there is no applicable statute, policy, rule or regulation, this personnel decision may be evaluated under the arbitrary and capricious standard. This entails a close examination of the process used to make the decision. Considerable deference must be afforded the professional judgment of those who made the decision. Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648 (1995). Baird v. Kanawha County Bd. of Educ., Docket No. 95-20-445 (Sept. 16, 1996). "In applying the `arbitrary and capricious' standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that decision and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, supra, at 286." Hill and Cyrus v. Kanawha County Bd. of Educ., Docket No. 96-20-362 (Jan. 30, 1997). HHR's action was a reasonable response to the circumstances, and was neither arbitrary nor capricious. Grievant also argued it was discriminatory to make her report to more than one supervisor. W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, 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.

A grievant alleging discrimination must establish a prima facie case by 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 job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once a prima facie case has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. Grievant may still prevail by establishing that the rationale given by the employer is "mere pretext". Id.

Grievant failed to demonstrate any detriment suffered by her from reporting to multiple supervisors. Without some showing that some harm occurs because Grievant must report to more than one supervisor, it is not detrimental. Accordingly, Grievant was not discriminated against.

The following Conclusions of Law support the decision reached.

CONCLUSIONS OF LAW

1. In nondisciplinary matters, the grievant bears the burden of proving the elements of her grievance by a preponderance of the evidence. Tucci v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 94-DOH-592 (Feb. 28, 1995). A grievant must also demonstrate she has been adversely affected. See Shobe v. Latimer, 162 W. Va. 779, 253 S.E.2d 54 (1979); Pomphrey v. Monroe County Bd. of Educ., Docket No. 94-31-183 (July 1, 1994).

2. Grievant failed to prove a violation of any statute, regulation, rule or policy.

3. HHR did not act in an arbitrary and capricious manner in deciding that Ms. Cyrus' assistant should supervise Grievant, and that Grievant should report to two supervisors.

4. Grievant was not adversely affected by the action complained of.

5. W. Va. Code § 29-6A-2(d) defines discrimination, for purposes of the grievance procedure, 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.

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and,

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

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). 6. Grievant failed to prove a prima facie case of discrimination, as the different treatment resulted in no harm to her.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the circuit court of the county in which the grievance arose, or the Circuit Court of Kanawha County. 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. 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.

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BRENDA L. GOULD

Administrative Law Judge

Date: October 6, 1998

Footnote: 1 The grievance was denied at Level I on July 18, 1997, and was appealed by Grievant to Level II on that

same day. The grievance was denied at Level II on August 5, 1997, and was appealed by Grievant to Level III on August 6, 1997. On September 18, 1997, the parties met in what was at first designated as a Level III hearing. Testimony was taken and exhibits were placed into evidence. The Level III hearing evaluator stated, however, that this would be considered a pre-hearing conference. The transcript and exhibits from the pre-hearing conference were placed into evidence at Level IV as Joint Exhibit A. On April 29, 1998, a telephonic hearing was held, which was not recorded. A Level III decision was issued on July 8, 1998, denying the grievance, and Grievant appealed to Level IV on July 17, 1998. Grievant had written a memorandum on July 10, 1998, to the Level III grievance evaluator questioning the failure to record the April 29, 1998 telephonic hearing and failure to reference it in the decision, alleging a due process violation, and asking that a decision be rendered on the entire record. A conference call was held at Level IV on July 27, 1998, for the purpose of determining whether Grievant wished to proceed at Level IV, or have her grievance remanded to Level III so that a recorded hearing could be held and a decision issued on the record developed. Grievant elected to proceed with her grievance at Level IV. A Level IV hearing was held on September 22, 1998. Grievant appeared pro se, HHR was represented by B. Allen Campbell, Esquire, and DOP was represented by Lowell D. Basford, Assistant Director. The parties declined to submit written argument, and this grievance became mature for decision at the conclusion of the hearing.

Footnote: 2 Respondents did not question whether this grievance was premature.

Footnote: 3 The record does not clearly reflect how many supervisors Grievant would have to report to, but indicates she would continue to report to Ms. Cyrus (or the person who replaces her), and would report to Ms. Cyrus' assistant as necessary. Grievant asked one of the witnesses at Level IV if any other Program Manager reported to three supervisors. The record does not otherwise reflect that Grievant reports to three supervisors, or who this third person might be.