JOANNA SMITH,

Grievant,

v.

DOCKET NO. 95-HHR-076

WEST VIRGINIA DEPARTMENT OF HEALTH
AND HUMAN SERVICES and DIVISION OF PERSONNEL,

Respondents.

D E C I S I O N

PROCEDURAL HISTORY

This grievance has a long and protracted procedural history. Grievant filed a grievance at level one on July 22, 1993, alleging she was misclassified as an Audit Clerk II when she was hired on January 31, 1989, through December 16, 1992, and thereafter misclassified as an Office Assistant II from December 16, 1992, through the present. The grievance proceeded through level three, where the Division of Personnel was joined as a party. A level three hearing was held on January 14, 1994, and the grievance was denied by Terry Ridenour, Grievance Evaluator, by decision dated November 9, 1994. Grievant appealed to level four on November 22, 1994, and was given Docket No. 94- HHR-1077. However, she amended her grievance statement to include claims of harassment, favoritism and discrimination, issues which were not addressed at the lower levels. Respondent Department of Health and Human Resources ("HHR") moved to remand the amended portion of the grievance for a level three hearing on those issues. The undersigned granted that motion by Order dated December 16, 1994, and remanded that portion of the grievance alleging harassment, favoritism and discrimination for hearing. On February 17, 1995, Grievant again filed a level four grievance alleging harassment, discrimination and favoritism (hereinafter, the "harassment" grievance), which was given

Docket No. 95-HHR-076. Grievant had received a level two decision denying the grievance from Harry Evans, Director, Division of Accounts Receivable and Payroll, on January 23, 1995, which informed her that she could appeal that decision to level three and request a hearing. Grievant appealed to level three, but did not receive a response within five days, and advanced her appeal to level four. Once again, HHR moved to remand the harassment grievance to level three for a hearing on March 15, 1995. That motion was denied by the undersigned by Order dated March 21, 1995, which also consolidated the misclassification and harassment grievances as Docket No. 94-HHR-1077/95-HHR-076.

Following several continuances, the grievance was reassigned to Administrative Law Judge Albert C. Dunn on September 28, 1995. On November 28, 1995, ALJ Dunn issued an Order remanding the harassment portion of the grievance to level three, upon request of the parties, and the misclassification portion was held in abeyance. Subsequently, the grievance was reassigned back to the undersigned.

A level three hearing was held on the harassment grievance over the course of several days from January through August, 1996, and a decision denying the grievance was issued by Barbara J. Wheeler, Grievance Evaluator, on March 10, 1997. Grievantappealed that decision to level four on March 25, 1997, and that grievance was once again consolidated with the misclassification grievance. Following many continuances for good cause, as well as substitution of counsel, this matter came on for a level four hearing on November 17, 1997. At that time, the parties indicated they wished to address the misclassification issue only and proceeded into settlement discussions. The hearing was continued pending settlement of the misclassification claim. On November 21, 1997, Grievant informed the Grievance Board that she declined the settlement offered by HHR, and requested her grievance be held in abeyance pending her obtaining new counsel. Following several more continuances, this matter finally came on for hearing at level four on May 19, 1998, and August 20, 1998. Following the presentation of evidence on the misclassification grievance, the parties agreed to submit the harassment grievance separately on the record developed below. Both the misclassification and harassment grievances became mature for decision on October 13, 1998, the deadline for the parties' submission of proposed findings of fact and conclusions of law. (See footnote 1) The grievances have been severed for decision purposes into Docket No. 94-HHR-1077 (misclassification) and Docket No. 95-HHR-076 (harassment). This is the harassment decision.

SUMMARY OF EVIDENCE (HARASSMENT)

Level III Grievant's Exhibits

Ex. 1 -

May 25, 1989 memorandum from Barry to Joanna regarding Change of Work Hours.

Ex. 2 -

1995 Performance Evaluation for Joanna Smith.

Ex. 3 -

November 15, 1991 request for leave form.Ex. 4 -
Payroll Unit Meeting, dated March 1, 1996.

Ex. 5 -

March 12, 1992 request for leave form.

Ex. 6 -

DHHR Policy Memorandum 2103 regarding Inclement Weather and Office Closures.

Ex. 7 -

March 25, 1996 memorandum from Joanna Smith to Danny Franco.

Ex. 8 -

October 20, 1992 memorandum from June Ingram to Barry Adkins.

Ex. 9 -

October 21, 1992 memorandum from Barry Adkins to Harry Evans.

Ex. 10 -

Division of Personnel Position Description for Office Assistant II and III.

Ex. 11 -

West Virginia Education and State Employees Grievance Board grievance form dated November 19, 1992.

Ex. 12 -

June 28, 1996 memorandum from Harry Evans to Joanna Smith.

Ex. 13 -

July 8, 1996 memorandum from Joanna Smith to Harry Evans.

Ex. 14 -

May 15, 1996 memorandum from Joanna Smith to Harry Evans.

Ex. 15 -

Jul 18, 1996 memorandum from Harry Evans to Joanna Smith.

Ex. 16 -

December 9, 1992 memorandum from Danny Franco to Joanna Smith.

Ex. 17 -

December 18, 1992 memorandum from Harry Evans to Joanna Smith.

Ex. 18 -

December 18, 1992 memorandum from Harry Evans to Daniel Garnett.

Ex. 19 -

July 15, 1996 memorandum from Joanna Smith to Ron Wright.

Ex. 20 -

Grievance form dated July 22, 1993.

Ex. 21 -

July 19, 1996 letter from Ronald Wright to Joanna Smith.

Ex. 22 -

July 27, 1993 memorandum from June Ingram to Joanna Smith.

Ex. 23 -

State of Relief.

Ex. 24 -

August 5, 1993 memorandum from Harry Evans to Joanna Smith.

Ex. 25 -

Level III Grievance decision, dated January 14, 1994.

Ex. 26 -

November 24, 1994 letter from Joanna Smith to Grievance Board.

Ex. 27 -

January 23, 1995 memorandum from Harry Evans to Joanna Smith.

Ex. 28 -

Statement regarding Level II decision.

Ex. 29 -

January 30, 1995 letter from Roberta Gail Mullen to Joanna Smith.

Ex. 30 -

May 23, 1994 memorandum from Barry Adkins to Harry Evans.

Ex. 31 -

December 20, 1993 Organizational Chart of Office of Financial Services.

Ex. 32 -

October 1, 1992 - September 30, 1993 Performance Evaluation.

Ex. 33 -

1994 Performance Evaluation.

Ex. 34 -

January 26, 1995 memorandum from June Ingram to Barry Adkins.

HHR' Exhibits

Ex. 1 -

Affidavit of Calvin Robbins.

Ex. 2 -

ESAL Management Report by Employee.

Ex. 3 -

West Virginia Administrative Rule 15.30(f) (6/95).

Ex. 4 -

DHHR Policy Memorandum 2103 regarding Inclement Weather and Office Closures.

Ex. 5 -

March 17, 1993 letter from Michael T. Smith.

Ex. 6 -

October 24, 1990 memorandum from Taunja Willis Miller to All Commissioners.

Ex. 7 -

July 13, 1994 memorandum from Barry Adkins to Harry Evans.Ex. 8 -
May 12, 1994 memorandum from June Ingram to Barry Adkins.

Ex. 9 -

May 23, 1994 memorandum from Barry Adkins to Harry Evans.

Ex. 10 -

May 16, 1994 memorandum from Calvin Robbins to DHHR Administrative Staff.

Ex. 11 -

March 25, 1996 Meeting Minutes.

Testimony

Grievant testified in her own behalf. Respondent presented the testimony of Jeanne Roberts, Danny Franco, Harriet Fitzgerald, June Ingram, Barry Adkins, Michael McCabe, Warren Keefer, and

Tammy Sebok.

BACKGROUND

In order to have a better understanding of the events comprising this grievance, a brief overview of the office structure of the Office of Financial Services is helpful. At times relevant to this grievance, Danny Franco was the Director of the Office of Financial Services. Reporting to him was Harry Evans, Director of Payroll & Accounts Receivable. Under Mr. Evans was the Payroll Team, headed by Barry Adkins, Manager. The Payroll Team was comprised of Dan Garnett, Tammy Sebok, Sue O'Brien, June Ingram, Lynn Dotson, and Grievant. G. Ex. 31. At one point in time, there were two separate agencies, the Department of Health, and the Department of Human Services, or Welfare Department. Both Departments had payroll and benefits functions. The two agencies merged in 1991 into the Department of Health and Human Resources. Within the Payroll Unit, the payroll and benefits functions are still split between the two “departments”. On the Health side, June Ingram was responsible for the payroll, and Grievant was the benefits coordinator. On the Human Resources side, Dan Garnett was responsible for the payroll, and Tammy Sebok was the benefits coordinator. (See footnote 2) Sue O'Brien and Lynn Dotson were PayrollAssistants. (See footnote 3) Barry Adkins was Grievant's immediate supervisor from the time she began working in the Payroll Unit in 1989 until 1992, when June Ingram became her supervisor. June Ingram and Dan Garnett were supervisors responsible for approving leave and performing evaluations. They were later stripped of those duties and became Team Leaders. Barry Adkins again assumed all supervisory duties in 1996.

The specific allegations Grievant contends support her claims include: (1) change in work hours; (2) problems with annual and sick leave; (3) failure to receive merit raises in 1992 and 1994; (4) problems with advancement; (5) prohibition against visitors; (6) threats of disciplinary action for refusing to sign a 1995 evaluation; (7) her refusal to sign position description form; and (8) reduction in some of her job duties. (See footnote 4) With regard to each of these claims, I find the following facts are supported by the record.

FINDINGS OF FACT

1.

Change in Work Hours

On May 25, 1989, Barry Adkins, then Grievant's immediate supervisor, advised Grievant by memorandum that he was changing her work hours from 8:00 a.m. to 4:00 p.m. to 8:30 a.m. to 4:30 p.m. The reason for this change was to make Grievant, a benefits coordinator, more accessible to employees during normal work hours. G. Ex. 1. Mr. Adkins also changed the work hours of the other benefits coordinator for the same reason. 8/12/96 Tr., pp. 18, 39, 52. (See footnote 5)

2. Problems with Annual and Sick Leave

Barry Adkins, Grievant's supervisor from 1989 through 1992, had a habit of joking with employees about bringing in food if they wanted to take days off. In one instance, Mr. Adkins even went so far as to deny Grievnt a request for annual leave to see what she would do. Grievant took her request to Warren Keefer and put it on his desk when he was not there. Mr. Adkins went in and put Mr. Keefer's initials on the slip, also denying the leave. Other workers in the office were aware of this “joke” while it was going on. Grievant, very upset, went to Mr. Franco to ask permission to take annual leave. Mr. Franco told her that her co-workers were playing a joke on her, but she did not take it that way. Apparently, her husband had to wait 40 minutes for her while she got permission to take the annual leave. 1/24/96 Tr., pp. 8-10. That same day, Mr. Franco gave Mr. Adkins a verbal reprimand for his insensitivity to Grievant. 7/11/96 Tr., p. 124; 8/12/96 Tr., p. 48.

Grievant was not the only one who was the subject of this “food for leave” joking by Mr. Adkins. Lynn Dotson and Tammy Sebok also were subject to his jokes. 1/24/96 Tr., p. 7. Apparently, this teasing was just Mr. Adkins' “way”, and he teased everybody. 8/12/96 Tr., pp. 20, 42.

On another occasion, Grievant called in sick and Barry Adkins told her that, because there was bad weather, she would have to take annual leave. 1/24/96 Tr., pp. 7-8. Grievant called Personnel Services and was told that Mr. Adkins was wrong, and that sheshould be able to take sick leave. Mr. Adkins admits he told Grievant this initially, because he was misinformed. He later checked with Personnel Services and found out that Grievant was entitled to take sick leave if she was sick, despite the weather conditions. 8/12/96 Tr., p. 42. Jeanne Roberts, Director of Employee Information, Personnel Services, confirmed that there was a lot of confusion among managers about the Department's Inclement Weather Policy when it first came out, and it became necessary for the office to develop a list of “frequently asked questions” about the policy. 7/10/96 Tr., pp. 77-90; A. Ex. 3. Grievant's annual leave records show that sick leave was recorded for the particular day in question. 7/10/96 Tr., p. 90; G. Ex. 3.

3. Failure to Receive Merit Raises in 1992 and 1994.

Grievant was recommended for, but did not receive, merit raises in 1992 and 1994. In 1994, only a very limited number of merit raises were given to HHR employees, as there was a freeze in effect, and within the Financial Services office, only two managerial-level employees received merit raises. In 1992, however, nearly everyone in Financial Services received a merit raise, but Grievant did not.

Grievant and Dan Garnett both filed grievances in 1992 over the merit raises. The paperwork was processed for Dan Garnett, but not for Grievant. The reason Grievant did not receive a merit raise in 1992 was because she had been promoted in 1989, and received a merit increase in November 1991, the first merit increase ever given in the Payroll Unit. 7/11/96 Tr., p. 117. While there is no rule or regulation which would prevent Grievant from receiving two merit increases in two years, Danny Franco testified that he wanted to be fair to others doing meritorious work, and he tried to institute some orderly concept of fairness in awarding merit raises. 7/11/96 Tr., p. 117-118. Mr. Franco talkedto Grievant at the time the 1992 merit increases were being awarded, and acknowledged that by trying to be fair to others, he was not being fair to her, but that was how it had to be. Mr. Franco encouraged her at that time to fill out a new position description form, and they would try to get her more money through a reclassification. 7/11/96 Tr., p. 119. According to Michael McCabe, Director of the Office of Personnel Services, it would not be improper to consider the amount of time that had passed between merit raises given to an employee, when two or more employees were up for a limited amount of merit money. 8/12/96 Tr., p. 61.

4.

Problems with Advancement.

Lynn Dotson held the job of Payroll Assistant in the Payroll Unit, a classification which is higher than Grievant's classification of Office Assistant II. Lynn Dotson left the Payroll Unit in 1994. Part of her duties had included the payroll function for HHR hospitals and health facilities. At about that time, the Legislature had passed a bill to lease or sell all state health care facilities. There was concern when Lynn Dotson left that the duties of that position would be severely curtailed if the payroll function for state health care facilities was removed. Danny Franco met with his managers and it was decided that when Lynn Dotson left, they would request that her position be placed into a different classification, with different duties. The position came back from the Division of Personnel as an Accounting Assistant I, which was not a higher classification than Grievant's classification of Office

Assistant II. 7/11/96 Tr., p. 108; 8/12/96 Tr., pp. 28-29, 44.

Lois Morton applied for and received the Accounting Assistant I position. Later, the Legislature decided not to sell or lease the state health-care facilities, and those functionsremained with Lois Morton's position. She subsequently filed a grievance and that position was reclassified to a Payroll Assistant classification once again. 1/24/96 Tr., p. 14, 18.

Grievant believes this whole scenario took place in order to deprive her of an opportunity for advancement, as she could have applied for and advanced into the Payroll Assistant position, but not an Accounting Assistant I position. Grievant believes Lois Morton got the position because she is friends with Barry Adkins, and goes line dancing with him at the Moose Lodge. 1/24/96 Tr., p. 18. Mr. Adkins considers himself friends with everyone in the Payroll Unit, and has asked others in the office, including Grievant, to go line dancing with him at the Moose Lodge in the past. 8/12/96 Tr., p. 44.

5.

Prohibition Against Visitors.

Barry Adkins held a staff meeting on March 1, 1996, in which he informed his staff that visitors to the Payroll Unit were to be discouraged, and that he was going to talk to the other managers to encourage them to convey the same message to their employees. This directive was issued to everyone in the meeting, and no one individual was singled out. Excessive visitation during business hours was a problem, and he wanted to get control of it. 8/14/96 Tr., pp. 139, 151.

6. Threat of Disciplinary Action for Refusing to Sign 1995 Evaluation.

June Ingram filled out Grievant's performance evaluation for 1995. On the statement of goals, Ms. Ingram inserted that Grievant's “goal this year to train her supervisor on the overall workings of PEIA and PERS.” G. Ex. 2. Grievant did not agree with this goal, and was concerned that Ms. Ingram was going to try to take her job away from her. 8/12/96 Tr., pp. 84-86. Ms. Ingram completed the evaluation on January 26, 1996, and then went on medical leave from January 29 through February 26, 1996. Shedid not have an opportunity to discuss the evaluation with Grievant herself, but left it with Barry Adkins. 8/14/96 Tr., p. 134.

On January 29, 1996, Barry Adkins went over Grievant's evaluation with her and told her to sign it, as it needed to be “up front” that day. 8/12/96 Tr., p. 84. Grievant refused to sign the evaluation, and told Mr. Adkins that she wanted to go over the evaluation with Ms. Ingram. 8/14/96 Tr., p. 149. He left the evaluation with Grievant overnight, but went back to retrieve the original the next day to

place in her file. He was not familiar with the goals set forth by Ms. Ingram. 8/14/96 Tr., p. 149.

When Ms. Ingram returned to work, she discussed the evaluation with Grievant on or about March 1, 1996. She assured Grievant she was not trying to take her job away from her, but merely thought it was in the best interests of the office if she, as Grievant's supervisor, had a basic working knowledge of her functions so that she could answer questions if Grievant was not available. 8/12/96 Tr., pp. 87; 8/14/96 Tr., p. 137. Grievant still did not sign the evaluation. The evaluation was forwarded to Danny Franco's office, but returned because there needed to be something put in writing as to why Grievant would not sign the evaluation. A memorandum was attached and initialed by Harry Evans, and sent back to Mr. Franco's office. 8/14/96 Tr., pp. 138-139. Grievant was never told she had to sign the evaluation, nor was she ever disciplined for not signing the evaluation.

On that same day, March 1, 1996, a staff meeting was held in Grievant's office, with Barry Adkins, Tammy Sebok, June Ingram, Dan Garnett, Susan O'Brien, Lois Morton and Grievant present. Mr. Adkins informed them that there was to be a reorganization of the Payroll Unit, and that he was going to become the supervisor of the employees in the unit. June Ingram and Dan Garnett would no longer have supervisory authority, but were tobecome lead workers. 8/12/96 Tr., pp. 88; 8/14/96 Tr., pp. 138, 151. Mr. Adkins also told them that he was going to limit the number of visitors to the Payroll Unit. 8/12/96 Tr., pp. 91; 8/14/96 Tr., pp. 139, 151.

7.

Refusal to Sign Position Description Form.

On the morning of March 21, 1996, Grievant was called into a meeting with Tammy Sebok, Harry Evans, Warren Keefer, and Danny Franco. Mr. Franco told Grievant and Tammy Sebok that he was going to try to get them a raise through reclassification. He had asked June Ingram to prepare a position description form for them and wanted them to go over it with them together and fine tune it to support a reclassification. 8/12/96 Tr., pp. 91- 92; 8/14/96 Tr., pp. 147-148, 152, 170, 178. Mr. Adkins and Ms. Ingram agreed that Grievant and Ms. Sebok were underclassified and attempted to help them get a higher classification of Office Assistant III.

Grievant refused to sign the position description form or to even go over it for accuracy. Grievant had a misclassification grievance in the process and she was afraid this new position description form would jeopardize her grievance. 8/12/96 Tr., p. 93. Ms. Sebok agreed to review the form. 8/14/96 Tr.,

p. 177.

That afternoon, on March 21, 1996, there was another meeting with Grievant, Tammy Sebok, Danny Franco, and Barry Adkins. Mr. Franco ordered Grievant to cooperate with the reclassification attempt, and told her that her refusal could constitute insubordination. 8/12/96 Tr., p. 94; 8/14/96 Tr., pp. 167, 178. Grievant still refused, and no disciplinary action was taken against her.

8.

Reduction in Job Duties.

At the same time the new position description was being developed, Grievant had some job duties taken away from her. The changes in her job duties were reflected in the new position description form. The duties that were taken away involved the "performance of Journal Entries and Adjusting Entries that allocate payroll related costs to the appropriate cost centers within the Department." 8/12/96 Tr., p. 95-96; 8/14/96 Tr., p. 154- 155, 158; G. Ex. 15. Warren Keefer, Assistant Director of Financial Services, realized that the same type of function was being done by various people within the department, and decided it would be more efficient to consolidate those activities into one position. 8/14/96 Tr., p. 158. Not only were job duties taken away from Grievant, but they were also taken away from others within the Department. The job functions were consolidated and Barry Adkins now performs that function. The job function is entirely different now than when Grievant and the others performed it. 8/14/96 Tr., p. 155.

DISCUSSION

Grievant filed this grievance on January 9, 1995, alleging that HHR has engaged in numerous acts of harassment, discrimination, favoritism, and retaliation against her since she began working in the Payroll Section in 1989. As relief sought, Grievant requests: (1) A $1,008.00 across the board raise; (2) a ten percent (10%) merit increase for 1992; (3) a ten percent (10%) merit increase for 1994; (4) relief from acts of harassment, favoritism, and discrimination; and (5) payment of all attorneys' fees and costs. Grievant alleges that the afore-described events substantiate her charges of discrimination, favoritism, harassment, and retaliation against her employer. HHR denies all of the allegations, and asserts that Grievant's request for relief for the 1992 and 1994 merit increases is untimely. 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 by the employees." 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." In order to establish a claim of discrimination or favoritism, an employee must establish a prima facie case by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(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.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

W. Va. Code § 29-6A-2(l) defines "harassment" as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession." W. Va. Code § 29-6A-2(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." A grievant claiming retaliation may establish a prima facie case of reprisal by establishing:

(1) that he engaged in protected activity, e.g., filing a grievance;

(2) that he was subsequently treated in an adverse manner by the employer or an agent;

(3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and

(4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Fareydoon-Nezhad v. W. Va. Bd. of Trustees/Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, nonretaliatory reasons for its actions. See Mace v. Pizza Hut, Inc., 377 S.E.2d 461 (W. Va. 1988); Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 309 S.E.2d 342 (W. Va. 1983); Webb, supra. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

With regard to Grievant's claim of discrimination, there is only one cited incident in which Grievant was allegedly treated differently than others similarly situated to her, in a detrimental manner: the 1992 merit increases. I find, however, that HHR has presented a legitimate, nondiscriminatory reason for not awarding Grievant a merit raise in 1992. Shehad recently received a pay raise with her promotion in 1989, and another merit pay raise in 1991. In an effort to equalize the awarding of limited merit money to many meritorious employees, it was necessary to exclude some employees from merit raises in 1992. As Grievant had just received one the previous year, she was excluded. While this is clearly differential treatment, considering the time lapse between merit increases is a legitimate consideration when there is a limited amount of money to be spread among several meritorious employees.

With regard to Grievant's claim of favoritism, she points to the reclassification of the Payroll Assistant position to an Accounting Assistant I position in 1994 when Lynn Dotson left the Payroll Unit. Grievant alleges the reclassification was merely to prevent her from applying for the position. Then, the position did not actually change, and Lois Morton, the successful applicant, was able to

have it reclassified back to a Payroll Assistant, through a grievance. Grievant contends that Lois Morton and Barry Adkins are good friends who go dancing together, insinuating that he somehow manipulated the system to get her a higher paying job.

The evidence shows that the alleged “conspiracy” reached far beyond Barry Adkins, as June Ingram, Danny Franco, and Harry Evans were all involved in the attempt to reclassify the Payroll Assistant position. In addition, the Legislature was also involved when it passed a bill regarding the sale and/or lease of state-owned health care facilities, which led to speculation that the Payroll Assistant position would be stripped of those particular duties.

I cannot conclude that HHR went to such far-reaching efforts merely to prevent Grievant from applying for a Payroll Assistant position. It is unfortunate for Grievant thatcircumstances would have it that the duties were not ultimately stripped from that position, and Lois Morton was able to have the position reclassified to her benefit. However, I do not find that Grievant has proven by a preponderance of the evidence that this incident was manufactured merely to show favoritism to Lois Morton over her.

Grievant alleges discrimination and harassment with regard to Barry Adkins' direction that visitors were to be discouraged from the Payroll Unit. She contends that this directive was meant specifically for her, as her friend, Sheila Young, visited her often, and had also filed a grievance against HHR. There is nothing in the record to support Grievant's contention. The directive was issued in a staff meeting to all employees, and no names were mentioned, nor any one person specifically identified. Mr. Adkins testified that there were frequent visitors to the Payroll Unit, and some people would stay overlong, causing disruption in the business operations of the Unit. This directive was the result of a legitimate managerial concern, and if Grievant's friend was one of the visitors who stayed overlong, then, of course, the directive would have applied to her, and not without justification. Grievant has failed to prove her claims in this regard.

Grievant claims she was threatened with disciplinary action for refusing to sign her 1995 evaluation. There is nothing in the record to substantiate this charge. Grievant did not sign her evaluation, and all witnesses who testified to this matter acknowledged that it is within an employee's purview not to sign an evaluation, and no disciplinary action was threatened or taken against Grievant for this incident.

Grievant also claims she was threatened with disciplinary action for refusing to sign a position

description form which was completed for her by June Ingram to facilitate attempts to get Grievant's position reclassified. The record establishes that Grievant wasnot threatened with discipline for refusing to sign the position description form, but for refusing to participate at all in the attempts to get her reclassified. Mr. Franco ordered her to review the form with Tammy Sebok and June Ingram for accuracy so that he could process the paperwork necessary for the reclassification request. Grievant refused to do so. Mr. Franco told her that failing to obey his orders could be viewed as insubordination. However, Grievant still did not participate in the process, and no disciplinary action was taken against her for that refusal. There is no evidence to suggest Grievant was being harassed or discriminated against here. Mr. Franco was quite frustrated with Grievant's refusal to cooperate, and merely stated the truth: a direct refusal to obey an order of a superior is considered insubordination. Nonetheless, when Grievant still refused, Mr. Franco did not take any disciplinary action against her.

Grievant claims that some of her duties were taken away from her as a result of her filing a grievance over her misclassification and this harassment grievance. Nothing in the record supports this contention. The evidence establishes that the duties that were taken away from Grievant were also taken away from other employees and consolidated into one function which Mr. Adkins now performs. Thus, other employees were treated similarly to Grievant. Grievant's assertion that this entire reorganization was done merely to jeopardize her chances at reclassification is farfetched and unsupported by the record.

Finally, Grievant makes a generalized complaint that everything that has happened in the Payroll Unit since 1989 has been designed to harass, discriminate, and retaliate against her for filing her misclassification grievance. It appears that nothing could be further from the truth. Clearly, Grievant's managers believed she was underclassified and attempted all along to have her position reclassified. That they did not agree with theclassification Grievant requested does not diminish their attempts to help her get a better position. While Mr. Adkins' joking clearly bothered Grievant, I cannot find his humor to constitute harassment as defined by the Code. Further, once Mr. Adkins was disciplined by Mr. Franco for his insensitivity to Grievant, his joking with her ceased. This office humor simply is too remote in time and too infrequent to support Grievant's claims of harassment.

CONCLUSIONS OF LAW

1. Grievant has failed to prove by a preponderance of the evidence that she was discriminated against in any way by her employer as defined by W. Va. Code § 29-6A-2(d).

2. Grievant has failed to prove by a preponderance of the evidence that her employer engaged in acts of favoritism which adversely affected her as defined by W. Va. Code § 29-6A-2(h).

3. Grievant has failed to prove by a preponderance of the evidence that she was harassed in any way by her employer as defined by W. Va. Code § 29-6A-2(l).

4. Grievant has failed to prove by a preponderance of the evidence that she was retaliated again in any way by her employer as defined by W. Va. Code § 29-6A-2(p).

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. 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.

_____

MARY JO SWARTZ

Administrative Law Judge

Dated: November 24, 1998

Footnote: 1

Grievant was represented by George P. Surmaitis, Esq. HHR was represented by Meredith Harron, Esq., Assistant Attorney General. The Division of Personnel was represented by Lowell D. Basford.

Footnote: 2

Tammy Sebok is no longer with the Payroll Unit, but was at all times relevant to this grievance.

Footnote: 3

Lynn Dotson was replaced by Lois Morton in 1994.

Footnote: 4

Some of the incidents complained of occurred after the filing of the grievance, and after the beginning of the level three hearing. The Level III Grievance Evaluator allowed limited testimony to these incidents, acknowledging that discrimination, favoritism, harassment, and retaliation can be continuing violations.

Footnote: 5

All citations to transcripts refer to the Level III hearing transcripts.