LOIS BOARD, et al.

Grievants,

v. **Docket No. 99-HHR-329**

WEST VIRGINIA DEPARTMENT OF HEALTH & HUMAN RESOURCES, BUREAU FOR BEHAVIORAL HEALTH & HEALTH FACILITIES, LAKIN HOSPITAL,

Respondent.

D E C I S I O N

On June 9, 1999, Lois Board, Marilyn Bugg, Russell Stover, Brenda Black, Jennifer Dunn, and Barbara Varian (Grievants), initiated this grievance pursuant to W. Va. Code §§ 29-6A-1, et seq., alleging that Respondent West Virginia Department of Health and Human Resources, Lakin Hospital (DHHR or Lakin), through their supervisors in the Dietary Department, had engaged in discrimination, favoritism, unfair scheduling, incompetency, unprofessional conduct, and harassment, thereby creating undue stress and hardship in their employment situation. After limited relief was granted at Levels I and II, Grievants appealed to Level III where an evidentiary hearing was conducted by Grievance Evaluator M. Paul Marteney on July 26, 1999. On August 2, 1999, Jonathon Boggs, Commissioner of DHHR's Bureau for Behavioral Health and Health Facilities, issued a Level III decision granting the following relief:

1. All dietary supervisors and employees will be given in-service training regarding proper polices and procedures, handling call-ins and scheduling, and developing better customer service and employee relations;

2. A policy on call-ins will be developed based on the draft policy outlined in the Level I decision;

3. A comprehensive interdepartmental policy and procedure for the Dietary Department will be made and placed in the [D]ietary [D]epartment for reference by all dietary employees and supervisors;

4. Policy L.202-8 will be followed for staffing vacancies on both shifts; and

5. The remedies granted by the Level I and II decisions (See footnote 1) will be implemented.

On August 9, 1999, Grievants appealed to Level IV alleging that DHHR was in default for failing to issue the Level III decision within the time limits specified in W. Va. Code § 29-6A-3(a). A default hearing was conducted in this Grievance Board's office in Charleston, West Virginia, on September 15, 1999. Thereafter, on September 24, 1999, the undersigned issued an Order Denying Default.

On December 21, 1999, a Level IV hearing was held at Lakin Hospital. (See footnote 2) At the conclusion of that hearing, the parties waived written closing arguments. This matterbecame mature for decision on December 23, 1999, upon receipt of the Level III hearing transcript.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29- 6A-6. Grievants have alleged a variety of work-related problems, including discrimination, favoritism, and harassment.

Discrimination is defined in W. Va. Code § 29-6A-2(d), 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." This Grievance Board has determined that grievants, seeking to establish a prima facie case (See footnote 3) of discrimination under Code § 29-6A-2(d), must demonstrate the following:

(a) that they are similarly situated, in a pertinent way, to one or more other employee(s);

(b) that they have, to their detriment, been treated by their 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 grievants and/or the other employee(s) and were not agreed to by the grievants in writing.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992). Once a grievant establishes a prima facie case of discrimination, the employer can offer legitimate reasons to substantiate its actions. Thereafter, the grievants may show that the offered reasons are pretextual. Hickman v. W. Va. Dep't of Transp., Docket No. 94-DOH-435 (Feb. 28, 1995). See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Hendricks v. W. Va. Dep't of Tax & Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Runyon v. W. Va. Dep't of Transp., Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995).

Favoritism is similarly defined by W. Va. Code § 29-6A-2(h), as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." In order to establish a prima facie showing of favoritism, grievants must establish the following:

(a) that they are similarly situated, in a pertinent way, to one or more other employee(s);

(b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded them;

and,

(c) that the difference in treatment has caused a substantial inequity to them and that there is no known or apparent justification for this difference.

Frantz v. W. Va. Dep't of Health & Human Resources, Docket No. 99-HHR-096 (Nov. 18, 1999); Blake v. W. Va. Dep't of Transp., Docket No. 97-DOH-416 (May 1, 1998). See McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996). Aswith discrimination, if grievants establish a prima facie case of favoritism, a respondent may rebut this showing by articulating a legitimate reason for its action. However, the grievants can still prevail if they can demonstrate that the reason proffered by respondent was mere pretext. See Burdine, supra; Frank's Shoe Store, supra; Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990).

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." In order to establish harassment in violation of W. Va. Code § 29-6A-2(l), the grievants must show a pattern of conduct, rather than a single improper act. See Hall v. W. Va. Dep't of Transp., Docket No. 96-DOH-433 (Sept. 12, 1997); Phares v. W. Va. Dep't of Public Safety, Docket No. 91-CORR-275 (Dec. 31, 1991). See also Thompson v. Bd. of Trustees, Docket No. 96-BOT-097 (Dec. 31, 1996).

Grievants are employed in the Dietary Department at Lakin Hospital, where they are assigned to the afternoon shift. Grievants are variously classified as Cooks or Food Service Workers. Their immediate supervisor on the afternoon shift is Ginger Vanmeter, a Food Service Supervisor. Martha Mynes, a Nutritionist II, is the overall supervisor for the Dietary Department, and serves as Grievants' second-level supervisor. Edna Patterson, another Food Service Supervisor, supervises the Dietary Department staff on the morning shift. Because of an “overlap” between the two shifts, Ms. Patterson also has supervisory authority over Grievants. In addition, Ms. Patterson and Ms. Vanmeter take turns preparing the staffing schedule for the Dietary Department. Some of the scheduling problems identified at Level III apparently resulted from this shared responsibility, inasmuch as Ms. Mynes would approve requested days off for one or more of Grievants, but this approval was either not communicated to Ms. Patterson or Ms. Vanmeter, or they overlooked that information when they made out the work schedule, requiring an employee to choose between working on a day that had been approved as leave, or forcing his or her fellow employees to work short-handed.

Because a number of remedies were granted to Grievants while this matter was being pursued through the lower levels of the Grievance Procedure, and another portion of the grievance was resolved by agreement between the parties prior to the Level IV hearing, Grievants were asked to

clearly indicate at the Level IV hearing what remedies they were still seeking in this matter.

Grievant Board contended that, despite the remedies previously granted through Level III, a problem remains with scheduling in the Dietary Department. In support of this contention, she noted that on September 2, 1999, as a result of vacation and sick leave, there were four employees available to work on the morning shift, but only three employees assigned to the evening shift. Rather than find additional workers for the evening shift, Grievants' supervisors approved the use of “paperware,” so that it was not necessary to wash dishes after the evening meal. Grievants Varian and Bugg testified that the normal practice was to have four employees on each shift. When only three employees are available, the remaining employees have to perform the work that would have been done by the fourth employee. Grievants contend this practice creates a hardship for the three employees who work that shift, and contributes to low morale in theDietary Department. Grievants only established one instance where this situation occurred since this grievance was filed. Although Grievants asked for “equal treatment” in scheduling matters, they did not indicate what specific additional remedy, over and above the corrective actions ordered at Levels I through III, was required to resolve this issue.

Grievant Varian stated that she was given a job description by Ms. Mynes that was prepared by another Food Service Worker. In addition, the job description she received was incomplete, because it did not include instructions for putting away the items on the salad bar after the evening meal. At Grievant Varian's request, Ms. Mynes clarified the job description the following day. Although it would obviously be helpful to a new employee to have something more than a generic job description, none of the Grievants indicated any policy, rule, or regulation that requires DHHR to provide an employee with a detailed job description setting forth each element of their daily job duties. Likewise, there was no explanation as to why a job description could not be prepared by an employee in the position, and approved by the supervisor, rather than being prepared exclusively by the supervisor.

Grievant Varian also complained about the manner in which she was spoken to over the phone by a “supervisor” that she did not identify, when she was called a “God damn lazy shift worker.” She reiterated a complaint from Level III that Ms. Patterson called her sister a pig, when the sister, also a Lakin employee, was coming through the line for lunch. Although such comments by a supervisor to Grievant Varian were demeaning and contrary to the demeanor expected by a professional supervisor, this incident does not equate to a pattern of improper conduct directed at her by Ms.

Patterson. See Hall, supra; Phares,supra. Even assuming that Grievants established harassment in violation of W. Va. Code § 29-6A-2(l), none of the Grievants indicated what remedy would be more appropriate than the remedies previously granted at the lower levels to assure that this would not happen again.

Grievant Varian also complained that there had not been weekly department meetings, despite statements that regular meetings would be held with the staff. Grievants did not indicate any rule, policy, or regulation which requires the supervisors to meet with the staff at any time, although such meetings would appear to be preferable to grievance hearings for ironing out disagreements between staff and management.

Another complaint involved the way the Grievants' absences were recorded on the sign-in sheet in the Dietary Department. Initially, it was argued that Grievants were being treated differently in regard to the use of red and green “marks” on these attendance sheets. However, a preponderance of the evidence of record indicates that red indicates an employee has scheduled leave in advance, while green indicates the employee called in to take leave, either sick leave or annual leave, shortly before their shift, or they left during their shift due to illness or some other unexpected development.

The record indicates that these color-coded entries are made to track possible leave abuse. However, none of the Grievants have ever been counseled or disciplined for leave abuse, none of the Grievants have had their annual evaluation lowered because of alleged leave abuse, and none of the Grievants have ever been charged with an unauthorized absence. One of the Grievants expressed resentment that her green marks (green indicating an “unscheduled” absence) were larger than others. It was not shown how thesize of these marks operated to give any other employee any substantial advantage, or worked to the detriment of any of the Grievants to a significant degree. Moreover, it was not shown that any particular entry was ever made with regard to the Grievants which was not in accordance with Lakin Hospital's written policies and procedures regarding leave and attendance. Indeed, Grievants did not introduce those policies to establish what rules their supervisors were required to follow. (See footnote 4)

Grievant Stover complained that he has been asked to work over when the afternoon shift is understaffed, noting that none of the employees from the morning shift will agree to work over. Grievant Stover agreed that he voluntarily works over when asked, because he does not want his fellow workers to be overwhelmed. However, he did not indicate that he was not properly

compensated for the hours he worked, or that any policy, rule or regulation was being violated in these circumstances.

The jurisdiction of this Grievance Board is limited to the resolution of grievances as defined in W. Va. Code § 29-6A-2(i). Skaff v. Pridemore, 200 W. Va. 700, 490 S.E.2d 787 (1997) (per curiam). See Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995). "Grievance" is broadly defined in the grievance procedure for state employees to include:

> any claim by one or more affected state employees alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of their employer; any specifically identified incident of harassment or favoritism; or any action,policy, or practice constituting a substantial detriment to or interference with effective job performance or the health and safety of the employees.

W. Va. Code § 29-6A-2(i).

While this grievance procedure provides state employees with a mechanism to pursue complaints regarding a variety of terms and conditions of employment, it does not empower this Grievance Board with authority to simply substitute its judgment for that of agency management in the day-to-day supervision of its workforce. See Skaff, supra. Grievants did not establish that they were being treated differently from any other employee, or any group of employees, in a manner which would constitute discrimination under W. Va. Code § 29-6A-2(d). Likewise, Grievants did not demonstrate that any other employee or group of employees was receiving preferred treatment in any significant matter, so as to establish favoritism in violation of W. Va. Code § 29-6A-2(h). Further, there was evidence that certain comments were made to one or more Grievants on various occasions which were contrary to the demeanor expected from a professional supervisor. However, Grievants did not demonstrate a pattern of conduct sufficient to establish that Grievants have been subjected to harassment in violation of W. Va. Code § 29-6A-2(l). Therefore, Grievants failed to establish any entitlement to relief beyond those remedies previously granted in the Level III decision in this matter, or attained as a result of the partial resolution of this matter at Level IV. See Hall, supra.

Consistent with the foregoing discussion, the following Findings of Fact and Conclusions of Law are made in this matter.

FINDINGS OF FACT

1. Grievants are employed by Respondent Department of Health and Human Resources (DHHR) in the Dietary Department at Lakin Hospital (Lakin).

2. Grievants are all assigned to the “afternoon” shift. Their immediate supervisor is Food Service Supervisor Ginger Vanmeter. Their second-level supervisor is Nutritionist II Martha Mynes. Because of an overlap of shifts, Grievants also fall under the supervision of Food Service Supervisor Edna Patterson. Ms. Patterson is primarily responsible for supervising the “morning” shift in the Dietary Department.

3. Ms. Patterson and Ms. Vanmeter have been delegated shared responsibility for preparing the staffing schedule in the Dietary Department.

4. Due to either oversight or a breakdown in communication, one or more Grievants have been scheduled to work by Ms. Vanmeter or Ms. Patterson on days when they had received approval from Ms. Mynes to be off.

5. Lakin normally staffs each shift with a minimum of four employees.

6. Grievant Stover has been asked to work beyond his normal shift on one or more occasions when no employees from the morning shift volunteered to stay over to cover for an absence on the afternoon shift. In each such case, Grievant Stover voluntarily agreed to work, despite a personal preference to go home at the end of his scheduled shift.

7. On at least one occasion in 1999, three Grievants have been required to complete the duties normally performed by four employees on the afternoon shift, with theonly concession being that “paperware” was employed to serve and deliver food, so that less cleanup was required after the evening meal.

8. On one occasion, Grievant Varian was provided a written job description, prepared by an unidentified co-worker, which did not include all of her job duties. When this problem was brought to Ms. Mynes' attention by Grievant Varian, the problem was corrected the following day.

9. On one occasion since her employment at Lakin, Grievant Varian was cursed over the phone and spoken to in a harsh and unprofessional manner by one of her supervisors.

10. On one occasion, in Grievant Varian's hearing, Ms. Patterson referred to Lakin employees going through the food line as “pigs.” Grievant Varian's sister, who is also employed at Lakin, was one of the employees in the food line at that time.

11. The Dietary Department does not hold regular meetings with the staff. It was not

established that a meeting with employees from both shifts would be feasible during normal working hours, given the meal schedule and the duties Grievants must perform.

12. Lakin uses “red” and “green” marks to track scheduled and unscheduled absences by its employees. No adverse actions have been taken against any Grievant based upon the number of red or green marks appearing on their attendance sheets.

CONCLUSIONS OF LAW

1. In a grievance which does not involve a disciplinary matter, the grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1§ 4.19 (1996); Payne v. W. Va. Dep't of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. "Discrimination" is defined by W. Va. Code § 29-6A-2(d) 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.”

3. 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.”

4. In order to establish a prima facie case of discrimination under W. Va. Code § 29-6A-2(d), grievants must demonstrate the following:

> (a) that they are similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that they have, to their detriment, been treated by their 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 grievants and/or the other employee(s) and were not agreed to by the grievants in writing.

Parsons v. W. Va. Dep't of Transp., Docket No. 91-DOH-246 (Apr. 30, 1992).

5. In order to establish a prima facie showing of favoritism, grievants must establish the following:

> (a) that they are similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that the other employee(s) have been given advantage or treated with preference in a significant manner not similarly afforded them;
>
> and,
>
> (c) that the difference in treatment has caused a substantial inequity to them and that there is no known or apparent justification for this difference.

Frantz v. W. Va. Dep't of Health & Human Resources, Docket No. 99-HHR-096 (Nov. 18, 1999); Blake v. W. Va. Dep't of Transp., Docket No. 97-DOH-416 (May 1, 1998). See McFarland v. Randolph County Bd. of Educ., Docket No. 96-42-214 (Nov. 15, 1996).

6. If the grievants establish a prima facie case of discrimination or favoritism, the employer can offer legitimate reasons to support its actions. Thereafter, the grievants may show that the offered reasons are pretextual. Frantz, supra. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986).

7. Harassment is defined 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(l).

8. In order to establish harassment in violation of W. Va. Code § 29-6A-2(l), the grievants must show a pattern of conduct, rather than a single, isolated improper act. See Hall v. W. Va. Dep't of Transp., Docket No. 96-DOH-433 (Sept. 12, 1997); Phares v. W. Va. Dep't of Public Safety, Docket No. 91-CORR-275 (Dec. 31, 1991).

9. Grievants failed to demonstrate that their employer engaged in conduct which constitutes discrimination, favoritism or harassment. 10. Grievants failed to establish that DHHR violated

any law, rule, policy, regulation, or written agreement in regard to Grievant's treatment as employees in the Dietary Department at Lakin Hospital.

11. This Grievance Board does not have authority to substitute its judgment for agency management in such matters as determining the work schedule for employees assigned to a particular department. See Skaff v. Pridemore, 200 W. Va. 700, 490 S.E.2d 787 (1997) (per curiam).

Accordingly, Respondent, West Virginia Department of Health and Human Resources, is hereby **ORDERED** to implement all remedies granted to Grievants at Levels I through III of the grievance procedure, not later than thirty (30) days from the date of this Decision. All other relief requested by Grievants is hereby **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. 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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: February 2, 2000

Footnote: 1

Copies of the Level I and II decisions were not provided to the undersigned by the parties. Therefore, the record in this matter does not reflect exactly what those remedies were.

Footnote: 2

DHHR was represented by Assistant Attorney General B. Allen Campbell. Grievants Lois Board, Marilyn Bugg, Russell Stover, Jennifer Dunn, and Barbara Varian appeared pro se. Grievant Brenda Black did not appear for the Level IV hearing, nor did she withdraw her grievance. Prior to the hearing, the parties reached an agreement that resolved a portion of Grievants' complaints relating to availability of Lakin Hospital policies and procedures. See n. 4, infra. However, the remainder of Grievants' concerns could not be resolved, and the parties elected to proceed with the hearing.

Footnote: 3

A prima facie case generally refers to a set of facts which, if not rebutted or contradicted by other evidence, would be sufficient to support a ruling in favor of the party establishing such facts. See Black's Law Dictionary 1353 (4th ed. 1968).

Footnote: 4

Grievants' complaints regarding access to applicable policies and procedures was resolved by agreement of the parties immediately prior to the Level IV hearing.