SHELLIE L. RODEHEAVER,

Grievant,

v. Docket No. 00-HHR-312

DEPARTMENT OF HEALTH & HUMAN RESOURCES/

HOPEMONT HOSPITAL,

Respondent.

D E C I S I O N

Grievant, Shellie L. Rodeheaver, employed by the Department of Health and Human Resources (DHHR or Respondent) as a Recreation Specialist at Hopemont Hospital, filed a level one grievance on June 28, 2000, in which she alleged her work schedule had been changed in an arbitrary and capricious manner, resulting in discrimination. Grievant requested to be made whole. The grievance was denied at all lower levels, and appeal was made to level four on September 26, 2000. Following a series of continuances requested by Grievant, a level four hearing was conducted at the Grievance Board's Morgantown office on July 12, 2001. Grievant appeared pro se, and DHHR was represented by Assistant Attorney General Jon R. Blevins. Both parties waived the right to file proposed findings of fact and conclusions of law, and the matter became mature for decision at the conclusion of the hearing.

The essential facts of this matter are undisputed and are set forth as the following formal findings of fact.

Findings of Fact

1. Grievant has been employed by DHHR for approximately eleven years, and has been assigned to the Recreation Department as a Recreation Specialist since January 1997.

2. Leslie Poling, Jr., Recreation Director and Grievant's immediate supervisor,notified Grievant by memorandum dated June 14, 2000 that effective July 1, 2000, her shift would change from 8:00 a.m. to 4:00 p.m. to 12:00-8:00 p.m. The stated purpose of the change was for Grievant to assist Ellen Kelly with the Evening Program.

3. Mr. Poling did not confer with Grievant prior to making the shift change.

4. Grievant was the only employee who experienced a shift change.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); W. Va. Code §29-6A- 6; Howell v. W. Va. Dept. of Health & Human Resources, Docket No.89-DHS-72 (Nov. 29, 1990). The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not. Hammer v. W. Va. Div. of Corrections, Docket No. 94-CORR-1084 (Nov. 30, 1995); Leichliter v. W. Va. Dept. of Health & Human Serv. Docket No. 92-HHR-486 (May 17, 1993).

Grievant does not question the decision to expand the Recreation Program into the evening hours, but asserts that it would be fair and equitable to divide the assignment among all eleven of the Department employees, as are weekend and holiday shifts. Grievant argues that to be solely and continually assigned the evening shift constitutes discrimination.

Director Poling testified at level four that after it was determined that he needed trained staff to beef up the evening program, he asked for volunteers, but no one wanted that shift. Because the other floor leaders were already in position, Mr. Poling choseGrievant since she was a co-leader. Rotation of the position is not in the best interest of residents, according to Mr. Poling, especially those suffering from Alzheimers disease or dementia, and for whom consistency is crucial. The Director denies the decision was arbitrary since management has the right to change employee schedules for the benefit of the program and residents.

An employee seeking to establish discrimination must first establish a prima facie case of discrimination under W. Va. Code §18-29-2(m) by demonstrating the following:

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

(b) that she has, to her detriment, been treated by her 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 v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason to substantiate its actions. Thereafter, a grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dept. 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); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

Grievant has established that she is similarly situated to other employees in a pertinent way, and has been treated differently, to her detriment, in a manner that the otheremployees have not. The undersigned cannot determine, however, that the difference in treatment was unrelated to the actual job responsibilities of the employees. On the contrary, of the ten staff members, four were functioning as Floor Leaders, and four were assigned to the Care Plan staff. These employees are assigned specific duties and responsibilities which require them to work a consistent 8:00 a.m. to 4:00 p.m. shift. A new hire in training was not considered experienced enough for the position, leaving Grievant, who had been functioning as an assistant Floor Leader, as the most reasonable candidate for the position. Based upon this evidence it is determined that Grievant failed to establish a prima facie case of discrimination. While the burden of proof did not shift, Respondent has proven that the decision was based upon actual job duties and was not pretextual.

Neither has Grievant shown the decision to have been arbitrary and capricious. "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. Hill and Cyrus v. Kanawha County Bd. of Educ., Docket No. 96-20-362 (Jan. 30, 1997). Respondent has provided a legitimate and reasonable basis for the decision to change Grievant's shift, and she has failed to prove that it was arbitrary and capricious.

While it is understandable that Grievant is unhappy with the shift change, it is well settled that agencies under civil service regulations have wide discretion in the reassignment of employees. 67 C. J. S. Officers § 98. See also Stoneking v. W. Va. Div.of Corrections, Docket No. 93-CORR-530 (Nov. 30, 1994); Titus v. W. Va. Div. of Corrections, Docket No. 93-CORR-528 Nov. 22, 1994). Further, the

transfer of a civil service employee was "never intended to be dictated by employee likes and dislikes", and the employing agency has the right to transfer employees based on need. 67 C. J. S. Officers § 98, Jarrett v. Dep't of Admin., Docket No. 98-ADMIN-165 (Jan 29, 1999). Consistent with these rulings, the 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); Board v. Dep't of Health and Human Resources/Lakin Hospital, Docket No. 99-HHR-329 (Feb. 2, 2000).

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

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); W. Va. Code §29-6A-6; Howell v. W. Va. Dept. of Health & Human Resources, Docket No.89- DHS-72 (Nov. 29, 1990).

2. An employee seeking to establish discrimination must first establish a prima facie case of discrimination under W. Va. Code §18-29-2(m) by demonstrating the following:

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

(b) that she has, to her detriment, been treated by her 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 v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

3. Grievant failed to prove that the change in her work schedule were unrelated to her duties or the duties of other employees, and failed to establish a prima facie case of discrimination.

4. Respondent provided a legitimate and reasonable basis for the decision, establishing that it was not arbitrary and capricious.

5. The 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); Board v. Dep't of Health and Human Resources/Lakin Hospital, Docket No. 99-HHR-329 (Feb. 2, 2000).

Accordingly, the 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, andshould not be so named. However, the appealing party is required by W. Va. Code §29- 5A-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: July 31, 2001 _____

Sue Keller

Senior Administrative Law Judge