LILLIAN SMITH, et al.,

Grievants,

v. Docket No. 00-HHR-271

DEPARTMENT OF HEALTH & HUMAN RESOURCES/

BUREAU FOR CHILD SUPPORT ENFORCEMENT,

Respondent.

D E C I S I O N

Grievants, Lillian Smith, David J. Griffin, Trena Douglas, Shirley Johnson, Laura Slacum, Valerie McKeebe, Dennis Dunfee, Denise Jebbia, Pamela Paith, Annette Krapa, Merry Fiber, Joyce Coen, Maria Pepper, Kim Mitchell, Debbie Price, Jeffrey Moats, Karen Kobily Jaskolka, Terry Goff, Sandra Wallace, Lorrie Yoho, Patricia L. Rogue, Jason E. Johnson, Mary Ferrell, Betty R. Hissam, Sandra Odom, Anita Barnhart, and Elizabeth G. Parks, employed by the Department of Health & Human Resources/Bureau for Child Support Enforcement (Respondent), filed a level one grievance on November 12, 1999, in which they alleged the following:

Region I of the bureau for Child Support Enforcement has had a longstanding and established practice of allowing employees to work flex hours, adjust their work week, and earn compensatory time. We received a series of three confusing, contradictory and poorly reasoned memo's (attached), authored by Regional Manager, Sarah Montello, as well as confusing and contradictory oral statements by Ms. Montello and Director of Field Operations, Larry LaFevre. Flex time and adjusting ones work week has been eliminated as of November 1, 1999 and earning compensatory time has become a mere fiction.

* * *

The elimination of flex time, adjusting and compensatory time is harassing, discriminatory, retaliatory, an abuse of authority, and is a violation of policy and long- established practices.

Grievants requested reinstatement of flex and compensatory time, as well as the option to adjust their work week. As alternative relief, Grievants requested the elimination of the same for “each and every BCSE employee, and each and every DHHR employee throughout the State.”

The grievance was denied by Grievants' immediate supervisor who lacked authority to grant the relief at level one. At level two, Ms. Montello granted the grievance regarding flex time and compensatory time, stating in part,

[f]lextime has been reinstated on an individual bases [sic] according to the Flextime/overtime policy per the instruction of Lena S. Hill, Commissioner. Working Holiday time without the presence of a supervisor has also been reinstated. Taking Sick & Annual Leave and then working hours within the week to make up for the hours taken in Sick & annual Leave is not the intent of Policy 2102 and will not be reinstated . . . .

Following an evidentiary hearing at level three, the grievance was further granted, to the extent that the practice of adjusting the work week in lieu of using sick or annual leave was discontinued for all BCSE employees statewide. Grievants advanced their appeal to level four on August 22, 2000. An evidentiary hearing was conducted in the Grievance Board's Wheeling office on December 19, 2000, at which time Mr. Griffin served as Grievants' spokesperson, and Respondent was represented by Anthony Eates, Assistant Attorney General. The matter became mature for decision upon submission of Grievants' response to Respondent's proposed findings of fact and conclusions of law on January 27, 2001.

The essential facts of this matter are as follows:

Findings of Fact

1. Grievants are all employees of DHHR/BCSE assigned to the Region I office in Weirton, West Virginia.

2. Prior to November 1, 1999, the Region I BCSE employees were permitted to adjust their work week in lieu of using sick or annual leave. For example, if an employee had a doctor's appointment which required two hours to complete, the employee was permitted to work two extra hours later in the week, and no sick leave would be reported. The same practice was applied to annual leave.

3. By memorandum dated October 18, 1999, Ms. Montello notified the BCSE staff that beginning November 1, 1999, the flex hours would no longer be permitted, and all staff would work the regular office hours of 8:30 a.m. to 4:30 p.m. An adjusted work week would be permitted for up to four hours of sick or annual leave within the week, provided that two or more individuals would work

the same adjusted hours. The reason given for the change in practice was “an issue of safety” which had been raised.

4. In a memorandum dated October 21, 1999, Ms. Montello directed the Team Leaders to notify staff of the changes in practice regarding flex and compensatory time which would be effective November 1, 1999. Modifying the October 18, 1999, memorandum relating to adjusting the work week, Ms. Montello stated, “[n]o BSCE Region I employee will be able to adjust the work week for Annual Leave or Sick Leave.”

5. In a third memorandum, dated October 25, 1999, Ms. Montello responded to several questions generated by the previous memoranda. Addressing the adjusted work week, she stated, “[w]hen an employee has a doctor's appointment or takes Annual Leave, the employee is already compensated because that leave is a paid leave. Any Non- Exempt employee who actually works over 40 hours must be compensated at 1 ½ in cashpayment. Non-[Exempt] Employees cannot be compensated in compensatory time for actual hours worked over 40.”

6. DHHR does not have a policy which either specifically permits, or prohibits, adjusting the work week to avoid using annual or sick leave.

7. DHHR Policy Memorandum 2102, “Hours of Work/Overtime” provides for an adjusted work week when necessary to prevent the employee from working more than forty hours in a week. Both parties agree that Policy 2102 is not applicable in this situation.

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 §4.21 (2000). 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. Dep't of Health & Human Serv. Docket No. 92-HHR-486 (May 17, 1993).

Grievants' argument is essentially three-fold: (1) there is no rule, regulation, policy, or statute which prohibits an employee from adjusting his or her work week; (2) BCSE has a long established practice of allowing an adjusted work week; and, (3) other DHHR employees continue to adjust their work week, resulting in discrimination. DHHR asserts that the practice of adjusting the work week has never been authorized for situations other than those addressed by Policy Memorandum 2102, and

that while it would be impossible to implement a policy addressing each and every potential activity that may affect the employment relationship, the lack of a specific policy should not be taken as authorizationfor any activity. DHHR additionally argues that simply because adjusting the work week was a past practice does not require that it be continued in the future, and that the elimination of a practice in the absence of a rule, or policy which entitles the employee to a benefit, does not constitute an abuse of authority. Finally, DHHR asserts that Grievants did not establish that any other DHHR employees continue to adjust their work week, thereby failing to prove the claim of discrimination.

The record indicates that the adjusted work week was implemented in the mid- 1990's by a previous supervisor as a reward for his overworked staff. Undeniably, the ability to adjust the work week provides employees a substantial financial benefit. Michael McCabe, Respondent's Director of Personnel, noted that upon retirement both annual and sick leave balances may be applied as time toward retirement, or to purchase insurance benefits after retirement.

Grievants correctly argue that there is no rule, policy or law which prohibits them from adjusting their work week; however, by the same token, there is no rule, policy or law which grants employees the right to adjust their work week. The absence of a prohibition does not automatically create an entitlement. Further, the employer has a legitimate interest in having employees on site during regular office hours.

Although Respondent has allowed adjustment of the work week for several years, past practice alone does not create an entitlement. The Grievance Board has determined that absent a legal requirement to do so, an employer is not required to follow the same informal personnel practices year after year. Reed v. Kanawha County Bd. of Educ., Docket No. 99-20-111 (May 27, 1999); Moore v. Brooke County Bd. of Educ., Docket No. 93-05-092 (Aug. 16, 1993); Conner v. Barbour County Bd. of Educ., Docket No. 93-01-246(Apr. 28, 1994). In the present matter, while Grievants have enjoyed the ability to adjust their schedules for a number of years, and wish to continue to do so, there is no legal requirement that Respondent continue to provide the adjusted work week benefit.

Finally, Grievants assert that individuals who work for other divisions of DHHR, but are housed in the same building as BCSE, continue to receive the benefit. 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." To establish a prima facie case of discrimination, 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.

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

Once the grievants establish a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason to substantiate its actions. Thereafter, the grievants 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. 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); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). Grievants did not offer the testimony of any DHHR employee who continues to adjust his or her work week, and have failed to establish a prima facie case of discrimination. Even if other DHHR employees who are located in the same building as Grievants are continuing to adjust their work weeks, because Grievants work in a division separate and apart from the other DHHR employees, they are not similarly situated. See Bonnett v. Department of Health & Human Resources, Docket No.98-HHR-320 (Jan. 29, 1999) (employees at Sharpe Hospital assigned to the public safety and nursing departments were not similarly situated.) All BCSE employees are restricted from adjusting their work week, therefore, no discrimination has been established. (See footnote 1)

Conclusions of Law

1. 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 §4.21 (2000).

2. Employees seeking to establish discrimination must first establish a prima facie case of discrimination under W. Va. Code §29-6A-2(d) by demonstrating 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.

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

3. Grievants have failed to prove that any similarly-situated DHHR employee continues to adjust his or her work week, and have failed to establish a prima facie case of discrimination.

4. Absent a legal requirement to do so, an employer is not required to follow the same informal personnel practices year after year. Reed v. Kanawha County Bd. of Educ., Docket No. 99-20-111 (May 27, 1999); Moore v. Brooke County Bd. of Educ., Docket No. 93-05-092 (Aug. 16, 1993); Conner v. Barbour County Bd. of Educ., Docket No. 93-01-246 (Apr. 28, 1994).

5. In the present matter, while Grievants have enjoyed the ability to adjust their schedules for a number of years, and wish to continue to do so, there is no legal requirement that Respondent continue to provide the adjusted work week benefit.

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 EmployeesGrievance 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 §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: February 22, 2001 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

At hearing, Respondent administrators indicated they were not aware of this practice in other divisions; however, given the rationale for discontinuing the practice set forth in Ms. Montello's October 25, 1999, memorandum, and the obvious negative impact upon BCSE employee morale, further investigation may be warranted.