SHEILA NESTOR,

Grievant,

v. Docket No. 05-HHR-424

DEPARTMENT OF HEALTH & HUMAN RESOURCES/

HOPEMONT HOSPITAL,

Respondent.

D E C I S I O N

Sheila Nestor ("Grievant"), employed by the Department of Health & Human Resources ("DHHR") as a Licensed Practical Nurse at Hopemont Hospital, filed a level one grievance on October 12, 2005, in which she alleged a violation of "Administrative Rule 143 CSR I and all other rules that may apply." For relief, Grievant requested the "adoption of a fair and just dress code policy, with input from workers." Grievant's immediate supervisor, Sherri Snyder, and Hopemont Hospital Administrator Ralph Raybeck, lacked authority to grant the requested relief at levels one and two.

The grievance was amended at level three to claim that the DHHR dress code violates Division of Personnel Policy, and is arbitrary and capricious, and not related to any legitimate business need, as it relates to the wearing of blue jeans and shorts. The amended relief was to allow employees the option of wearing blue jeans, and to allow them to wear shorts when temperatures are above normal at the work site. The grievance was dismissed at level three for failure to state a grievable issue.

Grievant appealed to level four on November 14, 2005, and an evidentiary hearing was conducted at the Grievance Board's Westover office on February 27, 2006. Grievant was represented by Anne Mueller of the Service Employees International Union District 1199, and DHHR was represented by Landon R. Brown, Senior Assistant AttorneyGeneral. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before April 1, 2006.

The following facts are undisputed.

Findings of Fact

1. Grievant has been employed by DHHR's Bureau for Behavioral Health & Health Facilities as a licensed practical nurse at Hopemont Hospital for nearly eight years.

2. By memorandum dated August 31, 2005, DHHR Secretary Martha Yeager Walker notified all DHHR employees, interns, volunteers and contractors that the Division of Personnel ("DOP") had approved a dress code, promulgated as DHHR Policy 2101, which had been developed by a DHHR Dress Code Task Team, composed of representatives from each Bureau. The purpose of the dress code was to "create a professional image" of the staff in the representation of the agency.

3. Secretary Walker noted that the dress code would be effective October 1, 2005, and that some "important points of the policy" included:

- Shorts and 'flip-flops' (rubber shower shoes) will not be permitted.

- Sweat/athletic pants - meaning pants that are elasticized at both the waist and cuffs - will not be permitted.

- Any garments that inappropriately reval the contours of or [sic] the trunk of the body or intimate undergarments are prohibited. For example: strapless dresses and tops, midriff-baring tops, elasticized tube tops and the wearing of pants in such a manner as to expose undergarments will not be permitted. Sleeveless tops and dresses may be worn as long as they are not inappropriately revealing of the body or undergarments. Tank tops,spaghetti-strap tops and 'muscle shirts' may be worn under another garment but are not acceptable if worn alone.

- Blue denim jean-style pants and capri pants shorter than mid-calf in length are not acceptable work attire. Unless specifically prohibited by the manager due to job-related duties, non-blue denim jean-style pants and capri pants mid-calf in length are appropriate work attire if they meet all other criteria of the policy.

- Body piercings other than in ears shall not be visible during work activities.

- Any clothing, accessories, jewelry, or tattoos exposed by an employee at work shall not state or allude to an obscenity, hate or violence; shall not advertise alcohol, tobacco, or illegal substances; and shall not state or allude to anything sexual in nature.

4. Individual managers have the authority to make exceptions to the policy for reasons including but not limited to medical necessity, religious beliefs, weather-related situations,

and for specific work activities. However, the Bureau's hospital administrators informally agreed that no exceptions would be made regarding the blue denim jeans.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her claim by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §§ 4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See W. Va. Code* §§ 29-6A-6. *See also Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ*., Docket No. 33-88-130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person wouldaccept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res*., Docket No. 92-HHR-486 (May 17, 1993).

Grievant does not dispute the authority of DHHR to promulgate a dress code policy, but argues that the prohibition of blue denim jeans has no rational basis, and is therefore, arbitrary and in violation of the DOP policy on agency dress codes. Grievant contends that her duties expose her to food, human waste, and cleaning chemicals, and opines that denim is more durable and shows less stains than khaki. Grievant also argues that wearing shorts during the summer months is necessary because sections of Hopemont's facilities lack adequate air conditioning. DHHR asserts that it has an interest in promoting professionalism within its offices and exhibiting professionalism to the public which constitutes a rational basis for the dress code.

The DOP has adopted a policy entitled "Agency Dress Codes," the purpose of which is "to communicate basic principles regarding written standards of dress and to establish appropriate guidelines" for agencies adopting such policies. The policy provides, in pertinent part:

Generally, dress standards should address issues regarding clothing, . . . safety, public images, productivity, and be job-related. Written [dress codes] should be clear, unambiguous, consistently enforced, non-discriminatory (sex, race, or religion) and must be reasonably related to a legitimate business need such as interference with job performance, the disruption of the workplace, or workplace safety. Restrictions on dress and grooming that

cannot be shown as having a direct effect on production, safety considerations, or relationships with the public, generally will not be upheld. . . . [The rationale for dress restrictions] should be based on the legitimate business necessity and obligation of maintaining a professional and safe working environment.

As discussed in previous Grievance Board decisions, the United States Supreme Court has ruled that dress codes should be judged pursuant to a rational basis analysis.In *Burdette v. West Virginia Public Service Commission*, Docket No. 93-PSC-132 (Nov. 16, 1993), it was stated that:

Because the right to dress as one sees fit is not a fundamental right, any restrictions placed upon one's choice of dress are to be judged under a "rational basis" test to determine if the regulation can be branded as arbitrary. The Employer may defeat the challenge to its dress code by showing that it has a reasonable and rational basis for restricting Grievant's manner of dress in order to meet a legitimate end.

(citing *Kelly v. Johnson*, 425 U.S. 238, 96 S.Ct. 1440, 47 L.Ed. 2d 708 (1976)).

Dress codes prohibiting the wearing of denim jeans have been upheld in cases involving a Unit Manager (*Shreve v. Division of Corrections/Huttonsville Correctional Center*, Docket No. 05-CORR-155 (Sept. 12, 2005)); health care workers (*Jenkins, et al. V. W. Va. Dep't of Health & Human Res./Mildred Mitchell-Bateman Hosp.*, Docket No. 00- HHR-334 (Apr. 13, 2001)); a Utility Financial Analyst (*Burdette, supra);* and a teacher (*Webb v. Mason County Board of Education*, Docket No. 26-89-004 (May 1, 1989)).

However, unlike the above-cited cases, the HHR's Dress Code Policy specifically prohibits the wearing of "[b]lue denim jean-style pants" but not "non-blue denim pants." The Grievance Board has recently held that the ban on only one color of denim fails to meet the rational basis test that restrictions on dress "hav[e] a direct effect on production, safety considerations, or relationships with the public," and have "a reasonable and rational basis . . . to meet a legitimate end." Division of Personnel Policy, *supra; Burdette, supra. Lilly, et al. v. Dep't of Health & Human Resources/Pinecrest Hospital*, Docket No. 05-HHR-419 (April 27, 2006).

As to wearing shorts during very warm weather, Policy 2101 invests Mr. Raybeck with the

authority to make exceptions to the dress code under various circumstances. Shorts or skorts, of an appropriate length and fit, would be a reasonable accommodation to employees who must work under conditions described by Grievant.

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

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her claim by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §§ 4.21 (2004); *Howell v. W. Va. Dep't of Health & Human Res*., Docket No. 89-DHS-72 (Nov. 29, 1990). *See W. Va. Code* §§ 29-6A-6.

2. To withstand Constitutional scrutiny, an employer must show a rational basis between a legitimate business decision and the implementation of a dress code. *Shreve v. Div. of Corr./Huttonsville Corr. Ctr.* Docket No. 05-CORR-155 (Sept. 12, 2005); *Burdette v. W. Va. Public Service Commission*, Docket No. 93-PSC-132 (Nov. 16, 1993); *See also Jenkins v. W. Va. Dep't of Health & Human Res*., Docket No. 00-HHR-334 (Apr. 13, 2001).

3. Grievant has proven that the DHHR dress code ban on blue denim, but not other colors of denim, fails to meet the rational basis test that restrictions on dress "hav[e] a direct effect on production, safety considerations, or relationships with the public," have "a reasonable and rational basis . . . to meet a legitimate end." Division of Personnel Policy, *supra; Burdette, supra. Lilly, et al. v. Dep't of Health & Human Resources/Pinecrest Hospital*, Docket No. 05-HHR-419 (April 27, 2006). 4. Pursuant to DHHR Policy 2101 institutional administrators are vested with the authority to make exceptions to the dress code under various circumstances. Shorts or skorts, of an appropriate length and fit, would be a reasonable accommodation to employees who must work under very warm conditions.

Accordingly, the grievance is GRANTED, and DHHR Ordered to rescind the ban on blue denim as stated in Policy 2101.

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.

DATE: APRIL 28, 2006

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE