THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

BURL G. BURNS, et al.,

Grievants,

Docket No. 05-DNR-430R

Denise M. Spatafore

Administrative Law Judge

DIVISION OF NATURAL RESOURCES/

EDRAY TROUT HATCHERY,

Respondent.

DECISION

Pursuant to an Order of the Circuit Court of Pocahontas County, West Virginia, issued on September 7, 2006, (See footnote 1) this grievance was remanded to level four for further consideration of the merits of the grievance, the Court having reversed the Grievance Board's prior ruling *(See footnote 2)* that this grievance was untimely filed. Additional briefs were submitted by counsel (See footnote 3) and received by the undersigned on October 23, 2006, at which time this matter became mature for consideration. Pursuant to a full review of the previous record, including the testimony and documentary evidence submitted at both levels three and four, I find that the following material facts have been proven.

Findings of Fact

1. Grievants are employed at the Edray Trout Hatchery ("the Hatchery") as technicians. The

Hatchery is a facility owned and operated by the Division of Natural Resources ("DNR") where trout are raised for recreational fishing in state parks and other state facilities. The fish are raised from eggs to adulthood, and then the trout are released.

2. Technicians are responsible for daily routine care of the fish and maintenance of the facility, including feeding, water treatment, and repair and upkeep of equipment.

3. There are seven fish hatcheries around the state, and each one has at least one residence, so that someone is always present to check on the fish around the clock and take care of any problems that arise. Leaves or ice can clog the water supply, causing fish fatalities. If a hatchery only has one or two residences, the manager is required to live there, along with the assistant manager, if there is a second residence.

4. The Edray Hatchery has three residences. One is occupied by the manager, one by the assistant manager, and one by a technician.

5. In February of 2001, a position was posted for a technician at the Hatchery who would be required to live on the premises. A Mr. Mearns (See footnote 4) was hired to fill this position. 6. All Hatchery technicians are paid within the parameters of the pay grade assigned to their classification, which is pay grade 10--$19,392 to $35,892--whether or not they live on-site.

7. The on-site technician performs some additional duties, which include driving around the facility several times during the night to make sure the equipment is functioning, along with providing a "presence" on the property for security purposes. Especially during the fall and winter months, 24-hour care is extremely important, because any interference with the water supply caused by ice or leaves can kill fish within a very short period of time, so "night" checks are always necessary.

8. Grievant Burns has been employed at the Hatchery since 1988. He was the on-site technician and lived on the premises from approximately 1990-1995, then voluntarily resigned this position to become a daytime-only technician.

9. Grievant Provesis has been working at the Hatchery since 2001. At one time, he also served as the on-site technician. (See footnote 5)

10. Grievant Pritt has been employed at the Hatchery since 2003.

11. The on-site technician does not pay for any costs associated with the housing, such as rent, utilities, or maintenance, and he still receives a technician salary comparable to that paid to Grievants.

12. Grievants have, at times, been required to respond to emergency situations which occurred at night, and they received compensatory time off the next day. On oneoccasion, the on-site technician was not called to respond until after at least two other technicians were called and were unavailable. (See footnote 6)

Discussion

In non-disciplinary matters, Grievants must prove all the allegations constituting 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 (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 would accept 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).

Grievants contend that the provision of housing to one hatchery technician, but not to others, is discriminatory and constitutes favoritism. "'Discrimination' means 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." (See footnote 7) "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." (See footnote 8) A grievant must establish a case of discrimination by showing:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Board of Education v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corrections*, Docket No. 04-CORR-278 (2005); *Frymier v. Glenville State College*, Docket No. 03-

HE-217R (2004). An employee claiming favoritism must also show he is similarly-situated to another employee. *Kincaid v. Div. of Corrections*, Docket No. 98-CORR-144 (1998); *Prince v. Wayne County Bd. of Educ.*, Docket No. 90-50-281 (1990).

The crux of Grievants' claim is that there is no actual difference in the job duties of daytime technicians and the technician who lives on-site. Grievant Provesis testified that he has performed the “night checks” himself, and that they only took about a half hour each, maybe twice a night. He also stated that he had been called on one occasion prior to the on-site technician being called to respond to an emergency. Therefore, Grievants contend that the duties of all technicians are one and the same.

Indeed, it would appear that other technicians should not have been called during the night, prior to the on-site technician. However, the evidence does not reveal under what circumstances this occurred, or why, whether it happened more than once, or when it occurred. Nevertheless, it should not have happened, and Respondent should be careful to ensure that only the on-site technician is called upon to handle nighttime emergencies.

However, the fact remains that there *are* additional job duties assigned to the on-site technician, which duties should not be performed by other technicians, except under extraordinary circumstances, such as the unavailability of the on-site employee. It isundisputed that, at least for several months of the year, nighttime checks of the equipment and water supply are imperative, creating the need for an on-site employee to perform those tasks. Regardless of Mr. Provesis' claim that he only performed these checks a couple of times a night, as Mike Shingleton, Assistant Chief of Cold Water Fish Management, explained, varying weather conditions sometimes require someone to check the fish as often as every fifteen minutes to an hour. Therefore, since the difference in treatment is directly related to a difference in assigned job duties, Grievants have failed to establish that they are similarly situated to Mr. Mearns. Therefore, they have not met their burden of proving discrimination and favoritism in this case.

The following conclusions of law support this Decision.

Conclusions of Law

1. In non-disciplinary matters, Grievants must prove all the allegations constituting 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 (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).

2. "'Discrimination' means 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." W. Va. Code § 29-6A-2(d). 3. "'Favoritism' means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." W. Va. Code § 29-6A-2(h).

4. A grievant must establish a case of discrimination by showing:

(a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

Board of Education v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corrections*, Docket No. 04-CORR-278 (2005); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (2004).

5. An employee claiming favoritism must also show he is similarly-situated to another employee. *Kincaid v. Div. of Corrections*, Docket No. 98-CORR-144 (1998); *Prince v. Wayne County Bd. of Educ.*, Docket No. 90-50-281 (1990).

6. Grievants have failed to prove discrimination and favoritism by a preponderance of the evidence in this case.

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 suchappeal 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: November 15, 2006

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Burns, et al., v. West Virginia Div. of Natural Res., Civil Action No. 06-AA-01 (Sept. 7, 2006).

Footnote: 2

See Burns, et al., v. Div. of Natural Res., Docket No. 05-DNR-430 (March 17, 2006).

Footnote: 3

Grievants were once again represented by Jerry Sklavounakis, Esquire, and Respondent was represented in this remanded grievance by William R. Valentino, Assistant Attorney General.

Footnote: 4

Mr. Mearns' first name was never stated in the record.

Footnote: 5

There was no explanation as to Grievant's reason for leaving the on-site position.

Footnote: 6

No details were given as to the reason for the call or when this occurred.

Footnote: 7

W. Va. Code § 29-6A-2(d).

Footnote: 8

W. Va. Code § 29-6A-2(h).