THE WEST VIRGINIA STATE AND EDUCATION EMPLOYEES GRIEVANCE BOARD

VIC BUTLER,

Grievant,

v. **Docket No. 06-CORR-281**

Sue Keller

Senior Administrative Law Judge

DIVISION OF CORRECTIONS/

NORTHERN REGIONAL JAIL AND CORRECTIONAL FACILITY,

Respondent.

D E C I S I O N

Vic Butler ("Grievant"), employed by the Division of Corrections ("DOC") as an Associate Warden of Programs at the Northern Correctional Facility, filed a level one grievance on or about July 6, 2006, in which he alleged discrimination and favoritism. For relief, Grievant request equal treatment. Specifically, he requested that: (1) all staff be required to sign in and out to establish accountability and enhance security; (2) all staff be searched equally; and, (3) designated parking be limited to the Jail Administrator and the Prison Warden. The grievance was denied at all lower levels prior to an appeal to level four on August 17, 2006.

A prehearing conference was conducted on October 3, 2006, with DOC counsel Charles Houdyschell, Assistant Attorney General, and Grievant appearing *pro se.* At that time, the parties agreed to submit the grievance for decision based on the lower-level record. The grievance subsequently became mature for decision upon receipt of Grievant's written summary on October 19, 2006. (See footnote 1)

Findings of Fact

1. Grievant has been employed as the Associate Warden of Programs at the Northern Correctional Facility at all times pertinent to this grievance.

2. The Northern Correctional Facility ("NCF") is located in a building which is shared by the

DOC and the Regional Jail Authority, which operates the Northern Regional Jail ("NRJ") at that location. The Northern Regional Jail and Correctional Facility, housing both agencies, has existed for approximately eleven years.

3. Although employees of both institutions are employed by the State of West Virginia, they are subject to the rules, procedures and policies of the agency of which they are employed.

4. On June 28, 2006, DOC staff were searched by security officers upon reporting to their duty shift. The search entailed a pat down body search, and each employee was required to empty his or her pockets, and open purses and lunch containers. NRJ staff were not subject to search that day.

5. DOC staff are required to sign in and out when entering or leaving the workplace. NRJ staff are not required to sign in and out.

6. DOC staff and their vehicles have been subject to screening by K-9 units upon entering the employee parking area. NRJ staff have not been subject to these searches.

7. Designated parking spaces have been made available to NRJ staff, specifically, the First Lieutenant and the Director of Inmate Services, while equivalent DOC employees have not been provided this benefit.

Issues and Arguments

Grievant argues that because the NRJ and NCF provide services to the public that are fundamentally identical, and the staff of both are employees of the State of West Virginia, the difference in treatment constitutes discrimination and favoritism. DOC asserts that discrimination/favoritism does not exist when comparing employees of two different agencies.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his 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 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).

W. Va. Code § 29-6A-2(d) defines discrimination to mean "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." Favortism is defined in *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." To establish claims of discrimination and/or favoritism a grievant must show by a preponderance of the evidence that:(a) one or more appositely similarly situated employee(s) have been granted preferential, exceptional or advantageous treatment that the grievant has not; and

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

The Bd. of Educ. of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004); *Lusher v. Dep't of Transp./Div. of Highways,* Docket No. 05-DOH-157 (June 15, 2005).

The claims of discrimination/favoritism cannot be proven in this instance because as a DOC employee, Grievant is not similarly situated to any RJA employee. While both institutions house incarcerated individuals, the fact remains that NRJ is a jail while the NCF is a prison, and their procedures reasonably differ. A state agency's failure to implement practices imposed by a separate agency does not result in discrimination and does not entitle its employees to similar benefits. *See Brining, et al. v. Div. of Corr.*, Docket No. 05- CORR-285 (Dec. 7, 2005); *Bossie v. Div. of Rehab. Serv*., Docket No. 03-RS-141 (Sept. 23, 2003).

Additionally, Grievant's concerns that NRJ is not properly conducting sign ins and searches, and has assigned parking spaces to various administrators, has not caused Grievant harm of any kind. "The Grievance Board has consistently refused to issue decisions where it appears the grievant has suffered no real injury on the basis that such decisions would be merely advisory." *Champ v. Pendleton County Bd. of Educ*., Docket No. 01-36-419R (July 14, 2003); *Khoury v. Pub. Serv. Comm'n*, Docket No. 95-PSC-501 (Jan. 31, 1996); *Smith v. W. Va. Parkways Economic Dev. and Tourism Auth*., Docket No. 97-PEDTA-484 (Apr. 17, 1998). Finally, a declaration that the NRJ's practices are wrong, is unavailable. "Relief which entails declarations that one party or the other was right or wrong, but provides no substantive, practical consequences for either party, is illusory, and unavailable from the [Grievance Board]." *Miraglia v. Ohio County Bd. of Educ*., Docket No. 92-35-270 (Feb. 19, 1993).

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 his 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. *W. Va. Code* § 29-6A-2(d) defines discrimination to mean "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. Favoritism is defined in *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."

4. To establish claims of discrimination and/or favoritism a grievant must show by a preponderance of the evidence that:
(a) one or more appositely similarly situated employee(s) have been granted preferential, exceptional or advantageous treatment that the grievant has not; and
(b) that the different treatment is not related to the actual job responsibilities of the employees;

The Bd. of Educ. of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004); *Lusher v. Dep't of Transp./Div. of Highways,* Docket No. 05-DOH-157 (June 15, 2005).

5. An employee of a specific agency is not similarly situated to an employee in another agency; therefore, an agency's failure to implement practices imposed by a separate agency does not result in discrimination/favoritism and does not entitle its employees to similar benefits. *See Brining, et al. v. Div. of Corr.*, Docket No. 05-CORR-285 (Dec. 7, 2005); *Bossie v. Div. of Rehab. Serv*., Docket No. 03-RS-141 (Sept. 23, 2003).

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 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: October 30, 2006

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

DOC rested on the arguments advanced at the lower levels, but cited two additional cases in support of its position.