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PATRICIA HELVEY

v.

Docket No. 91-WCF-034

WEST VIRGINIA WORKERS' COMPENSATION FUND

DECISION

Grievant, employed by Respondent West Virginia Workers' Compensation Fund (Comp Fund) in the Coal Workers' Pneumoconiosis Fund (OP Fund) it administers, see W.Va. Code §23-4B-7, filed this grievance October 9, 1990, alleging,

As further evidence of a continuing policy and/or practice of harassment and discriminatory actions towards me, Arnold Grinstead, the Director of the Coal Workers' Fund, without justification or good cause, unilaterally changed the terms and conditions of my employment, i.e., changed my hours of employment from 8:00 to 4:00 to 9:00 to 5:00. This action has created a substantial hardship on me, and furthermore, leaves the office unattended during a portion of the mandatory statutory hours of operations.

Relief requested: SPECIFIC RELIEF. That the hours of my employment be reinstated to those which I have worked in the Coal Workers' Fund since the start of my employment in August, 1979. GENERAL RELIEF. That the continuing policy and/or practice of harassment and discriminatory actions against me should immediately cease.

The grievance was denied at Level I and after hearing of October 26 and 27, 1990, at Level III.¹ Grievant appealed to Level IV January 18, 1991. After several hearings were scheduled and continued, in May 1991 the parties decided to submit the matter for consideration based on the Level III evidentiary record and they filed briefs. In October, upon the resignation of the administrative law judge who had been assigned the case, it was transferred to the undersigned's docket.

On October 18, 1991, the undersigned, having been advised by Grievant and her representative that Grievant's work-hours had been modified to her liking, queried the parties whether the matter might be moot on the basis that no further relief was available. Grievant submitted a letter-brief on the issue January 4, 1992, which stated that the relief she requested was to be relocated to the office she had worked in previously, to be given an apology and assurances that harassment and discrimination would not be tolerated, and "any and all other relief to be made whole."² Respondent's brief of January 31, 1992, conceded that the case was not moot and instead argued its merits. Grievant

¹Grievant was allowed to bypass Level II, apparently because Mr. Grinstead would have been the evaluator at that level and he had already denied her claim as Level I evaluator.

²Grievant also asked "that the Workers' Compensation Fund be found to have acted in bad faith in regard to these proceedings." No bad faith in the processing of this grievance has been established.

filed a further letter-brief on February 14 regarding the merits, as did Respondent on March 10.

Relief, in order to be available, "must bear some rational relationship to the harm done." Hall v. W.Va. Div. of Corr., Docket No. 89-CORR-687 (Oct. 19, 1990). Cf. Roberts v. W.Va. Div. of Highways, Docket No. 90-DOH-378 (Feb. 26, 1992). There is not even any evidence that Grievant was transferred; that such occurred only is stated in the briefs and they indicate that the transfer did not even occur until after the Level III decision was issued.³ Moreover, even Grievant's missives do not suggest that she was transferred improperly or against her will. That relief is accordingly not available, as is true also for the request for an apology. See Hall. Quite simply, in order to apologize an individual must express regret;⁴ an apology, if ordered, would have little meaning. Grievant represented herself in stating her requested relief;⁵ Grievant's plea will therefore be considered a request for a cease and desist order, which the undersigned finds would be the only

³According to the briefs, Grievant was moved in order to facilitate her entering information on the computer; she remains a employee in the OP Fund section, at least for salary purposes.

⁴Webster's New World Dictionary, 2nd College Ed., defines "apology" as "an acknowledgement of some fault, injury, insult, etc., with an expression of regret and a plea for pardon."

⁵While Grievant has on the record had a representative throughout the proceedings, each brief has been written by Grievant herself.

appropriate relief should her allegations prove founded. Accordingly, consistently with the concession of Respondent, the undersigned will address the merits of the claim.

The OP Fund at the time of the filing of the grievance and the Level III hearing was composed of five individuals: Mr. Grinstead; Grievant, an Audit Clerk II; Helen Ollis, an Audit Clerk III; Kiskey Nunley, a Clerk II; and Cindy Robinson, a Clerk III. Grievant was the most senior employee and Ms. Ollis was also a long-term employee. Ms. Nunley started work with the OP Fund shortly before Mr. Grinstead became Director in February 1988. Mr. Grinstead brought with him to the OP Fund Ms. Robinson, with whom he had worked for several years in another part of the Comp Fund. Grievant contends that after she, Ms. Ollis and Ms. Nunley met in early July 1990 with John Kozak, Executive Secretary of the Comp Fund, requesting transfer and complaining that Mr. Grinstead made decisions affecting their jobs without input from them (only accepting input from Ms. Robinson), Mr. Grinstead retaliated against them. Accordingly, while Grievant's statement of grievance refers to harassment and discrimination, as do her briefs generally, the charges made at hearing and tried there are more accurately characterized as favoritism and retaliation, favoritism by Mr. Grinstead for Ms. Robinson throughout his tenure as Director and retaliation by him against Grievant and the other employees for complaining to Mr. Kozak.

Grievant testified that an example of the lack of input of which she told Mr. Kozak was that she was ordered to stop requiring each employee to give her completed timesheets. She testified that they were invaluable in her duties of timekeeper for the office because they oftentimes showed that the computer results were inaccurate. She testified, "I was left a note that it would not be necessary for me to do the monthly time manually anymore and the reason for that was Ms. Robinson didn't want to keep a time sheet[.]" Tr. 33.

Grievant further testified that on July 17, 1990, Mr. Grinstead called a staff meeting, having talked to Mr. Kozak.⁶ He and Ms. Robinson were very angry. Mr. Grinstead told his staffers that, contrary to what Mr. Kozak had told him, that no employees would be allowed to transfer out, he would allow anyone who wished to transfer to do so. Grievant testified that Ms. Robinson accused the others of going all over the Comp Fund talking about her and Mr.

⁶Throughout these proceedings Grievant has stated that she considered the meeting with Mr. Kozak confidential. While the alleged loss of confidentiality is not at issue before the undersigned, it may be noted that fairness to a supervisor, like any other employee, would require that he be told if he is being charged with wrongdoing.

Grievant also indicated in her testimony that at the staff meeting Mr. Grinstead stated he knew who had met with Mr. Kozak. However, the notes she took the day of the meeting are that Mr. Grinstead said, "You know who you are," not that they knew "who we were," Tr. 36, as she reported in her testimony. Moreover, Mr. Grinstead testified that "Mr. Kozak was not specific on who the problems were coming from." Tr. 59. Accordingly, the record does not support that Mr. Kozak identified who had met with him.

Grinstead's relationship. She also accused the others of never liking her and of being jealous of her.⁷ Grievant, asked what kind of relationship Mr. Grinstead and Ms. Robinson have, replied, "Well, they have a very close, personal relationship that they have had for 13 years and we hear that real[ly] frequently." Tr.36. She stated that the two of them are oftentimes closeted together, in one or the other's office, with the door closed. She testified they spend 4 to 5 hours a day together; "you can't look at one without looking at the other." Tr.71.

⁷Grievant's notes of the meeting are much more detailed on what Ms. Robinson said than Grievant's testimony. The notes include,

Cindy then yelled this was all directed at her because we were jealous and she had a right to have personal problems and be upset without the rest of us running upstairs to whine about the time she and Pete [Mr. Grinstead] spent together and that she had talked to him about her personal problems but she didn't have to talk to the rest of us and she didn't have to kiss our asses and she didn't have to like us and we didn't have to like her which she knew we didn't anyway and never had, that we were jealous of the relationship she and Pete had and they had 13 years together and were friends and confided in each other and if we didn't like it and wanted to do something about it she would give us her husband's work number at Goldfarb's so we could call him, that he knew what was being said and knew it wasn't true.... She said she didn't know what changes had been made or what we were talking about but she didn't have to tell anybody what she was doing in her job.

Ms. Robinson was not called as a witness.

In her brief Grievant states that two days after the meeting Mr. Grinstead put out four memos.⁸ In fact, the evidence did not establish when the memos were issued and the subjects of only two were addressed in testimony, that Mr. Grinstead had required them to fill out self-appraisal forms and also told them that on pain of being reprimanded they were prohibited from doing any work that was not part of their job-duties. She explained that, for example, the practice had been to answer a question raised in a telephone conversation if the employee could even though the subject of the inquiry was not within her area of assignment. Grievant testified that she thought some of the questions on the self-appraisal questionnaire were personal and that she knew the answers would be discussed with Ms. Robinson.⁹ She

⁸The evidentiary record also indicates that Grievant thought Mr. Grinstead's being angry at the staff meeting was also retaliatory. Suffice it to say that the record as a whole, including Grievant's notes, indicates that he was primarily angry because the employees had gone to Mr. Kozak without first telling him what was wrong. If that is so, the undersigned finds Mr. Grinstead's anger not necessarily unreasonable.

⁹The questions asked by the appraisal were the following:

- (1) What do you feel are the most critical problems or concerns regarding the Coal Workers' Pneumoconiosis Fund?
- (2) What work procedures or work flow can be changed to make the Fund operate more efficiently?
- (3) a. Identify and discuss any problems concerning the Fund.
b. What can be done to resolve these problems?
- (4) What are your personal goals and what do you need in order to accomplish them?

(Footnote Continued)

resented the other memo because she thought it would not be applied to Ms. Robinson, who, she said, sometimes took over others' work. She related that, while she understood herself to be the only individual other than Mr. Grinstead to handle medical bills, she knew Ms. Robinson to do it.

Regarding the change in work-hours, which occurred in October 1990, she stated that all staffers other than Ms. Robinson had previously begun work at 8 a.m. or 8:30 a.m., and that Mr. Grinstead and Ms. Robinson had begun at 9 a.m.¹⁰ When Mr. Grinstead required all employees to work the same shift, he mandated that the workday begin at 9 a.m. although that required changing the work-times of most employees, creating commuter problems for her and Ms. Ollis. She also indicated that the time-change was improper because statute requires the Commissioner's office to open at 8:30.

Grievant in her testimony was not complaining of the lack of staff meetings; she was complaining that, while Mr. Grinstead makes the appearance of receptiveness, he is not in fact open to any input from the staffers other than Ms. Robinson. She related that prior to the change in office hours she told Mr. Grinstead of the transportation problems

(Footnote Continued)

- (5) What accomplishment have you made in your work during the last twelve months?
- (6) What can I do as Director to make things better for the Fund?
- (7) Do you have any ideas or suggestions?

¹⁰Grievant also noted that Ms. Robinson was oftentimes late even then. Mr. Grinstead testified he had spoken to Ms. Robinson about her tardiness.

she would have and he suggested they have a meeting on it. However, surmising that he was not really receptive to alternative suggestions, she asked him if his mind was already made up, and he said it was. She testified that she then told him that there was no purpose in having a meeting. Her summary testimony was that the staff meetings are a "waste of time" and that "[our] requests and our problems are unnoticed or unanswered [but] the same doesn't apply for Ms. Robinson."

The evidence does not establish retaliation.¹¹ The self-appraisal forms, which Mr. Grinstead testified were like those required of him and other directors, do not ask inappropriate questions and, if properly used by a supervisor, are unobjectionable.¹² Similarly, issuing the memo requiring that no employee work in another's area of assignment cannot be considered retaliatory.¹³ Finally, the

¹¹The record does establish that Mr. Grinstead was egregiously hostile to Grievant by the time of the hearing. Grievant testified that during the hearing while off the record Mr. Grinstead had told her "that I was down to my last ripple and I asked him what he meant and he said that I had tried to downgrade him and I said no I haven't and he said I better have my ducks in line because he was going to sue my ass." Tr. 75. Grievant's testimony is accepted as true.

¹²Grievant's concern that the other staffers' answers would be shared with Ms. Robinson relates to favoritism, not retaliation. However, because there was no evidence that the answers were in fact shown or discussed with Ms. Robinson, that concern was not substantiated.

¹³Again, Grievant's concern was more that the requirement would not be applied to Ms. Robinson; again,
(Footnote Continued)

change in work-hours also cannot be found to be retaliatory action. Mr. Kozak testified that he had told all directors to make consistent the work-hours of their staff. Mr. Grinstead's making such modification so the office-hours would conform with his own habitual hours, while not necessarily wise, does not support a charge of retaliation.¹⁴

Favoritism is defined as "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). A prima facie showing of favoritism is made by a grievant's establishing

(a) that he or she is similarly situated, in a pertinent way, to one or more other employee(s); (b) that the other employee(s) has/have been given advantage or treated with preference in a significant manner not similarly afforded him; and (c) that the difference in treatment has created a substantial inequity for him and that there is no known or apparent justification for this difference.

(Footnote Continued)

there was no evidence that after the memo Ms. Robinson improperly took over any duty of another staffer.

¹⁴Grievant's apparent argument that opening the office at 9 a.m. would be illegal has no merit. While she is correct that the statute at W.Va. Code §23-1-4 requires that "[t]he offices of the commissioner shall be open for the transaction of business between the hours of eight-thirty o'clock a.m., and five o'clock p.m., of each and every day excepting Saturdays, Sundays and legal holidays," it is not necessarily true that those requirements apply to the OP Fund and, even if that provision applies to the OP Fund, Grievant fails to recognize that if her office opened at 8:30, as she contends it should have, it would also close at 4:30, a half-hour before the time required by the statute.

Britner v. W.Va. Dept. of Health, Docket No. 91-DHS-059 (June 13, 1991); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990).

Grievant's testimony that Mr. Grinstead and Ms. Robinson spend much of the day together and that he accepts input from her, while not from others, was uncontradicted. Mr. Grinstead did not even state he treats the staffers equally or indicate that the time he spends with Mr. Robinson during the workday is justified; rather, asked what is his relationship with Ms. Robinson, he said, "We are very close. We are good personal friends." Tr. 58. His testimony also supported the lack of morale among the staff that Grievant had testified to, for he stated that at staff meetings, when he asks for suggestions, "no one ever has any." Tr. 64. He also stated that if another staffer came to his office and Ms. Robinson was there, he would tell the staffer to come back later "[u]nless it was an emergency[,]" Tr. 66, thereby indicating he would not consider which employee's need to see him is greater in a non-emergency situation.

The record does support a prima facie showing of favoritism. There is no doubt the first element thereof has been established. Moreover, that Mr. Grinstead spends much time with Ms. Robinson, affording her greater access and showing greater receptivity to her input than the other staffers, fulfills the last two prongs. Furthermore, in that the prima facie showing was not rebutted by the Comp Fund articulating a legitimate reason for the unequal

treatment, see Britner, Prince, it is determined that favoritism has been established.

In addition to the findings of fact and conclusions of law contained in the foregoing discussion, the following are appropriate:

Conclusions of Law

1. Grievant did not establish discrimination or harassment, as defined at W.Va. Code §29-6A-2(d) and (l), respectively. Moreover, Grievant did not establish retaliation. Compare Graley v. W.Va. Parkways Eco. Devel. and Tourism Author., Docket No. 91-PEDTA-225 (Dec. 23, 1991).

2. Grievant did establish favoritism, as defined by W.Va. Code §29-6A-2(h); i.e., she established that Mr. Grinstead treats Ms. Robinson preferentially to the other employees he supervises.

The grievance is accordingly **GRANTED in part.**

Accordingly, Respondent West Virginia Workers' Compensation Fund is hereby **ORDERED** to immediately CEASE AND DESIST from the practice here described of favoring Ms. Robinson over Grievant (and the other staffers).

Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be

filed within thirty (30) days of receipt of this decision. W.Va. Code §29-6A-7. 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.



SUNYA ANDERSON
ADMINISTRATIVE LAW JUDGE

March 30, 1992