JESSE C. ERBY,

Grievant,

v. **DOCKET NO. 04-ADMN-385**

DEPARTMENT OF ADMINISTRATION/

GENERAL SERVICE DIVISION,

Respondent.

DECISION

Grievant filed this grievance against Respondent on September 27, 2004, stating: “On Sept. 16 I was assigned to night shift via a letter. When I asked why, I was simply told they needed someone at that time. I feel it is a retaliation for a sexual harassment complaint filed involving me and a former worker in the snack bar. I am to report to night shift on Oct. 4. I explained that I am a caretaker of two children and also a sick, elderly parent needing my help in the evening. Also upon being hired I told Dave Pentz & Bill Pauley that I wanted straight day-shift and they told me that not a problem, the reason is because I have two boy[s] that I'm the caretaker for I have to be there in the eve.” Grievant seeks to be returned to day shift.

Having been denied at all lower levels, a level four hearing was held in the Grievance Board's Charleston January 3, 2005. Grievant was unrepresented, and Respondent was represented by Heather Connolly, Deputy Secretary and Assistant General Counsel. This matter became mature for decision at the close of the hearing, theparties having declined the opportunity to file proposed findings of fact and conclusions of law.

Based on a preponderance of the credible evidence contained in the record and adduced at the hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant is employed by Respondent on its custodial staff at the Capitol complex. Prior to September 16, 2004, he worked day shift, but on that date he was transferred to night shift, working from 3:00 p.m. to 11:00 p.m. He suffered no change in pay or title.

2. In the summer of 2004, a sexual harassment complaint was filed against Grievant by two females. On August 31, 2004, Acting Cabinet Secretary John Poffenbarger wrote Grievant to inform him that an investigation had been unable to substantiate the claims, but he was given a warning against making “inappropriate comments or inappropriate physical contact.” A temporary restriction against Grievant being in the East Wing snack bar was lifted.

3. James Bumpus is head of the custodial staff, and is responsible for supervising its approximately 20 employees, including Grievant. His employees are split between two shifts, day and night.

4. Mr. Bumpus had been receiving complaints about the night shift not getting its job done properly, and had several complaints about one worker in particular. To help resolve the problem, he opted to move that worker to day shift so she could be more closely supervised, and to replace her with a good and reliable day-shift worker. He chose Grievant because he was “not the best worker and not the worst.” 5. Mr. Bumpus did not consult Grievant or any other employees, but considered only work-related issues in making his choice. At the time, he did not know about Grievant's family situation. In the past, he has asked for volunteers for staffing changes, but he usually does not.

6. Grievant is the father and the only responsible parent of two school-age children (12 and 14 years old) and is the primary caretaker of his mother. He also has a stepdaughter who is seven. His children participate in extracurricular activities and need active parenting. After being assigned to night shift, Grievant only sees his children for about 20 minutes in the mornings as they get ready for school.

7. Mr. Bumpus has other supervisees on day shift who do not have the same family issues as Grievant.

DISCUSSION

Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned

Administrative Law Judge to decide that his claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996). Although Grievant characterized Mr. Bumpus' actions as retaliation, it is clear he meant that he feels his being assigned to night shift was punishment for having a sexual harassment complaint filed against him. He alleges no violation of a specific law or policy, but contends he could not be punished for a complaint that was ultimately unsubstantiated. Respondent's position is that the shift change was not punishment, but was a legal and proper management decision designed to improve the work of the agency.

"A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute asubstantial detriment to, or interference with, the employee's effective job performance or health and safety." *Viski v. Preston County Bd. of Educ.,* Docket No. 99-39-271 (Nov. 30, 1999)

"The Division of Personnel's Administrative Rule states in Section 11.6(a) that 'appointing authorities may transfer a permanent employee from a position in one organizational subdivision of an agency to a position in another organizational subdivision of the same or another agency at any time.' The West Virginia Supreme Court of Appeals has recognized that state agencies have the right to transfer employees where there is a need, if they remain in the same classification and pay grade, and are not demoted or reduced in pay." *Jordan v. Dep't of Transp./Div. of Highways,* Docket No. 03-DOH-057 (Sep. 15, 2003).

Technically speaking, nothing negative happened to Grievant, so even if Respondent had not had a good, job-based reason for the shift switch, it would not be considered a punishment. Practically, though, the change was very negative _ it is easy to see why Grievant finds it hard to accept the reasoning behind the change, given its enormous personal impact and the fact the change was made without consideration for his situation. In addition, the timing, coming so soon after Grievant was cleared of impropriety, gives a definite appearance he is being punished for something he was cleared of. But there is no distinction in the law between night and day shifts, and the undersigned cannot conclude, therefore, that being on night shift is "punishment." Respondent violated no law or rule, and was perfectly within its rights as an employer to take the action it did.

Legal arguments aside, I join the Grievant in being befuddled as to why, with at least eight other employees on day shift, his supervisor would not at least inquire if anyone would mind working the night shift. Unfortunately, this thoughtless oversight is not a legalbasis to overturn the decision, as

there is no legal requirement that a manager be compassionate. One would think that, with the demonstrably low morale of the night shift employees, a manager would consider giving some thought to the human side of his employees rather than just relying on his authority. Just because a decision may be made does not mean it should be made, and just because you are legally right does not mean you should not reconsider your decision.

However right Grievant may be from a conscientious perspective, he has presented no legal authority to support his allegations, so he has not met his burden of proof. One would hope that, despite the necessity of denying this grievance, Grievant's supervisors could find a way to work out the problem.

The following conclusions of law support this result.

CONCLUSIONS OF LAW

1. Since this grievance is not about discipline, Grievant must prove all of his claims by a preponderance of the evidence, which means he must provide enough evidence for the undersigned Administrative Law Judge to decide that his claim is more likely valid than not. *See Unrue v. W. Va. Div. of Highways*, Docket No. 95-DOH-287 (Jan. 22, 1996); *Leichliter v. W. Va. Dep't of Health and Human Resources*, Docket No. 92-HHR- 486 (May 17, 1993). If the evidence supports both sides equally, then Grievant has not met his burden. *Id.*

2. "'A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health and safety.' *Rice v. Div. of Highways*, Docket No. 96-DOH-247 (Aug. 29, 1997)." *Viski v. Preston County Bd. of Educ.,* Docket No. 99-39-271 (Nov. 30, 1999). 3. "The Division of Personnel's Administrative Rule states in Section 11.6(a) that 'appointing authorities may transfer a permanent employee from a position in one organizational subdivision of an agency to a position in another organizational subdivision of the same or another agency at any time.' The West Virginia Supreme Court of Appeals has recognized that state agencies have the right to transfer employees where there is a need, if they remain in the same classification and pay grade, and are not demoted or reduced in pay. *Childers v. Civil Serv. Comm'n*, 155 W. Va. 69, 75, 181 S.E.2d 22 (1971)." *Jordan v. Dep't of Transp./Div. of Highways,* Docket No. 03-DOH-057 (Sep. 15, 2003).

4. Grievant has failed to meet his burden of proving his transfer to night shift was a violation of law or policy, or in any other way legally impermissible.

For the foregoing reasons, this grievance is hereby **DENIED**.

Any party or the West Virginia Division of Personnel may appeal this decision to the Circuit Court of Kanawha County, and 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: January 25, 2005 _____

M. Paul Marteney

Administrative Law Judge