EVAN WILLIAMS,

Grievant,

v. Docket No. 04-ADMN-398

DEPARTMENT OF ADMINISTRATION/

PURCHASING DIVISION,

Respondent.

D E C I S I O N

___Evan Williams ("Grievant"), employed by the Department of Administration ("DOA") as a Buyer Supervisor in the Purchasing Division, filed a level one grievance on June 1, 2004, in which he alleged that he had been selected for transfer based upon his age. Grievant requests reinstatement to his previous job location and duties, and that DOA cease and desist from further discrimination and attempts to discredit his position. Karen Byrd, Director of Acquisition and Contract Administration, denied the grievance at level one. The record does not include a level two decision; however, the grievance was again denied following an evidentiary hearing conducted at level three. Appeal to level four was made on November 9, 2004. Grievant, represented by Fred Tucker of the United Mine Workers Association, and DOA, represented by Heather A. Connolly, Assistant Attorney General, agreed to submit the grievance for decision based upon the lower-level record. The grievance was transferred to the undersigned on March 8, 2005, and became mature for decision upon receipt of Grievant's proposed findings of fact and conclusions of law on March 17, 2005. DOA elected not to file post-hearing proposals.

The following facts have been derived from a preponderance of the evidence admitted into the level two record.

Findings of Fact

1. Grievant has been employed by the DOA as a Senior Buyer/Supervisor in the Purchasing Division for more than twenty-one years.

2. Prior to June 22, 2004, Grievant's work location was at 2019 Washington Street, East, in Charleston, West Virginia.

3. By letter dated May 20, 2004, Grievant was notified that his work location would be temporarily changed to manage a pilot program at the offices of the Division of Information Services and Communications ("IS&C"), located in downtown Charleston at One Davis Square.

4. The change in Grievant's assignment was part of an effort by Acting DOA Secretary Tom Susman to correct and improve the purchasing function of the Information Systems & Communications ("IS&C") division. In addition to Grievant, an Administrative Services Assistant from the Purchasing Division, and a Certified Public Accountant from the Finance Division were also assigned to IS&C to improve financial operations.

5. Grievant has experienced some changes in the way he functions due to a change by the Purchasing Division from a commodity-based to an agency-based manner of conducting business. Additionally, he no longer supervises other Buyers.

6. Grievant remains an employee of the Purchasing Division. He retains the same classification, and was awarded a five percent merit increase since his reassignment. In addition to clerical support, he is assigned a private office, and provided free parking.

7. Grievant was selected for this pilot programs based upon his experience and ability to perform the functions necessary to the successful implementation of the program, with minimal supervision.

8. Grievant was sixty-five years of age at the time the grievance was filed.

Discussion

Grievant complains that the transfer of his work site was unjust, that employees with less seniority were allowed to remain at the Washington Street location performing duties he is capable of performing, and that the action is discriminatory due to his age. DOA argues that the change in assignment was based upon a need which Grievant was capable of filling, and denies that his age was a factor in the reassignment.

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

Initially, administrative notice is taken of DOP Administrative Rule Section 11.06, which provides in pertinent part that, "appointing authorities may transfer a permanent employee from a position in one organizational subdivision of an agency to a position in another organizational sub-division of the same or another agency at any time." Of course, this discretion cannot be exercised in a discriminatory manner.

W. Va. Code § 29-6A-2(d) defines "discrimination" as "any differences in the treatment of employees unless such differences are related to the actual jobresponsibilities of the employees or agreed to in writing by the employees." This definition encompasses all types of discrimination, including discrimination based upon age. It is not necessary to analyze Grievant's claim under the West Virginia Human Rights Act, as such claims are subsumed by Code § 29-6A-2(d). Clark v. Kanawha County Bd. of Educ., Docket No. 99-20-088 (Aug. 19, 1999). See Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R- 215 (Sept. 24, 1996); and Aglinsky v. Bd. of Trustees, Docket No. 95-BOT-387 (Jan. 31, 1995). In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:
(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.

The Board of Education of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004); Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004) Docket Nos. 94-DOH-376 & 377 (Feb. 23, 1995). While Grievant was the only Buyer affected, and he did not agree to the change in writing, the difference in treatment was job related, the result of his revised

assignment. The fact that Grievant was the oldest ASA in the Purchasing Division, does not establish discrimination. Grievant's relocation is clearly contrary to his wishes, but there is noevidence to support a finding that the decision was based upon his age, or was otherwise negative in nature.

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 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.

2. W. Va. Code § 29-6A-2(d) defines "discrimination" as "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." This definition encompasses all types of discrimination, including discrimination based upon age. It is not necessary to analyze Grievant's claim under the West Virginia Human Rights Act, as such claims are subsumed by Code § 29-6A-2(d). Clark v. Kanawha County Bd. of Educ., Docket No. 99-20-088 (Aug. 19, 1999). See Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995).

3. In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

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

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The Board of Education of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004); Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004). 4. Grievant has failed to prove that his reassignment was the result of discrimination, or that he otherwise incurred

any harm as a result of the change.

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. Theappealing 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 4, 2005

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE