MARGARET LAMB,

Grievant,

v.

DOCKET NO. 05-HE-397

CONCORD UNIVERSITY,

Respondent,

and

SHERRY BROGAN,

Intervenor.

D E C I S I O N

Grievant, Margaret Lamb, filed the following Statement of Grievance on July 29, 2005, with Concord University stating:

> Respondent Concord University, failed to follow proper procedures when it filled a financial aid position that it did not post.
>
> Relief Sought: Post the financial aid position so that all interested parties have an opportunity to apply and be considered for the position.

This grievance was denied at all lower levels, and Grievant appealed to Level IV on October 26, 2005. A Level IV hearing was held in the Grievance Board's Charleston, West Virginia office on January 3, 2006. This matter became mature for decision on February 7, 2006, upon receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed by Concord University in its Financial Aid Office as a Program Assistant 1 in Pay Grade 12. Grievant has been employed by Concord University for twenty-one years and has served in her current position for more than ten years.

2. Sometime in June or July of 2005, Intervenor was transferred from her position in the Development Office to a position in Financial Aid Office. (See footnote 2)

3. Administrative transfers are used within the Higher Education system to resolve difficulties that occur with long-term employees in their work settings. Administrative transfers are to be used only in extraordinary situations. Over a fifteen-year period, Concord University has executed only three administrative transfers. These administrative transfers were done for long-term employees with medical problems, who submitted a doctor's recommendation for transfer to another work area. Test. D. Curry, Level IV Hearing.

4. With past administrative transfers, Concord University consulted Margaret Buttrick, Human Resources Administrator for the Higher Education Policy Commission. She was not directly consulted on Intervenor's transfer.

5. As a general rule, all vacancies are to be filled by posting. However, with Reduction-in-force and reorganizations, employees may be transferred to a position with the same title and pay grade, taking their position with them. Test. Ms. Buttrick, Level IV Hearing. 6. Typically, newly created positions are vacancies and require posting. Test. Ms. Buttrick, Level IV Hearing.

7. An administrative transfer can occur as an accommodation to meet the requirements of the Americans with Disabilities Act ("ADA"). Test. Ms. Buttrick, Level IV Hearing. W. Va. Code § 18B-7-1.

8. There is no Higher Education Policy Commission policy on administrative transfers.

9. Intervenor is a long-term employee with Concord University classified as an Administrative Assistant. She had served in the Development Office for approximately eighteen years. During this time, her work was satisfactory. Approximately one year before Intervenor's administrative transfer, her former supervisor retired. Intervenor's new supervisor had different expectations and did not find Intervenor's work satisfactory. Intervenor felt a great deal of stress.

10. Intervenor informed President Beasley she was under a great deal of stress, unhappy, and her difficult work situation was making her family suffer. She told President Beasley she was seeking medical treatment. (At the time of the administrative transfer, Respondent had received no medical

information from Intervenor. (See footnote 3)) Intervenor requested a transfer. Intervenor's supervisor also complained to President Beasley and reported Intervenor's work as unsatisfactory. Test. Beasley & Intervenor, Level IV Hearing. 11. There had been a vacant position in the Financial Aid Department for several years for a Program Assistant 1. There were no plans to fill this lower-level position, but there was a need for a position that could assume greater administrative duties. This Program Assistant 1 position was reworked and changed to become an Administrative Assistant position, Pay Grade 15. Intervenor was then placed in this newly-created position. Her former position in the Development office remains there, but is not yet filled.

Issues and Arguments

Grievant asserts the vacancy in the Financial Aid Office should have been posted. Respondent maintains the position was filled by an administrative transfer, and this transfer was within President Jerry Beasley's authority to accomplish. Respondent also asserts this administrative transfer was a "reasonable accommodation" for Intervenor's hostile work environment and in keeping with an ADA accommodation. Respondent argues this administrative transfer kept Intervenor from having to file a grievance. In the alternative, Respondent requests that if the administrative transfer is not approved, that Concord University not be required to post the Administrative Assistant position, but only to remove Intervenor from the position.

Discussion

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

The resolution of this grievance involves the intermeshing of several rules and policies. As previously stated, a transfer is defined as "movement from one position or job title to another position

or job title requiring the same degree of skill, effort and authority. Both positions are in the same pay grade." 133 C.S.R. 8 § 2.13. This is what happened here. While vacancies are typically posted, Ms. Buttrick agreed the need for an ADA accommodation could change this requirement.

Respondent notes 131 C.S.R. 59 § 3.4.5 charges President Beasley with "[m]aintaining lawful, equitable and efficient personnel programs, including appointment of qualified persons to the faculty and staff and promotion, retention or dismissal for cause of the same, with due regard for the best interests of higher education and the taxpayers of the State of West Virginia." Respondent also notes 131 C.S.R. 59 § 3.5 states with regard to § 3.4.5 that, "the president of each college in the State College System has final institutional-level authority and responsibility for every personnel action at the institution, . . . ," and 131 C.S.R. 59 § 3.6 states "[e]ach president is expected to consult appropriately within the campus community on personnel decisions, but shall retain ultimate authority for such decisions." (See footnote 4) Respondent asserts these Rules allow President Beasley to make an administrative transfer given this set of facts. 131 C.S.R. 59 § 8.1 dealing with postings states, "[e]ach institution shall develop a policy for posting of classified positions both internally and externally in order to provide employees adequate time to make application for positions. Institutions shall develop such policy within 90-days of the effective date of this rule." No Concord University policy was placed into evidence. The only document received into evidence was the "Hiring Procedures Classified Staff," which is a guide to follow in "filling all full time . . . classified positions." Under the posting section it says"by state law ALL non-exempt positions must be posted and filled by internal candidates who meet the minimum qualifications for a position." (Emphasis in the original). Jt. Exh. No. 4, Level III hearing. The undersigned Administrative Law Judge takes judicial notice that within Higher Education positions are to be posted and filled with qualified internal candidates before external candidates can be considered.

After a review of the authority and responsibilities given President Beasley by 131 C.S.R. 59 §§ 3.4.5, 3.5 & 3.6, the undersigned Administrative Law Judge finds, that with this specific set of facts, President Beasley acted in an equitable manner to assist a long- term employee who had been an asset to Concord University for many years. While it is understandable that Grievant would want the position posted and an opportunity to apply, she was not harmed by this administrative transfer. (See footnote 5)

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

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

2. "It is well settled that '[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs.' Syl. Pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). See Parsons v. W. Va. Dep't of Transp., Docket No. 97-DOH-289 (Oct. 30, 1997); Graham v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 94-PEDTA-448 (Mar. 31, 1995); Bailey v. W. Va. Dep't of Transp., Docket No. 94-DOH-389 (Dec. 20, 1994).

3. Within this set of facts, Grievant did not demonstrate this administrative transfer was an abuse of President Beasley's authority.

Accordingly, this grievance is **DENIED**.

Any party 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 itsAdministrative 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.

JANIS I. REYNOLDS

SENIOR ADMINISTRATIVE LAW JUDGE

Date: April 28, 2006

Footnote: 1

Grievant was represented by Chris Barr from AFT-West Virginia, Respondent was represented by Jendonnae Houdyschell, Senior Assistant Attorney General, and Intervenor was represented by Amy Pitzer.

Footnote: 2

A transfer is defined as "movement from one position or job title to another position or job title requiring the same degree of skill, effort and authority. Both positions are in the same pay grade." 133 C.S.R. 8 § 2.13.

Footnote: 3

Respondent submitted a letter dated December 21, 2005, which stated Intervenor's stress level had greatly decreased after the transfer. This document was given little weight as Respondent did not have this information at the time of the transfer, and the letter was clearly written for the Level IV hearing held January 3, 2006.

Footnote: 4

While the citation of these C.S.R. sections varies between Respondent and the undersigned Administrative Law Judge, the content is the same.

Footnote: 5

It should be noted that while there was evidence to support Intervenor's medical problems and stress, there was no evidence to support that Intervenor was subjected to a hostile work environment. The evidence only revealed a situation existed where the supervisor was displeased with Intervenor's work performance, and Intervenor was unable to function successfully within the work setting.