TOM JEWELL,

Grievant,

v. Docket No. 93-HHR-281

WEST VIRGINIA DEPARTMENT OF HEALTH
AND HUMAN RESOURCES at
COLIN ANDERSON CENTER,

Employer.

D E C I S I O N

This complaint was filed by Tom Jewell (hereinafter Grievant) against his employer, the West Virginia Department of Health and Human Resources (hereinafter HHR), on January 26, 1993. Grievant is a Health Service Worker assigned to the Colin Anderson Center (hereinafter Center). The facts in this case are not in dispute, and the issue involves only a question of law. The following findings of fact are deduced from the record.

Findings of Fact

1. On December 18, 1992, Grievant was suspended from his employment, without pay, for a period of three days, pending the outcome of a formal investigation into an allegation of patientabuse made by a co-worker. The investigation was conducted by an advocate for the West Virginia Legal Aid Society.

2. Prior to Grievant's suspension, he was assigned to work within the Mobile Grounds Crew of the Vocational Education Department at the Center.

3. Grievant's letter of suspension stated that because he was suspended relating to an allegation of patient abuse, upon his return to duty he would be assigned to the Can Redemption Program in the Vocational Education Department at the Center.

4. Grievant filed this complaint challenging his suspension and his grievance was granted, in

part, at level three. It was determined that the charges supporting Grievant's suspension were not proven by a preponderance of the evidence; however, it was determined that his transfer was not violative of any policy, regulation or law.

5. Grievant appealed to level four challenging his transfer.

Discussion

Grievant simply contends that the reason for his transfer dissipated once it was determined at level three that he had not committed any act of patient abuse. He requests that his transfer by rescinded because the charges which formed the basis for his suspension and transfer were not proven by a preponderance of the evidence. HHR contends that Grievant's transfer was not and is not currently violative of any policy, rule or regulation.

The Division of Personnel's Administrative Regulations, Series I (1991), Section 12.05(a), states, in pertinent part,

> Except as otherwise provided in Section 11.05, a transfer of an employee from a position in one sub-division of an agency to a comparable class in another organizational sub-division of the same or another agency may be made at any time by the appointing authorities concerned. . . ..

It is well-settled that a classified public employee does not have the same protected property interest in his/her job assignments as he/she has in continued employment. See, Baker v. Civil Service Commission, 245 S.E.2d 908 (W.Va. 1978); Johnson v. W.Va. Dept. of HHR, Docket No. 93-HHR-239 (Oct. 7, 1993). Grievant is not alleging that his transfer should be rescinded because he is not performing similar duties, he is simply contending that the motives behind the transfer are unfair.

Grievant's employer could legally have transferred Grievant to the Can Redemption Program pursuant to Personnel's regulation prior to him being accused of patient abuse, so long as that action was not taken for an impermissible reason, such as retaliation, discrimination, etc. In the realm of labor and employment relations, this type of discretionary authority is common. In Grievant's case, his transfer was actually reaffirmed by the employer after it had received and reviewed the grievance decision at level three; the employer made a decision to uphold Grievant's transfer even though it had not been proven by a preponderance of the evidence that he had committed the alleged abuse. This conscious decision to leave Grievant in the Can Redemption Program was a valid exercise of the

employer's discretionary authority and can be viewed as a separate administrative decision from the initial one to transfer Grievant.

Ms. Gloria Cox, Vocational Director in-charge of the Center's day programming, was the only witness called to testify at level four. Ms. Cox explained the various reasons why Grievant's transfer was reaffirmed. In summary, she stated that Grievant's transfer affected other employees' assignments because certain employees could only work certain schedules. Grievant's transfer had a domino effect on the assignments at the Center; therefore, simply reassigning Grievant to his previous position would be difficult to achieve with the current staff and would cause a certain amount a resentment among the workers. Ms. Cox concluded by stating that some of the employees who were also transferred as a direct result of Grievant's transfer had wanted such a transfer prior to February 3, 1993. She opined that both programs were operating more effectively and efficiently since the situation occurred.

While it may appear to be unfair, Grievant has not established any legal requirement that he be returned to his former work station as a result of the findings and conclusions in the level three decision. The employer's reasons for the transfer, both at the time of the initial transfer and after the level three decision was rendered, do not appear to be unreasonable, arbitrary or capricious. It must also be stressed, however, that it has not been proven that Grievant committed any improper acts of abuse. Therefore, the employee would appear to have an ethical or moral obligation to alleviate any negative effects that the initialtransfer has had and still may suffer as a result of said transfer. Grievant is obviously a very proud and conscientious worker.

The foregoing discussion of the facts of the case and of the applicable law to those facts is hereby supplemented by the following appropriate conclusion of law.

Conclusion of Law

Grievant has failed to provide the undersigned with any legal authority to support the conclusion that his transfer of February 3, 1993, must be rescinded as a direct result of the findings and conclusions of the level three grievance evaluator which held that the employer had not proven that Grievant was guilty of abuse. In this case, the employer's transfer of Grievant was not shown to be an abuse of its discretionary decision-making authority.

Therefore, this grievance is hereby **DENIED**.

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.

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ALBERT C. DUNN, JR.

Administrative Law Judge

January 21, 1994