

**IDA THOMPSON,**

**Grievant,**

**v.**

**Docket No. 96-BOT-097**

**BOARD OF TRUSTEES,**

**MARSHALL UNIVERSITY,**

**Respondent.**

### **DECISION**

Ida Thompson (Grievant) initiated this grievance pursuant to W. Va. Code §§ 18-29- 1, et seq., on December 13, 1995, alleging that Respondent Marshall University (Marshall) improperly denied her request to transfer to a lateral position. After her grievance was denied at Level I on December 20, 1995, Grievant appealed to Level II where a hearing was conducted on February 22, 1996. Thereafter, the grievance was again denied by Marshall University President J. Wade Gilley on February 28, 1996. [\(See footnote 1\)](#) As authorized by W. Va. Code § 18-29-4(c), Grievant waived Level III, appealing to Level IV on March 5, 1996. Following a continuance which was granted for good cause shown, an evidentiary hearing was held in this Board's office in Charleston, West Virginia, on July 2, 1996. [\(See footnote 2\)](#) This matter became mature for decision upon receipt of the parties' written post-hearing submissions on August 8, 1996.

### **DISCUSSION**

On August 16, 1995, Marshall advertised to fill six Building Service Worker Positions in Residence Services. See G. Ex C. [\(See footnote 3\)](#) Shortly after these positions were advertised, Grievant, a Building Service Worker assigned to Residence Services, approached her immediate supervisor, Barbara Atkins, and verbally requested reassignment from the Twin Towers to Holderby Hall

(Holderby), where she would be working a Monday through Friday work schedule. Grievant was subsequently informed by Ms. Atkins, that Winston Baker, Director of Residence Services, had determined Grievant would not be considered for transfer due to her poor work performance. After filing this grievance, she learned that a new employee had been hired for the Holderby position she requested.

Grievant contends that she should have received the Holderby position in accordance with W. Va. Code § 18B-7-1(d) which provides as follows:

A nonexempt classified employee . . . who meets the minimum qualifications for a job opening at the institution where the employee is currently employed, whether the job be a lateral transfer or a promotion, and applies for same shall be transferred or promoted before a new person is hired unless such hiring is affected by mandates in affirmative action plans or the requirements of Public Law 101-336, the Americans with Disabilities Act. If more than one qualified, nonexempt classified employee applies, the best-qualified nonexempt classified employee shall be awarded the position. In instances where such classified employees are equally qualified, the nonexempt classified employee with the greatest amount of continuous seniority at that state institution of higher education shall be awarded the position. A nonexempt classified employee is one to whom the provisions of the Fair Labor Standards Act, as amended, apply. (Emphasis added).

Marshall contends that the foregoing statute does not control this grievance because the employer has discretion to assign Building Service Workers hired by Residence Services to different locations and work schedules at any time. Accordingly, the positions advertised did not specify any location or work schedule.

The clear and unambiguous language in the statute controls the outcome of this grievance. Grievant applied for a lateral transfer to another position in her current classification, Building Service Worker. Thus, Grievant was clearly "minimally qualified" for the position. See Bush v. Bd. of Directors, Docket No. 94-BOD-1137R (Aug. 30, 1996). No other incumbent employee applied for that position, and the decision to hire an external applicant was in no way affected or mandated by an affirmative action plan or the Americans with Disabilities Act. See, e.g., Rumer v. Bd. of Trustees, Docket No. 95-BOT- 064 (May 31, 1995). Marshall denied Grievant the transfer based upon poor work performance, and the employer's authority to determine the work days, shift, and building location of Building Service Workers, in accordance with a memo which Grievant signed in 1989. [\(See footnote 4\)](#) Although documented poor work performance may provide a basis for the employer to transfer an employee from one position to another, this is not a basis to deny an employee a

requested lateral transfer under the explicit terms of the statute. [\(See footnote 5\)](#) See Carter v. Bd. of Directors, Docket No. 95-BOD-148 (Aug. 29, 1995). W. Va. Code § 18B-7- 1(d) was enacted by the West Virginia Legislature in 1993, providing rights to classified nonexempt employees that supersede earlier institutional policies governing transfer rights. See generally Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979). Further, use of the word "shall" in regard to transfers in § 18B-7-1(d) connotes mandatory action by Marshall rather than discretionary action. See Marion County Bd. of Educ. v. Bonfantino, 179 W. Va. 202, 204, 366 S.E.2d 650, 652 (1988); Terry v. Sencindiver, 153 W. Va. 651, 171 S.E.2d 480 (1969).

Grievant also complained that after she was transferred from the Memorial Student Center to Twin Towers, her new supervisor engaged in improper "harassment" by placing written memos in her personnel file concerning various complaints residents and others made about her work performance. "Harassment" is defined by W. Va. Code § 18-29-3(n) as the "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession." Clearly, more than a single deviation from accepted demeanor is required to violate this provision. See Eagle v. Marion County Bd. of Educ., Docket No. 94-24-226 (Nov. 23, 1994); Jackson v. Fayette County Bd. of Educ., Docket No. 94-10-029 (May 18, 1994). The record reflects that Grievant's supervisors were following proper instructions to document complaints regarding Housekeeping Services. While the merits of each complaint might be subject to debate, the evidence of record fails to substantiate that this documentation process constitutes illegal harassment as defined in § 18-29-2(n). See Eagle, supra; Jackson, supra. Indeed, Judy Blankenship, Assistant Supervisor of Building Services, was following a neutral policy of informing employees in regard to complaints received about work performance. [\(See footnote 6\)](#) Both Ms. Blankenship and Ms. Atkins indicated that Grievant's performance improved after certain matters were brought to her attention. Grievant's allegation of "harassment" is not supported by a preponderance of the evidence.

In addition to the foregoing discussion, the following findings of fact and conclusions of law are appropriate in this matter.

### **FINDINGS OF FACT**

1. Grievant has been employed by Respondent Marshall University (Marshall) as a Building Service Worker assigned to Residence Services since 1989. 2. On August 30, 1995, Grievant's work location and duty hours were changed from the evening shift at the Memorial Student Center to the day shift at Twin Towers East, based upon her supervisors' determination that Grievant required more supervision than was available on the evening shift.

3. On August 16, 1995, Marshall advertised for applicants to fill six Building Service Worker positions in Residence Services. The notice of job opportunities did not indicate the location, shift or duty schedule for these positions.

4. Sometime subsequent to August 16, 1995, following guidance from Bill Burdette, Marshall's Interim Director of Human Resources, Grievant verbally applied to her immediate supervisor for a lateral transfer to a vacant Building Service Worker position in Holderby Hall, with a Monday through Friday duty schedule.

5. In late November 1995, Grievant was verbally advised that she was not selected for the Holderby Hall position because of poor work performance.

6. Marshall ultimately hired Elizabeth Call to one of the six Building Service Worker positions, and assigned her to work in Holderby Hall on Monday through Friday. Ms. Call was not previously employed by Marshall University, having been employed by Kelly Services as a temporary worker and assigned to perform custodial work under a contract between Marshall and Kelly Services.

7. In January 1996, Grievant's request to change assignments from floors 7, 8, and 9 in Twin Towers East to floors 10, 11, and 12, in the same building, on the same duty schedule, was granted.

### **CONCLUSIONS OF LAW**

1. In a grievance of this nature, the grievant has the burden of proving each of the allegations in her complaint by a preponderance of the evidence. W. Va. Educ. & State Employees Grievance Bd. Procedural Rule 4.19, 156 C.S.R. 1 (1996); Carter v. Bd. of Directors, Docket No. 95-BOD-148 (Aug. 29, 1995).

2. "A nonexempt classified employee . . . who meets the minimum qualifications for a job opening at the institution where the employee is currently employed, whether the job be a lateral transfer or a promotion, and applies for same shall be transferred or promoted before a new person is hired unless such hiring is affected by mandates in affirmative action plans or the requirements of Public Law 101-336, the Americans with Disabilities Act." W. Va. Code § 18B-7-1(d) (1993).

3. In accordance with W. Va. Code § 18B-7-1(d), Grievant was entitled to a lateral transfer to a Building Service Worker job opening in Holderby Hall working a Monday through Friday schedule, notwithstanding that she had previously been transferred to her current assignment for alleged poor performance. See Carter, supra. See generally Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979).

4. "'Harassment' means repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession." W. Va. Code § 18-29-2(n).

5. Various memoranda and other correspondence placed in Grievant's personnel file between September 14, 1995, and December 6, 1995, do not constitute harassment prohibited under W. Va. Code § 18-29-2(n). See Eagle v. Marion County Bd. of Educ., Docket No. 94-24-226 (Nov. 23, 1994); Jackson v. Fayette County Bd. of Educ., Docket No. 94-10-029 (May 18, 1994).

Accordingly, this Grievance is **GRANTED, IN PART**. Respondent is hereby **ORDERED** to transfer Grievant to a Monday through Friday Building Service Worker position in Holderby Hall. All other requested relief is hereby **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. 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.

**LEWIS G. BREWER**

**ADMINISTRATIVE LAW JUDGE**

**Dated: December 31, 1996**

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[Footnote: 1](#)

*President Gilley granted the relief requested in regard to a second grievance filed on January 11, 1996. That grievance had been consolidated with the instant matter for hearing at Level II, but will not be addressed in this decision as it is clearly moot. See Jervis v. Bd. of Trustees, Docket No. 94-BOT-1117 (Mar. 20, 1995); Coddington v. W. Va. Dept. of Health & Human Resources, Docket Nos. 93-HHR-265/266/267 (May 19, 1994).*

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[Footnote: 2](#)

*Prior to that hearing, this matter was reassigned to the undersigned administrative law judge for administrative reasons.*

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[Footnote: 3](#)

*All references relate to exhibits admitted at Level IV, unless otherwise indicated, e.g., "G Ex 1 at L II."*

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[Footnote: 4](#)

*While Marshall argues that Building Service Worker positions in Residence Services are generic, the record indicates that each employee is assigned to a specific location and duty schedule, and employees have been permitted to transfer to other specific locations and duty schedules, provided that there is a vacancy or "job opening." To the extent that Mr. Baker's policy announcement of November 29, 1994 (R Ex 2), stating "we must reservethe right to make assignments to best meet the existing demand" is relied upon as a basis to deny a lateral transfer to an employee in Grievant's situation, it is in direct conflict with W. Va. Code § 18B-7-1(d). However, this decision should not be read to impinge upon the employer's authority to move employees based upon need, as that issue was not raised by the facts in this grievance.*

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[Footnote: 5](#)

*Inasmuch as "poor work performance" is not one of the reasons an employee can be denied a lateral transfer under W. Va. Code § 18B-7-1(d), it is not necessary to determine if Marshall properly documented Grievant's alleged poor performance. It should also be noted that Grievant's most recent performance evaluation was generally satisfactory, and she was not on a performance improvement plan at the time her request to transfer was denied.*

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[Footnote: 6](#)

*One letter to which Grievant objected was issued to all employees assigned to Housekeeping Staff on October 13, 1995. See G Ex 4 at L II. It is clearly informational and does not reflect negatively on Grievant.*