KAREN ALI,

Grievant,

v. **DOCKET NO. 97-HHR-474**

WEST VIRGINIA DEPARTMENT OF
HEALTH & HUMAN RESOURCES,

Respondent.

DECISION

Grievant, Karen Ali, employed as a Legal Assistant for the Child Support Enforcement Division, challenges the Department of Health & Human Resources' (DHHR) decision to reassign her to the Weirton office. She also seeks mileage and travel time allowance for periods during which she was required to travel to other offices for temporary assignments. This grievance was initiated at level one on July 29, 1997, where Grievant's supervisor was without authority to grant relief. Grievant appealed to level two, and the grievance was denied by Sarah Montello, Regional Manager, on August 13, 1997. A level three hearing was held on October 2, 1997, followed by a written decision by Barbara Wheeler, Grievance Evaluator, denying the grievance, dated October 14, 1997. Grievant appealed to level four on October 24, 1997. After the grievance was held in abeyance pursuant to Grievant's request, a level four hearing was held in the Grievance Board's office in Wheeling, West Virginia, on April 14, 1998, and this matter became mature for decision at that time. (See footnote 1)

The following findings of fact are made from a preponderance of the evidence ofrecord.

Findings of Fact

1. On September 16, 1996, Grievant was hired as a Legal Assistant for DHHR's Child Support Enforcement Division (CSED) in the Wheeling office.

2. Region 1 of the CSED includes several counties, including Ohio, Hancock, Wetzel, Marshall and Tyler.

3. Grievant's assigned headquarters between September 16, 1996, and July 28, 1997,

was the Wheeling CSED office.

4. Prior to her permanent reassignment to the Weirton office on July 28, 1997, Grievant was assigned to other offices in Region 1 for temporary periods of time, as follows:

March 24, 1997_for approximately three weeks, Grievant alternated working three days in Wheeling and two days in Moundsville

April 15, 1997_for approximately two months, Grievant worked in the New Martinsville office

June 23, 1997_for approximately two weeks, Grievant worked at the Moundsville office

July 7, 1997_Grievant worked in the Wheeling office for approximately two weeks

July 21, 1997_for approximately one week, Grievant worked at the New Martinsville office **(See footnote 2)**

5. Grievant began working at the Weirton office on July 28, 1997, pursuant to her reassignment, as reflected on a WV-11 form in her personnel file. 6. For the temporary assignments listed in Finding of Fact #4, Grievant was required to reach the worksite by 8:30 a.m. and work there until 4:30 p.m. She was not given any allowance for extra time needed to travel to and from the office, which was performed on her own personal time.

7. Grievant was reimbursed for mileage for some of the temporary assignments listed in Finding of Fact #4 after she initiated this grievance.

8. Other Legal Assistants in Region 1 who have been placed in other offices for temporary periods have been given mileage reimbursement and travel time, meaning that they did not have to begin travel until 8:30 a.m. and were expected to complete travel by 4:30 p.m. Some Legal Assistants have been given a state car in lieu of mileage reimbursement.

Discussion

In a non-disciplinary grievance, Grievant bears the burden of proving her claim by a preponderance of the evidence. Lilly v. W. Va. Dept. of Tax and Revenue, Docket No. 95-T&R-576 (Apr. 5, 1996); See W. Va. Code § 29-6A-6. Grievant has raised two arguments. First, she alleges that DHHR did not have the authority to permanently reassign her to the Weirton office in July, 1997, and, second, she contends she is entitled to mileage reimbursement and travel time allowance for the periods she was temporarily assigned to other Region 1 offices.

Grievant's first argument is without merit. In similar cases previously presented to this Grievance Board, it has been held that DHHR and other state agencies have the authority to change an employee's headquarters from one office to another. Bever v. Dept. of Health & Human Resources, Docket No. 96-HHR-258 (Dec. 31, 1996); Goodnight v. W. Va. Div. of Human Services, Docket No. 91-DHS-111 (May 31, 1991). In support of its action, DHHR has noted that the Division of Personnel's Administrative Rule, applicable to all classified state employees, provides in Section 11.06 that an agency may "transfer a permanent employee from a position in one organizational sub-division of an agency to a position in another organizational sub-division of the same or another agency at any time." Additionally, Section 3.96 of the same Rule defines "transfer" as "the movement of an employee to a different subdivision or geographic location of the same or a different agency." The undersigned agrees that DHHR's change of Grievant's headquarters was proper and within the agency's discretion.

Grievant has argued that her reassignment violated DHHR's personnel policy regarding "reinstatements and transfers." Level III, Gr. Ex. 2. That policy does contain a very detailed procedure by which employees are to be transferred from one division or area of the agency to another. However, the policy refers throughout to "vacant positions," and it clearly is to be implemented only when an employee is moving from his or her present position into a vacant one. That did not occur here. Grievant maintained her position as Legal Assistant in Region 1 at all times, and only her headquarters was changed in July of 1997. This change did not violate any law, rule or policy.

Grievant's second allegation is grounded in claims of discrimination. "Discrimination" is defined by W. Va. Code § 29-6A-2(d) 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.

A prima facie case of discrimination requires the grievant to prove the following:

(a) that she is similarly situated, in a pertinent way, to one or more otheremployees;

(b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Hindman v. W. Va. Div. of Corr., Docket No. 94-CORR-262 (Feb. 27, 1997); Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996).

Grievant has met her burden of proof on this issue. Several other Legal Assistants from Region 1 testified that, when temporarily assigned to another office, they were given either a state car or mileage reimbursement, and they were allowed to complete any required travel within, not in addition to, their regular working hours. Not only has Grievant established that she, although identically situated, received no such benefits, Sally Montello, Regional Manager, testified that Grievant was entitled to and should have received mileage and time for all temporary assignments prior to July 28, 1997. (See footnote 3)

DHHR has engaged in discrimination as defined by Code § 29-6A-2(d). Since other Legal Assistants in the region have been allowed mileage and time during temporary assignments, Grievant is entitled to the same. See Ferrell v. Div. of Corrections, Docket No. 94-CORR-1062 (Dec. 31, 1997). On each and every occasion between March 24, 1997, and July 28, 1997, when Grievant was required to travel to an office other than her assigned headquarters in Wheeling, she is entitled to travel reimbursement. Suchreimbursements are contemplated by the travel regulations applicable to state employees, promulgated pursuant to Code § 12-3-11. As stated in Ms. Montello's testimony, since Grievant was not given time consideration

during these assignments, she is now entitled to compensatory time for those periods when she traveled on her own personal time. However, Grievant is not entitled to mileage or time consideration between her home and her permanently assigned headquarters. See Pyles v. W. Va. Div. of Human Services, Docket No. 90-DHS-036 (Oct. 11, 1990).

In accordance with the foregoing findings and discussion, the following conclusions of law are made.

Conclusions of Law

1. In a non-disciplinary grievance, Grievant bears the burden of proving her claim by a preponderance of the evidence. Lilly v. W. Va. Dept. of Tax and Revenue, Docket No. 95-T&R-576 (Apr. 5, 1996); See W. Va. Code § 29-6A-6.

2. State agencies have the authority to transfer an employee from one official headquarters to another. Bever v. Dept. of Health & Human Resources, Docket No. 96- HHR-258 (Dec. 31, 1996); Goodnight v. W. Va. Div. of Human Services, Docket No. 91- DHS-111 (May 31, 1991).

3. Grievant did not prove by a preponderance of the evidence that the change of her official headquarters from Wheeling to Weirton violated any law, policy or regulation.

4. A state employee is not entitled to reimbursement for travel between her home and her permanently assigned headquarters. See Pyles v. W. Va. Div. of Human Services, Docket No. 90-DHS-036 (Oct. 11, 1990).

5. "Discrimination" is defined by W. Va. Code § 29-6A-2(d) as "any differencesin 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."

6. A prima facie case of discrimination requires the grievant to prove the following:

(a) that she is similarly situated, in a pertinent way, to one or more other employees;

(b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Hindman v. W. Va. Div. of Corr., Docket No. 94-CORR-262 (Feb. 27, 1997); Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996).

7. Grievant proved by a preponderance of the evidence that DHHR engaged in discrimination when it did not give her mileage reimbursement and time consideration when she was temporarily assigned to other offices.

Accordingly, this grievance is GRANTED, and Respondent is ORDERED to reimburse Grievant for mileage and travel time for all periods between March 24, 1997, and July 28, 1997, when she was required to work in offices other than the Wheeling CSED office, and for which she has not previously been compensated.

Any party 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 StateEmployees 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.

Date: June 30, 1998 _____

V. DENISE MANNING

Administrative Law Judge

Footnote: 1

Grievant was represented by attorney Linda Richmond Artimez, and DHHR was represented by B. Allen Campbell, Assistant Attorney General.

Footnote: 2

Grievant raised allegations regarding reassignments which occurred after July, 1997; however, these incidents occurred after this grievance was filed and are not proper matters for consideration herein.

Footnote: 3

The WV-11 in Grievant's personnel file changing her headquarters was dated July 14, 1997, but she did not actually begin working in Weirton until July 28, 1997, so the latter date will be considered her official "starting" date at the new office.