CLAYTON PATTERSON,

Grievant,

v. **Docket No. 97-HHR-193**

WEST VIRGINIA DEPARTMENT

OF HEALTH AND HUMAN RESOURCES,

Respondent.

DECISION

Clayton Patterson (Grievant), is employed as a Child Protective Service (CPS) Worker with the West Virginia Department of Health and Human Resources/Office of Social Services (DHHR). Grievant filed this grievance pursuant to W. Va. Code §§ 29-6A- 1, et seq., alleging that he was the subject of discrimination when he was reassigned from the Ongoing Unit to the Intake Unit of DHHR's Beckley CPS office. The grievance was denied at Level I by immediate supervisor Michael Horton on November 12, 1996. The grievance was denied at Level II by Administrator Jack L. Tanner on December 5, 1996. A Level III hearing was held on March 21, 1997. Grievant was represented at this hearing by Lynn Belcher of the W. Va. State Employees Union, and DHHR was represented by Margaret Waybright. On April 9, 1997, the grievance was denied at Level III by Grievance Evaluator Barbara J. Wheeler. The parties, agreeing that the facts had been fully developed at Level III, requested that the matter be submitted on the Level III record for decision at Level IV. An Order reflecting this agreement was issued on November 24, 1997. This matter became mature for decision on or about January 9, 1998. (See footnote 1) The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record, including the transcript of the Level III hearing, and documentary evidence admitted at Levels I through III.

FINDINGS OF FACT

1. DHHR hired Grievant in the classified position of Protective Service Worker (PSW) on November 16, 1995.
2. DHHR assigned Grievant to the Ongoing Unit of its Beckley CPS office.
3. The Ongoing Unit provides services to families that have been found to need assistance.

The Intake Unit performs an initial assessment of a child's safety when an allegation of abuse or neglect has been made.

4. The PSW job description does not differentiate between Intake or Ongoing Unit positions. Intake and Ongoing positions are different assignments within the same job classification.

5. Nancy Forsberg (Forsberg) and Michael Horton (Horton) supervise Grievant at CPS. On November 4, 1996, they informed Grievant that he was being reassigned from the Ongoing to the Intake Unit.

6. Forsberg believed that in CPS it is very important that the Intake and the Ongoing Units work together as if they are one.

7. Forsberg and Horton planned to rotate all PSWs between the two units to avoid burnout and provide each employee with experience in both units.

8. Grievant was an exceptionally good and highly talented worker, and a good investigator who showed initiative. Grievant had great writing skills and liked helpingclients receive treatment and therapy. Grievant was good at getting clients to cooperate, thus avoiding the need for court enforcement proceedings.

9. Grievant received substantial job satisfaction from his work in the Ongoing Unit.

10. Horton thought highly of Grievant and, for the reasons stated above, thought he was the best candidate for the Intake Unit. Horton meant the reassignment as “a pat on the back,” thought Grievant would have enjoyed it, and was surprised when Grievant resisted reassignment.

11. Grievant understood that none of the reasons given him for his reassignment were punitive or negative in nature.

DISCUSSION

___In a non-disciplinary grievance, the 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 § 4.19 (1996); 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).

___Grievant contends that CPS' decision to reassign him to the Intake Unit was discriminatory. 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." To establish a prima facie case of discrimination, Grievant must show:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his 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.

Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996). Once the grievant establishes a prima facie case, the burden shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for the employment action. Id. However, a grievant may still prevail if he can demonstrate the reason given by the respondent was mere pretext. Steele v. Wayne County Bd. of Educ., Docket No. 89-50- 260 (Oct. 19, 1989).

Grievant has failed to establish a prima facie case of discrimination. He has shown that he is similarly situated, in a pertinent way, to one or more other employee(s) because he was one of several PSWs that could have been reassigned to Intake. However, Grievant fails to meet the second prong of the test. He has not been treated by his employer in a manner that the other employees have not. DHHR established legitimate, nondiscriminatory reasons for its employment action with its policy of rotating all PSWs between the two units to avoid burnout and provide each employee with experience in both units, and with its explanation that Grievant was selected for the Intake Unit position because his supervisors felt he was the most qualified. Grievant's job classification, pay, and geographical area did not change. Grievant has simply been reassigned to the Intake Unit.

Forsberg explained that the Intake Unit of CPS focuses on child safety. The Intake workers conduct initial assessments and take measures to provide child safety. Horton explained that the Intake investigations and assessments of abuse are the most important functions in CPS and require a strong worker with a lot of talent. Horton believed Grievant was the most qualified and the best candidate for the position. Grievant had an excellent work record, was able to handle clients without being intimidated, had strong writing skills, and a criminal justice background.

In light of Grievant's opposition to his reassignment, which surprised his supervisors, it may well have been better to have left him in Ongoing, where he was highly effective and felt a strong sense of accomplishment. However, an employee may be transferred from one organizational subdivision to another subdivision of the same or another agency at any time. Administrative Rules, W. Va. Div. of Personnel, 143 C.S.R. 1 § 11.06(a) (1995).

Generally, DHHR may transfer its employees to any geographical area in which the employee is

needed. See Zigmond v. Civil Service Comm'n, et al., 155 W. Va. 641, 186 S.E.2d 696 (1971), Childers v. Civil Service Comm'n, 155 W. Va. 69, 181 S.E.2d 22 (1971). However, Grievant's reassignment of job duties was not a transfer. Goodnight v. W. Va. Div. of Human Services, Docket No. 91-DHS-111 (May 31, 1991). Grievant's job classification, pay, and geographical location did not change. Grievant was simply asked to assume a different job function within the same classification. In Crow v. Dept. of Corrections, Docket No. 89-CORR-116 (June 30, 1989), this Grievance Board held that it was management's prerogative to assign a corrections officer to various duties within a prison. In Prince v. Dept. of Highways, Docket No. 89-DOH-042(b) (July 31, 1989), management properly assigned a dispatcher to operate a grader when one was neededto remove snow. The assignment of additional work by management was also permitted. Smith v. Dept. of Health and Human Resources, Docket No. 91-DHS-207 (Feb. 28, 1991). Grievant has failed to prove by a preponderance of the evidence that his “transfer” or reassignment violated any law, administrative policy or procedure.

CONCLUSIONS OF LAW

1.

In a non-disciplinary grievance, the 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 § 4.19 (1996); 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).

2. Grievant has failed to prove, by a preponderance of the evidence, that he was the victim of discrimination.

3. An employee may be transferred from one organizational subdivision to another subdivision of the same or another agency at any time. Administrative Rules, W. Va. Div. of Personnel, 143 C.S.R. 1 § 11.06(a) (1995).

4. Respondent did not violate any law, administrative policy or procedure by assigning Grievant different job duties within his classification.

Accordingly, this grievance is DENIED.

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 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 theintent 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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ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated May 29, 1998

Footnote: 1 *For administrative reasons, this grievance was reassigned to the undersigned Administrative Law Judge on March 27,1998.*