**PENNY JARVIS,**

**Grievant,**

**v v.**

**Docket No. 01-RS-421**

**WEST VIRGINIA DIVISION OF**

**REHABILITATION SERVICES,**

**Respondent.**

## D E C I S I O N

Grievant, Penny Jarvis, is employed by the West Virginia Division of Rehabilitation Services ("DRS") as an Office Assistant. Her Statement of Grievance reads:

> I was accused of being "rude to the clients," playing favorites by giving restrictions to some and "not allowing some clients to see the physician." I was told that "we assume since there is that much smoke there must be fire." I was told to "pack my things" immediately and move to Speech & Hearing _"the only space available." A new employee had started that day 4-16-01 without posting a vacant position. I was not given an opportunity to have clarified - who or when I was rude, played favorites to or refused to allow [to] see the physician. These issues were never discussed before the transfer, accusations of rudeness & favoritism & refusal to see physicians were made about other clinic staff without any others being moved.
>
> Relief Sought: (1) clarification of events of accusations[;] (2) letter of apology available to all co workers (sic)[;] (3) reinstatement to the position I proudly & effectively & professionally held for 14 years. (See footnote 1)

This grievance was denied at Levels I and II. The Level III Decision was issued by the Hearing Examiner, Katherine Dooley, and adopted by the Interim Executive Director, Janice Holland, on June 18, 2001. Grievant appealed to Level IV on June 29, 2001. A Level IV hearing was held on September 24, 2001. At the Level IV hearing, the undersigned Administrative Law Judge noted Hearing Examiner Dooley had ruled Respondent had not demonstrated Grievant had engaged in "less than professional"conduct, and that issue was resolved. This case became mature for decision

on September 24, 2001, as the parties elected not to submit proposed Findings of Fact and Conclusions of Law. (See footnote 2)

## Issues and Arguments

At Level IV, the focus of Grievant's argument was that DRS did not follow its own regulations in processing the transfer, and if DRS had taken the time to follow the transfer procedure properly, then co-workers would not think she had done something wrong. The harm Grievant alleged was "embarrassment."

Respondent asserts it has the right to transfer employees to meet the needs of the Agency, and there was an increased need for clerical assistance in the Speech and Hearing Department. Additionally, Respondent maintains Grievant was not harmed by the failure of Respondent to follow the regulations exactly, and the results would have been the same. Both parties agree Grievant had never been written up or subjected to any discipline as a result of the allegations students/clients had made against her.

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

## Findings of Fact

1. At the time of transfer, Grievant was employed at DRS as an Office Assistant in Student the Health Center. She has been employed by DRS for many years.

2. For the past several years, DRS has received complaints from student/ clients about Grievant's failure to allow them to see the physician, and treating some clientsmore favorably than others. There were also complaints about Grievant being rude to DRS's clients. See Resp. Ex. No. 1, at Level II.

3. In either late February or early March 2001, DRS had a Town Meeting, (See footnote 3) and again received several complaints from students about Grievant's negative treatment of them, including her failure to allow them to receive medical services. There were also complaints about other staff members.

4. Steven Hill, the Hospital Administrator, informed Grievant about these complaints, and he told her the entire staff would meet to discuss and resolve these issues. He also informed Grievant

the administration was considering staff reassignments.

5. Grievant was not given specific details and examples regarding the complaints clients had made about her behavior.

6. Before this staff meeting took place, Grievant was transferred to an Office Assistant position in the Speech and Hearing Department.

7. The decision to transfer Grievant was made after Mr. Hill had several discussions with Mr. William Tanzey, the Center Administrator.

8. Grievant was not demoted, her compensation was not reduced, nor was her schedule changed. This transfer was lateral and was not disciplinary.

9. The Speech and Hearing Department had been in need of clerical help for some time, and a vacancy had existed for many months.

10. Shortly before the transfer, the needs of the Speech and Hearing Department had increased due to the resignation of one of the staff members. 11. A temporary employee replaced Grievant in the Student Health Center.

## 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 (2000); Howell v. W. Va. Dep't of Health & Human Resources, 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 Division of Personnel's ("DOP") Administrative Regulation, Section11.6 deals with transfers and states:

> (a) Except as otherwise provided in Subsection 10.4 of this rule (See footnote 4) , appointing authorities 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. In the case of inter-agency transfers, annual and sick leave and all seniority rights shall be transferred with the employee.

DRS's Policy 1806 also discusses transfers and states:

B. INTRA-AGENCY TRANSFER. An intra-agency transfer is a reassignment of an agency employee from one organizational or operational unit to another. The transfer may be lateral, a promotion, or a demotion.

1. Transfers deemed necessary to meet the needs of the agency may be made at the convenience of the agency.

2. Administrators who transfer employees within or between organizational units under their supervision must obtain written approval by the Assistant Director and submit a copy of the approval memorandum to the Human Resources Section prior to implementing the transfer.

It is clear from Section 11.6 that an agency has considerable discretion in decisions relating to the transfer of employees, as 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." Grievant's transfer did not violate this regulation. It is well settled that agencies under civil service regulations have wide discretion in the reassignment of employees. 67 C. J. S. *Officers* § 98. See also Stoneking v. W. Va. Div. of Corrections, Docket No. 93-CORR-530 ( Nov. 30, 1994); Titus v. W. Va. Div. of Corrections, Docket No. 93-CORR-528 Nov. 22, 1994). A civil service employee may be transferred from one distinct classification to another when "the duties, qualifications, responsibilities, and salaries are substantially the same." Id. Thus, the undersigned Administrative Law Judge finds the transfer of Grievant was not improper based the West Virginia DOP Administrative Rules.

DRS's regulation states "[t]ransfers deemed necessary to meet the needs of the agency may be made at the convenience of the agency." The evidence is uncontroverted that there was a definite need for clerical assistance in the Speech and Hearing Department. Grievant also noted in her Level III testimony that there was a backlog of work when she first moved into the position. Accordingly, Grievant's transfer to the Speech and Hearing Department was to meet the needs of the agency. (See footnote 5)

Grievant argues DRS did not follow its own rules because there was no "prior written approval." The individual who directed the transfer occur was Mr. Tanzey, the Center Administrator and the Chief Administrator of the Rehabilitation Center. Any written noticehe may have given to the Human Resources Section would merely have been a formality. Mr. Tanzey had the authority to transfer

Grievant per DRS's regulations, and failing to place his approval in writing and to give it to the Human Resources Section prior to implementing the transfer does not make the transfer invalid.

Grievant stated the harm she received from the failure of DRS to follow its regulation to the letter was "embarrassment." She believed if the transfer had been in writing no one would think she "did something wrong." While DRS certainly did not carry out this transfer in the most humane and considerate manner, placing the transfer in writing would not have changed the outcome, and certainly would not merit the relief Grievant seeks, reinstatement. (See footnote 6) "[A]n error which is not prejudicial to the complaining party is harmless and does not require reversal of the final judgment."Syl. Pt. 4, Burns v. Goff, 164 W. Va. 301, 262 S.E.2d 772 (1980). See Meredith v. Mercer, Docket No. 00-27-247 (Baker v. Hancock County Bd. of Educ., Docket No. 97-15-447 (May 5, 1998), aff'd 543 S.E.2d 378, 2000 W. Va. Lexis 62 (June 28, 2000). Here, Grievant, while understandably upset by the quick transfer, has not demonstrated she has suffered harm that is recognized within the grievance procedure.

Accordingly, Grievant's transfer did not violate DOP's regulations, and the technical violation of DRS's regulations does not merit the relief sought by Grievant. Even if the correct process had been followed to the letter, the outcome would not have changed. There was still a need for clerical help in the Speech and Hearing Department, and Grievant was selected to be transferred.

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 (2000); Howell v. W. Va. Dep't of Health & Human Resources, 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).

2. The Division of Personnel's ("DOP") Administrative Regulation, Section11.6 deals with transfers and states:

> (a) Except as otherwise provided in Subsection 10.4 of this rule, appointing authorities 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. In the case of inter-agency transfers, annual and sick

leave and all seniority rights shall be transferred with the employee.

3. Grievant's transfer did not violate DOP's regulation.

4. By failing to put Grievant's transfer in writing, prior to the time it occurred, DRS committed a technical violation of its regulations.

5. This technical violation of its regulations did not harm Grievant. Farley v. W. Va. Parkways Economic Dev. and Tourism Auth., Docket No. 96-PEDTA-204 (Feb. 21, 1997). 6. "[A]n error which is not prejudicial to the complaining party is harmless and does not require reversal of the final judgment." Syl. Pt. 4, Burns v. Goff, 164 W. Va. 301, 262 S.E.2d 772 (1980). See Baker v. Hancock County Bd. of Educ., Docket No. 97-15-447 (May 5, 1998), aff'd 543 S.E.2d 378, 2000 W. Va. Lexis 62 (June 28, 2000).

7. A correction of the technical violation would not have created a change in the outcome; Grievant would still have been transferred.

8. The occurrence of this technical violation does not entitle Grievant to the relief sought: reinstatement.

Accordingly, this grievance is **DENIED**.

Any party, or the West Virginia Division of Personnel, 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 its Administrative 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**

**ADMINISTRATIVE LAW JUDGE**

**Dated: October 5, 2001**

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Footnote: 1

*The undersigned Administrative Law Judge informed Grievant at Level IV that an apology was not a form of relief available through the grievance procedure.*

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Footnote: 2

*Grievant represented herself, and Respondent was represented by Attorney Warren Morford.*

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Footnote: 3

*Apparently, Town Meetings are held to allow students to voice their concerns and complaints about the facility, and changes they believe should be made.*

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Footnote: 4

*Subsection 10.4 is not applicable to this situation.*

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Footnote: 5

*DRS also believed this transfer would decrease the number of complaints from students about the Student Health Center.*

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Footnote: 6

*It is recommended in the future that DRS counsel its employees in a timely and clear manner when inappropriate behavior is observed. This approach gives the employee an opportunity to change incorrect behavior, and also gives the employee a chance to correct misperceptions the employer may have about what actually occurred.*