JEAN BOLEN,

Grievant,

v. **Docket No. 01-41-372**

RALEIGH COUNTY BOARD OF EDUCATION

Respondent.

DECISION

Grievant Jean Bolen is a guidance counselor employed by the Raleigh County Board of Education at Beckley-Stratton Junior High School (Beckley-Stratton), currently assigned to counsel the seventh-grade students. On April 9, 2001 she filed a Grievance at level one against Respondent alleging,

> The Board of Education violated WV Code 18-29-2(m), (o) by changing my counseling duties from 7th grade to 8th grade. Grade level assignments at the school have always been based on seniority and this reassignment is contrary to that practice. Furthermore, counseling assignments at other junior highs in the county are determined by seniority and not rotation.

As relief, Grievant requests that her "reassignment to the 8th grade be rescinded and that [she] be reinstated to the 7th grade counseling position." Having been denied at levels one, this grievance progressed to a level two hearing before Grievance Evaluator Connie Giammerino, with the Grievant represented by Gary Archer of the West Virginia Education Association and the Respondent represented by attorney Erwin L. Conrad, Esq. The grievance was again denied at level two and the Grievant appealed to level four on May 30, 2001 requesting that a decision be made on the lower-level record. The partieswere directed to submit their proposed findings of fact and conclusions of law no later than July 2, 2001, and the matter became mature for decision on that date. A brief was filed on behalf of Respondent on June 22, 2001, and no brief was filed by Grievant.

Discussion

The undisputed facts show that Grievant was previously a counselor at Stratton Junior High School where she counseled all of the seventh grade and shared the eighth grade with another

counselor. She was transferred to her current position upon the consolidation of Stratton Junior High and Beckley Junior High Schools. At the time of the consolidation in 1997, the three guidance counselors who were selected based on their seniority to fill the positions at Beckley-Stratton were permitted to choose, based on their personal preferences, which grade level they would service. For the 2001-2002 school year, the Beckley-Stratton principal Ronald Cantley, II made the decision to rotate all of the counselors through the grades so that they stayed with the same class of students throughout their tenure at Beckley-Stratton. This change will require Grievant to counsel the same students when they reach eighth grade as she now counsels in their seventh grade.

On or about March 26, 2001 the Grievant was notified by letter from Raleigh County Schools Superintendent Charlotte Hutchens, Ed.D. of Mr. Cantley's proposal to change the manner in which the counselors were assigned to students, and that Grievant was entitled to be notified of the change and to have a hearing. A hearing date was set for April 9, 2001 but on April 5, 2001 the Superintendent sent a new letter to Grievant stating that the assignment change was not considered to be a transfer and that the March 26 letterwas retracted. Grievant was not given an opportunity to consent to the change and no hearing was held.

During the previous school year, several classroom teachers had their grade level and subject assignments changed to accommodate a vacancy caused by the retirement of another teacher whose job was not being filled by a new hire. These teachers were given an chance to agree to the changes in subject and grade level, and each did agree to the changes without the necessity of a hearing.

Grievant also argues that no other school in the county uses the rotation system for counselors. Both the Grievant and Respondent conducted a survey of the other schools to determine how counselors were assigned to grades, and the information they obtained agreed. However, the information also indicated that there was no consistent way in which counselors were assigned to grades. At park Junior High, a school with many fewer students than Beckley-Stratton, students saw the first available counselor irrespective of what grade the student was in, and one counselor did all the testing. At Independence Junior High, one counselor has seventh grade and half the eight grade and the other counselor has ninth grade and half the eighth grade, and the counselors were assigned to the grades based on their personal preferences without regard to seniority. This was the same system used at Shady Junior High School.

Grievant alleges that the decision to require the counselors to change grades without allowing them to choose their preference of classes based on seniority is discriminatory under the definition provided by W.Va. Code § 18-29-2(m) and that it shows favoritism as defined in W.Va. Code § 18-29-2(o), because the classroom teachers whohad their teaching assignments changed were given an opportunity to agree to or challenge the “transfer.” Additionally, counselors at other schools within the county do not rotate with the classes. Respondent maintains that the decision was within the discretion and authority of the Principal and that no discrimination nor favoritism was shown because the change in counselor assignments is not a transfer in the same way the change in teacher assignments was.

Based on the preponderance of the evidence contained in record submitted for consideration, the following findings are appropriate:

Findings of Fact

1. Grievant Jean Bolen is employed by Respondent Raleigh County Board of Education at Beckley-Stratton Junior High School as a guidance counselor.

2. Grievant's current position was created in 1997 upon the consolidation of Beckley Junior High School and Stratton Junior High School, at which Grievant was previously a guidance counselor.

3. The job posting for the newly-created guidance counselor positions at Beckley-Stratton Junior High School listed three vacancies to be filled pursuant to W.Va. Code § 18A-4-8f and did not specify the grade levels to which the counselors would be assigned.

4. Grievant was chosen to fill one of the three new positions because she was the second-most senior eligible applicant. The three successful applicants were permitted by the principal to choose which grade level they wished to work with. 5. As principal of Beckley Stratton, Ronald Cantley, II initially assigned Grievant to counsel the seventh-grade students based on her preference for that grade, and she has held that assignment from her initial appointment at Beckley-Stratton until the present time.

6. Mr. Cantley notified all the counselors that for the 2001-2002 school year, they would change to a rotating grade level assignment so that each would stay with the same class as they were promoted through the different grade levels. This change will require the Grievant to counsel the eighth-grade students beginning in the fall of 2001.

7. While the counselors, including grievant, were notified of the planned change, they were not

given the option of accepting or declining the change. All three of the existing counselors at Beckley-Stratton are to be placed on the same rotating grade level assignment.

8. The counselors who applied for the initial Beckley-Stratton counselor positions were entitled by W.Va. Code § 18A-4-8f to "super seniority" preference for the assignments due to the consolidation of schools. The change in grade level assignments planned by Mr. Cantley is not due to consolidation or merger and is not subject to the requirements of Section 8f.

9. While the hiring of the counselors for the newly-created positions was based on seniority, their assignments to different grades by Mr. Cantley was not based on seniority, but rather based on their expressed preferences.

10. Counselors at schools controlled by Respondent, according to surveys made by both grievant and Respondent's representative, were not given their grade levelassignments based on seniority. At none of the other schools are the counselors rotating through the grades with the students.

11. Because there is no consistent method of assigning counselors to grade levels used throughout the county, there is no discrimination or favoritism shown by Mr. Cantley's decision to use a system that is not used at the other schools.

12. A group of classroom teachers was reassigned to different subjects in different grade level classes at Beckley-Stratton for the 2001-2002 school year due to a vacancy in a teaching position. Those reassignments were treated as a transfer by Mr. Cantley and the teachers were given an opportunity to agree to the change in assignment, which they did.

13. The change in assignment of the classroom teachers was necessitated by the elimination of a teaching position at the school, resulting in a vacancy which is required to be filled by a transfer or new hire. The counselors are not in the same position as the classroom teachers because their change in assignment is not related to a change in counselor staffing levels and they are not moving to positions requiring different expertise. The change in counselor assignments is simply a management decision of the principal designed to improve the service to the students. Guidance counselors are certified and expected to be able to counsel all the students in their school and to perform the related duties associated with each grade.

14. Grievant is certified and qualified to counsel all the grades to which she will be assigned, and has only been solely counseling the seventh grade for three years. Mr. Cantley's proposed

change in counselor assignments does not involve a change inlocation and is not a substantial change outside the Grievant's certification, discipline, department or grade level of many years standing, and so is not a “transfer” within the meaning of W.Va. Code § 18A-2-7.

Conclusions of Law

1. This is a non-disciplinary grievance in which the Grievant bears the burden of proof. Her allegations must be proven by a preponderance of the evidence. See, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't. of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

2. “Discrimination” is defined 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.” W. Va. Code § 18-29-2(m). Since Grievant did not agree to the change in the terms of her assignment, at issue is whether there was a difference in treatment and if so, whether the differences are job related. Further, the grievant must prove that she is similarly situated to the other employees who were treated more favorably. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Grievant did not meet her burden of proving a difference in treatment from other similarly situated employees. 3. “Favoritism” is defined as “unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.” W. Va. Code § 18-29-2(o).

4. A grievant seeking to prove discrimination or favoritism may establish a *prima facie* case by demonstrating:

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

(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 other employee(s), and were not agreed to by the grievant in writing.

If a grievant does establish a *prima facie* case, a presumption of discrimination or favoritism exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, a grievant may still prevail if she can demonstrate the reason given by the respondent was pretextual. Rice v. Dept. of Transp./Div. of Highways, Docket No. 96-DOH-180 (Aug.

29, 1997); Steele, *supra*.

5. The evidence presented by the Grievant does not establish that she was similarly situated to other employees who were reassigned to different subjects in different grade levels due to a reduction in teaching positions. She has likewise failed to prove that the change made by the principal was to her detriment or that any actual differences in treatment were unrelated to her job responsibilities as a counselor. 6. The proposed change in Grievant's counselor assignment is not a “transfer” within the meaning of W. Va. Code § 18A-2-7. It is generally accepted that a work transfer is a reassignment from one location or job site to another. State ex rel. Hawkins v. Tyler County Bd. of Educ., 166 W. Va. 363; 275 S.E.2d 908 (1980). In addition, a substantial change outside a "teacher's presently utilized area of certification, discipline, department or grade level of many years standing" may be work alterations amounting to a transfer as contemplated by W.Va. Code § 18A-2-7. Schafstall v. Brooke County Bd. of Educ., Docket No. 05-86-347-3 (Mar. 30, 1987); Winland/Steele v. Wetzel County Bd. of Educ., Docket No. 92-52-490 (Feb. 16, 1993).

For the foregoing reasons, this grievance is hereby **DENIED.**

Any party 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 § 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. 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Dated: August 14, 2001 _____

M. Paul Marteney

Administrative Law Judge