WILLIE MAE MOORE,

Grievant,

v. DOCKET NO. 01-27-558

MERCER COUNTY

BOARD OF EDUCATION,

Respondent.

DECISION

On or about September 7, 2001, Grievant Willie Mae Moore filed her grievance at Level I stating, "I was illegally moved from my job as kindergarten aide to LD aide Aug. 24, 2001. On Aug. 30, 2001 I was moved again to the position of one on one aide to physically handicapped." As relief, she asks Respondent to return her to her previous position as "kindergarten aide."

Her immediate supervisor denied the grievance at Level I on September 12, 2001, and following a Level II hearing held on October 16, 2001, it was again denied. Level III was waived and a Level IV hearing was held in the Grievance Board's Beckley Office on January 10, 2002. At this hearing, WVSSPA Representative John E. Roush, Esq. represented Grievant and Kathryn Reed Bayless of Bayless & McFadden, LLP represented Respondent. The parties elected to file their proposed Findings of Fact and Conclusions of Law by February 8, 2002, whereupon the matter became mature for decision.

FINDINGS OF FACT

1. Grievant is in her 24th year of employment with Respondent. She is currently serving in an Aide position at Princeton Primary School, and has been in that position since she was hired pursuant to a job posting dated November 18, 1999. She was hired to fill one of ten openings at that school for the 2000-2001 school year.

2. The position for which Grievant was hired was listed in that posting as follows: "*65. Aide (10 positions) - Princeton Primary School." Princeton Primary School was a new school that year.

3. For the 2000-2001 school year, Princeton Primary School Principal JoAnna Fredeking assigned Grievant to assist in a kindergarten class taught by Karen Thorn. Prior to assigning the aides, Ms. Fredeking gave the aides an opportunity to indicate which class they preferred to work in,

and Grievant's assignment matched her indicated preference.

4. Grievant began the 2001-2002 school year in Ms. Thorn's classroom, but shortly after the beginning of the term Ms. Fredeking reassigned Grievant to another kindergarten class, where a one-on-one aide was needed to help with a physically disabled student. Another Aide was placed in Ms. Thorn's class. Grievant did not consent to the class change in writing.

5. Respondent did not follow the service personnel transfer notification procedures described in W. Va. Code § 18A-2-7.

DISCUSSION

Because Grievant's allegations are unrelated to a disciplinary action, she bears the burden of proving the charges 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 requiresproof 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.

The basic facts giving rise to the grievance are not disputed. Grievant was assigned to assist in a particular classroom for the 2000-2001 school year. Due to enrollment changes, a reduction in force for the 2000-2001 school year caused the transfer of some less senior aides at that school, so the remaining aides had to be reallocated. Grievant was assigned to a different classroom and teacher for the 2001-2002 school year. In previous year, she was a general aide to the entire class, but in the latter year she had a primary responsibility of assisting a physically disable student when needed, and other times providing general aid to the class. Grievant characterizes this assignment change as a “transfer,” triggering the notice requirements of W. Va. Code § 18A-2-7. Respondent maintains no transfer occurred and that the change was within the discretion of the Principal. Grievant also argues that W. Va. Code § 18A-4-8a(7) prevents Respondent from changing her assignment without her consent.

Taking Grievant's second argument first, W. Va. Code § 18A-4-8a(7) (2001) does not prevent a change in a service employee's general duties. That section states:

> No service employee may have his or her daily work schedule changed during the school year without the employee's written consent and the employee's work hours may not be changed to prevent the payment of time and one-half wages or the employment of another employee.

This provision, under the general heading of “Service personnel minimum monthly salaries” is inapplicable to the particular duties assigned to the employee, but instead controls when the employee works and how she is paid. Grievant is not contending that her schedulechanged. Grievant argues that this section makes a distinction between daily schedule and work hours, and contends that the obvious meaning of “daily work schedule” is the assignment performed by the employee. A position more consistent with the tenor of the Section is that both relate to when the employee works, but are different in scope.

Grievant also contends that had she been made aware of the assignment change through the notification procedure required for transfers, she could have bid on a different opening. The requirement she refers to is found in W.Va. Code § 18A-2-7(a), which states in part: “[A]n employee shall be notified in writing by the superintendent on or before the first Monday in April if he [or she] is being considered for transfer or to be transferred.” And goes on to allow the employee to request reasons for the transfer and a hearing before the board to dispute the reasons.

This Grievance Board has on several occasions explored the boundary between “transfer” and a simple change in assignment. In this case, the change to Grievant's assignment was minimal and does not amount to a transfer. Although she contends she was changed from a kindergarten aide to a special education aide, there is no such distinction in the Aide classification. Grievant now has the same daily schedule, the same working hours, is in the same school, and at the same grade level, as she did when she was hired. This grievance board has previously found that W. Va. Code § 18A-4-8 does not differentiate between types of aides, and “an aide may perform any duties assigned to him or her, as long as they are within the scope of the classification.” Buck v. Wood County Board of Education, Docket No. 96-54-325 (Feb. 28, 1997). The kindergarten aide and special education aide positions Grievant describes do not exist. This year, she is merely in a different classroom, and because that classroom happens to have a disable student in it, her actual duties are a little more difficult for her some of the time. She is still one of the aides at Princeton Primary School, and that is precisely the job she applied for in 1999. This minimal change in no way fits the meaning of “transfer” as used in W. Va. Code § 18A-2-7(a), and does not trigger the notification requirement of that section. See Tolliver v. Mingo County Bd. of Educ., Docket No. 95-29-475 (May 31, 1996); McClain v. Hancock County Bd. of Educ., Docket No. 96-15-114 (June 27, 1996).

CONCLUSIONS OF LAW

1. Because Grievant's allegations are unrelated to a disciplinary action, she bears the burden of proving the charges 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. West Virginia Code § 18A-4-8a(7) does not prevent a change in a service employee's general duties. That section states:

> No service employee may have his or her daily work schedule changed during the school year without the employee's written consent and the employee's work hours may not be changed to prevent the payment of time and one-half wages or the employment of another employee.

(2001). This provision, under the general heading of "Service personnel minimum monthly salaries" is inapplicable to the particular duties assigned to the employee, but instead controls when the employee works and how she is paid.

3. West Virginia Code § 18A-2-7(a) mandates that: "[A]n employee shall be notified in writing by the superintendent on or before the first Monday in April if he [or she] is being considered for transfer or to be transferred," and further allows the employee to request reasons for the transfer and a hearing before the board to dispute the reasons.

4. This grievance board has previously found that W. Va. Code § 18A-4-8 does not differentiate between types of aides, and "an aide may perform any duties assigned to him or her, as long as they are within the scope of the classification." Buck v. Wood CountyBoard of Education, Docket No. 96-54-325 (Feb. 28, 1997). The Kindergarten Aide and Special Education Aide positions Grievant describes do not exist.

5. Grievant has not met her burden of proving that the change in her job assignment for the 2001-2002 school year was a transfer within the meaning of W. Va. Code § 18A-2-7(a), thereby triggering the notification requirement of that section. See Tolliver v. Mingo County Bd. of Educ., Docket No. 95-29-475 (May 31, 1996); McClain v. Hancock County Bd. of Educ., Docket No. 96-15-114 (June 27, 1996).

Accordingly, this grievance is hereby **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Mercer County. 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: February 20, 2002 _____

M. Paul Marteney

Administrative Law Judge