VICKIE L. VANCE,

Grievant,

v. **Docket No. 01-BEP-610**

WEST VIRGINIA BUREAU OF EMPLOYMENT PROGRAMS,

Respondent.

D E C I S I O N

Grievant, Vickie L. Vance, employed by the Bureau of Employment Programs (BEP or Respondent) as an Office Manager II, filed a level one grievance on June 18, 2001, in which she contested her transfer from Manager of the Elkins Job Service Office to Region VI System Coordinator. For relief, Grievant requested that she be returned to the Office Manager position at the Elkins Job Service, or in the alternative, that she retain the classification title of Manager II, that she remain in cost center 0602, pay grade 16 or higher, and maintain her seniority, bumping rights and all other rights and protection to which she was entitled.

Grievant's immediate supervisor lacked authority to grant the grievance at level one. At level two, the transfer was upheld, but the grievance was granted to the extent that Grievant would retain the classification of Office Manager II, pay grade 16, remain in the Elkins Job Service office, and retain bumping rights in the event of a reduction in force. Grievant's appeal to level three, requesting that the transfer be rescinded, was denied, and the matter advanced to level four on December 13, 2001. A level four hearing was conducted in the Grievance Board's Elkins office on February 21, 2002. Grievant was represented by Frank P. Bush, Jr., Esq., and Respondent was represented by Kelli D. Talbott, Deputy Attorney General. Proposed findings of fact and conclusions of law were submitted by the parties on or before March 25, 2002, and the matter became mature fordecision upon receipt of the level two exhibits on April 19, 2002.

The essential facts of this matter are undisputed and may be set forth as the following findings of fact.

Findings of Fact

1. Grievant has been employed by BEP for twenty-five years, and has been assigned to the Elkins Job Service Office in Elkins, West Virginia, since September 1989. Grievant has held the

classification title of Office Manager II at all times pertinent to this grievance.

2. In early 2001, Respondent noted ongoing management problems in the Elkins Job Service Office. More grievances were filed from the Elkins Office than any other in the state, and the employees there were using a significantly high amount of sick leave. The situation was found by one grievance evaluator to constitute a hostile work environment, caused in part by Grievant's management. Efforts to resolve the situation by counseling and conflict resolution sessions with Grievant and the employees had been unsuccessful.

3. BEP is responsible for implementing the Work Force Investment Act which will be administered throughout West Virginia from seven regions. Each region is to employ a Systems Coordinator to act as a liaison between the Workforce Investment Board, which is comprised of local individuals, and all Comprehensive Site Coordinators located in the region.

4. In April 2001, Stephen Dailey, Assistant Director for Operations, offered Grievant the opportunity to voluntarily transfer to the position of Region Six Systems Coordinator. Grievant declined the offer. 5. Grievant was involuntarily transferred to the position of Region Six Systems Coordinator, effective June 26, 2001. Grievant retained the classification of Office Manager II, pay grade 16, and seniority rights, but was transferred to a different cost center, the ES Field Operations (5204). (See footnote 1) Grievant was returned to cost center 0602, the Elkins Job Service office, pursuant to the level two decision.

6. BEP Commissioner Robert J. Smith advised Grievant of her transfer by letter dated June 4, 2001, at which time he explained, “[y]our transfer is necessary in order to maintain the high quality of service to our customers.” The personnel problems in the Job Service office were not stated to be a reason for the transfer, which was considered by BEP to be non-disciplinary in nature.

7. The position of Region Six Systems Coordinator was not posted prior to Grievant's transfer.

8. Region Six was the first region to be assigned a Systems Coordinator; however, Region Four now also has a Coordinator, and it is the intent of BEP to ultimately staff all seven regions.

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.

Grievant asserts that her involuntary transfer was in violation of BEP's Administrative Directives 6500.40, 6000.10, 6000.11, and 6000.40. Respondent argues that the involuntary transfer was based upon legitimate factors and was properly implemented. (See footnote 2) Although not acknowledge by Grievant, BEP's Administrative Directives are subordinate to the Division of Personnel's ("DOP") Administrative Regulations.

Section11.6 of the DOP Administrative Rule 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.

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." It is well settled that agencies under civil service regulations have wide discretion in the reassignment of employees. 67 C. J. S. Officers § 98. Jarvis v. Div. of Rehabilation Serv., Docket No. 01- RS-421 (Oct. 5, 2001);Forth v. Dep't of Trans./Div. of Highways Docket No. 98-DOH-433 (July 22, 1999). 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 transfer of Grievant was not improper based the West Virginia DOP Administrative Rule.

Grievant argues BEP did not follow its own rules when it did not consult her, provide an explanation and documentation supporting the need for the transfer, follow proper channels for instituting an involuntary transfer, and did not post the position system-wide. The Administrative Directives cited by Grievant follow, in pertinent part.

6000.11 Hiring Process for Classified Positions

Whenever a job opening occurs in the classified service, the hiring agency must post a notice throughout the agency that candidates will be considered to fill the job openings. . . .

Job posting notices must be posted for at least ten working days before making an appointment. This posting requirement includes any vacancy to be filled by original appointment, promotion, demotion, lateral class change, reinstatement, or transfer. . . Intra- and inter-agency transfer is often used as an efficient means to fill needed positions.

6500.40 Job Posting Policy

It shall be the policy of [BEP] to advertise vacancies in order that qualified full-time employees with permanent status may have an opportunity to be considered. . . .

Selection will be made by the unit supervisor, subject to the approval of the normal chain of command and the division director. The commissioner has final authority in the appointment of all employees. . . Vacancies will be advertised via a Job Opportunities announcement . . . [t]his is the official posting for Bureau jobs. . . .

Posted vacancies may be filled by promotion, demotion, lateral class change, reinstatement, transfer, or by selectionfrom an appropriate Division of Personnel (DOP) Register. . . .

It is the responsibility of the unit supervisor to initiate, through channels, the request to fill an authorized vacancy.

6000.40 Transfers

In the event an involuntary transfer becomes necessary, the affected employee will be consulted prior to the fact, given written reasons why the need exists, and given at least a two week (14 calendar day) notice of the impending transfer, when possible. . . .

It is the responsibility of the unit supervisor to initiate through channels a request to fill an authorized vacancy, justifying any request for any involuntary movement or a specific individual['s] transfer. . . If the transfer is involuntary, the supervisor must provide documentation to all affected parties justifying the necessity of the transfer.

First, Grievant was consulted regarding the transfer when it was offered to her on a voluntary basis in April 2001.

Second, BEP provided an explanation for the transfer in the June 4, 2001, letter in which BEP Commissioner Robert J. Smith advised Grievant of the action. Commission Smith stated, in part, “Your transfer is necessary in order to maintain the high quality of service to our customers.” A more specific statement could have been offered, but Commissioner Smith's statement meets the requirements of the BEP Policy Directive. While Grievant's problems with personnel was not given as a formal reason for the transfer, it was to Grievant's benefit since the action was not considered disciplinary in nature. It appears that filling the Systems Coordinator positions has not been a priority, but is necessary to implement the Work Force Investment Act, and was a legitimate reason for the transfer. Documentation supporting the need for the transfer would consist of theAct, which may not have been provided to Grievant, but was undoubtedly available to her. Third, Grievant's transfer was accomplished by Mr. Dailey and Quetta Muzzle, Director of the Employment Services Division of BEP, who recommended the transfer to Commissioner Smith. Grievant opines that the transfer must originate from her immediate supervisor, Steve Frantz. It is the responsibility of the unit supervisor to request the filling of vacancies; however, in this instance the vacancy was in another unit. Mr. Frantz was involved with Mr. Dailey in discussions regarding Grievant's transfer, and it cannot be determined that proper channels were not followed in this instance.

Fourth, the position of Systems Coordinator was not posted, a violation of Administrative Directive 6500.40. Of course, posting this position would have been a formality when a transfer was already planned. "[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).

Grievant has identified no harm she incurred as a result of the transfer. To the contrary, she remained in the same classification and pay grade (both of which have been elevated), her work location remains the same, and she has retained all seniority and other rights she has acquired as a long-term employee. At level four Grievant continued to express concern regarding her job security and seniority rights. Mr. Dailey testified at hearing that there are no plans to eliminate Grievant's position. The level two decision stated that Grievant would retain her seniority-based bumping rights in the event of a reduction in force. Grievant is understandably upset by the involuntary transfer, but has not demonstrated she has suffered harm that is recognized within the grievance procedure. The technical violation of BEP'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.

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.

2. An appointing authority 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.

3. By failing to post the position of Systems Coordinator, BEP committed a technical violation of its regulations.

4. This technical violation of its regulations did not harm Grievant. See Farley v. W. Va. Parkways Economic Dev. and Tourism Auth., Docket No. 96-PEDTA-204 (Feb. 21, 1997).

5. "[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).

6. A correction of the technical violation would not have created a change in the outcome; Grievant would still have been transferred. 7. 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 §29- 5A-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.

Date: April 30, 2002 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

Since the inception of this grievance, Grievant's position has been upgraded to Employment Programs Manager III, at pay grade 17.

Footnote: 2

Neither party referred to Administrative Directive 6000.11 in their level four briefs, and this argument is deemed abandoned.