CAROL JARRETT,

Grievant,

v. Docket No. 04-ADMN-392

DEPARTMENT OF ADMINISTRATION/

PURCHASING DIVISION,

Respondent.

D E C I S I O N

___Carol Jarrett ("Grievant"), employed by the Department of Administration ("DOA") as an Administrative Services Assistant I in the Purchasing Division, filed a level one grievance on June 1, 2004, in which she alleged that she had been selected for transfer based upon her age. Grievant requests reinstatement to her previous job location and duties, and that DOA cease and desist from further discrimination and attempts to discredit her position. The record does not include a level one decision. The grievance was denied at level two and level three. Appeal to level four was made on November 5, 2004. Grievant, represented by Fred Tucker of the United Mine Workers Association, and DOA, represented by Heather A. Connolly, Assistant Attorney General, agreed to submit the grievance for decision based upon the lower-level record. The grievance was transferred to the undersigned on March 8, 2005, and became mature for decision upon receipt of Grievant's proposed findings of fact and conclusions of law on March 17, 2005. DOA elected not to file post-hearing proposals.

The following facts have been derived from a preponderance of the evidence admitted into the level two record.

Findings of Fact

1. Grievant has been employed by the DOA as an Administrative Services Assistant I in the Purchasing Division for more than nine years. 2. Prior to June 22, 2004, Grievant's work location was at 2019 Washington Street, East, in Charleston, West Virginia.

3. By letter dated May 20, 2004, Grievant was notified that her work location would be temporarily changed to the offices of the Division of Information Services and Communications ("IS&C"), located in downtown Charleston at One Davis Square.

4. The change in Grievant's assignment was part of an effort by Acting DOA Secretary Tom Susman to correct and improve the purchasing function of the IS&C division. In addition to Grievant, a Buyer Supervisor from the Purchasing Division, and a Certified Public Accountant from the Finance Division were also assigned to IS&C to improve financial operations.

5. Grievant remains an employee of the Purchasing Division. She retains the same classification, and has received a five percent merit increase since her reassignment.

6. Grievant was sixty-five years of age at the time the grievance was filed.

Discussion

Grievant complains that the transfer of her work site was unjust because employees with less seniority were allowed to remain at the Washington Street location performing duties she is capable of performing, and that the action is discriminatory due to her age. DOA argues that the change in assignment was based upon a need which Grievant was capable of filling, and denies that her age was a factor in the reassignment.

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 (2004); Howell v. W. Va.Dep't of Health & Human Res., 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 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 & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

Initially, administrative notice is taken of DOP Administrative Rule Section 11.06, which provides in pertinent part that, "appointing authorities may transfer a permanent employee from a position in one organizational subdivision of an agency to a position in another organizational sub-division of the same or another agency at any time." Of course, this discretion cannot be exercised in a discriminatory manner.

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." This definition encompasses all types of discrimination, including discrimination based upon age. It is not necessary to analyze Grievant's claim under the West Virginia Human Rights Act, as such claims are subsumed by Code § 29-6A-2(d). Clark v. Kanawha County Bd. of Educ., Docket No. 99-20-088 (Aug. 19, 1999). See Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995); Hendricks v. W. Va. Dep't of Tax and Revenue, Docket No. 96-T&R- 215 (Sept. 24, 1996); and Aglinsky v. Bd. of Trustees, Docket No. 95-BOT-387 (Jan. 31, 1995). In order to establish a claim of discrimination, an employee must establish a primafacie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:
(a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

The Board of Education of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004); Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004). While Grievant was the only ASA affected, and she did not agree to the change in writing, the difference in treatment was job related, the result of her revised assignment. The fact that Grievant was the oldest ASA in the Purchasing Division, does not establish discrimination. Grievant's relocation is clearly contrary to her wishes, but there is no evidence to support a finding that the decision was based upon her age, or was otherwise negative in nature.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal 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 (2004); Howellv. W. Va. Dep't of Health & Human Res., Docket No. 89-DHS-72 (Nov. 29, 1990). See W. Va. Code § 29-6A-6.

2. 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." This definition encompasses all types of discrimination, including discrimination based upon age. It is not necessary to analyze Grievant's claim under the West Virginia Human Rights Act, as such claims are subsumed by Code § 29-6A-2(d). Clark v. Kanawha County Bd. of Educ., Docket No. 99-20-088 (Aug. 19, 1999). See Vest v. Bd. of Educ., 193 W. Va. 222, 455 S.E.2d 781 (1995).

3. In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(a) that he or she has been treated differently from one or more similarly-situated employee(s);

(b) that the different treatment is not related to the actual job responsibilities of the employees; and,

(c) that the difference in treatment was not agreed to in writing by the employee.

The Board of Education of the County of Tyler v. White, 605 S.E.2d 814 (W. Va. 2004); Frymier v. Glenville State College, Docket No. 03-HE-217R (Nov. 16, 2004). 4. Grievant has failed to prove that her reassignment was the result of discrimination, or that she otherwise incurred any harm as a result of the change.

Accordingly, the 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.

DATE: APRIL 4, 2005

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE