LAURA MONK

v. **Docket No. 94-20-620**

KANAWHA COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant, Laura Monk, is a Clerk II currently employed by Kanawha County Board of Education ("KCBOE") at John Adams Junior High School ("JA"). She grieves her transfer from the Ben Franklin Career Center ("BFCC"). This grievance was denied at Levels I and II and waived at Level III. Grievant appealed to Level IV and a hearing was held on January 10, 1995. This case became mature for decision on February 3, 1995, after the submission of proposed findings of fact and conclusions of law.

Issues

Grievant argues KCBOE placed her on the transfer list because her position was eliminated when BFCC was required to reduce positions. Grievant states that KCBOE then hired Sharon Ramsey "to perform the same duties that I was previously assigned to do." Grievant argues her transfer should have been rescinded or the position should have been posted.

At the Level IV hearing, Respondent renewed its Motion to Dismiss stating the relief sought was the same relief sought in a prior grievance, and that this grievance was merely a new theory of the case. The prior case was settled and dismissed in Kanawha County Circuit Court. Grievant argued that although the relief sought was the same, this grievance concerns a different issue.

The former grievance concerned a violation of due process rights, stating the Superintendent's letter confirming her transfer was dated before her transfer hearing was held. This action was settled by agreement sometime in May, 1994. In this action, Grievant states she was told she was transferred because her position was eliminated, but she found out, after the opening of school this year, that another person was employed by KCBOE to perform her duties without the position being posted.

Respondent's Motion to Dismiss is **DENIED**. The issues raised in each grievance are separate and distinct. One grievance dealt with procedural due process, the second with invalid transfer and failure to post. Thus, the Grievant is not barred by the prior grievance.

The next issue raised at Level IV, is whether Grievant could argue, for the first time, that the individual performing Grievant's former duties was not certified to perform them. Respondent objected, stating this argument was not presented below. A review of the lower level record reveals this issue was not discussed or argued below. Accordingly, since Respondent objected to this new issue being raised at Level IV, it will not beconsidered. See W. Va. Code §18-29-3(j); W. Va. Dept. of Health and Human Resources v. Hess, 432 S.E.2d 27 (W. Va. 1993).

Findings of Fact

1. Grievant was employed as a Clerk II at BFCC.

2. Grievant's duties included performing "basic office skills and procedures." She worked as an attendance clerk, collected lunch money, answered phones, input data into the computer, typed when needed, and copied materials.

3. In the Spring of 1994, she was notified her position would be eliminated because of budgetary considerations.

4. Since Grievant's duties would still have to be performed, Mr. Alvin Brown, Principal at BFCC, planned to have her duties "absorbed" by existing staff.

5. Grievant was placed on the transfer list and later placed at JA as a Clerk II.

6. Prior to the opening of school, Grievant heard that Ms. Ramsey had been employed to perform her former duties.

7. Ms. Ramsey, an assessment lab aide, has worked as a part-time, temporary employee for the past three years at BFCC. Her job is to evaluate BFCC students through a computer system and to assist them in selecting a career.

8. Ms. Jerri Ruckle, Secretary at BFCC, was off work an unspecified amount of time the first of the school year, due to her husband's death. No substitute was called.

9. Prior to the opening of school and during the first weeks of school, Ms. Ramsey performed many of Grievant's former duties. She worked on attendance records and forms, collected lunch money, and answered phones.

10. Ms. Ramsey still does the daily lunch count and assists in the office in the morning. She returns to her computer lab after this and performs her other duties.

11. Some of Grievant's former duties are performed by the other secretaries and teachers. Some of Grievant's former duties are not performed.

12. There is no Clerk II position at BFCC.

Discussion

This unfortunate situation was created by the necessity of cutting positions due to budgetary considerations. It is obvious that Grievant performed many necessary duties at BFCC, and Principal Brown was faced with the hard choice of selecting a position for elimination, which he would have preferred to keep. There is no question that many of Grievant's former duties still have to be performed. It was always the plan that these duties be assumed by the remaining staff. This is what happened.

Contrary to Grievant's statement of grievance, Ms. Ramsey was not hired to perform her duties. Ms. Ramsey was already employed at BFCC, and there is no longer a Clerk II position at BFCC. What did happen is that Ms. Ramsey assumed many of Grievant's former duties, especially before school opened, the first month of school, and during the time Ms. Ruckle was off. Ms. Ramsey still performs part of Grievant's former duties, and the other duties are either not done or are performed by other staff.

This series of events does not represent a violation of any posting or transfer statutes or regulations. Grievant was properly transferred when her position was eliminated. No position was posted because there was no position to post.

The above discussion will be supplemented by the following conclusions of law.

Conclusions of Law

1. In a grievance dealing with posting or transfer the Grievant has the burden of proving her case by a preponderance of the evidence.

2. "County boards of education have substantial discretion in matters relating to hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, and in the best interests of the school, and in a manner which is not arbitrary

and capricious." Dillon v. Wyoming County Bd. of Educ., 351 S.E.2d 58 (W. Va. 1986).

3. "When an employee's [transfer] loses its stated justification prior to the end of the school year, the employee is entitled to keep the position absent some extraordinary circumstances." Clay v. Mingo County Bd. of Educ., Docket No. 94-29-516 (Dec. 29, 1994); see also Brown v. Logan County Bd. of Educ., Docket No. 90-23-177 (Oct. 31, 1990).

4. Grievant has failed to meet her burden of proof and demonstrate by a preponderance of the evidence that her transfer should have been rescinded or that KCBOE acted in an arbitrary and capricious manner.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County and 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: March 31, 1995