REBECCA ECKENRODE, et al.,

Grievants,

v. DOCKET NO. 95-20-272

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants, Becky Eckenrode, Phyllis Gunnoe, Regina Welch, Donna Sizemore and Esta Fields, employed as Cooks by Kanawha County Board of Education ("Board"), filed the following grievance in May 1995:

> Grievants were recommended for placement on the transfer list. After hearings on April 27, 1995 the Respondent refused to approve the recommendation to transfer Grievants. Grievants were notified of this action and were informed they were reassigned to the school to which they were assigned during the 1994-1995 school year. Subsequently, the Respondent reversed itself and approved Grievants placement on the transfer list. Grievants contend that Respondent was without authority to take this action and that such action violates West Virginia Code § 18A-2-7. Grievants seek reinstatement to their 1994-1995 assignments.

Following adverse decisions at the lower levels, Grievants appealed to level four on June 23, 1995. The parties agreed to submit this matter on the record developed below, and this case became mature following the expiration of the agreed upon briefing schedule on September 1, 1995.

The facts in this matter are not in dispute and are summarized below in the following findings of fact.

Findings of Fact

1. Grievants are employed as Cooks by the Board at various county schools.

2. Pursuant to a decision to increase the number of meals to be served per cook, a number of Cook I/II positions in the county's schools were recommended to be eliminated.

3. In accordance with that decision, several cooks, including Grievants, received Notice on or about March 15, 1995, that they would be recommended for placement on the transfer list pursuant to W. Va. Code § 18A-2-7 by Superintendent Jorea Marple.

4. Grievants requested and were granted a hearing on the proposed transfers before the Board on April 27, 1995. Following the conclusion of the hearings, Respondent voted and, in the case of Grievants, failed to approve the Superintendent's recommendation for transfer.

5. Grievants were notified by letter dated April 28, 1995, that the Board had not approved the recommendation for transfer and they would remain in their present positions for the 1995-96 school year.

6. On May 1, 1995, the Board met again and voted to rescind the action taken at the April 17, 1995, meeting to disapprove the transfers of the Grievants. The Board then voted to approve the Superintendent's recommendation that Grievants be placed ontransfer and subsequent assignment commencing with the 1995-96 school year.

7. Grievants were notified of the Board's actions by letter dated May 5, 1995, and sent by regular mail. Grievants all received this letter.

Discussion

Grievants allege that the Board violated W. Va. Code § 18A-2-7, which states, in pertinent part:

> The Superintendent, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter. However, an employee shall be notified in writing by the superintendent on or before the first Monday in April if he is being considered for transfer or to be transferred, ... Any teacher or employee who desires to protest such proposed transfer may request in writing a statement of the reasons for the proposed transfer. Such statement of reasons shall be delivered to the teacher or employee within ten days of the receipt of the request. Within ten days of the receipt of the statement of the reasons, the teacher or employee may make written demand upon the superintendent for a hearing on the proposed transfer before the county board of education. The hearing on the proposed transfer shall be held on or before the first Monday in May, ... At the hearing, the reasons for the proposed transfer must be shown.
>
> The superintendent at a meeting of the board on or before the first Monday in May shall furnish in writing to the board of list of teachers and other employees to be considered for transfer and subsequent assignment for the next ensuing school year, ... The list of those recommended for transfer shall be included in the minute record of such meeting and all those so listed shall be notified in writing, which notice shall be delivered in writing, by certified mail, return receipt requested, to such persons' last

> known addresses within ten days following said board meeting, of their having been so recommended for transfer and subsequent assignment and the reasons therefor.

Grievants allege that the Board violated this Code section in several ways. First, they allege the Board, having voted on April27, 1995, not to approve the Superintendent's recommendation for their transfer, had no authority to then vote again on May 1 to approve the recommendation. Grievants also contend once the Board voted on April 27, 1995, they were in effect removed from the transfer list. Thus, when the Board voted a second time on May 1, 1995, it resulted in their being placed on the transfer list a second time, which required a second notice and hearing opportunity. Finally, Grievants allege the notice they received following the May 1, 1995, meeting of the Board approving their transfer was not sent by certified mail, return receipt requested, in violation of the statute.

Grievants' first argument is essentially one of estoppel; that the Board, having voted once on their transfers, could not later change its mind. While the principle of estoppel, that parties will not be permitted to assume successive inconsistent positions in the course of an action in reference to the same fact or facts, is widely upheld against a private party, it is well-settled that estoppel against the state or its agencies and subdivisions, including county boards of education, is rarely available. See, North v. W. Va. Bd. of Regents, 332 S.E.2d 141 (W. Va. 1985), certiorari denied, 106 S.Ct. 1207, 475 U.S. 1020, 89 L.Ed.2d 320; Utz v. Bd. of Educ. of Brooke County, 30 S.E.2d 342 (W. Va. 1944). Further, Grievants have not demonstrated they relied in any way, to their detriment, on the Board's conduct or representation. See, Simmons v. Comer, 438 S.E.2d 530 (W. Va. 1993).

Grievants' second argument, that they were denied a second notice and hearing opportunity following the Board's first vote, must also fail. The statute provides clear timelines which must be followed by the Board in notifying, discussing, and voting upon the Superintendent's recommendations for transfer. In the instant case, the Board did not violate the timelines of the statute. The Board notified Grievants of the proposed transfers on March 15, 1995. The Board held hearings on the transfers on April 27, 1995. The Board notified Grievants they had voted not to approve the transfers on April 28, 1995. The Board met again on May 1, the first Monday in May, and voted again, this time approving the transfers. Grievants were notified by letter dated May 5, 1995, of the Board's decision. All of these events took place within the timelines prescribed by the statute.

Grievants were afforded proper notice and a hearing on the proposed transfers. The fact the

Board initially voted not to approve the transfers does not mean that Grievants were removed from the transfer list at that time. The statute plainly states the Board has until the first Monday in May to review the transfer recommendations. That the Board deliberated on Grievants' transfers over the course of two meetings, within the statutory framework, does not create a second right to notice and hearing opportunity over the same recommendation for transfer. The undersigned sympathizes with Grievants over the disappointment they must have felt when they received the second letter informing them the Board voted to approve the transfers, and suggests that theBoard may want to consider waiting until the final meeting under the statute to inform employees of its decisions regarding proposed transfers to prohibit this type of situation from occurring in the future.

Finally, Grievants contend that, because the May 5, 1995, letter from the Board was not sent certified mail, return receipt requested, the Board violated the statute and their transfers should be rescinded. Grievants do not deny they received the letters in a timely manner. The purpose of that provision is to ensure that employees receive notice of the Board's action in a timely fashion to allow them ample time to make any necessary arrangements for the ensuing school year, as well as to prompt the grievance procedure timelines. Grievants have not shown they were in any way prejudiced by the failure of the Board to send the letters by certified mail. Thus, the undersigned finds this procedural irregularity constitutes harmless error, and Grievants' argument on this issue must fail as well.

Conclusions of Law

1. Estoppel against the state or its agencies and subdivisions, including county boards of education, is largely proscribed. See, North v. W. Va. Bd. of Regents, 332 S.E.2d 141 (W. Va. 1985), certiorari denied, 106 S.Ct. 1207, 475 U.S. 1020, 89 L.Ed.2d 320; Utz v. Bd. of Educ. of Brooke County, 30 S.E.2d 342 (W. Va. 1944).

2. Grievants have failed to prove by a preponderance of the evidence the Board violated W. Va. Code § 18A-2-7 by voting once todeny the Superintendent's recommendation for transfers, and then voting again to reverse themselves in a subsequent meeting held within the statutory framework and timelines.

3. The Board violated W. Va. Code § 18A-2-7 when it failed to send Grievants letters informing them of the Board's action to approve their transfers by certified mail, return receipt requested.

However, Grievants failed to show they had been prejudiced in any manner, and the oversight is deemed to be harmless error.

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.

_____

MARY JO SWARTZ

Administrative Law Judge

Dated: September 27, 1995