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**WEST VIRGINIA EDUCATION  
EMPLOYEES GRIEVANCE BOARD**

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EVELYN HANCOCK

v.

DOCKET NO. 20-86-108

KANAWHA COUNTY BOARD OF EDUCATION

**DECISION**

Grievant, Evelyn Hancock, was employed by the Kanawha County Board of Education as a Custodian I at East Bank High School on November 8, 1982. On February 27, 1985 she was notified by Kanawha County Superintendent of Schools Edward R. Lakey that she was being recommended for transfer for the ensuing school year to make adjustments in staffing and to realign and adjust custodial staffing in accordance with changes in school population and custodial staffing formula. She requested a hearing before the board of education and a hearing was conducted on April 22, 1985. The board voted to place her on the transfer list and she filed a petition for appeal with then State Superintendent of Schools Roy Truby on June 28, 1985, who returned the petition on the basis of House Bill 1970. (Code, 18-29-1, et seq.) A level four hearing was scheduled for April 29, 1986 and prior thereto counsel for

the board of education filed a motion to dismiss the appeal and requested a hearing thereon prior to the hearing on the merits; a hearing on the motion was conducted on April 24, 1986.

The basis of the motion to dismiss is that the Education Employees Grievance Board lacked jurisdiction to entertain direct appeals of decisions rendered in connection with transfer hearings conducted pursuant to Code, 18A-2-7 because the subject matter of the appeal had never been prosecuted as a grievance under either the previous grievance procedure, State Board of Education Rule No. 1340, or Code, 18-29-1, et. seq.; that the grievance was never appealed but came to this Board as a direct transfer of pending matters from Dr. Truby to this Board and that such a transfer did not confer jurisdiction upon this Board. Counsel for the board contends additionally that the grievant's problem should have been resolved by the State Superintendent of Schools or by the Circuit Court of Kanawha County via a petition for writ of certiorari.<sup>1</sup>

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<sup>1</sup> This is the first question raised as to the Grievance Board's jurisdiction on this basis and it should be noted that the effective date of Code, 18-29-1, et. seq., was July 1, 1985; Governor Moore appointed the present members to the Board on September 6, 1985. The Board employed two hearing examiners and began conducting hearings on the accumulated requests for hearings in early December, 1985. However, because there was no office established until the latter part of December the individual board members had been receiving the correspondence and appeals at their business offices and retained it until the grievance procedure became  
(footnote continued)

It is to be noted that this appeal was pending before the State Superintendent of Schools when Code, 18-29-1, et. seq., was enacted and it appears that, procedurally, it is of little consequence as to the manner by which the appeal was transferred to the Grievance Board. Consentina v. Compensation Com'r., 127 W.Va. 67, 76, 31 S.E.2d 499 (1944). There is no question that Code, 18-29-1, et. seq., extricated the State Superintendent from the general employee - county board of education disputes, Smith v. Board of Education of Logan County, 341 S.E.2d 685 (W.Va. 1985), and the approach taken by Dr. Truby that any appeal not decided by him prior to July 1, 1985 had to be referred to the Grievance Board was consistent with this legislative intent. Moreover, grievant is entitled to any benefit which may have been afforded by enactment of Code, 18-29-1, et. seq., while her appeal was pending. State v. Duvernoy, 156 W.Va. 578, 587, 195 S.E.2d 631 (1973). Accordingly, the motion to dismiss is denied.<sup>2</sup>

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(footnote continued)

functional. It was then turned over to the hearing examiner. It was decided early on that no grievant would suffer any prejudice on a pending grievance by virtue of the problems created in the implementation and transition involved in the new grievance procedure.

<sup>2</sup> Counsel for the board of education also argues that Code, 18A-2-7 is a separate statutory proceeding not incorporated automatically into those areas contemplated by Code, 18-29-1, et. seq. However, the definition of "grievance" in Code, 18-29-2(a) appears to be sufficiently broad so as to include disputes involving transfers.

Turning to the merits of this grievance, the evidence is that on January 25, 1985 Mr. Harry Graves, principal at East Bank High School, received notification from Mr. Cy L. Faris, Associate Superintendent, division of personnel, that for the 1985-86 school year the staffing pattern reflected a reduction of 1.0 classroom teacher and .5 Custodian I.<sup>3</sup> On February 6, 1985 he advised Mr. Faris that grievant was the youngest employee on the custodial staff in terms of seniority but that reduction in the custodial staff would result in a deterioration of the condition of the building. He testified that he had been at East Bank High School since 1970 and during that time had seen the number of custodians reduced from nine to what would be 5.5; that the condition of the school could not be maintained properly if another half-time custodian was lost.<sup>4</sup>

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<sup>3</sup>The transcript of evidence adduced at the level two hearing was admitted into evidence at the level four hearing on the joint motion of the parties; no additional evidence was offered.

<sup>4</sup>East Bank High School was involved in community education and GED programs as well as a program with the Parks and Recreation Commission and this required more custodial work. East Bank is one of four schools in the county having a contract with Parks and Recreation for athletic programs at the school. There is a Parks and Recreation director with an office in the building and they utilize portions of the building six days a week for seven to eight months of the year.

Mr. John Lyons, assistant superintendent for facility management, testified that the formula utilized in determining custodial staffing of schools was based upon the square footage of the building, acreage, number of students and teachers and the size of the kitchen. This formula is in accordance with board of education policy and is utilized county-wide. The formula also takes into account the community education programs and other night classes and activities.<sup>5</sup>

Grievant testified that she was responsible for cleaning thirteen rooms, two bathrooms, a stairway and a long hallway and a short hallway at East Bank High School. She testified in detail about her duties and concluded that it would not be possible for a custodian to perform that work on a half-day basis. Counsel for grievant contends that the application of the computerized formula utilized by the administration is arbitrary and ignores the specific needs of each individual school and the recommendation of the principal of the school involved.

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<sup>5</sup>Mr. Lyons testified that Parks and Recreation usually did their own cleaning of the facilities that it used; that it was provided in the original contract for such cleaning. The testimony of the grievant confirmed this (T. 26). Mr. Graves had also testified that while the physical plant at East Bank had not changed since 1970 the student population had decreased by about one-half.

In addition to the foregoing factual recitation the following specific findings of fact are appropriate.

FINDINGS OF FACT

1. Grievant was employed by the Kanawha County Board of Education in 1982 as a Custodian I at East Bank High School.

2. In 1985 it was determined that on the basis of the formula applied by the administrative staff that the custodial staff at East Bank High School should be reduced by one-half custodian.

3. Grievant was the least senior custodian at East Bank High School and was advised that she would be transferred for the 1985-86 school year.

4. The formula employed by the school board is applied on a county wide basis and is a board policy.

5. Although there is evidence that the reduction in the custodial staff at East Bank High School will result in a possible hardship on the custodial staff there is no showing that the reduction procedure or decision was arbitrary or unreasonable.

6. There is no probative evidence showing that the decision to reduce the custodial staff at East Bank High School was not taken in good faith or contrary to the best interests of the school system.

#### CONCLUSIONS OF LAW

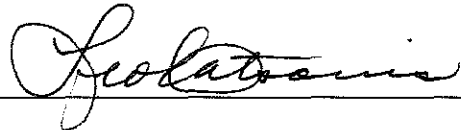
1. Code, 18-29-1, et seq., confers jurisdiction upon the Education Employees Grievance Board in cases involving transfers of school service personnel and hearings held pursuant to Code, 18A-2-7.

2. Code, 18A-2-7 vests great discretion in the county superintendent of schools and the county boards of education in transferring school personnel and their decisions will be upheld unless the decisions are arbitrary, unreasonable or contrary to the best interests of the school.

3. The decision to reduce the custodial staff at East Bank High School on the basis of the formula was not arbitrary or unreasonable primarily because the formula was applied on a county wide level and on a uniform basis.

For the foregoing reasons it is Ordered that the grievance is denied.

Either party may appeal this decision to the Circuit Court of Kanawha County and such appeal must be filed within thirty days of receipt of this decision. (Code, 18-29-7). Please advise this office of your intent to do so in order that the record can be prepared and transmitted to the Court.



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LEO CATSONIS  
Hearing Examiner

Dated: 7-25-86