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**WEST VIRGINIA EDUCATION  
EMPLOYEES GRIEVANCE BOARD**

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**CARMELITA M. PETERS**

**v.**

**Docket No. 27-86-144-1**

**MERCER COUNTY BOARD OF EDUCATION**

**DECISION**

Grievant, Carmelita M. Peters, is employed by the Mercer County Board of Education as an LD teacher at Bluefield High School. On January 17, 1986 she filed a grievance alleging that the principal at Bluefield High School, Billy J. Norton, had created and filled the position of attendance director at Bluefield High School contrary to law and on the basis of favoritism. A level two hearing was conducted on February 4 and a level three hearing was conducted on April 14, 1986. The board of education upheld the denial of the grievance on April 24 and an appeal to level four was filed on May 6, 1986.<sup>1</sup>

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<sup>1</sup> This grievance was assigned to the Beckley hearing examiner and then reassigned to the undersigned hearing examiner.

A level four evidentiary hearing was waived by the parties and the grievance was submitted to the hearing examiner on the record made at the previous levels. References made herein to those transcripts will be designated as: (Level II, T.\_\_\_\_) and (Level III, T. \_\_\_\_).

Grievant was initially employed as a full time teacher by the Mercer County Board of Education in 1976 and transferred to Bluefield High School to an LD position four years ago. (Level III, T. 14). In addition to her normal attendance duties such as roll-taking, etc., she also did early dismissals each day for a period of three and one half years. These early dismissal duties commenced at approximately 7:30 a.m. prior to her teaching duties and amounted to an hour per day; these duties terminated upon creation of the attendance director position in question. (Level III, T. 15).<sup>2</sup>

Sometime around January 18, 1986 a new schedule was circulated at the school and the name of Larry Estep appeared thereon as Attendance Director. The position of attendance director was to be a full time position with no duties other than attendance with an office in the administrative wing of the school building and appropriate support staff. Mr. Estep had been in the English department and had previously carried five English classes and a study hall. The new schedule distributed those teaching assignments to other teaching personnel in the English and Social Studies departments. (Level III, T.16, 35). Mr. Estep had not previously had any attendance duties

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<sup>2</sup> The two administrators at Bluefield High had not been able to give attendance the proper attention because of the work load. (Level III, T. 36).

Consequently, attendance control had become a serious problem at Bluefield High School and principal Norton acknowledged that grievant had alleviated the problem by her willingness to come in the mornings and help with attendance controls. (Level III, T. 36). She performed those duties without extra pay. (Level III, T. 15).

and he did not receive a salary increase. There was no formal announcement or posting of the attendance director position prior to January 18, 1986 except that Mr. Norton had allegedly made mention of it in the teacher's lounge and grievant had learned of it. (Level III, T. 16).

Principal Norton contends that he did not create a position but made a reassignment of duties of a temporary nature. (Level III, T. 25, 32). He stated that because of some schedule changes he could not use grievant for attendance duties and the attendance director position had to be filled from the English or Social Studies departments. (Level III, T. 25).

Grievant does not contest the authority of principal Norton to reassign teachers from one position to another within their area of certification but does contest his authority to establish a new administrative position and fill it without permitting other qualified personnel to be considered for the position. (Level II, T. 2). She is also concerned that an instructional position has been eliminated and the duties thereof absorbed by others.

Conversely, the position of the level two grievance evaluator and the Mercer County Board of Education is that the attendance director position was a temporary assignment and not a newly created position which principal Norton was authorized to make and fill. However, neither the level two grievance evaluator nor the board of education issued a written decision containing findings of fact and conclusions of law required by W. Va.

Code, 18-29-6 and the absence thereof has obscured the issue involved in this grievance.<sup>3</sup>

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

#### FINDINGS OF FACT

1. Grievant has been employed as a teacher by the Mercer County Board of Education since 1976 and assigned to Bluefield High School as a special education teacher for four years. She was employed as a substitute from 1970-76.

2. For three and one half years grievant performed early dismissal duties at Bluefield High School in addition to her regular teaching assignments. These duties were performed prior to commencement of the school day and consumed approximately an hour per day; they were performed without additional compensation.

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<sup>3</sup> For example, Superintendent Baker testified that there was no certification for a position of attendance director other than a county attendance director and that the instant position had not been approved in advance by he or the board of education. (Level III, T. 43). Further, the grievance evaluator opined that the position was not an administrative position but perhaps a clerical position because Mr. Estep could not suspend students. (Level II, T. 2). These questions should have been developed and resolved at the previous hearings.

3. Attendance control was a serious problem at Bluefield High School and around January 18, 1986 the principal of Bluefield High School, Billy J. Norton, revised the schedule for the second semester by relieving Larry Estep of his teaching duties and assigning "attendance" duties for the seven period day to Mr. Estep.

4. Mr. Estep has been at Bluefield High School for about ten years as a full time English teacher. His teaching duties were distributed between five other teachers in the English and Social Studies departments.

5. The position occupied by Mr. Estep involved the performance of full time attendance duties in an office established in the administrative wing of the school building and included support staff to assist Mr. Estep. Mr. Estep had not previously performed any attendance duties and neither his classification as teacher nor his pay scale were changed.

6. There was no formal announcement or posting of this position prior to January 18, 1986 and it does not appear that the superintendent or board of education was involved in the decision to create this position. It is unknown and not decided if the position is deemed to be administrative, clerical or teaching. However, there is no position officially classified as "Attendance Director" at Bluefield High School.

7. Grievant filed a grievance alleging that the position was required to be posted and that the selection of Mr. Estep under the circumstances involved "favoritism". Principal Norton denied the grievance on the basis of opinions of the State Superintendent authorizing principals to reschedule teachers to other positions within their certification as approved by the county superintendent of schools with the approval of the board of education.

8. Grievant thereafter requested a level two hearing requesting that a job description be written and that the position be advertised in the same manner other non-teaching positions were advertised. The grievance evaluator denied the grievance on the basis of a State Superintendent interpretation dated April 9, 1985 and on the basis that the position was temporary; that the county superintendent would decide "if this arrangement will continue next year." No written decision containing findings of fact and conclusions of law was issued by the level two grievance evaluator.

9. Grievant requested a level three hearing and an evidentiary hearing was conducted by the board of education on April 14, 1986. By letter dated April 29, 1986 from Superintendent Baker, the grievance was denied on the basis that the position of attendance director was a temporary assignment and did not amount to the creation of a new position. This conclusion

was apparently predicated on the testimony of principal Norton that the continued existence of the position would depend upon future attendance figures. However, there was no written decision issued containing findings of facts and conclusions of law supporting the decision of the board of education.

10. Both parties to this grievance waived an evidentiary hearing at level four and submitted the grievance to the hearing examiner on the record made up at levels two and three of the grievance procedure.

#### CONCLUSIONS OF LAW

1. W. Va. Code, 18A-2-9 authorizes a principal, under the supervision of the county superintendent, to assume administrative and instructional supervisory responsibility for the educational program of the school to which he is assigned and to submit, in writing, recommendations to the superintendent regarding the appointment, assignment or promotion of all personnel under the principal's control. This provision does not authorize a principal to create and fill a position of Attendance Director by internal transfer and thereby avoid the requirements of W. Va. Code, 18A-4-8b.

2. W. Va. Code, 18A-4-8b requires boards of education to post and date notices of all openings of newly created

positions in conspicuous working places for all professional personnel to observe for at least five working days; the notice must include the job description. This requirement is not obviated by the designation of a newly created position as "temporary" when the characterization is predicated upon future student enrollment and/or attendance since most, if not all, positions are dependent upon those considerations.

3. W. Va. Code, 18-29-4(b) requires that the grievance evaluator at level two conduct a hearing and issue a written decision.

4. W. Va. Code, 18-29-4(c) permits the board of education to conduct a hearing at level three of the grievance procedure and if a hearing is conducted the board of education must issue a written decision.

5. W. Va. Code, 18-29-6 requires that every decision pursuant to a hearing shall be in writing and shall be accompanied by findings of fact and conclusions of law. This provision is mandatory and grievances submitted to the hearing examiner on the record of previous hearings will be remanded in absence of a written decision containing findings of fact and conclusions of law.



6. Statutory provisions which are clear and unambiguous are not subject to interpretation and must be given full force and effect. Lavender v. McDowell County Board of Education, 327 S.E.2d 691 (W.Va. 1984).

7. School personnel laws are to be strictly construed in favor of personnel and regulations and statutes enacted for their protection must be carefully complied with. Morgan v. Pizzino, 163 W.Va. 454, 256 S.E.2d 592 (1979).

For the foregoing reasons the grievance is granted and it is Ordered that the attendance director position be posted and filled as required by law.

Either party may appeal this decision to the Circuit Court of Kanawha County or Mercer 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.



LEO CATSONIS

Chief Hearing Examiner

Dated: November 26, 1986