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**WEST VIRGINIA EDUCATION  
EMPLOYEES GRIEVANCE BOARD**

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DORSEY C. SCOTT

v.

JACKSON COUNTY BOARD OF EDUCATION

DOCKET NO. 18-86-009

DECISION

Grievant, Dorsey C. Scott, contends that as a result of a grievance he filed in 1984 his position as director of general services was eliminated and he was transferred to a position of itinerant physical education teacher at three elementary schools in Jackson County. After several unsuccessful attempts to obtain a hearing before the county board of education, he filed a request that the grievance be submitted to a hearing examiner and hearings were conducted on January 27, February 5 and 21, 1986, at which the following evidence was adduced.<sup>1</sup>

Grievant has an A.B. degree in physical education and a masters degree plus thirty hours with graduate specialties in principalships and superintendency; he holds permanent state certification in school attendance, health and physical

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<sup>1</sup> At the request of the parties, the hearing on January 27 was a pre-hearing conference to delineate the issues and to settle any discovery problems. At this hearing, counsel for the grievant and the board of education were required to lay out their cases in detail in that the employer had indicated earlier that they did not understand the nature of the grievance.

education, principal and supervising student teachers.<sup>2</sup> He served as director of attendance of Jackson County from 1976 to 1983 when he became director of general services upon the recommendation of the superintendent, James D. Lannan. This was a new position and included the duties of attendance director. Another director-level position was created at this time, director of support services, and Paul Raines was appointed. At the time these positions were created Lannan advised the board of education that a savings of approximately \$50,000 per year would be effected.

Sometime in June, 1984, grievant and Paul Raines filed a grievance concerning a salary increase allegedly promised by Superintendent Lannan and on September 6, 1984 the Jackson County Board of Education heard and denied the grievance.<sup>3</sup>

Shortly thereafter, grievant's courtesy card to athletic events issued by the Secondary Schools Activities Commission was revoked at the instigation of Superintendent Lannan, he was removed from the agenda of in-service training seminars, he was denied permission to attend educational meetings, he was refused permission to requisition work pads, etc. In addition, by memorandum dated October 1, 1984 Superintendent

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<sup>2</sup> Grievant has over twenty seven (27) years of experience in the field of education as principal of Ravenswood High School, assistant superintendent and superintendent of Wetzel and Jackson Counties and presently as itinerant physical education teacher at elementary schools since June 30, 1985. He also holds permanent certificates in elementary and secondary principalships and social worker.

<sup>3</sup> James Marshall, another administrative employee, was involved in the grievance initially but did not pursue the grievance to the hearing stage. Grievant contends that Marshall was "bought off" by Lannan and got the position of attendance director that grievant should have had. Marshall testified that he withdrew his grievance after talking with Lannan but denied that Lannan had coerced him into withdrawing his grievance.

Lannan anticipated changes in the office organization for the 1985-86 school year with the possible elimination of some central office positions and initiated a monthly evaluation procedure by which the evaluations of grievant and Paul Raines suffered dramatically.<sup>4</sup>

On March 27, 1985 grievant and Paul Raines were notified that they would be put on the administrative transfer list upon the recommendation of Lannan and on April 5 grievant requested a hearing on the transfer before the board of education. He testified that he withdrew this request on the basis of representations made to him by Lannan that grievant would be given the position of attendance director or a comparable position.

On May 3, 1985, Superintendent Lannan advised grievant that the board had approved the placement of grievant's name on the transfer list because:

"...we intend to eliminate the position of Director of General Services for next year, and will need to be able to place you into another position for which you are certified."

On May 20, 1985 grievant was advised by Lannan that he was being considered for placement into the posted positions of itinerant physical education teacher for the elementary

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<sup>4</sup> Paul Raines testified that Lannan told him in October, 1984 that he would "get him"; that he (Raines) would not be around next year. Brooks Smith, board member and ex-superintendent of schools of Jackson County and friend of grievant testified that Lannan told him that "he was going to get the little son-of-a-bitch my way" after the grievance. Grievant stated that Lannan told grievant he would "tear him a new asshole". Lannan stated that he had no recollection of these remarks but if they were made it was in jest. Raines did not file a grievance on this basis but did file a grievance on the basis of his suspension for insubordination. Raines v. Jackson County Board of Education, No. 20-86-080, decided March 17, 1986.

schools and director of attendance.<sup>5</sup> The posted notice for the director of attendance position stated that application for the position had to be in writing and that the applicant was required to have a school attendance certification; on May 21 grievant advised Lannan that he requested to be recommended for assignment as director of attendance and that if the recommendation was for itinerant physical education teacher grievant requested the opportunity to appeal. Grievant further requested that the options he and Lannan discussed on May 15 be considered and/or have priority.<sup>6</sup>

On June 6, 1985 the board of education approved the elimination of the positions of director of general services and director of support services as recommended by Lannan on a 3-2 vote and refused to create the position of director of attendance by a vote of 3-2.<sup>7</sup> The board also approved the transfer of Paul Raines to teacher at Ripley High School and the transfer of grievant to itinerant physical education teacher, elementary, for the 1985-86 school term. Upon

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<sup>5</sup> Grievant was also advised in this memorandum that he could indicate his preference and if he wanted to protest he would be entitled to a hearing before the board on June 6. The notices for both positions were posted on the same day.

<sup>6</sup> The May 15 discussion alluded to by grievant involved the representations by Lannan that grievant would be given the job of attendance director, or service director or a new job encompassing grievant's and Raines' job, i.e., director of auxillary services.

<sup>7</sup> Lannan had recommended the creation of the position of attendance director and also recommended grievant for the position. At least one board member voted against creation of the position because it is created by Code, 18-8-3 and is mandatory.

notification of the action of the board, grievant requested an appeal and on July 3 grievant was notified by Lannan that the board had taken no action on his appeal but did:

"...at the same meeting, vote to combine the function of director of school attendance with another administrative function presently being performed in this office..."<sup>8</sup>

Grievant was never given any reasons for his removal as director of attendance and he later learned that James Marshall, the employee who was appointed to the position, did not hold state certification in school attendance and never applied for the position; that Marshall had been requested by Lannan to take the job in addition to his duties as Director of Chapter I and II Programs for a supplementary salary of \$1,000.00.<sup>9</sup> As a result of the elimination of his position and the transfer to the physical education teacher's position, grievant had a reduction in salary of at least \$3,500.00 per year.

Superintendent Lannan contended that grievant and Paul Raines were transferred and their positions eliminated due to declining student enrollment and its effect upon the funds Jackson County would receive pursuant to the

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<sup>8</sup> In his appeal, grievant's attorney had pointed out that state law required the county to have a certified attendance director and that grievant was the only Jackson County teacher so certified. The July 3rd letter from Lannan also noted that although the board had taken no action on grievant's request for an appeal the board had "...implicitly spoken to your appeal" and Lannan considered the matter closed.

<sup>9</sup> Mr. Marshall had been attendance director in 1973-75 when grievant had been superintendent on a temporary permit; however, at that time there was no one else in Jackson County who was certified. Mr. Marshall was issued a permit in September, 1985 on an application filed in July signed by Lannan attesting that Marshall was the most qualified person available in Jackson County. To get proper certification, Mr. Marshall would have to complete courses at Glenville.

state aid formula for financing public education, i.e., a budget problem.<sup>10</sup> He denied that there was any retaliatory motivation for any of the actions that had been taken against grievant and Paul Raines and that it was merely coincidence that their positions were the only two central office positions eliminated.<sup>11</sup> The board members testified generally that they voted as they did on the basis of the representations made by Lannan as to the budget constraints even though they were aware of a surplus; that with the exception of board member Brooks Smith they did not know what motivated Lannan to eliminate the positions. The deputy and assistant superintendents testified that they were not aware of any hostility on the part of Superintendent Lannan toward grievant and/or Paul Raines and that the positions had been eliminated

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<sup>10</sup> There was no explanation offered for the elimination of the attendance director's position in a period of declining student enrollment, i.e., a loss of 150 students in enrollment in September, 1984. This concern was voiced by board member and ex-superintendent Brooks Smith who also stated that there was no budgetary problem at the time the jobs were eliminated but that, on the contrary, there was approximately one half million dollars of unexpended funds.

<sup>11</sup> He admitted telling the executive secretary of the SSAC to take grievant off the courtesy card list and stated that grievant and Raines were taken off the in-service conference agenda because it was "inappropriate to subject other staff members to the unpleasantness surrounding the grievance." He knew that there was a surplus in the budget at the time and stated that he signed Marshall's application asserting that Marshall was the most qualified available person for the job because grievant was an itinerant physical education teacher and was not "available".

only after much effort to assure that the legal requirements had been met.<sup>12</sup>

As a general rule, Code, 18A-2-7 vests great discretion in the board of education and the county superintendent of schools in the transfer of teachers and courts will not interfere with the exercise of that discretion where the action is taken in good faith for the benefit of the school system and is not arbitrary. The power of a county superintendent to transfer teachers must be exercised in a reasonable manner and arbitrary and capricious use of the power will not be permitted. State ex rel. Hawkins v. Tyler County Board of Education., 275 S.E.2d 908 (W.Va.1981).

A transfer of a teacher in retaliation for the filing of a grievance by that teacher is an arbitrary and capricious act and a violation of Code, 18-29-3(h).<sup>13</sup> The evidence of reprisal in this case is compelling and would require relief on that basis. It should be noted, however, that other aspects of this grievance, whether motivated as retaliation or otherwise, need to be addressed.

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<sup>12</sup> This evidence must be weighed in light of the un rebutted direct and circumstantial evidence of the hostile relationship between Lannan and the grievant which also manifested itself on at least two occasions at the hearing. The testimony of assistant superintendent Pack concerning his evaluations of grievant subsequent to the grievance whereby grievant's performance deteriorated from "highly effective" in practically every rating category to "needs improvement" in all categories in such a short period of time must be similarly weighed.

<sup>13</sup> Code, 18-29-2 (p) defines "reprisal" as retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it. Code, 18-29-3(h) provides that any person held to be responsible for reprisal action shall be subject to disciplinary action for insubordination. These provisions were not in effect at the time of this occurrence but similar safeguards were in effect. This type of retaliation is not uncommon in the educational employment field. Holland v. Board of Education of Raleigh Co., 327 S.E.2d 155 (W.Va. 1985). See also, Melinda Cook v. Logan County Board of Education, docket No. 23-86-076, decided March 6, 1986, a copy of which is being forwarded with this decision.

More specifically, Code, 18-8-3 requires every county board of education to appoint a county director of school attendance and such assistant attendance directors as deemed necessary; permits the board to set up such special and professional qualifications as are deemed proper and are consistent with the state board of education. The power of removal of the attendance director rests with the board but the reasons for the contemplated dismissal must be reduced to writing and the director must be given an opportunity for a hearing. Thus, the board did not have the authority to abolish the position of attendance director and subsequently transfer those duties to an employee who failed to meet the requirements of the State or the board itself.<sup>14</sup>

In addition to the foregoing discussion, the following specific findings and conclusions are made:

1. Grievant served as director of attendance of Jackson County from 1976 to 1983 and thereafter, as part of his duties as director of general services.

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<sup>14</sup> The notice provided that state certification was required and that the application must be in writing. Superintendent Lannan arranged for James Marshall to accept the position for \$1,000.00 supplementary pay and certified to the State Board of Education that there were not qualified applicants in the county. He concluded that a permit was state certification and that grievant was not available because he had been transferred. However, the board and Superintendent Lannan are bound by the procedures they establish in the conduct of their affairs. Powell v. Brown, 238 S.E.2d 220 (W.Va. 1977). Cf. State ex rel. Hawkins v. Tyler County Board of Education, supra. It also appears that grievant was entitled to a hearing before the board prior to approval of the transfer list by the board. (See Code, 18A-2-7) Grievant withdrew his request for a hearing on the basis of representations made by Lannan that he would be appointed attendance director. These provisions providing for a hearing must be strictly construed in favor of the employee. Morgan v. Pizzino, 256 S.E.2d 592 (W.Va. 1979). See also the decision of Melinda Cook v. Logan County Board of Education, enclosed herewith, as it applies to seniority.



2. In June, 1984, grievant filed a grievance alleging that Superintendent Lannan had promised grievant a supplemental pay increase; in September, 1984, the board of education ruled against grievant.

3. Commencing on October 1, 1984, Superintendent Lannan engaged in series of retaliatory acts against grievant culminating in the abolition of grievant's position and his transfer/demotion to the position of itinerant physical education teacher of the elementary schools in Jackson County.

4. Grievant was not afforded a hearing on his removal as director of attendance or on the transfer/demotion to his present position.

5. As a result of the actions of the Superintendent and/or the board of education grievant's salary was reduced at a minimum of \$3,500.00 per year.

#### CONCLUSIONS OF LAW

1. Superintendent Lannon engaged in retaliatory conduct against grievant as a matter of law.

2. The board of education violated Code, 18-8-3 in the abolition of the position of attendance director and the removal of grievant from that position.

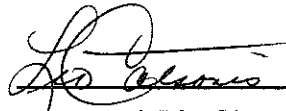
3. Superintendent Lannon and the board of education erred in assigning James Marshall to the position of attendance director.

4. Grievant's rights under Code, 18A-2-7 were violated in the manner by which he was transferred and/or demoted.

5. The transfer and/or demotion of grievant was an arbitrary and capricious exercise of power. School personnel laws are to be strictly construed in favor of the employee.

Accordingly, it is ordered that the grievant be reinstated to the position of director of attendance of Jackson County or be placed in an equivalent position commensurate with his qualifications and/or seniority and previous salary range. In addition, he is to be awarded the salary differential occasioned by the transfer/demotion retroactive to the date he was removed from said position.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Jackson County and such appeal must be filed within thirty (30) 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  
HEARING EXAMINER

3/21/86