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EMPLOYEES GRIEVANCE BOARD**

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JANE BURGE & SHIRLEY WORRELL

v.

DOCKET NO: 27-86-113

MERCER COUNTY BOARD OF EDUCATION

DECISION

This matter comes before the West Virginia Education Employees Grievance Board on appeal from a level three decision by the Mercer County Board of Education affirming the decision rendered at level two.

Thereafter, this matter was set for hearing on two occasions and, subsequently, at the request of the parties. Following the second continuance, the parties requested that this matter be submitted on the existing record with the opportunity to file briefs. Upon receipt of the executed written waiver and the filing of the final brief on December 10, 1986, the matter was submitted for decision.

The grievants, Jane Burge and Shirley Worrell, are teachers employed by the respondent, the Mercer County Board of Education and are assigned to Thorn Elementary School. In their complaints, consisting of approximately thirty-four handwritten and typed pages,

the grievants complain that since the 1982-83 school year, they have been harassed and otherwise treated in an unprofessional manner by their principal. As of the 1985-86 school year, they have been assigned to teach the first and second grades after having taught the fifth grade for many years.

The respondent denies that there was any harassment and contends that any actions taken by the principal were in conformity with state and county policies or otherwise within the authority of a principal as set forth in WV Code §18A-2-9.

The record reveals that grievant Worrell has taught at Thorn Elementary School, hereinafter referred to as TES, for over eighteen years and for seventeen years has taught the fifth grade. As of the 1985-86 school year, grievant Worrell was assigned to the first grade. Since the 1982-83 school year, grievant Worrell's evaluations have declined.¹

Similarly, grievant Burge has taught at TES for over twenty-three years and for the past twenty years has taught the fifth grade. The grievant was assigned to teach the second grade for the 1985-86 school year. Grievant Burge's evaluations have also declined since the 1982-83 school year.²

¹Grievant Worrell in the nine related areas, received in 1982-83, a total of seven outstanding ratings and two highly effective ratings. In 1983-84, she received two highly effective, five effective, and two unmarked ratings. Grievant Burge in the nine areas received in 1982-83, a total of six outstanding ratings and three highly effective ratings. In 1983-84, she received one outstanding rating, three highly effective, and five effective ratings.

²The bulk of the grievants' complaints arose during the 1983-84 and 1984-85 school year beginning with separate complaints regarding scheduling of math - lab in 1983-84.

Testimony relating to numerous incidents was presented by each grievant. The respondent attempted to explain that in each incident the grievants' complaints were unfounded; however, the net result was that the grievants received lower evaluations and re-assignments to teach at different grade levels from those they had been accustomed to teaching for over seventeen years.

The respondent explained that the lower scores on evaluations were a result of an overall tightening up of the evaluation process and that most, if not all, the teachers received lower evaluations.³

In response to the grievants' complaint about the reassignment, Principal McPherson's first explanation to the grievants was that it was done to allow two other teachers who were then teaching the first and second grades to move out of that area because they felt stuck. Later Principal McPherson asserted the transfer was a result of a reduction in force involving a physical education position.

A transfer of a teacher for either of the stated reasons by Principal McPherson would be suspect, especially in light of this pending grievance. The further fact that other teachers had been moved in past years does not alter the fact that these two teachers had been exemplary fifth grade teachers for approximately twenty years.

³While the respondents' position in this regard is partially substantiated in the record, it is also shown that the grievants' evaluations were more radically affected than the evaluations of other teachers.

In making this transfer, the respondent contended that such transfer/reassignment was within the authority of a school principal as provided in WV Code §18A-2-9.⁴ An examination of that statute reveals that the principal has the administrative and supervisory responsibility of the total educational program of the school. However, the principals' authority is limited in the area of assignment and transfer. This limitation is revealed in WV Code §18A-2-9 which, in pertinent part, provides:

The principal may submit recommendations to the superintendent regarding the appointment, assignment, promotion, transfer and dismissal of all personnel assigned to the school or schools under said principal's control. Such recommendation shall be submitted in writing as prescribed by the superintendent. (Emphasis added)

The West Virginia Supreme Court of Appeals in the case of Morgan v. Pizzino, 256 S.E.2d 592 (W.Va. 1979), established the rule of law which requires that school personnel regulations and laws are to be strictly construed in favor of the employee. In the Morgan case, supra, the Court required the application of WV Code §18A-2-7, which provides for notice and hearing in matters involving the transfer or reassignment of school personnel. The West Virginia Supreme Court of Appeals has also spoken to the matter of reassignment of professional employees in the case of Lavender, et al., v. The McDowell County Board of Education, 327 S.E.2d 691

⁴The respondent concedes that the transfer from the fifth grade to the first and second grades is a dramatic change which would require more work and a change of routine which the grievants had established over their many years of teaching the fifth grade. Thus, it is clear that the transfer of the grievants from a fifth grade position to a first and second grade position was a transfer involving a substantial change in duties, responsibilities, and subject matter.

(W.Va. 1984), wherein the Court decided that the transfer of a professional employee from his assignment as a guidance counselor to that of a classroom teacher, was a transfer as contemplated by WV Code §18A-2-7. Additionally, the West Virginia Education Employees Grievance Board has established in the case of Pansmith, et al., v. Taylor County Board of Education, Docket No. 46-86-057, that the transfer-reassignment of full-time special education teachers to one-half time kindergarten and half time fifth and sixth grade teachers amounted to a transfer as contemplated by WV Code §18A-2-7. In that matter, as is true in the present grievance, the reassignment amounted to a substantial change in the grievants duties, responsibilities, and subject matter. In addition, the transfer of the grievants was made by Principal McPherson without resorting to any written recommendation or notice as provided for in WV Code §18A-2-9, supra, and WV Code §18A-2-7 which, in pertinent part, provides:

The superintendent, subject only to approval of the board, shall have authority to assign, transfer, promote, demore 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 receipt of the request. Within ten days of the receipt of the statement of 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 a list of teachers and other employees to be considered for transfer and subsequent assignment for the next ensuing school year. All other teachers and employees not so listed shall be considered as reassigned to the positions or jobs held at the time of this meeting. 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 therefore. . .⁵

The respondent's additional argument to bolster its position that other teachers within TES had been moved does not alter the fact that the grievants had not been moved in over seventeen years and that they had been rated as outstanding/highly effective teachers during that time. That fact combined with the failure of the respondent to satisfactorily explain how the "reduction in force" required that these two teachers be moved, leaves little doubt that their reassignment to the first and second grades was arbitrary and not in the best interest of the school system.

In addition to the foregoing, the following findings of fact and conclusions of law are incorporated herein.

⁵The record indicates that the authority to assign/transfer teachers within the principal's school was regularly exercised by principals throughout the county.

FINDINGS OF FACT

1. Grievant, Jane Burge, is a teacher employed by the Mercer County Board of Education with over twenty-three years of experience.
2. Grievant, Shirley Worrell, is a teacher employed by the Mercer County Board of Education with over eighteen years of experience.
3. Grievant, Jane Burge, had taught the fifth grade continuously for the past twenty years prior to her transfer to the second grade.
4. Grievant, Shirley Worrell, had taught the fifth grade continuously for the past seventeen years prior to her transfer to the first grade.
5. The grievants were outstanding/highly effective teachers in their assigned fifth grade positions.
6. In transferring the grievants, Principal McPherson did not make a written recommendation to the superintendent as provided for in WV Code §18A-2-9.
7. The reduction in force involved a physical education scheduling problem and did not directly relate to the grievants' transfer.
8. The transfer of the grievants was accomplished by the principal without resorting to the procedure in WV Code §18A-2-7.
9. The transfer of the grievants was not in the best interest of the school system.
10. The evaluations of the grievants were not considered or relied upon by Principal McPherson in his decision to transfer

the grievants.

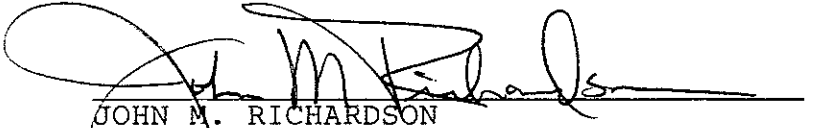
CONCLUSIONS OF LAW

1. The grievants failed to prove by a preponderance of the evidence that they were harassed by Principal McPherson.
2. A transfer/assignment involving a substantial change in duties, responsibilities, and subject matter requires compliance with WV Code §18A-2-7.
3. Pursuant to WV Code §18A-2-8, in matters involving the appointment, assignment, promotion, transfer and dismissal of school personnel, a principal may make recommendations to the superintendent.
4. The transfer of the grievants under the existing circumstances was arbitrary, capricious and not in the best interest of the school or the county educational system.

The grievants' request that the 1983-84 and 1984-85 evaluations be altered or changed is denied. The transfer of the grievants was improper and void.

In accordance with the foregoing, the Mercer County Board of Education is ORDERED to rescind Principal McPherson's transfer of the grievants and return them, if they so desire, to their fifth grade assignments at Thorn Elementary School.

Either party may appeal this decision to the Circuit Court of Mercer County or the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of this decision. (WV 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.



JOHN M. RICHARDSON
Hearing Examiner

DATED: Feb. 6, 1987