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RAYMOND DUNLEAVY

v.

DOCKET NO. 20-87-262

KANAWHA COUNTY BOARD OF EDUCATION

DECISION

Grievant, Raymond Dunleavy, is employed by Kanawha County Schools as a school psychologist and filed a grievance alleging that he was improperly transferred in violation of W.Va. Code, 18A-2-7. A level two evidentiary hearing was conducted on September 17, 1987 and the decision appealed to the Education Employees Grievance Board on October 16, 1987. The parties waived an evidentiary hearing at level four and submitted the grievance to the hearing examiner on the record.<sup>1</sup>

Grievant is in his third year of employment as a school psychologist and has responsibility for ten elementary schools

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<sup>1</sup> The transcript of evidence of the level two hearing was filed in the office of the Education Employees Grievance Board on November 18, 1987 along with grievant's proposed findings of fact and conclusions of law; counsel for the school board did not file findings of fact and conclusions of law and relied on those rendered by the level two grievance evaluator. References to the level two transcript herein will be designated (T.\_\_\_\_).

as the assigned psychologist for each of these schools. (T.7).

School psychologists are generally assigned to the department of psychological services and then assigned to specific schools on a geographical basis. (T.8,9).<sup>2</sup> Grievant's job is to administer psychological tests and personality tests and to work with teachers, principals and special ed personnel in setting up placement advisory committees to place students in special ed programs. In effect, he is the psychological representative to each of the ten schools and he maintains the services to these schools on a continuing basis; about 80-85 per cent of his time is spent in the schools and he returns to the central office at the end of the day (T.7,8).

In the 1985-86 school year, his first year of employment, grievant was assigned to provide psychological services to ten elementary schools in the St. Albans area and in his second year that assignment continued, except that Sacred Heart Elementary was substituted for Faith Christian Academy.

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<sup>2</sup> The psychological services delivery model was ostensibly prepared by grievant's supervisor, Mr. McMillian, effective August 16, 1985 and lists the specific schools assigned to each psychologist for each year. (Grievant's Exhibits 1 and 2).

Grievant did not object to that change because he had not, in fact, been requested to perform any services at Faith Christian Academy. (T.17).

By letter dated July 20, 1987 from Harold McMillian, director of the office of psychological services, grievant was advised that for the 1987-88 school year his assignment had been changed from the ten schools in the St. Albans area to eleven schools in the Stonewall and Sissonville areas. (Grievant's Exhibit 5).<sup>3</sup> Prior to this notification grievant had received no notice, oral or written, of the proposed change in assignment.

James Simmons, associate superintendent of pupil support services of Kanawha County Schools, had met with Mr. McMillian after school was out in 1987 to determine the staffing assignments of the itinerant staff (T.21). They determined that changes in assignment were necessary for a variety of reasons<sup>4</sup> and hence the assignments of ten

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<sup>3</sup> These schools are: Bonham, Buena Vista, Chandler, Flinn, Robins, Sissonville, Sugar Creek, Wallace Heights, Watts, Woodlawn and one non-public school, Conquerors Christian.

<sup>4</sup> The reasons given were that familiarity with a given assignment could reduce effectiveness, new assignments could stimulate new experiences and challenges, it broadened the perspective of the individual and it was necessary at times to upset routines because routines led to "lackidaziness" (T.22).

Grievant testified that one reason given by Mr. McMillian was personality differences between team members, (T.17), a point not elaborated upon since Mr. McMillian did not testify. Grievant was of the opinion that a transfer after two years of familiarizing himself with his schools and personnel was counterproductive in his case (T.15). Presumably, grievant would have developed these reasons had he been given a hearing prior to transfer.

of the eleven school psychologists were changed (T.23,24). Mr. Simmons was of the opinion that the change of assignment involved in this grievance was equivalent to an inschool transfer rather than a transfer as contemplated by W.Va. Code, 18A-2-7.

Grievant's representative contends that grievant received no notice from the superintendent of schools, the only notice he did receive was untimely and provided by the wrong official, the notice did not contemplate an opportunity to contest the transfer, there was no action by the board of education to list his name for transfer and there was no written notification by certified mail in a timely manner or at all, all in violation of W.Va. Code, 18A-2-7. It is concluded that grievant's supervisor(s) exceeded their authority and usurped authority reserved exclusively to the superintendent of schools and the board of education in reassigning grievant.<sup>5</sup>

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<sup>5</sup> Several Supreme Court decisions and decisions of the Education Employees Grievance Board are cited in support of these propositions, among which are two early cases decided prior to the enactment of W.Va. Code, 18A-2-7, i.e. Neal v. Putnam County Board of Education, 116 W.Va. 435, 181 S.E. 541 (1935) and White v. Lincoln County Board of Education, 117 W.Va. 114, 184 S.E. 264 (1936). These cases hold that a teacher may not be lightly shorn of the privileges and rights bestowed by law or contract.

The level two decision merely concludes that the grievant failed to establish by a preponderance of the evidence that the change in schools served constituted a violation of W.Va. Code, 18A-2-7.

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

#### FINDINGS OF FACT

1. Grievant is employed in the office of psychological services as a psychologist and is in his third year of employment. School psychologists are assigned to provide psychological services to specific schools on a geographical basis and report directly to the school each day; they return to the central office each afternoon for preparation time and other duties. Grievant spends approximately 80-85 per cent of his work time working directly with the schools to which he is assigned.

2. In his first year of employment, the 1985-86 school year, grievant was assigned to provide psychological services to ten elementary schools in the St. Albans area; in the 1986-87 school year that assignment continued.

3. By letter dated July 20, 1987 grievant was notified that commencing with the 1987-88 school year he would no longer be assigned to the schools he had previously served but would be assigned to elementary schools in the Stonewall and Sissonville areas. Prior to this letter grievant had received no notice, either written or oral, of a possible change of assignment. During his tenure grievant has received satisfactory evaluations and there is no evidence that the change of assignment was disciplinary in nature.

CONCLUSIONS OF LAW

1. The change of grievant's assignment was a transfer as contemplated by W.Va. Code, 18A-2-7 and required adherence to the procedure set out therein. Pansmith v. Taylor County Board of Education, Docket No. 46-86-057; Schafstall v. Brooke County Board of Education, Docket No. 05-86-347.

2. School personnel regulations and laws are to be strictly construed in favor of the employee. Morgan v. Pizzino, 256 S.E. 2d 592 (W.Va. 1979).

The grievance is Granted and it is Ordered that grievant be reassigned to the position he held prior to the change of assignment.

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. (W.Va. 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: January 5, 1987