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**WEST VIRGINIA EDUCATION
EMPLOYEES GRIEVANCE BOARD**

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RAYMOND A. DUNLEAVY

v.

Docket No. 20-87-102-1

KANAWHA COUNTY BOARD OF EDUCATION

DECISION

Grievant, Raymond A. Dunleavy, is employed by the Kanawha County Board of Education as a school psychologist and filed a grievance on January 5, 1987, alleging that Placement Advisory Committees (PACs) at his schools had been convened improperly. A level two hearing was conducted on March 19, 1987, and the decision appealed to the Education Employees Grievance Board on April 22, 1987. A level four hearing was conducted on June 17, 1987, and the grievance was dismissed after the opening statements of the parties.

Grievant is in his second year of employment as a school psychologist and is assigned to ten elementary schools in the

St. Albans area (T. 7).¹ His basic responsibilities are to provide psychological services to those ten schools in evaluating students for special education programs. One of his primary responsibilities is to sit in on PAC meetings with teachers, principals and other educational specialists to determine placement of these students. (T. 7).²

On January 5, 1987, grievant commenced the grievance procedure by requesting an informal conference with his immediate supervisor, Harold McMilliam, director of psychological services for Kanawha County Schools, and described his grievance as "PAC composition." (Grievance Evaluator's Exhibit 1, level two transcript.) On January 14, 1987, Mr. McMillian filed a response to the grievance noting that

I will ask Mr. Simmons to direct the Office of Exceptional Children to provide timely notice to all school psychologists of Placement Advisory Committee meetings. There have apparently been some problems in this regard and I hope this will resolve the problem.

¹ The transcript of evidence adduced at the level two hearing and the decision of the grievance evaluator were admitted at level four; references to that transcript will be designated as (T.__).

² He defined his role on the PAC to be to address the psychological aspects of the evaluation and to interact with teachers, educational specialists and the parents to most effectively place a student (T.9).

On January 24, 1987, grievant pursued the grievance by filing a written grievance alleging that he had been prevented from meeting his responsibility as psychological services representative on the PACs and concluded that his grievance could be resolved as follows

Assure that I am notified of all PACs in my area of responsibility and that the PACs are not conducted without me being present, or an equivalently qualified professional, to discharge my responsibilities.

The grievance proceeded to a level two evidentiary hearing on March 19, 1987, and grievant's representative informed the grievance evaluator that the "notification" portion of the grievance had been resolved on the basis of the assurances of Mr. McMillian and Pat Homberg, coordinator of the department of exceptional students of Kanawha County Schools; that the point grievant intended to pursue was a decision that whenever grievant was unable to be present personally another school psychologist be present to substitute for him or that the PAC meeting be delayed to a time grievant could be present (T. 4,5,6). Grievant predicated this contention on State Board Policy 2419. (T. 11, Grievant's Exhibit 1).

At the level two hearing Mr. James E. Summers, associate superintendent of pupil support services for Kanawha County Schools, testified that school psychologists were generally expected to be present at PAC meetings in which they did the evaluation (T. 28) but the school psychologist was required to make a written report of the student evaluation in narrative form; that these reports

were available at PAC meetings regardless of the presence of the author thereof (T. 24).³ There are several instances when neither the presence of the psychologist nor the evaluation report is appropriate, such as physical or occupational therapy cases, speech cases, vocational placement cases, etc., and the need for the presence of the psychologist should be decided on a case by case basis, not as a blanket rule (T. 25).

On April 9, 1987, the level two grievance evaluator issued a written decision finding, inter alia, that

5. The evidence presented at the Level II hearing established that the PAC meetings are generally conducted with the school psychologist in attendance. If the psychologist is absent and his/her expertise and/or interpretation of test results is essential in making the correct decision, the meeting is delayed until the psychologist can attend.

The conclusion of law of the decision was that

West Virginia Board of Education's Regulations for the Education of Exceptional Students Policy 2419 does not require the attendance of school psychologists at all PAC meetings.

³ On cross examination he noted that if the psychologist is not on the job the PAC meeting would not be delayed unless there was an absolute need, as interpreted by the members of the PAC, that the psychologist be present (T. 28). If it became apparent the psychologist was needed the PAC meeting would be continued (T. 30).

He also noted that in many instances reports are done by out of state psychologists who are generally not available for consultation at PAC meetings (T. 24).

Grievant appealed this decision to the Education Employees Grievance Board and at the hearing on June 17, 1987, during opening statements, grievant's representative noted that the sole issue to be decided by the hearing examiner was whether it was appropriate under Policy 2419 to conduct a PAC meeting without a school psychologist present; that

The issue itself is a broad issue with general applicability but in Dr. Dunleavy's immediate situation the question is whether when he is absent is it appropriate under State Regulations to proceed with a PAC rather than to delay until he can either be present personally or have another school psychologist be present for him.

On the basis of the opening statement of grievant's representative and the objections made by counsel for the school board, the grievance was dismissed.⁴

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

⁴ Counsel for the school board contended that this was an abstract question seeking an advisory opinion because grievant had not suffered any adverse effects of any kind; that grievant seeks to elicit a decision which would, in effect, emasculate the authority of his superiors to perform the functions of their offices and have the Education Employees Grievance Board set policy. This hearing examiner has issued what resulted in an advisory opinion in Raymond Dunleavy v. Kanawha County Board of Education, Docket No. 20-86-240-1 on Policy 5310 due to the peculiar set of circumstances involved.

As to the authority of the hearing examiner to dismiss a grievance on the basis of the opening statement, see Alexander v. Jennings, 150 W.Va. 629, 149 S.E.2d 213 (1966).

FINDINGS OF FACT

1. Grievant has been employed by the Kanawha County Board of Education for approximately two years as a school psychologist and is assigned to ten elementary schools. One of his primary responsibilities is to sit in on PAC meetings with teachers, principals and other educational specialists.

2. On January 5, 1987, grievant requested an informal conference with his immediate supervisor concerning the composition of PAC meetings and the grievance was ostensibly resolved as to notifying grievant of the PAC meetings.

3. Notwithstanding, grievant filed a level one written grievance which he stated could be resolved by notifying grievant of all PAC meetings in his area of responsibility and to assure him that the PAC meetings would not be conducted in his absence or in the absence of another qualified professional to discharge his responsibilities.

4. A level two evidentiary hearing was conducted on March 19, 1987, at which grievant sought to elicit a decision that State Policy 2419 required the attendance of school psychologists at all PAC meetings.

5. The level two grievance evaluator found that in Kanawha County it was the policy that school psychologists were generally required to be present at all PAC meetings and that if the psychologist was absent and his/her expertise was essential to the decision making process, the PAC meeting was continued until the psychologist could be present. The grievance evaluator concluded, however, that Policy 2419 did not require the attendance of school psychologists at all PAC meetings.

6. Grievant appealed that decision to the Education Employees Grievance Board and during opening statements it was concluded that grievant had not suffered any adverse consequences as a result of any action of the school board but was seeking a decision of the Education Employees Grievance Board that under Policy 2419, in the future, grievant would be required to be present at PAC meetings or the meeting delayed until grievant or another psychologist could be present.

CONCLUSIONS OF LAW

1. The Education Employees Grievance Board will not issue advisory opinions or anticipate issues not fairly raised in the evidence. Douglas Richmond v. Raleigh County Board of Education, Docket No. 41-86-127; Ledbetter v. Braxton County Board of Education, Docket No. 04-86-092; Helen Joan Harper v. Wayne County Board of Education, Docket No. 50-86-221.

2. Moot questions or abstract propositions, the decision of which would avail nothing in the determination of controverted rights, are not properly cognizable in the grievance procedure. Helen Joan Harper v. Wayne County Board of Education, Docket No. 50-86-221; Harrison v. Cabell County Board of Education, 351 S.E.2d 604 (W.Va. 1985). A case is "moot" when relief, if rendered, will have no practical effect on existing controversies.

3. A grievance will be dismissed at level four of the grievance procedure when it appears that the grievant has not been adversely affected or aggrieved by any alleged act of the employer and which is otherwise highly speculative. Four-H Road Comm. Assoc. v. Division of Water Resources, 355 S.E.2d 624 (W.Va. 1987).

Accordingly, 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. (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: June 30, 1987