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MARILYN LOUGHMAN

v.

Docket No. 25-87-131-3

MARSHALL COUNTY BOARD OF EDUCATION

DECISION

Marilyn Loughman, grievant, was employed by the Marshall County Board of Education as an English teacher assigned to John Marshall High School prior to notice that she was to be transferred to Moundsville Junior High School. On May 8, 1987 grievant, with school officials' consent to waive the lower procedural levels, filed a grievance directly to level four alleging improper calculation of her seniority and other violations of W.Va. Code, 18A-4-8b(a).¹ A level four evidentiary hearing was scheduled for June but continued for cause and subsequently conducted on July 8, 1987. Proposed findings and argument from grievant's WVEA representative and the board's counsel were received the end of the first week in August, 1987.

A transfer hearing was conducted by the board of education on April 27, 1987 and references thereto shall be cited as (T.__).

Prior to the 1986-87 school year, two English teachers at Moundsville Junior High School (hereinafter MJHS) holding multi-certification were transferred to another school to teach in their other specialty area. This created a vacancy of two positions. At that time an effort was made by respondent to transfer grievant herein from her position at John Marshall High School (hereinafter JMHS), which she had held for a number of years, to one of the vacant junior high positions. The reason given her at that time was that she was the least senior English teacher at JMHS. The transfer was abandoned upon her protest to the involuntary transfer and the board's failure to provide timely notice as set forth in W.Va. Code, 18A-2-7.

Accordingly, two substitutes were employed by the board to fill the MJHS positions in a full-time capacity for 1986-87. In the spring of the 1986-87 school year, school administrators determined that one English position at MJHS could be eliminated and again earmarked grievant for the remaining position. The board again notified grievant, this time in a timely fashion, of an impending transfer to MJHS for the 1987-88 school year. Grievant once more objected to the involuntary transfer.²

² School officials notified grievant that the reason for her transfer was, "[t]o provide Moundsville Junior High with an instructor in English without increasing the number of professional employees, to maintain a thorough and efficient school system by transferring a teacher with excellent evaluations that attest to her ability and knowledge in the teaching of skills so essential to success not only in English but in all subject areas."

Grievant alleges that her transfer violates Department of Education Policy 5300. She maintains that the policy is controlling in the event of teacher transfer in any instance and that her good evaluations for past performance preclude her from involuntary transfer by the board.³ Case law cited by grievant only supports the contention that Policy 5300 is operational under certain circumstances involving employee demotions, transfers or discharge.⁴

Grievant also charges that the board violated W.Va. Code, 18A-2-7, the transfer and notice statute, as it did not demonstrate how the transfer would be of benefit to the school system nor provide her with the true reason for the transfer. Grievant believes that, in fact, she was selected for transfer because of school officials' mistaken belief that she was the least senior English teacher at JMHS.⁵

³ In regard to teachers, Policy 5300 provides that decisions concerning promotion, demotion, transfer or termination of employment be based upon evaluation and not upon extraneous factors.

⁴ A board of education may not demote, transfer or discharge an employee for reasons having to do with prior misconduct or poor performance, or for disciplinary purposes, when the employee has not been apprised of the offending behavior or given an opportunity to improve. Trimboli v. Wayne County Board of Education, 254 S.E.2d 561 (W.Va. 1979).

⁵ The school superintendent testified at the transfer hearing that seniority was at least one of the reasons for grievant's selection as a transferee from JMHS to MJHS. (T.8).

Grievant maintains that she is not the least senior English teacher at JMHS; that she was employed for one year, 1973-74, and again employed for the 1980-81 year and continuously to the present. Grievant cites Morgan v. Pizzino, 256 S.E.2d 592 (W.Va. 1979), and argues that a strict construction of W.Va. Code, 18A-2-7 would obligate the board to substantiate its rationale for her transfer and it has failed to do so.

Additionally, grievant claims the board violated W.Va. Code, 18A-4-8b when it did not date and post the English teaching vacancy at MJHS; she cited a number of West Virginia Education Employees Grievance Board cases in support of her position.⁶

Finally, grievant suggests that a reduction-in-force has in fact occurred in regard to the staffing of English teachers at JMHS. She maintains that she has rights afforded her under those circumstances, citing W.Va. Code, 18A-4-8b(a). The pertinent provisions of W.Va. Code, 18A-4-8b(a) are:

Whenever a county board is required to reduce the number of professional personnel in its employment, the employee with the least amount of seniority shall be properly notified and released from employment....Provided, that such employee shall be employed in any other professional position where he had previously been employed or to any lateral area for which he is certified and/or licensed if his seniority is greater than the seniority of any other employee in that area of certification and/or licensure.

⁶ Whether the position was vacant or not is arguable since the board did not intend to add to the county staff; rather it was concerned with needed staff reduction without terminating any professional employee to do so. (T.18,19).

Grievant states that school administrators arbitrarily eliminated her position out of the seven English positions at JMHS. She again points out that she is not the least senior English teacher at JMHS, and in accordance with the reduction in force provisions of W.Va. Code, 18A-4-8b(a), the transferee from JMHS must be selected on the basis of seniority.

The respondent board states that grievant's proposed transfer is administrative, and not disciplinary or part of a reduction in force action, thus neither grievant's seniority nor State Board Policy 5300 are of significance in the matter. Respondent's counsel argues that W.Va. Code, 18A-2-7 requires only that a board of education be shown a sufficient reason for a transfer and then the board may exercise its discretionary authority to approve the proposed transfer.⁷

Reasons proposed by the respondent for grievant's transfer were varied. The transfer was to eliminate overstaffing of English teachers at JMHS and fill a position at the junior high school vacated the year before due to staffing reorganization and filled

⁷ The board steadfastly maintains administrative cause has been shown and it is grievant's good evaluations which precipitated her transfer; not addressed was whether grievant's evaluations were reviewed on a comparative basis with other JMHS English teachers.

A paradox is created when respondent says evaluations need not be considered for administrative transfer yet claims grievant's good evaluations deemed her appropriate for the transfer.

at that time with a substitute. The substitute will continue employment, but not on a permanent basis, and no employee will be completely removed from the work force. By means of the proposed transfer of grievant, it is reasoned, teachers will be more efficiently utilized and money will be saved by employing the substitute on a needed-only basis.

The board contends that a reduction in force did not occur since no staff was completely eliminated from the work force, thus W.Va. Code, 18A-4-8b(a) seniority laws are not controlling.⁸ Since procedural requirements have been met, it argues, and reasons have clearly been shown for grievant's transfer, then the applicable statute, W.Va. Code, 18A-2-7, has been clearly met.

It is true that the respondent has shown a compelling reason to eliminate a position at JMHS and to transfer one of the high school teachers to MJHS. The testimony of the superintendent of schools at grievant's transfer hearing established that Marshall County may already be exceeding the State Aid Formula for

⁸It is noted that in State ex rel. Kanawha County Board of Education v. Casey, 349 S.E.2d 436 (W.Va. 1986), the Court determined that a reduction in force can occur in a particular professional area.

In Casey, a principalship was eliminated and no principal's vacancy existed for the principal to assume, thus, reduction in force of principals. However, the least senior principal slated to lose his position may be transferred to a vacant teaching position and there would be no complete elimination (layoff) of an employee from the work force.

See also, Tony Andia v. Harrison County Board of Education, Docket No. 17-87-127-2, wherein a service employee scheduled for RIF termination was transferred to a previously posted vacant service position as per statutory requirements, thus no layoff occurred and no vacancy existed (see, footnote 6).

teacher-to-pupil ratios and may be overstaffed by ten teachers. (T.15).

While a showing of need has been made for a transfer, the selection of grievant as transferee falls short of decisional law that places restrictions upon a county school board's discretionary power to transfer. The employee's transfer must be a good faith action for the benefit of the school system and not be arbitrary. State ex rel. Hawkins v. Tyler County Board of Education, 275 S.E.2d 908, (W.Va. 1980).

The board has not shown that another teacher could not do as well as grievant at MJHS despite the highly complimentary reference to her teaching abilities. In fact, there was little rational basis for its selection of grievant as transferee. Further, there is no doubt but that her transfer was predicated, in part, upon administrative belief that she was the least senior English teacher at JMHS.⁹

⁹ See footnote 5, supra. Amazingly, the secondary schools administrator contradicted the school superintendent's earlier testimony. He related that it was his decision to select grievant as transferee and that seniority was not a criterion this year (T.26). During cross-examination he admitted that last year it had been a criterion (T.28). The remaining testimony gave credence to the notion that the criteria was changed because of recent pronouncements that split seniority was to be calculated for total seniority purposes and, in effect, grievant's transfer was predetermined from the time the board was thwarted the previous year.

Given the circumstances of the need to reduce staff at JMHS which are parallel to a reduction in force action and evidence establishing that seniority was the only determinative factor with a rational basis prompting grievant's transfer, then W.Va. Code, 18A-4-8b(a) is triggered for the transferee selection.

The statute provides that for seniority purposes, "[a] random selection system established by the employees and approved by the board shall be used to determine the priority if two or more employees accumulate identical seniority." The respondent has not challenged grievant's contention that she is not the least senior English teacher at JMHS and admits that another may be equal to grievant in seniority.

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

FINDINGS OF FACT

1. Grievant has been employed as a teacher by the Marshall County Board of Education from 1980-81 to the present school year; she has an additional year's seniority to her credit for employment during the 1973-74 school year.

2. Grievant has taught English for a number of years at John Marshall High School; she is not the least senior English teacher on staff at the school and is tied in seniority with at least one other English teacher.

3. During the spring of 1986 an attempt was made to transfer grievant to a vacated position at Moundsville Junior High School; the reason given for the attempted transfer in 1986 was that grievant was the least senior English teacher at JMHS. The transfer action was abandoned when grievant protested and the transfer notice was untimely. A substitute teacher was employed full-time to teach English at MJHS in 1986-87.

4. Grievant was again informed in March, 1987 that she was being considered for a transfer to MJHS for the 1987-88 school term. In April, at grievant's request, she received a letter from the superintendent listing the reasons for the proposed transfer.

5. The superintendent of schools wrote that the reasons for grievant's transfer was to avoid staff increases (at MJHS) and to favorably maintain the school system by transferring a teacher with excellent evaluations. A transfer hearing was conducted on April 27, 1987 by the board of education and the board approved the transfer.

6. At the transfer hearing before the board of education, the superintendent of schools testified that grievant's seniority was one criterion for her selection as transferee. An assistant superintendent in charge of secondary education related that he made the recommendation to transfer grievant but seniority was not a factor in his selection of her. School officials have given conflicting and contradictory testimony regarding the rationale for grievant's selection as a transferee from her high school English position.

7. Grievant's transfer was characterized by the respondent board as an "administrative transfer"; the probative evidence demonstrates that an English position at JMHS was being eliminated and the transfer was a de facto reduction in force of English teachers at the high school.

8. The respondent has satisfied its claim that cause existed for the transfer of an English teacher from JMHS which was overstaffed, to MJHS, which was understaffed, without hiring new personnel since the county is overstaffed by at least ten teachers at this time.

9. Regarding grievant's transfer, the respondent has failed to follow its past practice in the transfer of teachers for need. The respondent's secondary administrator admitted that "in the past" seniority has been a criterion for transfer but (this year) seniority was no longer used, "[b]ecause it is not now a criterion." (T.29). No plausible reason or justification was given for the sudden change of past practice in this particular transfer decision and it can only be viewed as arbitrary.

10. Regarding grievant's transfer, the respondent alleged it considered grievant's teaching excellence and evaluations but the probative evidence indicates that it arbitrarily reviewed only one JMHS English teacher, grievant herein.

11. The respondent has not shown good reasons for the selection of grievant as transferee over any other JMHS English teachers. The probative evidence, in fact, indicates that her transfer had been predetermined on the basis of an earlier administrative belief that she was the least senior English teacher at JMHS. Since no other rational basis was given for the selection of grievant as transferee over that of other qualified English teachers at JMHS, there is no basis to support respondent's assertion that the selection of grievant (from a group of other qualified teachers) served the best interests of the school system.

12. Given all of the circumstances of this grievance and the board's need to reduce the number of English teachers at JMHS, selection of a transferee on the basis of seniority, as was respondent's past practice, would be the fairest method to use and would eliminate all hint of arbitrariness on the part of the board.

13. For determining seniority priority of two employees of equal seniority, an approved method must be utilized as a tie-breaker as a matter of law.

CONCLUSIONS OF LAW

1. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Dillon v. Wyoming County Board of Education, 351 S.E.2d 58 (W.Va. 1986); Joan Byrd v. Mercer County Board of Education, Docket No. 27-86-288-4.

2. County boards of education are bound by procedures they properly establish to conduct their affairs. State ex rel. Hawkins v. Tyler County Board of Education, 275 S.E.2d 908, 912 (W.Va. 1980); Robert Phares v. Randolph County Board of Education, Docket No. 42-86-232-2.

3. The presumption of good faith which is ordinarily accorded an official act cannot prevail and will not apply when a review of the facts warrant otherwise. Beverlin v. Lewis County Board of Education, 216 S.E.2d 554 (W.Va. 1975); State ex rel. Linger v. Board of Education, 163 S.E.2d 790 (W.Va. 1968).

4. The board of education did not act in good faith when it did not follow its past practice for the selection of a candidate for a RIF-like transfer and instead arbitrarily selected, without a rational basis, grievant herein.

5. The past practice followed by the board of education for transfer of teachers for need on a seniority basis is the fairest method available and removes any hint of arbitrariness on the part of the administration and board.

6. A random selection system established by the employees and approved by the board of education shall be used to determine seniority priority among employees with identical seniority. W.Va. Code, 18A-4-8b(a).

7. School personnel laws are to be strictly construed in favor of personnel. Morgan v. Pizzino, 256 S.E.2d 592 (W.Va. 1979); Lester Lucas v. West Virginia State Department of Education, Docket No. 02-87-069-2.

Accordingly, the grievance is **DENIED** as to grievant's request for reinstatement to her JMHS position at this time but **GRANTED** to the extent that a random selection process must be utilized to determine the seniority priority between grievant and any other English teacher of equal seniority at JMHS for purposes of the RIF-like transfer action. If the random selection eliminates grievant as transferee, she is to be reinstated to JMHS as per her request.

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

DATED: September 1, 1987

Nedra Koval

NEDRA KOVAL
Hearing Examiner