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PAMELA GALLAHER

v.

DOCKET NO. 46-87-233-2

TAYLOR COUNTY BOARD OF EDUCATION

DECISION

Grievant, Pamela Gallaher, is employed as a teacher by the Taylor County Board of Education. Ms. Gallaher filed a level one grievance in June, 1987 in which she alleged that her assignment at Flemington Elementary School had been improperly changed from sixth grade to third grade and requested that she be reassigned to the sixth grade position.

The grievance was denied at level one and a level two hearing was conducted on August 13, 1987. In his level two decision Assistant Superintendent James Smith determined that the grievant was employed as a teacher assigned to no specific grade level and therefore the action did not constitute a transfer

as set forth in W.Va. Code, 18A-2-7. The board of education waived consideration at level three and the matter was appealed to level four. The grievant indicated that the matter could be determined on the record, however, her representative later indicated that he would like an opportunity to review the level two transcript before making a final determination of whether an evidentiary hearing would be necessary.

By letter dated October 26 Superintendent Ronald Dellinger notified the level four hearing examiner that subsequent to the grievance being filed the grievant had requested and received a transfer to Grafton Middle School. Superintendent Dellinger suggested that the second transfer rendered the grievance moot and as such should be dismissed from consideration. The grievant's response, filed on November 10, indicated that the subsequent transfer was not intended as a waiver of her right to remain in the sixth grade position at Flemington. As the grievant indicated that it remained her desire to return to her original position, the motion to dismiss was denied.

The board of education submitted a position memorandum December 7 and the grievant filed a brief on December 21, 1987. The board requested on January 15, 1988 that it be allowed

to make an additional submission of recently available information and the grievant was given an opportunity to respond. Due to the extended absence of the grievant's representative no response was received until April when the examiner was notified that the grievant did not wish to address that evidence submitted by the board in January.

The record is clear that Mr. Richard Teagarden, principal at Flemington Elementary School, by his own volition transferred the grievant from her sixth grade assignment to third grade. The grievant argues that such a change constitutes a transfer as defined by W.Va. Code, 18A-2-7 and provides her with due process rights stated therein. The board of education relied on a decision rendered by the Marion County Circuit Court, Marion County Board of Education v. Leonard Bonfantino, Civil Action No. 86-C-448 upholding an interpretation of the State Superintendent of Schools which permitted principals to reassign in-house staff based on need without the necessity of posting. That decision has since been reversed by the W.Va. Supreme Court of Appeals which rejected the board's argument that reassignments in-house are necessary for a principal to efficiently run the

school. Citing W.Va. Code, 18A-2-7 the Court noted that only the superintendent, subject only to approval of the board, shall have the authority to assign, transfer, promote, demote or suspend school personnel. The Court had previously held that the provisions of W.Va. Code, 18A-2-7 are applicable to such in-house transfers in Lavender v. McDowell County Board of Education, 327 S.E. 2d 691 (W.Va. 1984) where a guidance counselor was transferred without due process to a teaching position within the building.

This reasoning has previously been applied by the Education Employees Grievance Board in Pansmith, et al. v. Taylor County Board of Education, Docket No. 46-86-057 and in Burge and Worrell v. Mercer County Board of Education, Docket No. 27-86-113 which both held that in-house transfers must be accomplished within the provisions of W.Va. Code, 18A-2-7.

In addition to the foregoing it is appropriate to make the following specific findings of fact and conclusions of law.

Findings of Fact

1. The grievant is employed as a teacher by the Taylor County Board of Education.

2. The grievant was assigned to the sixth grade at Flemington Elementary School during the 1986-87 school term. She was advised by the building principal that she would be assigned to teach third grade for the 1987-88 school term.

3. The third grade position was not posted and the grievant was not transferred as required by statute.

Conclusions of Law

1. A change of assignment involving a substantial change in duties, responsibilities or subject matter is a transfer and requires compliance with W.Va. Code, 18-2-7. Pansmith, et al. v. Taylor County Board of Education, Docket No. 46-86-57 and Burge and Worrell v. Mercer County Board of Education, Docket No. 27-86-113.

2. A principal may make recommendations regarding personnel but it is the superintendent, subject only to approval of the board, who has the authority to assign transfer, promote, demote or suspend school personnel. W.Va. Code, 18A-2-7 and 18A-2-9.

3. The reassignment of the grievant by the building principal was in violation of the transfer procedure as set forth in W.Va. Code, 18A-2-7.

Accordingly the grievance is **GRANTED** and the board of education is **ORDERED** to reinstate the grievant to the position of sixth grade teacher at Flemington Elementary School.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Taylor 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

May 19, 1988

Sue Keller

SUE KELLER

HEARING EXAMINER