



**REPLY TO:**  
101 Harper Park Drive  
Suite D  
Beckley, WV 25801  
Telephone: 255-6155

**Members**  
James Paul Geary  
Orton A. Jones  
David L. White

**WEST VIRGINIA EDUCATION  
EMPLOYEES GRIEVANCE BOARD**  
ARCH A. MOORE, JR.  
Governor

**Offices**  
240 Capitol Street  
Suite 508  
Charleston, WV 25301  
Telephone: 348-3361

**WILLIAM KELL**

**v.**

**DOCKET NO. 33-87-236**

**MCDOWELL COUNTY BOARD OF EDUCATION**

**D E C I S I O N**

The grievant is employed as a teacher for the McDowell County Board of Education assigned to Mount View High School. Mrs. Jewell Smith, a teacher at the same school, retired at the end of the 1986-87 school term and her vacant position was filled by Mr. Gary Brown, another teacher at Mount View. The grievant alleges there was no posting of the vacant position and the Board made an "in-house transfer" in violation of W.Va. Code, 18A-2-7. A Level II hearing was conducted on July 21, 1987 and the parties agreed to submit the case for decision at Level IV on the record developed at that hearing.

The facts in this case are not in dispute as the Board does not assert there was any posting of the vacancy. It is the Board's position that principals have the authority to place teachers in vacant positions within a school without complying with the

provisions of W.Va. Code, 18A-4-8b(a), which in pertinent part reads:

Boards shall be required to post and date notices of all openings in established, existing or newly created positions in conspicuous working places for all professional personnel to observe for at least five working days. The notice of such position openings shall include the job description. No vacancy shall be filled until after the five-day minimum posting period.

The provisions governing transfers of school personnel are contained in W.Va. Code, 18A-2-7:

The superintendent, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter.  
(Emphasis added)

The Board has mistakenly<sup>?</sup> relied on interpretations of these two sections by the State Superintendent of Schools to support their contention that "in-house" transfers by a principal are allowed by the West Virginia Code. (Board's Exhibits No. 1, 2 and 3)<sup>1</sup> It is true that where a statute is ambiguous the construction placed upon it by those responsible for its execution is entitled to great weight, Evans v. Hutchinson, 214 S.E.2d 453 (W.Va. 1975), and interpretations of the State Superintendent of Schools are considered

---

<sup>1</sup> Board's Exhibit No. 4 is a copy of an opinion rendered by Circuit Judge Fred L. Fox, II, in the case of Marion County Board of Education v. Leonard Bonfantino which reverses a decision of the West Virginia Education Employees Grievance Board. The  
(footnote cont.)

persuasive authority, Smith v. Logan County Board of Education, 342 S.E.2d 685 (W.Va. 1985); Dunleavy v. Kanawha County Board of Education, Docket No. 20-87-040-1; Lavender v. McDowell County Board of Education, 327 S.E.2d 691 (W.Va. 1984), those interpretations can be disregarded when clearly erroneous. Thomas v. Board of Education, 261 S.E.2d 66 (W.Va. 1979); Moore v. Fayette County Board of Education, Docket No. 10-86-137-1; Thompson v. Kanawha County Board of Education, Docket No. 20-86-366-1. The Superintendent's opinions on the pertinent sections of the W.Va. Code are clearly erroneous and moreover, these sections are clear and unambiguous and as such require no interpretation and should be given full force and effect. Lavender v. McDowell County Board of Education, supra.

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

#### FINDINGS OF FACT

1. The grievant, William Kell, is a teacher employed by the McDowell County Board of Education and assigned to Mount View High School.

---

(footnote cont.)

Sixteenth Judicial Court found the Superintendent's opinions legally binding in a factual setting similar to the present case. That case is pending an appeal in the West Virginia Supreme Court of Appeals. Notice of Judge Fox's opinion and the McDowell County Board of Education's reliance thereon is taken but that decision is not considered controlling in the present grievance.

2. At the end of the 1986-87 school term Mrs. Jewell Smith, another teacher at Mount View High School, retired creating a vacancy in the social studies department.

3. The vacant position was filled by Mr. Gary Brown, a teacher in the school suspension program at the same high school.

4. There was no posting of the vacancy and the McDowell County Superintendent of Schools and the McDowell County Board of Education took no action prior to Mr. Brown's assignment to the vacant position.

#### CONCLUSIONS OF LAW

1. W.Va. Code, 18A-2-9 authorizes a principal, under the supervision of the county superintendent, to assume administrative and instructional supervisory responsibility for the educational program of the school to which he is assigned and to submit, in writing, recommendations to the superintendent regarding the appointment, assignment or promotion of all personnel under the principal's control. This provision does not authorize a principal to fill a position by internal transfer and thereby avoid the requirements of W.Va. Code, 18A-4-8b. Peters v. Mercer County Board of Education, Docket No. 27-86-144-1.

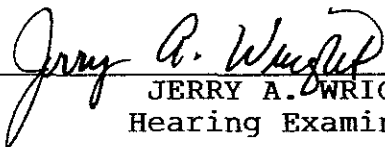
2. W.Va. Code, 18A-2-7 provides that the sole authority to transfer school personnel rests with the county superintendent of schools, subject only to the county school board's approval.

3. W.Va. Code, 18A-4-8b(a) requires school boards to post and date notices of all openings in established positions for at least five working days. Bonfantino v. Marion County Board of Education, Docket No. 24-86-079.

4. The Board's failure to post the vacant position created by the retirement of Mrs. Jewell Smith and the subsequent assignment of Mr. Gary Brown to that position violated W.Va. Code, 18A-4-8b(a) and W.Va. Code, 18A-2-7.

Accordingly, the grievance is **GRANTED** and the McDowell County Board of Education is hereby **ORDERED** to post and date notice of the vacancy created in the social studies department of Mount View High School by the retirement of Mrs. Jewell Smith.

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

  
JERRY A. WRIGHT  
Hearing Examiner

DATED: January 6, 1988