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**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**

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A. THOMAS EDWARDS

v.

DOCKET NO. 89-02-234

BERKELEY COUNTY BOARD OF EDUCATION

DECISION

Grievant, A. Thomas Edwards, has been employed by the Berkeley County Board of Education (Board) for approximately twenty-two years and is presently assigned to the position of principal at the Pikeside Pre-Vocational Center. Mr. Edwards filed a level four grievance appeal on May 22, 1989 in which he alleged that his removal from the position of Director of Federal Programs and placement on the transfer list was improper. Because Superintendent J. Sam Meek is the grievant's immediate supervisor, levels one and two were bypassed and consideration was waived by the Board at level three. An evidentiary hearing was conducted at level four on July 7; proposed findings and conclusions were received by August 7.

By letter dated April 19, 1989 Superintendent Meek notified the grievant that his name would be included on the transfer list to be presented to the Board on May 1, 1989

and his assignment for the 1989-90 school term would be principal at the Pikeside Pre-Vocational Center. The letter stated the purpose of the change in assignment to be a reorganization and redistribution of the federal programs resources which would permit the hiring of additional teachers. A hearing was conducted on May 15 after which the Board approved the recommended transfer.

The grievant argues that the transfer was improper for the following reasons:

(1) Superintendent Meek has failed to satisfy the requirements of Code 18-29-1, et seq., by specifically failing to begin the transfer process in a timely manner so that your aggrieved may have exhausted his administrative remedies as provided by law prior to the time in which this Board may have statutorily acted upon a transfer [First, see Code 18-29-4 in that Grievant has 15 working days to aggrieve any proposed recommendation or 15 working days from the most recent in a continuing occurrence [(sic)] of a practice. Second, Grievant under Code 18-2-7, has the statutory right to a formal statement of reasons for the proposed transfer recommendation. Superintendent Meek's written response to Grievant's demand for a specific statement does not satisfy substantive due process in that it does not specifically give reasons for the proposed transfer, but merely repeats a paragraph from Grievant's notice letter; therefore, Grievant cannot receive a fair hearing because the superintendent has failed to give specific reasons as required by 18A-2-7. Grievant will therefore, according to law, file a Grievance on May 23, 1989, as is his right under Code 18-29-4 concerning the proposed recommendation and its legal inadequacies [Grievant has at least until May 24, 1989]; however, since the Superintendent's formal statement, even if it had been specific, was not given in time to allow Grievant to exhaust his administrative remedies prior to fourth Monday in May (22nd), it is not ripe for hearing at this or any time since the Board loses jurisdiction after the fourth Monday in May and is therefore estopped from hearing or approving any transfer for next school year.

(2) The Superintendent's recommendation is not based upon any causal connection between a reduction in force and the lack of need for the responsibilities of Grievant's job and is therefore null and void.

(3) Grievant is the most senior professional administrator in this school system and has a legal entitlement and continuing contract to his position as Director of Federal Programs.

(4) It is illegal for the Superintendent as a public officer to hold two positions within the school system as proposed by him.

(5) The Superintendent has not legally recommended the abolishment of the position of Director of Federal Programs; therefore, as long as the position is legally in existence, grievant has a contractual and statutory right to it by virtue of his being the senior professional administrator in this system.

(6) Superintendent Meek has not evaluated Grievant or his position as is required by Sec. 5300 of the Rules of the West Virginia Board of Education and West Virginia caselaw since he became Superintendent in September, 1988, nor during this school year, and is thus estopped from changing the status of A. Thomas Edwards for next school year nor legally recommend abolishing his job.

The Board argues that the action was a reasonable exercise of its power to transfer personnel inasmuch as it was based upon a finding of the On-Site Review Committee for the West Virginia Department of Education "[t]hat a close examination of the needs assessment be made with a view toward realignment of Chapter I personnel on the basis of actual need." This report, together with input from principals who expressed concern about the inequitable distribution of federal program resources, led first to Superintendent Meek's request that the grievant review and recommend changes in personnel allocation. Using the grievant's

recommendations Superintendent Meek further revised the personnel allocation including the transfer of the grievant outside the program thereby permitting the hiring of two additional teachers which could be assigned to schools that previously had received no federal program services.¹

The Board denies this action was a reduction in force because W.Va. Code §18A-4-8b contemplates that the actual number of personnel be reduced in such an event. It also asserts that Superintendent Meek's assumption of the administration of the federal programs is not prohibited by the federal guidelines which do not require a separate administrator. Finally, the Board argues that the transfer was timely and was processed appropriately in regard to providing the grievant with reasons for the action and a hearing before the Board on the proposed transfer.

The superintendent, subject only to approval of the board, shall have the authority to transfer school personnel pursuant to the provisions of W.Va. Code §18A-2-7. Transfers may either be administrative or disciplinary in nature. Holland v. Board of Education, 327 S.E. 2d 155 (W.Va. 1985). While the protections afforded by W. Va. State Board of Education Policy 5300 must be applied prior to the discharge, demotion or transfer of an employee for reasons

¹The position of Director of Federal Programs has not been abolished but the duties of the position have been assumed by the superintendent and presumably reassigned to other administrators.

having to do with prior misconduct or incompetency that have not been called to the attention of the employee through evaluation and which are correctable, the test for an administrative transfer is whether the authority was exercised reasonably and in the best interest of the schools, not arbitrarily or capriciously. Beverlin v. Board of Education of Lewis County, 216 S.E. 2d 554 (W.Va. 1985).

Effective the 1988-89 year only, the superintendent was obligated to notify employees in writing on or before the fourth Monday in April who were being considered for transfer and any requested hearings on the proposed transfer were to be conducted on or before the fourth Monday in May. W.Va. Code §18A-2-7. The grievant received the written notification that he would be recommended for transfer on April 19 and a hearing was conducted to consider the recommendation on May 15; both events occurring within the special statutory timelines for the 1988-89 year.

The grievant's argument that the notification of the proposed recommendation was the grievable event and that the employee must be permitted to exhaust his administrative remedies provided by W.Va. Code, §§18-29-1 et seq. prior to any Board action is incorrect. This interpretation would wreak havoc with the entire transfer process as the completion of a grievance through available judicial appeals could reasonably cause a delay of years. The notification of intent to recommend is not the grievable action; however, once made the employee may exercise the right to a hearing

prior to Board action. Approval of the recommended transfer is the event which triggers the employee's right to file a grievance.

The measure of due process to which an employee is entitled prior to a personnel action is flexible and will vary depending upon the particular circumstances of the case; however, it may generally be stated that when an employee is entitled to a post-action hearing, notification and an opportunity to respond to the proposed action fulfill any requirement of pre-action due process. See Cleveland Board of Education v. Loudermill, 84 L. Ed. 2d 494, 470 U.S.____, 106 S. Ct. _____, (1985); Buskirk v. Civil Service Commission of W. Va., 332 S.E. 2d 579 (W.Va. 1985); Luzader v. West Virginia University, Docket No. BOR-86-345-2 (April 20, 1987). The grievant was afforded adequate pre-transfer due process through the statutory provisions which permit a request for a statement of the reasons and a hearing before the Board on the proposed transfer. The grievant's assertion that the statement of reasons for the transfer was not specific enough to meet due process requirements is somewhat bewildering. That the transfer was part of a reorganization to reallocate resources permitting the hiring of additional teachers was clearly and concisely stated in both the April 19 letter of notification and the May 2 response to the request for reasons. The grievant does not expound as to how the statement lacked clarity or in what way he found it vague or ambiguous.

Neither is the grievant's argument that the transfer was not "...based upon any causal connection between a reduction in force and the lack of need for the responsibilities of the grievant's job..." persuasive. There is no indication that any professional staff was terminated or positions eliminated; therefore there was no reduction in force. Because there was no reduction in force it was not necessary for the Board to show a lack of need for the position held by the grievant.

The grievant's reliance upon his seniority and continuing contract to establish a legal entitlement to the position of director also lacks supportive authority. The continuing contract entered into by professional personnel is a generic teacher's contract which, even if construed in the broadest possible sense, does not provide for a permanent assignment as an administrator. Just as teachers have no vested right to be assigned to any particular school in the county, Hawkins v. Tyler County Board of Education, 275 S.E. 2d 908 (W.Va. 1981), neither has an employee a vested right to be assigned to any particular administrative position. While seniority may be a factor considered when filling a position it does not grant an employee entitlement to a position which the Board chooses to leave unfilled.

At the level four hearing the grievant additionally raised the issue of whether he had received a meaningful hearing before the Board prior to its action to approve the

recommended transfer. He argues that the hearing was not meaningful because no reasons were given to the Board for the proposed transfer; therefore there was nothing upon which it could legally act. His second argument is that he was denied a detached and independent hearing because the superintendent had discussed his transfer and received a consensus of approval from the Board prior to initiating the transfer process.

A review of the transcript of the grievant's transfer hearing shows that no reasons were given for the proposed action; however, the evidence establishes that by May 15 the superintendent had discussed his proposed reorganization with the Board and the grievant had received notification of the proposed transfer and the reasons therefor. The grievant appeared at the hearing and responded to the recommendation, completing the necessary pre-transfer due process.

By the superintendent's own admission he discussed with the Board the realignment of available resources in the federal programs area, including the absorption of the director's position by the office of the superintendent, prior to the transfer hearing. Superintendent Meek characterized his presentation as a statement of what he hoped to accomplish through the reorganization and asserted that he did not ask for a vote of the Board at that time (T.pp. 13-14). Applying the standards set forth in Lavender v. McDowell County Board of Education, 327 S.E. 2d 691 (W. Va.

1984), it does not appear that the superintendent's presentation of his plans for reorganization to the Board in any way deprived the grievant of his right to a detached and independent hearing before the Board voted on the recommended transfer. Because the superintendent did not ask for the Board's approval at the time of his presentation there was no invitation for prejudgment of the grievant's case. The mere statement of the school district's needs and proposed methods of meeting those needs is a necessary form of communication between the superintendent and the Board in order that they may make informed decisions and effectively serve the school system.²

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

Findings of Fact

1. The grievant has been employed by the Berkeley County Board of Education for approximately twenty-two years and is presently assigned as principal of the Pikeside Pre-Vocational Center.

²Because the question of whether it is illegal for the superintendent to hold two positions within the school system is not directly relevant to the issue of whether the transfer was properly implemented, it will not be considered.

2. Prior to the 1989-90 school term the grievant had held the position of Director of the Federal Programs for nineteen years.

3. By letter dated April 19, 1989 the grievant was notified that Superintendent J. Sam Meek would recommend that he be transferred from the position of director and be reassigned to the position of principal with no loss of income.

4. The letter stated that the purpose of the change in assignment was to redistribute resources of the federal programs permitting the Board to hire additional teachers.

5. On April 27 the grievant requested a written detailed justification for his transfer; a response from Superintendent Meek dated May 2 restated the purpose as set forth in the April 19 letter.

6. At the grievant's request the Board held a hearing on the recommended action at a meeting held May 15. After that hearing the Board voted to approve the grievant's transfer.

Conclusions of Law

1. "The superintendent, subject only to the approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel..." W.Va. Code §18A-2-7; however, the power to transfer must be exercised in a reasonable manner and in the best interest of the school and not exercised in an arbitrary and capricious

manner. State ex rel. Hawkins v. Tyler County Board of Education, 166 W. Va. 363, 275 S.E. 2d 908 (1980); Arnold v. Putnam County Board of Education, Docket No. 89-40-216 (Oct. 13, 1989).

2. Teacher transfers may be either administrative or disciplinary in nature. Holland v. Board of Education, 327 S.E. 2d 155 (W.Va. 1985).

3. State Board of Education Policy 5300 which prohibits a Board from discharging, demoting or transferring an employee for reasons having to do with prior misconduct or incompetency that have not been called to the attention of the employee through evaluation and which are correctable, is not applicable to administrative transfers.

4. The notice of the superintendent's proposed recommendation was issued and the transfer hearing was held by the Board within the special timelines for 1988-89 set forth in W.Va. Code § 18A-2-7 (amended 1989).

5. The grievant was provided an adequate statement of reasons for the proposed transfer in compliance with W.Va. Code §18A-2-7.

6. Teachers have no right to be assigned to any particular school. State ex rel. Hawkins v. Tyler County Board of Education, 166 W. Va. 363, 275 S.E. 2d 908 (1980). Similarly, teachers employed as administrators have no right to any particular assignment.

7. The transfer action was not a reduction in force since there was neither a loss of personnel nor positions.

8. Neither seniority nor continuing contract establish a legal entitlement to a specific position.

Accordingly, the grievance is DENIED.

Either party may appeal this decision to the Circuit Court of Berkeley County or to 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) Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate Court.

DATED: November 28, 1989

Sue Keller

SUE KELLER

SENIOR HEARING EXAMINER