



REPLY TO:
401 Davis Avenue
Suite 315
Elkins, WV 26241
Telephone: 636-1123

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

**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**
GASTON CAPERTON
Governor

Offices
240 Capitol Street
Suite 515
Charleston, WV 25301
Telephone 348-3361

CAROL INGRAM

v.

DOCKET NO. 89-02-235

BERKELEY COUNTY BOARD OF EDUCATION

DECISION

Grievant, Carol Ingram, has been employed by the Berkeley County Board of Education (Board) for sixteen years as a teacher's aide and has been assigned to the federal Chapter I program at the Burke Street Elementary School for the entire period of her employment. Ms. Ingram filed a grievance with the Board on May 23, 1989 in which she alleged the following:

1. Superintendent J. S. Meek has placed her name upon the transfer and subsequent assignment list in a manner which is in violation of due process and equal protection of the law in that she has been and will be treated differently from others within a class--she has been grouped with all other Chapter I aides to be transferred each of the others being of the least seniority within his or her respective school while she has the most seniority at hers, creating an invidious classification of her; that this is a continuing matter, grievable under Code 18-29-4; and, that no substantive basis exists in law or fact to justify such proposed transfer and subsequent assignment.

2. Superintendent J. S. Meek has violated the provisions of Code 18A-2-7 in that Grievant

has timely demanded, and the Superintendent has failed to produce within ten days, a statement of the reasons for the proposed transfer; Grievant therefore may not be transferred based upon the Superintendent's recommendation as it is now null and void for lack of specificity and of following the mandatory requirements of statute.

3. The Berkeley County Board of Education has acted upon a null and void recommendation as a result of enumerated paragraphs one and two above.

4. The time has passed for the legal hearing or acting upon by the Board of Education of this matter, thus by operation of law, Grievant is automatically returned to her same job for the next school year.

At the grievant's request consideration of the grievance was waived at levels one through three and was forwarded to the Education and State Grievance Board by the Board on May 24, 1989. An evidentiary hearing was conducted July 7 and concluded on August 25; proposed findings of fact and conclusions of law were filed by both parties September 16, 1989.

By letter dated April 14, 1989 Dr. Alan Canonico, Assistant Superintendent for Personnel, advised the grievant that her name might be placed on the transfer list for the 1989-90 school year. The reason for consideration of the grievant for transfer was "...adjustment in the federal program." A hearing scheduled before the Board on May 1 was rescheduled at the grievant's request and was subsequently held on May 11, 1989. Following a Board meeting on May 15 Dr. Canonico notified the grievant that she had been placed on the transfer list for possible reassignment. The reason given in this letter for the Board action was that it would

allow flexibility of assignment to another location should caseload changes be deemed necessary. The grievant was later reassigned to the Chapter I program at Tuscarora Elementary School.

The grievant argues that her transfer was improper because it was contrary to Board practice which allowed the aides a choice of whether to stay with the program and be transferred or to remain in the school but not work within the Chapter I program. The Board concedes that, due to an oversight, the grievant was not given a choice prior to her receiving the notice of proposed transfer.

Second, the grievant argues that there was no valid basis for the transfer inasmuch as a need for services had been established by application of a county formula and by the density of free lunches served, a criterion of the federal government. Additionally, both the county director and the State Board of Education had recommended that no personnel changes be implemented for the 1989-90 school year. The Board asserts that the transfer was based upon a lack of need for both a teacher and an aide at the Burke Street School as established by recommendations of the school principals and the report of a State Department of Education On-Site Review Committee which were substantiated by statistics indicating the number of eligible students and personnel allocation.

Third, the grievant argues that the transfer was in violation of W.Va. Code §18A-2-7 because the superintendent

did not notify her of the proposed transfer, she was not provided a written statement of the reasons for the proposed action and because no reasons for the recommended action were provided to the Board at the transfer hearing upon which a decision could be based. The Board asserts that the transfer was accomplished within the procedure outlined in W.Va. Code §18A-2-7 in that the grievant was notified of the proposed recommendation, was fully apprised of the reasons therefore and was provided a hearing before the Board prior to final action being taken.

At the level four hearing Dr. Canonico described the procedure used in transferring the affected personnel:

I informed the principal to ask the Chapter 1 aide if they would rather stay with the program, if they were not the least senior or to stay in the school and then if they wanted to stay in the school, transfer the least senior.

That was what I was attempting to do with all the transfers. (T. p.58).

He conceded, however, that this procedure was not followed in the grievant's case:

Q. In every other school, they were given the choice, but this young lady was not, in this school, is that correct? That's the oversight.

A. Correct and I apologized to Mrs. Ingram for that and that was the administrative oversight.

This testimony establishes that the Board failed to follow its own procedure in the transfer of the grievant resulting in her being treated differently than similarly-situated employees with the differences being unrelated to the actual job responsibilities of the employees or agreed

to in writing by the employee, thereby constituting discrimination as defined by W.Va. Code §18-29-2(m).

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 is employed by the Berkeley County Board of Education as a teacher's aide assigned to the federal Chapter I program.

2. As a result of the Board's reallocation of Chapter I personnel throughout the county, the grievant was placed on the transfer list in May 1989.

3. The procedure utilized in effectuating the transfers of the Chapter I employees was that those aides who did not have the least in-school seniority were given the option of remaining with the program and moving to another school or staying in the school as a regular teacher's aide and transferring the regular aide with the least seniority.

4. The grievant was not the aide with the least in-school seniority and she was not given the option of transferring with the program or remaining at the Burke Street School. She indicated at level four that her preference was to remain at Burke Street School.

Conclusions of Law

1. County boards of education are bound by procedures they properly establish to conduct their affairs. Hawkins v. Tyler County Board of Education, 275 S.E. 2d 908 (W.Va. 1980) and Powell v. Brown, 238 S.E. 2d 220 (W.Va. 1977).

2. The Berkeley County Board of Education failed to follow its own procedure when it neglected to give the grievant the same option as other employees were granted regarding transfer.

3. The grievant has been treated differently than other employees with the differences being unrelated to the actual job responsibilities of the employees, and without her consent, resulting in discrimination as defined by W.Va. Code §18-29-2(m).

Accordingly, the grievance is **GRANTED** and the Board **ORDERED** to place the grievant pursuant to the procedure applied to other employees subject to transfer.

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: December 29, 1989

Sue Keller

SUE KELLER

SENIOR HEARING EXAMINER