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

GASTON CAPERTON
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GARRY TENNEY

v.

DOCKET NO. 01-88-223 ²³³

BARBOUR COUNTY BOARD OF EDUCATION

DECISION

Grievant, Garry Tenney, is employed by the Barbour County Board of Education (Board) and presently holds the position of Director of Administrative Services. Mr. Tenney initiated grievance proceedings on October 27, 1988 when he requested an informal conference with his immediate supervisor. As the matter was not resolved he filed a level one grievance on November 9, 1988 in which he alleged violations of W. Va. Code §§18A-2-7 and 18A-1-1 when in August he was assigned the additional duties of Director/Supervisor of Transportation, a service personnel position. The grievance was denied by Superintendent William Phillips and by the Board; a level four appeal was filed on December 5, 1988.¹ An evidentiary hearing was conducted on April 17, 1989 with proposed findings of fact and conclusions of law submitted by May 8.

¹Superintendent Phillips is the grievant's immediate supervisor and therefore levels one and two were continued.

For many years the grievant had held the position of principal at Philip Barbour High School; however, as a result of a transfer he assumed the duties of Director of Administrative Services on July 1, 1988. The duties to be performed by the Director of Administrative Services are listed on the job description as follows: work with the Director of Business Affairs for understanding of existing process; develop and implement a computerized system for scheduling service personnel substitutes; develop and implement a technologically managed system for school/county inventories; develop and implement a computerized system for scheduling bus routes, extracurricular trips, driver assignments and a systemized bus maintenance program; develop and implement a computerized process for the operation and management of maintenance requests and repair and perform other duties as assigned by the Superintendent.²

The grievant reported to work in his new capacity on Friday, July 1 and Tuesday, July 5 after which he was on leave for military duty until August 5, 1988. On August 8 the grievant was assigned the duties relating to

²The examiner takes notice from a previous grievance filed by Mr. Tenney that this was a newly created position and his transfer into it was justified by the Board as the grievant possessed the required expertise to develop and implement the computer programs. He was also expected to eventually assume the duties of the Director of Business Affairs. There was no question at that time that the Director of Administrative Services was a full-time position.

transportation which were previously performed by the Director of Auxiliary Services and the Supervisor of Transportation. The responsibilities of these positions are numerous and include the overall supervision of the transportation program as well as specific daily chores, such as calling substitute operators and picking up parts to repair the equipment. A three page outline of transportation duties provided to the grievant by Superintendent Phillips establishes that his additional responsibilities included the development and functioning of bus routes for regular and extracurricular runs, bus maintenance and repair, establishing bus shelters, the completion of daily and monthly reports plus an array of personnel related duties including securing substitutes, new driver training, monitoring the drivers' physical examinations, staff development and personnel observations.

The grievant argues that the combining of the Director of Administrative Services with the Director/Supervisor of Transportation positions resulted in the creation of a new position which must be posted and filled in compliance with the provisions of W.Va. Code §18A-2-7. He asserts that he was not "transferred" to this new position as required by statute and therefore the change in his duties was improper. He additionally argues that the assignment of service personnel duties violates his status as a professional employee as defined by W.Va. Code §18A-1-1. The grievant

requests that he be relieved of the duties relating to transportation which were improperly assigned to him.

The Board explained that changes were made in the duties of many administrators as a result of fiscal restrictions and added responsibilities. It argues that the assignment of transportation duties to the position of Director of Administrative Services does not constitute an improper transfer in violation of W.Va. Code §18A-2-7 as the job description for that position includes the duty to develop and implement a computerized system for scheduling bus routes, extracurricular trips, driver assignments and systemized bus maintenance and requires the performance of other duties as assigned by the Superintendent.

The Board asserts that the changes in duties did not affect the grievant's status as a professional employee. In support of this position the Board cites State Board of Education Valid Professional/Instructional Positions Codes 1988-89, No. 107, "Director/Coordinator Supportive Services". The position requires the assigned employee to direct and manage programs and activities in supportive services, including transportation, and provides that it may also be defined as professional personnel in Code §18A-1-1. The Board also cites Cox v. Board of Education of Hampshire County, 355 S.E.2d 365 (W.Va. 1987) in which the Court held that it is within the discretion of a Board to assign the management of the transportation system to a professional employee who may presumably be more acquainted with

administrative and managerial skills necessary to the operation of an efficient system.

The Board additionally raises the question of timeliness and asserts that this grievance was not filed in compliance with W.Va. Code §18-29-3 since the grievant was made aware of the changes in duties on August 8, 1988 and a level one grievance was not filed until October 27. The Board argues that Code §§18-29-3(a) and 18-29-4(a)(3) are mandatory in requiring that grievances be filed within a specified period of time and provides no exceptions for failure to do so. Further, it argues that the grievant has provided no reason for the delay and that his filing of a writ of mandamus did not toll the specific statutory timelines of the administrative agency.

It is evident that the grievant became aware of a change in his duties as a result of a conference with Superintendent William Phillips on August 8, 1988 and that a writ of mandamus concerning this and another issue was filed on August 24. As a matter of record the grievant has utilized the grievance procedure on his own behalf twice before and has been involved in numerous staff grievances while assigned as a principal. Therefore, his familiarity with the grievance procedure is unquestionable. However, the documentation shows that the grievant was represented by legal counsel and presumably the action was taken on the advice of that counsel. Contrary to the Board's argument that the statutory guidelines must be strictly enforced, the

Education and State Grievance Board has followed a more liberal interpretation allowing some leeway when the period of time is not of great length and the employee has shown good cause for the delay. In this case the grievant did take action to protect his rights in a timely manner and has continued to zealously pursue a resolution as evidenced by his initiation of the grievance procedure on the same day as the writ of mandamus was denied.

Although the Board denies the grievant was transferred, the Education and State Grievance Board has previously held that the shifting of duties resulting in a substantial change of responsibilities for the employee is, in effect, the creation of a new position which must be posted and filled in statutory compliance. Fletcher, et al. v. Berkeley County Board of Education, Docket No. 02-87-017-02 (May 15, 1987). The testimony offered by both parties at the level four hearing was that the grievant has been assigned duties relating to transportation services once performed by Ed Larry, the Director of Transportation, who had himself assumed the duties previously performed by the Supervisor of Transportation. Mr. Larry testified that these duties consumed approximately four to five hours daily while Mr. Ralph Godwin, the retired Supervisor of Transportation, stated that he worked nearly twelve hours daily. The grievant estimates the transportation duties require approximately seventy-five percent (75%) of his time. The addition of the transportation duties has altered the

position of Director of Administrative Services to such an extent that it must be considered a newly created position. This finding is further supported by the job description for the Director of Administrative Services, as amended in August 1988, which requires that the grievant direct and administer the total county transportation program. Adding this duty to the job description is deceiving since it creates the appearance of only a slight change in duties while in fact it consolidates three positions into one. While the Board was within its authority to consolidate the positions and has shown reasonable cause for having done so, the procedure it followed when implementing the changes has violated the grievant's rights guaranteed by W.Va. Code §18A-2-7; i.e., to be notified on or before the first Monday in April of a possible change in assignment through transfer, the right to protest the transfer and to request a hearing on the proposed action to be taken by the Board on or before the first Monday in May. As the grievant was denied these statutory rights the action taken by the Board was improper.³

³Due to the resolution of this issue it is unnecessary to discuss whether the grievant's status as a professional employee was affected by the addition of the transportation duties; however, the current authority, cited supra, indicates that the position of Director of Transportation might well be professional in nature.

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 was initially assigned to the position of Director of Administrative Services for the 1988-89 school year. He assumed the duties of that position on July 1 and July 5 after which he was absent until August 5 due to a military leave of absence.

2. The duties listed on the job description for the Director of Administrative Services consist primarily of working with the Director of Business Affairs and the development and implementation of a computerized county-wide management system.

3. Prior to the 1988-89 school term, the Board suffered a loss of funding and had been assigned additional responsibilities relating to asbestos removal. As a result certain administrators were not replaced when they retired and the duties of various remaining administrators were shuffled to best meet the needs of the school system.

4. On August 8 Superintendent William Phillips advised the grievant that he was to assume the duties pertaining to transportation which were previously performed by Mr. Larry.

5. Ed Larry had previously acted as Director of Transportation and for several months had been performing the duties of the retired Supervisor of Transportation.

6. The duties assigned to the grievant results in his administration of the entire transportation department of Barbour County Schools.

7. The job title of Director of Administrative Services was amended in August 1988 to include the administration of "the total county transportation program" as a responsibility of the position.

8. The grievant filed a writ of mandamus on August 24 seeking in part to be relieved of the additional transportation duties.

9. The writ of mandamus was denied at a hearing held on October 27 due to the grievant's failure to exhaust his administrative remedies. The grievant initiated grievance proceedings that same day.

Conclusions of Law

1. The grievant has exercised diligence in pursuing a remedy in this manner and shown a valid reason for the delay in filing a level one grievance.

2. When the duties of two or more administrative employees are combined into one position the result is a newly created position as evidenced by numerous factors including a change in the position's responsibilities. The newly created position must be posted and filled within statutory guidelines. Fletcher et al. v. Berkeley County Board of Education, Docket No. 02-87-017-02 (May 15, 1987).

3. The assignment of an employee to a different position as evidenced by a significant change in responsibilities constitutes a transfer.

4. Transfers must be effectuated within the guidelines of W.Va. Code §18A-2-7 which requires that the Superintendent notify the employee of his intent to recommend transfer by the first Monday in April; that the employee be given an opportunity for hearing on the proposed action and that a final decision be made by the Board on or before the first Monday in May.

5. The transfer of the grievant in August to a newly created position which had not been posted was not in compliance with statutory guidelines providing employee due process and therefore was improper.

Accordingly the grievance is **GRANTED** and the Board of Education is **Ordered** to delete the transportation duties assigned to the grievant in August 1988 from his job description.

Either party may appeal this decision to the Circuit Court of Barbour 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: June 30, 1989

Sue Keller

SUE KELLER

SENIOR HEARING EXAMINER