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JAMES FOX

v.

Docket No. 89-45-435

SUMMERS COUNTY BOARD OF EDUCATION

DECISION

Grievant, James Fox, was employed by the Summers County Board of Education (Board) as a homebound student instructor prior to his reassignment to Hinton High School (HHS). He filed a grievance at Level I June 5, 1989, protesting his placement on a transfer list. Grievant's supervisor was without authority to grant relief and, upon appeal to Level II, the grievance was denied following hearing held July 13, 1989.¹ At Level III the Board voted July 27, 1989, to uphold the Level II decision. An appeal to Level IV was made August 4, 1989, and a hearing was held August 24, 1989. The parties submitted proposed findings of fact and conclusions of law by September 28, 1989.

¹At this hearing, it was agreed that grievant's protest over placement on the list would be consolidated with his grievance concerning the actual reassignment to HHS. It should be understood that the decision herein addresses both actions.

The facts of the case are not in dispute. By letter dated April 13, 1989, grievant was advised by Superintendent of Schools Demetrius Tassos that he was being considered for transfer for the 1989-90 school term. Grievant requested reasons for the proposal and, by letter dated May 3, 1989, Mr. Tassos responded that "[t]he reason...is that I plan to abolish the position of full-time homebound teacher and provide said services in accordance with board policy IV-M-5". Grievant requested and was afforded a hearing pursuant to W.Va. Code §18A-2-7 on May 22, 1989. By letter dated May 30, 1989, Mr. Tassos advised him that the Board had accepted the recommendation that his name be placed on the transfer list.

On May 31, 1989, the position of math teacher, grades 7 through 12 at HHS, was posted. Three persons made application but grievant did not. He was, however, informed by Mr. Tassos, in a letter dated June 9, 1989, that the Board had accepted the recommendation that he be placed in the position.

Grievant advances the following arguments for reversal of the Board's decision:

1. There was no valid reason for the transfer and it was simply part of an ongoing practice of harassment on the part of the administration.
2. Pursuant to State Board of Education Policy 5300, grievant's transfer should have been based strictly upon evaluations of his past performance as a homebound teacher.
3. The Board's decision to accept the Superintendent's recommendation that a number of employees be placed on the transfer list rather than voting on the individual employees' placement thereon was a violation of W.Va. Code §18A-2-7 and decisions of the West Virginia Supreme Court of Appeals.

4. The administration failed to adequately show reasons for the proposed transfer at the May 22, 1989 hearing in violation of W.Va. Code §18A-2-7.

5. The position of mathematics teacher at Hinton High School to which grievant was assigned was not filled in accordance with W.Va. Code §18A-4-8b(a).

The Board maintains grievant was provided sufficient reasons for the transfer and the action was taken in the best interest of the school system. The Board makes no specific responses to grievant's other assertions, but generally contends his reassignment was not arbitrary or capricious.

The assertions concerning Policy 5300 and the Board's decision to vote on the entire list of persons recommended for transfer were recently addressed and rejected in Parker v. Summers County Board of Education, Docket No. 89-45-434 (December 14, 1989). Accordingly, these issues are not addressed herein.

Grievant's allegation of harassment is not supported by the evidence. His sole support for this particular part of the grievance is the fact that Superintendent Tassos proposed his transfer during the two preceding years. In Fox v. Summers County Board of Education, Docket No. 45-87-175 (December 22, 1987), it was held that grievant's reassignment in school year 1987-88 did not conform to certain procedural requirements of W.Va. Code §18A-2-7.² During school year 1988-89, Mr. Tassos

²The decision specifically held that the Board had voted to abolish grievant's position which was one of two homebound positions in the county prior to affording him a hearing and, thus, deprived him of a meaningful hearing.

again made the recommendation, but the Board declined to accept it. The record does not reveal the reasons for the Board's decision. W.Va. Code §18-29-2(n) defines harassment as:

Repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession.

Grievant produced no evidence that improper motives prompted any of the recommendations for transfer. The record as a whole reveals they were all made because of Mr. Tassos' and others' conclusion that homebound student services could be more economically provided in ways other than the use of full-time teachers in the program. As noted in Parker, supra, the mere fact that a county board of education sought the transfer of an employee in past years is insufficient to substantiate a charge of harassment.

Grievant's assertions concerning the sufficiency of the reasons given for the transfer at the hearing are similarly unsupported. Board minutes of that date reflect that Mr. Tassos read his letter verbatim and grievant's counsel then gave reasons why the transfer recommendation should not be accepted. The minutes also show that grievant and his brother, Mr. Bill Fox, voiced their opinions as to the need for a full-time homebound teacher. Grievant specifically expressed his belief that the services could not be performed efficiently through the use of contracts with a number of teachers. The minutes do not show that Superintendent Tassos was called upon by grievant or his counsel to elaborate on the reasons given for his recommendation. Neither grievant nor his counsel represented at the Level IV

hearing that the administration refused to respond to inquiries about those reasons and, absent such evidence, it cannot be said that grievant was denied a meaningful hearing.³ His comments at the hearing, in particular, reveal some understanding of Policy IV-M-5, adopted by the Board on September 26, 1985. The policy provides that contracts may be established with full-time teachers or substitutes for the delivery of homebound student services at a rate of \$10.00 per hour. Grievant's knowledge of the policy indicates Mr. Tassos adequately conveyed that his recommendation was made in an effort to realize some reduction in expenditures for the program.

Grievant's argument that the position to which he was assigned was improper is essentially an assertion that the

³While Mr. Tassos' explanation is deemed sufficient to allow grievant and/or counsel to make a reasoned response, it is noted that it falls far short of what could have been presented. At Level IV extensive evidence concerning financial constraints and savings to be realized from utilizing an alternative method of providing homebound student services was presented. It was apparent from the testimony of Mr. Billy Joe Kessler, Business Manager/Treasurer, that this information was available and could have been presented to the Board prior to its decision to place grievant on the transfer list. The obvious purpose of hearings on proposed transfers is to allow the affected employee(s) the opportunity to explore the reasons given and provide his or her own reasons against the action. The Board, which has the ultimate authority in the matter, is then given some evidence on which to make an informed decision. As was stated in Parker, elaboration on the reasons for a proposed transfer provided once grievance proceedings are initiated is of little consequence in an inquiry as to whether an employee was afforded a meaningful transfer hearing. It is quite possible that the present grievance could have been avoided had the grievant been furnished the documentation provided at Level IV when he made his April 29, 1989, request of Mr. Tassos.

position was not filled on the basis of qualifications. It is well-settled that a county board of education must fill professional positions on that basis, W.Va. Code §18A-4-8b(a); Dillon v. Board of Education of the County of Wyoming, 351 S.E.2d 58 (W.Va. 1986); State of West Virginia ex rel. Oser v. Haskins, Superintendent and Board of Education of the County of Marshall, 374 S.E.2d 184 (W.Va. 1988). Grievant's evidence in support of his allegation that the Board failed to follow this mandate, however, is nearly non-existent. The record reveals only that three persons applied for the position and that two of them had been employed by the Board for less time than the grievant. Absent any evidence concerning the applicants' actual qualifications or the process by which those qualifications were assessed, it cannot be concluded that the Board contravened the requirements of W.Va. Code §18A-4-8b(a) when grievant was assigned to HHS.⁴

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

⁴Because of this failure to produce evidence, it is not necessary to address the question of under what circumstances would the necessity of assigning a professional employee, properly placed on a transfer list, to a position give rise to an exception to the requirements of §18A-4-8b(a). It appears that those requirements may be in conflict with the provisions of W.Va. Code §18A-2-7, which grant a county board of education the authority to make reassignments.

FINDINGS OF FACT

1. Grievant has been employed by the Board as a homebound student instructor for approximately fifteen years.

2. Grievant was notified April 14, 1989, by Superintendent of Schools Demetrius Tassos that he was being considered for transfer during the 1989-90 school term. Grievant requested and was given a statement of reasons for the proposal in a letter dated May 3, 1989.

3. At a hearing held May 22, 1989, Mr. Tassos reiterated the reasons contained in the May 3, 1989 letter. Grievant and his counsel were afforded the opportunity to present to the Board reasons why the action should not be taken. The Board subsequently voted to include his name in the proposed transfer list.

4. On June 8, 1989, Mr. Tassos sought and received Board approval to assign grievant to the posted position of math teacher, grades 7 through 12, at Hinton High School.

CONCLUSIONS OF LAW

1. Pursuant to the provisions of W.Va. Code §18A-2-7, a school employee being considered for transfer is entitled, upon request, to a letter which states the reasons for the action. The letter must sufficiently apprise the employees of the reasons in order that he or she may prepare for a hearing on the matter

in the event such is requested. Parker v. Summers County Board of Education, Docket No. 89-45-434 (December 14, 1989).

2. At the transfer hearing the administration must inform the employee and the Board of the reasons for the action. The employee must be given the opportunity to question members of the administration and present his or her reasons why the action should not be taken. The measure of due process to which the employee is entitled is flexible and may vary depending upon the particular circumstances of the case. Parker, supra; Edwards v. Berkeley County Board of Education, Docket No. 89-02-234 (November 28, 1989).

3. Grievant has not shown that he was not given the opportunity to question Superintendent of Schools Demetrius Tassos as to the reasons for his proposal or denied the opportunity to provide rebuttal to these reasons before the Board made its decision.

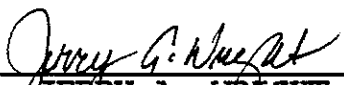
4. A grievant must prove the allegations of his or her grievance by a preponderance of the evidence. Taylor v. Putnam County Board of Education, Docket No. 89-40-429 (September 21, 1989); Hanshaw v. McDowell County Board of Education, Docket No. 33-88-130 (August 19, 1988).

5. Grievant has not shown that the Board did not adhere to the requirements of W.Va. Code §18A-4-8b(a) when he was assigned

to the position at Hinton High School or that said assignment was otherwise arbitrary or capricious.

Accordingly, the grievance is **DENIED**.

Either party may appeal this decision to the Circuit Court of Summers 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. 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.



JERRY A. WRIGHT
Chief Hearing Examiner

Dated: December 29, 1985