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881

CHARLES S. McCANN

v.

Docket No. 22-88-202

LINCOLN COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant Charles S. McCann is employed by Respondent Lincoln County Board of Education as Assistant Principal, Harts High School (HHS). Until June 30, 1988, Grievant was Assistant Superintendent for Lincoln County Schools. In early July 1988, he initiated the following complaint:

- (1) Improperly and illegally terminated from the position of Asst. Supt.
 - (2) Improperly and illegally transferred, assigned and/or demoted to Assistant Principal.
 - (3) The[y] improperly and illegally abolished my position as Assistant Superintendent.
 - (4) I was denied my due process rights.
- I seek to be reinstated as Assistant Superintendent or a county level position or a principalship with any loss of pay due to the switch in positions be made up by the board [of education] plus payment of attorney fees.

After denials at Levels I, II and III,¹ Grievant advanced his claim to Level IV on October 24, 1988, where hearing was conducted January 11, 1989.² Attorneys for the parties requested a responsive submissions schedule, and the undersigned approved the same.³ The record is now complete with Grievant's original brief, Respondent's reply and Grievant's rebuttal, rendering the case mature for disposition.

Gr. Ex. 1. Grievant testified that he had worked for Respondent as a classroom teacher for five years, an elementary principal one year, a secondary principal four years, Assistant Superintendent two years, Superintendent nine years, again Assistant Superintendent two years, and now Assistant Principal, HHS. He is the holder of a Masters-plus-thirty degree and has certification in science, physical education, and school administration/secondary principal and superintendent. Gr. Ex. 1.

In July 1986, Harold Smith, who had then-recently been elected to a two-year term as Superintendent of Schools for Lincoln County, recommended that Respondent hire Grievant

¹ Rather detailed information concerning each of the lower levels, including the Level III transcript and exhibits, are a part of the record at Level IV.

² A scheduled mid-December hearing was continued upon Grievant's motion, to which Respondent did not object, and for good cause shown.

³ After the Level IV hearing, several weeks' extension of the briefing schedule was authorized upon Respondent's motion due to office equipment failure. Grievant did not object to this delay of proceedings.

for a two-year term as Assistant Superintendent for Personnel and Special Services. Respondent adopted this recommendation. Gr. Ex. 2. Grievant was not offered, nor did he execute, a separate written contract with Respondent for this Assistant Superintendent post; the only written contract between Grievant and Respondent is his continuing contract of employment as a teacher, Gr. Ex. 3.⁴ He admitted that at no time did anyone promise him, orally or in writing, that he would have a job as Assistant Superintendent past June 30, 1988.

Grievant's most recent title before moving to HHS was Assistant Superintendent for Personnel and Special Services, under which his duties were "all personnel, certification, records, grievance representation, job posting" and "transportation, maintenance, and food service." As Assistant Superintendent from July 1, 1986, through June 30, 1988, Grievant was evaluated twice by Smith. Both evaluations were rated "exceeds performance standards." Gr. Exs. 5, 6. However, the 1986 review provided that Grievant could be more thorough with communication, and the 1987 document twice referred to problems with temper. Grievant characterized those criticisms as constructive but defended, "I don't

⁴ Grievant explained that for two years out of the nine he was Superintendent of Lincoln County Schools he received a contract specific to that job. He suggested Grievant's Exhibit 3 might be one of those agreements.

think I had problems with my temper but he must've thought so. You'd have to ask him."⁵

During school years 1986-88, there was one other Assistant Superintendent besides Grievant. Stephen B. Priestley, currently Superintendent of Schools for Lincoln County, served in the capacity of Assistant Superintendent for Instruction. Priestley was elected Superintendent in January, effective the end of Smith's term, after Smith announced his retirement from Respondent's employ as of June 30, 1988. On April 5, 1988, Respondent voted to abolish the post of Assistant Superintendent for Personnel and Support Services. According to Grievant, this was contrary to Superintendent Smith's desire and was not based upon any express recommendation from him. However, Grievant admitted that Smith was present with him at the meeting and failed to voice any objection to Respondent's action. Grievant had no prior notice of Respondent's intent to do away with the post and was not given opportunity for a hearing on the alteration; the item was not even on Respondent's agenda for the evening but was an "add-on" item initiated by one of the members. Grievant received written notice in July 1988 that Respondent had voted, upon the recommendation of Superinten-

⁵ Smith did not testify, or otherwise provide evidence, at any level of this grievance proceeding. Information concerning a letter of reprimand issued by Smith to Grievant has been afforded no weight herein, inasmuch as that letter was removed from Grievant's personnel file by Smith prior to June 30, 1988.

dent Priestley, to place him at HHS. This was the first notice he was given of this assignment and he had no hearing or opportunity for hearing thereon.

As Assistant Superintendent for Personnel and Support Services, Grievant drew a salary of approximately \$40,000.00 per annum. In addition, Respondent furnished him with a vehicle for work trips and for travel to and from home, about one-half mile from Respondent's central office. As Assistant Principal, HHS, his salary is roughly \$30,000.00, he is supplied no car, and his work site is about 30 miles away from his home.⁶

Currently, Respondent has only one Assistant Superintendent, for Personnel and Public Relations.⁷ Grievant applied for this new job, but was not interviewed for it or for any other position. Thomas Miller was hired. Grievant has more seniority with Respondent than does Miller, having been employed in 1963 to Miller's 1967. Further, Grievant received his administrative certificate before Miller and has more administrative experience than anyone in Lincoln

⁶ Grievant's experience as a secondary principal was also at HHS but at that time he lived in the Harts area.

⁷ Respondent has two less central office administrators this school year, as compared to last. Missing are the Assistant Superintendent for Instruction and the Coordinator of Testing and Guidance. Grievant's former job, Assistant Superintendent for Personnel and Support Services, has been replaced by the new Assistant Superintendent for Personnel and Public Relations position. Significantly, there were no layoffs as a result of this reorganization.

County. He added that his former position, with its personnel chief duties, enabled him to know this information to be accurate. See also Gr. Ex. 7. Grievant concluded by stating his opinion that Respondent had "gotten the cart before the horse" by abolishing the Personnel/Support Services⁸ job in April, since no new organizational chart for its central office was adopted until July or August.

Priestley appeared at Level IV and testified that he had worked as Assistant Superintendent under Grievant for three years and under Smith for two, and that he had also served as Grievant's Administrative Assistant. He related that he himself had been elected Superintendent of Schools of Lincoln County, effective July 1, 1988, on January 25, 1988. He admitted he had no authority to act in that capacity before July 1, which was the date he took the oath of office; he later qualified that somewhat by explaining Smith had actually left work in mid-May 1988 and asked him to act as Superintendent.⁸

He stated that upon his election in January, he began formulating a plan for reorganizing Respondent's central office. He expressed that there had been much sentiment in the county, with which he concurred, that it was time for that office to share in budget-cutting, since the teaching force and the schools had borne the brunt of financial

⁸ Apparently Respondent never officially appointed Priestley Acting Superintendent in Smith's absence.

cutbacks up to that point.⁹ Sometime in February 1988, he met with attorneys for Respondent and the West Virginia Department of Education to discuss certain legal concerns related to possible restructuring. The next day he met with Superintendent Smith to inform him that, if reorganization occurred, certain jobs might be abolished; he asked Smith to ~~PC~~ inform the individuals in those positions of that possibility, Grievant "definitely being one of them."¹⁰ Priestley explained he had discussed this whole matter with members of the Board of Education, Smith and others, in an effort to get input from several sources. For reasons unknown to Priestley, Superintendent Smith did not, in line with his request, speak to McCann or any other employee whose position was potentially in jeopardy.

In late March, job vacancy notices originating from Superintendent Smith's office were posted. Included were two Assistant Superintendent positions, one for Instruction and one for Personnel and Support Services. According to Priestley, several members of the Board of Education felt Smith had "jumped the gun" by unilaterally noticing job

⁹ Priestley opined that, in the several years immediately prior to his promotion to Superintendent, Respondent's budget had been cut "a million dollars or more when you're talking about personnel alone."

¹⁰ In this regard, Priestley asked Smith to advise Principal Bell of Guyan Valley High School, the least senior secondary principal in the county, that he might be bumped by Grievant if the reorganization were perceived as a reduction-in-force.

vacancies without conferring with them or considering his views as Superintendent-Elect.¹¹ In response to Smith's actions, Respondent abolished the Personnel/Support Services position and directed Smith to advertise for two Assistant Superintendents, Instruction and Personnel/Public Relations, which he did, with provision that applications should be forwarded to Priestley and would be accepted through June 30, 1988. He admitted neither he, Smith nor anyone else advised Respondent that notice and hearing to Grievant might be necessary prior to abolition of the position he held and stated that to his knowledge such procedures were never mentioned in any of Respondent's meetings. He added that Respondent's elimination of the job was not a matter of personality but one of restructuring, and not based upon an overt recommendation from Smith, himself or anyone. He further opined that it was not a "personnel action" and therefore did not require a recommendation.

Priestley related that Grievant had expressed concern to him on several occasions about his employment status for 1988-89, and that he had assured Grievant that he intended to recommend his appointment to any available administrative post. He went on that he and Grievant talked "through May and June" about whether there would be one or two Assistant

¹¹ No member of the Lincoln County Board of Education offered testimony or other evidence at any level of this grievance proceeding.

Superintendents, inasmuch as the issue had not finally been settled. In late June, Respondent decided that there would only be one Assistant Superintendent, Personnel/Public Relations. Priestley characterized the Personnel side of this job as being "what Mr. McCann did," but the Public Relations responsibilities as "totally new--I felt like this was imperative, as we've gotten some bad press in Lincoln County in recent years."¹²

Priestley explained that he interviewed three people who applied to be Assistant Superintendent of Personnel and Public Relations in response to the job announcement issued by Smith, and thereafter, in early July, recommended the hiring of Miller, which Respondent approved. He stated he did not interview Grievant because, "although Mr. McCann had many good qualifications, he wasn't the person for that job," citing "times I observed actions on Mr. McCann's part that I thought unbecoming to a professional administrator."¹³ He reminded this Grievance Board that he had worked directly with Grievant for a number of years. He

¹² Priestley was one of the primary drafters of the job description for Assistant Superintendent for Personnel and Support Services, according to Grievant, and thus was quite familiar with the same.

¹³ Grievant objected to any consideration of such reasoning since his non-selection for the new Assistant Superintendent job was not so explained prior to his initiation of this grievance. Grievant admitted, however, that he had not requested Respondent to provide the reasons for his non-selection, although he had that right as the most senior applicant.

admitted he had not reviewed Grievant's personnel file prior to making his recommendation to Respondent, although he had access to it.

Priestley recommended Grievant's assignment to HHS at Respondent's first meeting in July 1988 since "we were all aware from what we'd heard that Mr. McCann was entitled to the highest administrative position available" and "the only administrative post available was Assistant Principal [at HHS]." ¹⁴ Resp. Ex. 8. He continued that McCann would have been offered a teaching position if no administrative job had been vacant. He characterized Respondent's perspective on Grievant's transition from central office administrator to assistant principal as the same as his: an assignment based upon his recommendation, not a transfer, an adverse action, disciplinary action or reduction-in-force. He confirmed that Grievant was never placed on any sort of administrative transfer or other "list" for personnel action.

In closing, Grievant makes the following assertions:

1. An assistant superintendent, unlike a superintendent, is an "employee," not an "officer." Further, an assistant superintendent is a "professional educator" per W.Va. Code §18A-1-1(c) and thus a "teacher" per Code §18-1-1(g). It

¹⁴ Priestley readily admitted that Grievant would be making "upwards of \$35,000.00" per year were he assigned as a Principal, as opposed to Assistant Principal.

follows from these truths that the broader procedural protections enjoyed by most school employees attach to assistant superintendents, as opposed to superintendents;

2. Grievant was transferred and demoted; if not, then he was "the victim of a reduction in force;"

3. Respondent acted without authority in abolishing the position of Assistant Superintendent for Personnel and Support Services, since it did so without the recommendation of then-Superintendent Smith;

4. Respondent violated West Virginia State Board of Education Policy 5300(6)(a) and (b); further, it violated due process, statutes governing transfers and demotions, and its own policies.¹⁵

Grievant also cites authority including Trimboli v. Bd. of Educ. of the Co. of Wayne, 254 S.E.2d 561 (W.Va. 1979), and Smith v. Bd. of Educ. of the Co. of Logan, 341 S.E.2d 685 (W.Va. 1985).¹⁶

¹⁵ Statutes cited here are W.Va. Code §§18-5-4, 18A-2-7; county policies, included in Grievant's Exhibit 8, are 8-01.04, 8-04.00 and 8-05.00.

¹⁶ The undersigned has reviewed and considered all authority cited and arguments made by both parties to this grievance.

The plaintiff in Trimboli held the central office administrative position of Director of Federal Programs prior to his transfer, after a proper hearing, to a teaching position. The only written contract between Trimboli and the defendant board of education was his continuing teacher's contract; his employment in the central office was in no way termed. The reason proffered for his transfer was ~~the~~ superintendent's desire "'to see some new faces. . .[and have] new ideas at the central office.'" At 254 S.E.2d 564. The defendant cited Code §18-5-32, as follows, as justification for its conclusion that Trimboli was an at-will employee in any event:

The board [of education], upon the recommendation of the county superintendent, shall have authority to employ such general and special supervisors or directors of instruction and of such other educational activities as may be deemed necessary. . . . The period of employment for. . .[such personnel] shall be at the discretion of the board.

The Supreme Court of Appeals remanded the case to the Circuit Court of Wayne County for assessment of whether the board of education had complied with West Virginia Board of Education (WVBOE) policy 5300(6)(a), which reads:

Every employee is entitled to know how well he is performing his job, and should be offered the opportunity of open and honest evaluation of his performance on a regular basis. Any decision concerning promotion, demotion, transfer or termination of employment should be based upon such evaluation, and not upon factors extraneous thereto. Every employee is entitled to the opportunity of improving his job performance prior to the terminating or transferring of his services, and can only do so with assistance of regular evaluation.

In essence, Trimboli held that, if the board of education failed to comply with WVBOE policy, the plaintiff was entitled to reinstatement to his central office post; if it did comply, his transfer was valid. See Trimboli at 568.

Smith involved the nonrenewal of a one-year Code §18A-4-16 extracurricular contract for football coaching. The Court found that extracurricular contracts are subject to Code §18A-2-7 protections and that Smith's nonrenewal was tantamount to transfer. Since plaintiff Smith had not been afforded notice of his transfer and a right to hearing thereon, he deserved an extracurricular coaching contract for the next school year.

Respondent, in closing, pressed the following points:

1. Grievant was not transferred, demoted, or the subject of a reduction-in-force. Rather, there was a reorganization in Lincoln County; as a result, he was assigned to the only available administrative position in the county pursuant to Church v. McDowell Co. Bd. of Educ., Docket No. 33-87-214 (Nov. 30, 1987), when his contractual term as Assistant Superintendent, per Respondent's original decision to hire him for two years and per W.Va. Code §18-5-32, expired June 30, 1988.

2. The successful applicant for the new position of Assistant Superintendent for Personnel and Public Relations, while not as senior as Grievant, was the most qualified candidate and

according to Dillon v. Bd. of Educ. for the Co. of Wyoming, 351 S.E.2d 58 (W.Va. 1936) and W.Va. Code §18A-4-8b(a) was entitled to the job.

W.Va. Code §18-5-32 provides, in pertinent part:

The county board of education, upon the recommendation of the county superintendent, may employ an assistant whose term of employment shall be not less than one nor more than four years: Provided, that such term shall not extend beyond that of the incumbent county superintendent.

Opin., State Supt. Schools, March 26, 1981, Re: "Board of Education, County -- Superintendent & Assistant Superintendent," provides that, although "transfers and reassignments must be initiated by the county superintendent of schools in order for the board [of education] to act on them," the county board of education may, sua sponte, "reorganize its [own] administrative office and define jobs [therein]."

Opin., State Supt. Schools, February 2, 1988 Re: "Contract -- Health & Public Welfare -- Superintendent & Assistant -- Certification," provides:

1. Can a local school board refuse to renew[] the contract of an assistant superintendent who has had high evaluations, when such refusal to renew is without notice or opportunity for hearing or due process, and where the county superintendent--who has one more year on his existing contract--has recommended him to be employed for another year?

Yes, because. . .[W.Va. Code §18-5-32 does not grant an assistant county superintendent of schools a means for contesting nonrenewal of his or her contract--nor does any other statute found.*

2. If the local school board may do so, what are the rights of the assistant superintendent to remain in the central office and/or county school system? The assistant superintendent has served in that position for 16 consecutive years and has a total of 29 years of service in said county school system, including experience as a classroom teacher and principal prior to becoming an assistant superintendent.

It is my interpretation of the school law that an outgoing assistant superintendent is entitled to some other lead administrative position for which he or she is qualified either in the county office, on a county program or as a school principal.

*I do not think that. . . [W.Va. Code §]18A-2-8... provides a remedy in this regard because... [Code §]18-5-32 clearly limits the assistant county superintendent of schools to the term agreed upon by the superintendent and board, notwithstanding cause.

Since June 27, 1988, Code §18A-2-1 has provided, in pertinent part:¹⁷

Professional personnel employed as deputy, associate or assistant superintendents by the board [of education]. . . and who are directly answerable to the superintendent shall serve at the will and pleasure of the superintendent and may be removed by the superintendent upon approval of the board.

WVBOE Policy 5300(6)(b) provides:

Every employee is entitled to "due process" in matters affecting his employment, transfer, demotion or promotion.

¹⁷ Grievant argued this portion of the statute irrelevant since it was not in effect prior to June 27, 1988. This contention is dismissed as meritless.

Respondent presented Code §18A-2-1 as an exhibit, but based on Grievant's contention of irrelevance, withdrew it. However, the law must be considered, and Grievant recognized this by reference to §18A-2-1 in his narrative final argument/brief.

In Church, this Grievance Board held, in a situation where a county superintendent of schools' contract was not renewed,

The school board should consider the outgoing superintendent for a supervisory/director position unless it appears the former superintendent is not qualified as a supervisor or director or that the position is occupied by a more qualified employee.

It was further ordered in Church that the grievant be considered for a "supervisory-type position if one was available."¹⁸

The remainder of this Decision will be presented as formal findings of fact and conclusions of law.

FINDINGS OF FACT

1. Grievant is employed by Respondent as Assistant Principal, Harts High School (HHS), and immediately prior to assuming this position, Grievant was Respondent's Assistant Superintendent for Personnel and Support Services (Asst., Pers./Supp.), July 1, 1986-June 30, 1988. As Asst., Pers./Supp., Grievant made approximately \$40,000.00 per annum, had

¹⁸ Grievant cites another Grievance Board case, Bowers v. Harrison Co. Bd. of Educ., Docket No. 17-87-198-2 (Feb. 16, 1988). Bowers involved a reduction-in-force of central office administrators and is thus distinguishable from the instant case.

the use of a car owned by Respondent, lived one-half mile from the office, and achieved an overall "exceeds performance standards" rating on all formal evaluations. As HHS Assistant Principal, Grievant makes around \$30,000.00 a year, must use his own vehicle for business, and has to travel thirty miles one-way to work.

2. His original employment by Respondent as Asst., Pers./Supp., was for the set two-year term, July 1, 1986-June 30, 1988.

3. While Grievant was Asst., Pers./Supp., Respondent's Superintendent was Harold R. Smith. Smith announced his retirement effective June 30, 1988; accordingly, Respondent, in January 1988, selected Stephen Priestley as its new Superintendent, effective July 1, 1988.

4. Immediately upon his selection, Priestley began discussing with Superintendent Smith, Respondent's members, and others his ideas for reorganization of Respondent's central office. These included having only one Assistant Superintendent, to cover the areas of Personnel and Public Relations, and eliminating the Asst., Pers./Supp. position.

5. In March 1988, Smith posted vacancy notices for the positions of Asst., Pers./Supp. and Assistant Superintendent, Instruction.

6. On April 5, 1988, at one of its regularly-scheduled public meetings, Respondent abolished the post of Asst., Pers./Supp., effective June 30, 1988. This action was taken unilaterally, without the express recommendation of Smith;

however, Smith was present and voiced no objection to the same. Also at that meeting, Respondent directed Smith to post as vacant two Assistant Superintendent jobs, in the areas of Personnel/Public Relations and Instruction.

7. Grievant had no formal notice that the Asst., Pers./Supp. position was to be eliminated prior to this meeting, although Priestley had asked Smith to advise Grievant of this possibility as early as February 1988. Grievant has never been afforded a hearing, or the opportunity therefor, on the elimination of the Asst., Pers./Supp. post.

8. In mid-May 1988, Smith went on vacation until June 30, 1988, when he retired. He asked Superintendent-Elect Priestley to act as an interim superintendent during this time.

9. In May and June 1988, Priestley and Grievant had several conversations about Grievant's employment status for school year 1988-89. Priestley assured Grievant that he intended to recommend that Respondent employ him in an administrative capacity if such was available.

10. In late June 1988, Respondent determined that it would have only one Assistant Superintendent, for Personnel and Public Relations. Grievant applied for this job, along with several other people. Three individuals, not including Grievant, were interviewed, and Tom Miller was hired upon Priestley's recommendation in early July.

11. Grievant, with twenty-seven years in Respondent's employ, including nine years as its Superintendent of Schools, was the most senior applicant for the position. He has not, to date, asked Respondent to provide him with reasons for his non-selection as Assistant Superintendent, Personnel/Public Relations.

12. On or around July 1, 1988, Respondent, upon the recommendation of Superintendent Priestley, hired Grievant to be Assistant Principal, HHS, which was the only administrative vacancy in the Lincoln County school system at that time. Grievant did not apply for or otherwise seek the job, or get direct prior notice that he was being considered for it.

CONCLUSIONS OF LAW

1. In order to prevail, a grievant must establish the allegations of his claim by a preponderance of the evidence. Shaver v. Jackson Co. Bd. of Educ., Docket No. 18-88-107 (Nov. 7, 1988).

2. The term of an assistant county superintendent of schools cannot extend beyond that of the incumbent superintendent. W.Va. Code §18-5-32.¹⁹ In this case, Grievant's

¹⁹ Possible exceptions to this, in situations such as
(Footnote Continued)

term ended as a matter of law on June 30, 1988, when Superintendent Smith's term expired.

3. Although Grievant had tenure as a member of Respondent's staff, he had no property or other vested right in the position of Asst., Pers./Supp., beyond June 30, 1988, the expiration of his oral contract of employment thereas. See State ex rel. Hawkins v. Tyler Co. Bd. of Educ., 275 S.E.2d 908, 911-12 (W.Va. 1981); cf. Trimboli v. Wayne Co. Bd. of Educ., 254 S.E.2d 561 (W.Va. 1979) (no set term of employment).

4. A reduction-in-force occurs when personnel are laid off from employment, and not otherwise. See Code §18A-4-8b(a); see also State ex rel. Bd. of Educ. v. Casey, 349 S.E.2d 436 (W.Va. 1986). No reduction-in-force occurred in this situation.

5. Grievant was not "transferred" within the meaning of Code §18A-2-7. His term as Asst., Pers./Supp. expired with the term of Smith, and he had no reasonable expectation for retention of that post. This case is distinguishable from Smith v. Logan Co. Bd. of Educ., 341 S.E.2d 685 (W.Va.

(Footnote Continued)

where a county superintendent resigns his or her post, do not apply to this grievance.

One obvious justification for this term limitation is the close proximity of an assistant's position to the superintendent's. This professional relationship is also recognized by Code §18A-2-1, as cited herein. It is noted that the plaintiff in Trimboli held a hierarchically lower administrative position than that of assistant superintendent, and that the two posts are covered by different portions of §18-5-32. -

1985), discussed in the body of this Decision, due to the vastly different nature of the positions and terms of employment involved. In this regard, see Conclusions of Law 2, 3.

6. Salary and perquisite distinctions notwithstanding, Grievant was not "demoted" within the meaning of Code §18A-2-7, Trimboli, or other authority. Rather, his time as Asst., Pers./Supp., expired, and he was assigned to another supervisory job within the county for which he was qualified.

7. West Virginia Board of Education (WVBOE) Policy 5300(6)(a) was in no-wise violated and is otherwise not applicable to this case.

8. Grievant has not established any denial of due process per WVBOE Policy 5300(6)(b) or other authority. No adverse action was taken against him, and Respondent and its agents made every reasonable attempt to keep him timely informed of the reorganization and its potential effects.²⁰ Cf. Baker v. Civil Service Commission, 245 S.E.2d 908 (W.Va. 1978).²¹

²⁰ Respondent's former agent, Superintendent Smith, did apparently fail to keep Grievant as up-to-date as he possibly should have. While this is unfortunate, it was not the fault of Respondent or any of its current agents, including Superintendent Priestley, and the undersigned perceives no prejudice as a result of Smith's inaction.

²¹ Baker involved a state employee and the elimination of his position due to a governmental reorganization. At
(Footnote Continued)

Further, Grievant was on clear notice that his term as Asst., Pers./Supp., would end June 30, 1988. See Conclusions of Law 2, 3.

9. Opinions of the West Virginia State Superintendent of Schools may be considered by this Grievance Board. McClure v. Kanawha Co. Bd. of Educ., Docket No. 20-88-131 (Oct. 24, 1988).

10. A county board of education in West Virginia may take unilateral action to reorganize its central office and define the jobs therein. Opin., State Supt. Schools, Mar. 26, 1981; see, generally, Code §§18-5-1, 18-5-13, 18-5-34.²²

(Footnote Continued)

912-13, the Court reasoned:

Where a classified position has been abolished, the employee ordinarily is not entitled to a procedural due process hearing. The reason is rather obvious--the abolishment of a position results from the plenary authority of the legislative body which created the position and does not involve a personnel question as to the fitness of the particular employee who holds the position.

The Court held, in essence, that government restructuring, even when it results in employees losing their jobs, is appropriate and due process protections do not attach as long as positions are not done away with arbitrarily, in bad faith, or for improper motive. Waite v. Civil Service Commission, 241 S.E.2d 164 (W.Va. 1978), was relied upon for the proposition that a state employee with "statutory entitlement to tenure" still was without a property interest protectible by due process if his position had been or was being discontinued. 245 S.E.2d 913.

²² "The law is well settled in this jurisdiction that a Board of Education cannot exercise any power that is not expressly conferred by statute, or does not fairly arise by implication." Cochran v. Tressler, 141 W.Va. 130, 135, 89 S.E.2d 306, 310 (1955). This reorganization power rather clearly arises "by implication" from, e.g., a county board

(Footnote Continued)

Staff transfers and other "personnel actions," however, may be effected only upon the recommendation of the county's superintendent. See, e.g., Code §§18-4-10(2), 18A-2-1, 18A-2-7. In this case, no personnel action with regard to Grievant's position as Asst., Pers./Supp., occurred.²³ See n. 21.

11. An assistant superintendent serves "at the will and pleasure of the superintendent and may be removed by the superintendent upon approval by the board [of education]." Code §18A-2-1.²⁴ This portion of §18A-2-1 was not effective until June 27, 1988; however, even if there had been error on Respondent's part which negatively affected Grievant in this situation, Respondent's action on Priestley's July 1988 recommendation that he be assigned to HHS may properly be considered an §18A-2-1 removal from the assistant superintendency he held.²⁵

(Footnote Continued)
of education's mandate to supervise and control its school district. Code §18-5-1. See also n. 21.

²³ The question of whether Superintendent Smith's failure to object to the Respondent's actions at the April 5, 1988, meeting, despite clear opportunity to do so, constituted a "constructive recommendation," is left for another day. Grievant, without citing any authority for his proposition, argues that it did not.

²⁴ This language from §18A-2-1 is markedly different from that of §18-5-32 discussed in Trimboli. See this Decision, supra.

²⁵ The question of whether Priestley could have done so as of June 27, since he was "acting superintendent" at least by Smith's authority, need not be addressed.

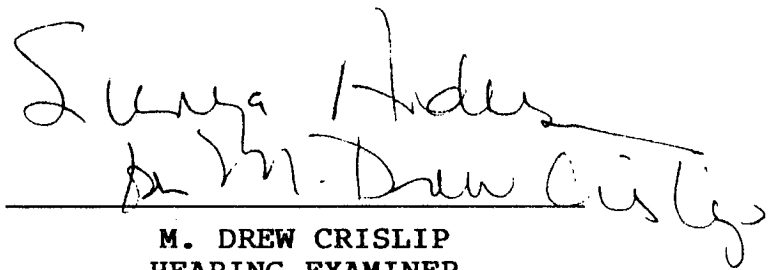
CERTIFICATE OF SERVICE

I, M. DREW CRISLIP, Hearing Examiner for the West Virginia Education and State Employees Grievance Board, do hereby certify that I have this 26th day of June, 1989, served true copies of the foregoing **DECISION** upon the following by United States Certified Mail in properly addressed and stamped envelopes to their addresses as follows:

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M. DREW CRISLIP
HEARING EXAMINER