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PHYLLIS PARKER

v.

Docket No. 89-45-434

SUMMERS COUNTY BOARD OF EDUCATION

DECISION

Grievant, Phyllis Parker, was employed by the Summers County Board of Education (Board) as a Secretary III at the Summers County Career Center (Center) during the 1988-89 school term. She filed a grievance at Level I May 31, 1989, alleging her placement on a transfer list was improper for a number of reasons, including the administration's failure to adequately show reasons therefor at a hearing held May 22, 1989. 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,

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

1989 and a hearing was held August 24, 1989. The parties submitted proposed findings of fact and conclusions of law by September 22, 1989.

The facts of the case are not in dispute. By letter dated April 13, 1989, grievant was informed by Superintendent of Schools Demetrius Tassos that she was being considered for transfer for the 1989-90 school term. She requested reasons for the action and, by letter dated May 3, 1989, Mr. Tassos responded:

The reason you are being considered for transfer is that I do not anticipate the need for a secretary for a 261 day term at the Career Center for 1989-90. Due to the current uncertainties involving the early retirement of Mr. Davis and yourself, I am not sure of what personnel will be needed to staff the Career Center for the school year 1989-90 as well as the term of employments needed. Therefore, I need to keep my options open until these uncertainties are made final.

Grievant was advised she had a right to a hearing before the Board on the proposal. Grievant requested and was given a hearing May 30, 1989. Following the hearing the Board voted 4 to 1 to place her on a transfer list. Mr. Tassos conveyed the Board's decision in a letter dated May 30, 1989. He reiterated that the reason grievant was being considered for transfer was his anticipation that a 261-day secretary would not be needed at the Center.

On June 12, 1989, a 240-day Secretary III central office position was posted with the provision that "If the successful applicant [was] currently employed at 261 days, their term [would] not be decreased". Grievant did not make application for the job but was notified by letter dated June 23, 1989 from Mr.

Tassos that the Board had accepted his recommendation that she be assigned to the position. Upon request of the grievant, the Circuit Court of Summers County issued an injunction staying this assignment until August 21, 1989.² As of August 24, 1989, the date of the Level IV hearing, a secretary position at the Center had not been advertised.

Grievant advances numerous legal arguments for reversal of the Board's decision but they can be generally categorized and stated as follows:

1. 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.
2. 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.
3. Pursuant to State Board of Education Policy 5300(6)(a), grievant's transfer should have been based strictly upon evaluations of her past performance at the Center.
4. 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.
5. The position in the central office to which grievant was assigned was not filled in accordance with W.Va. Code §18A-4-8b(b).

²The reason(s) for the injunction and the significance of its expiration date are not entirely clear from the record. In her proposed findings of fact, grievant represents that the Court considered the impending appointment of a new Director at the Center of importance.

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

Grievant's argument concerning Policy 5300³ is without merit. The policy's applicability is triggered in a transfer of a school employee only when the action is taken for disciplinary purposes. It is designed to preclude dismissals and punitive transfers or demotions when the employee has not been apprised of deficiencies or afforded the opportunity to correct them. Mason County Board of Education v. State Superintendent of Schools, 274 S.E.2d 435 (W.Va. 1980); Trimboli v. Board of Education of the County of Wayne, 2574 S.E.2d 561 (W.Va. 1979); Beverlin v. Lewis County Board of Education, 216 S.E.2d 554 (W.Va. 1975). Grievant made no allegation that her transfer was a disciplinary

³The policy specifically provides in 5300(6)(a):

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 termination or transferring of his services, and can only do so with assistance of regular evaluation.

one and the evidence clearly reveals it was initiated for administrative reasons.

Grievant's assertions concerning the Board's decision not to vote on individual employees proposed for transfer is similarly without merit. W.Va. Code §18A-2-7, in pertinent part, provides:

The superintendent at a meeting of the board on or before the first Monday in May, shall furnish in writing to the board a list of teachers and other employees to be considered for transfer and subsequent assignment for the next ensuing school year. All other teachers and employees not so listed shall be considered as reassigned to the positions or jobs held at the time of this meeting.

These provisions contain no requirement that the Board's acceptance of a superintendent's recommendations concerning employee transfers be accomplished in any particular manner other than a vote.⁴

Grievant's sole evidence in support of her allegation of harassment⁵ is the Board's unsuccessful attempt to transfer her

⁴Curiously, Mr. Tassos testified during the Level IV hearing that he had, at some time, advised the Board that votes on individual employees was contrary to a "grievance case." No such case is referenced in the Board's proposed conclusions of law and the undersigned is not aware of any such holding. Grievant cites a West Virginia Supreme Court of Appeals case and two decisions of the Grievance Board in support of her contention, none of which even remotely touch upon the issue. Reference to these cases has therefore not been made herein.

⁵Grievant's Level I filing form includes allegations that the Board violated W.Va. Code §§18-29-3(n), (o) and (p). It is assumed that grievant intended to make reference to §18-29-2, as §18-29-3 relates to the procedural steps of the grievance procedure. No evidence was presented at any level in support of the charges of reprisal or favoritism as defined in §§18-29-2(o) and (p).

in 1983. Then-State Superintendent of Schools Roy Truby, in a decision dated July 14, 1983, held the Board failed to show good cause for the transfer.⁶ This decision was affirmed by the Circuit Court of Summers County although the opinion was not offered as evidence.

W.Va. Code §18-29-2(n) defines harassment as,

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

The mere fact that the Board has sought her transfer from the Career Center twice in six years is obviously insufficient evidence upon which to conclude grievant was being harassed.

Grievant's assertion that the central office position to which she was assigned was not filled in accordance with W.Va. Code §18A-4-8b(b) has some merit but, when carried to its logical conclusion, it distorts the intent of W.Va. Code §18A-2-7. Grievant maintains she could not be properly assigned to the position since only applicants could be considered. W.Va. Code §18A-4-8b(b) provides in pertinent part:

A county board of education shall make decisions affecting promotion and filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight [§18A-4-8], article four of this

⁶This decision is somewhat confusing in that the Superintendent, at least implicitly, concluded a county board of education could satisfy the requirement of W.Va. Code §18A-2-7 that reasons be shown for the transfer after an employee grieved the matter. The issue of whether the reasons given at the statutory hearing were sufficient was essentially not addressed.

chapter, on the basis of seniority, qualifications and evaluation of past service.

. . .

... Applicants shall be considered in the following order:

1. Regularly employed service personnel;
2. Service personnel whose employment has been discontinued in accordance with this section;
3. Professional personnel who held temporary service personnel jobs or positions prior to the ninth day of June, one thousand nine hundred eighty-two, and who apply only for such temporary jobs or positions;
4. Substitute service personnel; and
5. New service personnel.

The reference to applicants and the further requirement in §18A-4-8b(b) that all service personnel vacancies be posted lends support to grievant's argument. To conclude, however, that an employee on a transfer list can thwart reassignment simply by refusing to make applications would render meaningless the authority given boards of education in W.Va. Code §18A-2-7 to make such reassignments. When the two Code sections are read pari materia, it can reasonably be concluded that a board may assign a school service employee who has been properly placed on a transfer list to a posted position for which he or she has not applied when it has been determined that the employee would have received the position if such application had been made. It is uncontested that grievant was the most senior Secretary III in the school system when the position was posted and her personnel evaluations were good. The Board, therefore, had the authority to make the assignment.

Grievant's remaining argument is perhaps the crux of her complaint. This is the contention that the Board did not fulfill its mandate under W.Va. Code §18A-2-7 to show reasons for her placement on the transfer list at the May 22, 1989 hearing. Board minutes of that date reveal Mr. Tassos did not elaborate on the reasons given in his letter of May 3, 1989 to grievant and, in fact, merely read the letter verbatim. The minutes do not reflect whether or not Mr. Tassos was called upon to provide details by counsel for grievant. They do show that counsel made a statement to the Board as to why placement on the transfer list should not be approved and that grievant also cited reasons why a 261-day secretary was needed at the Center. At the Level IV hearing, grievant did not testify nor did her counsel represent that the administration refused to respond to inquiries about reasons for the proposed transfer. Absent such evidence, it cannot be said that grievant was denied a meaningful hearing before the Board made its vote. The explanation of Mr. Tassos was noticeably vague but from the nature of statements made by grievant and her counsel, it appears he adequately conveyed that he wanted to reduce the term of the secretary position at the Center.⁷

⁷This is not to say that a great deal more information could have been provided. It was apparent at Level IV that the administration had in its possession, at the time, financial information concerning the need to reduce school service personnel positions. Had this data been furnished to the grievant, the grievance might have been avoided.

Although of little consequence in an inquiry concerning the sufficiency of the reasons given at the May 22, 1989 hearing, the evidence presented by the Board at the Level IV hearing fully substantiated the budgetary necessities and workload distribution concerns prompting Mr. Tassos' recommendation. Declining student enrollment in the county required the Board to make reductions in both its professional and school service personnel staff. The Director's employment term had been reduced to 220 days and while the parties offered conflicting testimony as to the need for a longer term for both the Director and his secretary, the Board's evidence was more persuasive. Many of the tasks performed by grievant at the Center were essentially paperwork-related and could be easily carried out from her position in the central office. Others might be more efficiently performed at the Center, but it is only logical that some efficiency and even work product is lost when the employment terms are reduced.

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

FINDINGS OF FACT

1. Grievant, a Secretary III, has been employed by the Summers County Board of Education for approximately fifteen years at the Summers County Career Center.

2. Grievant was notified April 13, 1989 that Superintendent of Schools Demetrius Tassos would recommend that her name be placed on a transfer list for reassignment in the ensuing school

term. Grievant requested and was given a statement of reasons for the recommendation 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 her counsel were afforded the opportunity to present to the Board reasons why her name should not be included on a transfer list. The Board subsequently voted to include her on said list.

4. On June 22, 1989, Mr. Tassos sought and received Board approval to assign grievant to the Board's central office as a 261-day Secretary III. The assignment became effective August 21, 1989.

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 employee of the reasons in order that he or she may prepare for a hearing on the matter in the event such is requested.

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. Edwards v. Berkeley County Board of Education, Docket No. 89-02-234 (November 28, 1989).

3. Grievant has not shown that she 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. State Board of Education Policy 5300(6)(a) is not applicable to administrative transfers and the Board therefore was not obligated to base its decision on grievant's past employment record. Mason County Board of Education v. State Superintendent of Schools, 274 S.E.2d 435 (W.Va. 1980); Trimboli v. Board of Education of the County of Wayne, 254 S.E.2d 561 (W.Va. 1979); Beverlin v. Lewis County Board of Education, 216 S.E.2d 554 (W.Va. 1975); Edwards v. Berkeley County Board of Education, Docket No. 89-02-234 (November 28, 1989).

5. 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); Andrews v. Putnam County Board of Education, Docket No. 40-87-330-1 (June 7, 1988).

6. Grievant has not shown that her transfer was initiated in order to harass her or that the action was otherwise taken in bad faith and not in the best interests of the school system.

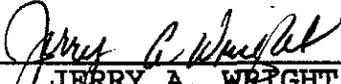
7. W.Va. Code §18A-2-7 does not require that a county board of education vote on individual employees' recommended for placement on a transfer list.

8. A school service employee who has been properly placed upon a transfer list may be assigned to a posted vacancy despite said employees refusal to apply for the position when it has been determined that he or she would have received it had application been made. W.Va. Code §§18A-2-7, 18A-4-8b(b).

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 14, 1989