



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

GASTON CAPERTON
Governor

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

MARY BARBERIO

v.

Docket No. 89-17-351

**HARRISON COUNTY
BOARD OF EDUCATION**

D E C I S I O N

Grievant Mary Barberio, employed as a teacher by Respondent Harrison County Board of Education, alleges that in Spring 1989 Respondent transferred her from her position at South Harrison High School¹ in violation of W.Va. Code §18A-2-7. The grievance was filed directly at Level II, apparently due to lack of authority at Level I,² and denied at that level. Respondent waived consideration at Level III, and Grievant appealed to Level IV, requesting a decision based on the evidence presented at Level II.³

¹Respondent informs the undersigned that Grievant has been assigned to a teaching position at Lincoln High School.

²The documents entered into evidence do not indicate that the Level I evaluator agreed in writing to Grievant's filing directly at Level II, as required by W.Va. Code §18-29-3(c).

³Grievant advanced his claim to Level IV on July 11, 1989, but the transcript of the Level II hearing was not
(Footnote Continued)

The dispute is one of law, for the pertinent facts, as follows, are not in dispute: As part of a reorganization, Respondent decided to eliminate the assistant principalship held by William Fratto, and determined that Mr. Fratto, having no seniority to remain an administrator, should be transferred to a teaching position. Since Grievant was the least senior instructor in Harrison County in the areas of Mr. Fratto's teaching certification, she was scheduled to be replaced by Mr. Fratto and was notified that she would be put on the transfer list. However, prior to Grievant's transfer hearing mandated by Code §18A-2-7, Mr. Fratto bid on and won another position and Respondent posted Grievant's job and awarded it to another applicant.⁴

Grievant maintains that, since the only justification for her transfer was that Mr. Fratto was to "bump" her, when he accepted another post no valid basis for transferring her remained and she should have retained her position. Respondent argues that it was required by State ex rel. the

(Footnote Continued)

received until November 1, 1989. Upon Respondent's request, for good cause, the deadline for mailing proposed findings of fact and conclusions of law was extended to January 16, 1990, and on January 17 the record was complete.

⁴As this statement suggests, only the basic facts are provided by the record. The dates for the various actions are not provided, nor are any notices sent Grievant or any records of the transfer hearing. However, the facts established are sufficient to decide this matter. Grievant concedes that Respondent's initial determination that Mr. Fratto would "bump" into her position was proper and all timeframes mandated by Code §18A-2-7 were complied with.

Bd. of Educ of the Co. of Kanawha v. Casey, 349 S.E.2d 436 (W.Va. 1986), to complete all reduction-in-force actions prior to the fourth Monday in April, 1989; while not physically placed into Grievant's job, Mr. Fratto legally was put there; he subsequently opted out of it, creating a vacancy which had to be filled by following the normal requirements for filling a vacancy, i.e. posting the position and selecting the most qualified applicant.

In Casey the West Virginia Supreme Court of Appeals ruled,

Where no vacancy in a secondary principalship currently exists at the time a county board of education votes to close a particular secondary school, a reduction in force of secondary principalships occurs, imposing upon the county board of education, under West Virginia Code §18A-4-8b (1984 Replacement Vol.), a nondiscretionary duty to notify and release from employment, pursuant to the provisions of West Virginia Code §18A-2-2 (Supp. 1985), the secondary principal with the least amount of seniority, and to place in such secondary principalship the principal whose school is to be closed.

[emphasis added] Syl. Pt. 2. Apparently Respondent relies on the highlighted portion of the decision. While the Court's use of the present tense "occurs" creates the impression that, where there is no vacancy, a reduction-in-force actually happens at the time a board votes to close a school, that is not the case. Indeed, at the time a board votes to close a school it is not yet determined even which individual's or individuals' employment will be terminated when a reduction-in-force occurs and it is patently true that a reduction-in-force cannot actually occur until such personnel are released from employment. Rather, the

language is better interpreted as meaning that a reduction-in-force is necessitated by the fact that no vacancy exists.

Moreover, the statutory provisions cited by the Court support that interpretation rather than Respondent's view that a reduction-in-force must be completed prior to the end of April and therefore that the reduction-in-force involved in this matter had to be and was effected before the end of April, prior to Grievant's transfer hearing. As indicated by the Court, the pertinent part of Code §18A-4-8b merely directs that the least senior employee "be properly notified and released from employment pursuant to [Code §18-2-2,]" which in turn provides in pertinent part,

The continuing contract of any teacher shall remain in full force and effect...unless and until terminated (1) by a majority vote of the full membership of the board before April first of the then current year,...except that for the school year one thousand nine hundred eighty-eight--eighty-nine only, the board shall have until the fourth Monday of April, one thousand nine hundred eighty-nine, to initiate termination of a continuing contract. Such termination shall take effect at the close of the school year in which the contract is so terminated....

This provision requires that, in years other than 1988-1989, a board of education must vote before April 1 to end the employment of the least senior employee but his employment is not terminated until the end of the school year, and in 1988-89, the year involved in this case, a board was merely required to initiate such action by April 24, 1989. Again, the termination was not effected until the end of the school year.

Moreover, Respondent's view is, as Grievant asserts, contrary to W.Va. Code §18A-2-7, which provides in pertinent part,

[A]n employee shall be notified in writing by the superintendent on or before the first Monday in April if he is being considered for transfer or to be transferred, except that for the school year one thousand nine hundred eighty-eight--eighty-nine only, the superintendent shall have until the fourth Monday of April to provide an employee with such written notice. Any teacher or employee who desires to protest such proposed transfer may request in writing a statement of reasons for the proposed transfer. ...Within ten days of the receipt of the statement of the reasons, the teacher or employee may make written demand upon the superintendent for a hearing on the proposed transfer before the county board of education. The hearing on the proposed transfer shall be held on or before the first Monday in May, except that for the school year one thousand nine hundred eighty-eight--eighty-nine only, the hearing shall be held on or before the fourth Monday in May, one thousand nine hundred eighty-nine. At the hearing, the reasons for the proposed transfer must be shown.

Under this provision, an employee is only "considered for transfer" and his transfer remains only "proposed" or "recommended" until after a requested transfer hearing is held. Respondent's view, that the transfers have already occurred at that time, albeit only "legally," is clearly contrary to the statute; there is no support for Respondent's contention that Grievant had already been transferred out of the position and that allowing her to be in it in school year 1989-90 would have entailed a reinstatement to it. In short, Grievant remained in the position at the time of the hearing.

Acceptance of Respondent's view would also make a sham of the transfer hearing. Grievant asserts and Respondent

does not deny that the only basis for her transfer given at the hearing was that Mr. Fratto's placement into her job had been approved. However, that placement was nullified by Mr. Fratto's selection for a different job. Under Code §18A-2-7 there must be valid reason for a transfer at the time of the hearing. A transfer hearing must not be meaningless, Morgan v. Pizzino, 256 S.E.2d 592, 595 (W.Va. 1979). "[T]herefore, a county board of education may not take final action guaranteeing changes in personnel assignments or status without first allowing affected employees the opportunity to be heard and have their point of view actually considered." Bumgardner v. Ritchie Co. Bd. of Educ., Docket No. 89-43-222 (Oct. 6, 1989). See also Fox v. Summers Co. Bd. of Educ., Docket No. 45-87-175 (Dec. 22, 1987). Grievant correctly argues that, since at the time of the hearing Mr. Fratto was no longer scheduled to assume her job, no valid basis for transferring her remained and she was entitled to be removed from the transfer list and to retain her job at South Harrison High School.

In addition to the findings of fact and conclusions of law contained in the foregoing discussion, the following are appropriate:

Findings of Fact

1. Grievant, a teacher, was scheduled to be replaced in her position at South Harrison High School by another employee, Mr. Fratto, due to a reduction-in-force action.

2. Prior to Grievant's transfer hearing, Mr. Fratto was selected for another position. Also prior to the hearing Grievant's job was posted and awarded to another employee, effective the 1989-1990 school year.

4. Grievant remained on the transfer list and was thereafter placed in another position.

Conclusions of Law

1. A transfer is only a proposed action at the time of a requested transfer hearing under W.Va. Code §18A-2-7.

2. Hearings on proposed transfers must be meaningful. Morgan v. Pizzino, 256 S.E.2d 592, 595 (W.Va. 1979); Bumbardner v. Ritchie Co. Bd. of Educ., Docket No. 89-43-222 (Oct. 6, 1989); Fox v. Summers Co. Bd. of Educ., Docket No. 45-87-175 (Dec. 22, 1987).

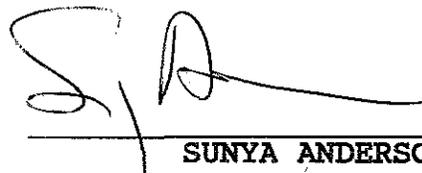
3. It is a violation of W.Va. Code §18A-2-7 to transfer an employee when no valid basis for that action existed at the time of the transfer hearing.

4. Since the only reason for transferring Grievant, that another employee was scheduled to be assigned her position, did not exist at the time of her transfer hearing,

Respondent violated W.Va. Code §18A-2-7 in placing her on transfer.

Accordingly, the grievance is **GRANTED**. Respondent is ORDERED to reinstate Grievant in her teaching position at South Harrison High School.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Harrison 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.

A handwritten signature in black ink, appearing to read 'S.A.', is written over a horizontal line. The signature is stylized and cursive.

SUNYA ANDERSON
HEARING EXAMINER

Date: February 13, 1990