



REPLY TO: ✓  
401 Davis Avenue  
Suite 315  
Elkins, WV 26241  
Telephone: 636-1123

**Members**  
James Paul Geary  
Chairman  
Orton A. Jones  
David L. White

**WEST VIRGINIA EDUCATION AND  
STATE EMPLOYEES GRIEVANCE BOARD**  
**GASTON CAPERTON**  
Governor

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

HARRY CROUSE

v.

DOCKET NO. 89-32-468

MORGAN COUNTY BOARD OF EDUCATION

DECISION

Grievant, Harry Crouse, is employed by the Morgan County Board of Education (Board) and is currently assigned as an itinerant music teacher. Mr. Crouse filed a level one grievance on May 24, 1989, in which he alleged violations of W.Va. Code §§18A-2-7 and 18-29-2(n) and (p) when he was recommended for administrative transfer. Principal Dennis Beyer determined that he was without authority to act at level one, Superintendent Dwight Dials denied the matter at level two and the Board affirmed the level two decision. An appeal was filed at level four on August 16, 1989, an evidentiary hearing was conducted on September 26 and proposed findings and conclusions were submitted by the grievant on November 6, 1989.<sup>1</sup>

---

<sup>1</sup>The Board has chosen to adopt the Findings and Conclusions of the level two Hearing Evaluator.

A brief recitation of prior events will be provided to aid in understanding the issues raised in this grievance. The grievant has been employed by the Board since 1984 as the music teacher and band director at Paw Paw Schools (Elementary and High). The grievant was employed under a 200-day contract supplemented by an extracurricular contract which extended his employment by 20 days and provided additional salary in the amount of \$825.00.

In May 1987 the grievant was involved in an incident in which a student was left off a bus in Winchester, Virginia during a band trip. After an investigation Superintendent Dials placed the grievant on suspension, with pay, effective May 4. At a Board meeting on May 21 the Superintendent brought charges of incompetency, insubordination and willful neglect of duty upon which the Board voted to suspend the grievant for the remainder of the school year, without pay. The grievant thereafter filed a grievance which was completed at level four on December 7, 1987, where it was denied. Crouse v. Morgan County Board of Education, Docket No. 32-87-150-2 (Dec. 7, 1987). The grievant appealed the matter to the Circuit Court of Morgan County where the level four decision was affirmed by Order of May 2, 1988. A petition for appeal to the Supreme Court of Appeals of West Virginia was refused in November 1988.

Throughout the 1987-88 school year the grievant fulfilled his extracurricular duties as before. During the summer of 1988 he conducted band camp as in previous years;

however, he did not sign his annual extracurricular contract and for the remainder of the school year refused to take the band on any extracurricular trips or participate in any parades or concerts other than the Memorial Day parade. Students and parents complained about the lack of extracurricular activities and the band lost a significant number of participants in 1988-89. The Board attributes the deterioration of the program to the grievant's refusal to participate in the outside events. The grievant opines the decline was due to scheduling.

It was apparently the grievant's strenuous opposition to participating in the band-related events which led to the letter dated March 13, 1989 from Principal Beyer recommending to Superintendent Dials that the grievant be transferred to a position with duties limited to the instruction of classroom music. The basis for the recommendation was "Mr. Crouse's expressed preference, and because the curriculum at Paw Paw needs someone who will, as much as possible, provide a complete band program - this includes band trips." Mr. Beyer concluded by expressing his belief that a transfer would be mutually beneficial for the grievant and the school.

At a Board of Education meeting on March 21, 1989 Superintendent Dials "filed" a list of employees to be considered for transfer and subsequent assignment. The employees were identified by name along with the reason for the recommendation. The grievant was included among the

fourteen professional teaching recommendations with the reason stated "[t]o reassign to another teaching assignment in your area of certification based on principal's recommendation and curricular needs of the school and the system." Superintendent Dials notified the grievant by letter dated March 22 that the Board decided to consider his placement on the transfer list so as to enable his reassignment, which was motivated by the principal's recommendation and the curricular needs of the school and the system.<sup>2</sup>

The Board reconvened its meeting of March 21 on April 18, 1989, at which time Superintendent Dials made the following recommendation as reflected by the Board minutes:

In accordance with Chapter 18A, Article 2, Section 7 of the Code of West Virginia, I am herewith filing with you a list of personnel employed by the Morgan County Board of Education to be placed on the transfer and subsequent assignment list for the 1989-90 school term and the reasons therefor.

Personnel shall be listed on the minutes of the board of education and each person listed shall be notified in writing, by certified mail, return receipt requested, to such persons' last known addresses within ten days following this board meeting, of their having been so recommended for transfer and subsequent assignment and the reasons therefor.

It was noted by the superintendent that Senate Bill 159 extended this process by one month. However, the board approved action to proceed with placement of listed personnel on the transfer list.

---

<sup>2</sup>The grievant denies having received this letter, submitted as Board of Education Exhibit No. 3, which was not sent by certified mail.

Again, specific employees were identified for transfer along with the reasons therefore. The grievant was included with the same reason provided at the March 21 meeting.

Superintendent Dials notified the grievant by certified letter dated April 19, 1989 that his name had been placed on the transfer list presented to the Board on April 18. Superintendent Dials advised the grievant on May 25 that on May 23 the Board had voted to approve his transfer from Paw Paw Schools to a position of itinerant music teacher effective the 1989-90 school term.

The grievant requested formal reasons for his placement on the transfer list on or about May 23.<sup>3</sup> The reasons for the transfer were again stated "to meet the curricular needs of Paw Paw students while providing you with an assignment which does not include extracurricular involvement. You have expressed a desire for such an assignment."

The grievant argues the transfer was improperly implemented because the Board voted on the action as early as March 21, prior to any notification being sent to him in violation of W.Va. Code §18A-2-7 and because the transfer was motivated by his decision to not accept the extracurricular assignment related to the position of band director, a violation of W.Va. Code §18A-4-16.

---

<sup>3</sup>The record includes two identical letters, one dated May 23 and the other dated May 28, however, the dates are not significant and do not affect the outcome of this decision.

The Board's position, as set forth in the level two decision, is that no action was taken on the recommended transfers until May 23 and that the grievant had been notified in writing before the first Monday in April that he was being considered for transfer and was later notified by certified mail that he had been recommended for transfer. The Board asserts that the grievant was provided notice and ample opportunity to present his case to the Board if he desired to protest his transfer prior to its decision on May 23, thereby complying with the purpose of W.Va. Code §18A-2-7. Notifying the grievant of the recommendation after having so notified the Board did not violate the grievant's due process rights, it argues, because no action was taken on the matter at that time.

In response to the alleged violation of W.Va. Code §18A-4-16, the Board concurs that the grievant has the right to refuse to sign an extracurricular contract; however, the position of band director/music teacher specifically requires the organization and conducting of marching band performances, marching band trips, concert band performances, and concert band trips and that the responsibilities cannot be divided into two separate and distinct jobs. The Board argues that it has an obligation to meet the curriculum needs of the students; that a course of instruction in band necessitates performances outside the classroom; and the grievant's decision to not organize or conduct such outside performances, which are listed duties in his job

description, form a basis for a transfer to a position which accommodates his desire not to be involved with those activities and enables it to employ a person who will provide a complete band program to the students.

The first issue to be considered is whether the transfer was properly implemented. A review of the chronological events as set forth in the documentation establishes that the procedure utilized by the Board during the transfer process was deficient because Superintendent Dials recommended the grievant be considered for transfer without providing the grievant with notice and a hearing. This Board has previously held in the matter of Lambert v. Pocahontas County Board of Education, Docket No. 89-38-143 (Feb. 28, 1990) that such preliminary consideration is comparable to the tentative approval process ruled improper in Lavender v. McDowell County Board of Education, 327 S.E.2d 691 (W.Va. 1984). The consideration of a specific employee for transfer invites prejudgment of the situation and suggests an ex parte exposition of the Superintendent's reasons for requesting the action prior to the employee's being given the opportunity to present his response.<sup>4</sup> This procedure is inconsistent with the concept that the Board is

---

<sup>4</sup>While Boards may generally consider personnel issues, it is imperative in these situations that the employees be guaranteed an impartial hearing if one is requested. Providing the names of the affected employee(s), or even specific positions which would effectively identify the employee, renders the proceedings invalid.

to make a detached and independent evaluation of the employee's case.<sup>5</sup> See Lambert v. Pocahontas County Board of Education, supra; Fox v. Summers County Board of Education, Docket No. 45-87-174 (Dec. 22, 1987).

Because the procedure utilized by the Board was improper, resulting in a nullification of the transfer, it is unnecessary to address the issue of whether the grievant's retaining the regular position of band director/music teacher was made contingent upon his agreeing to accept the extracurricular contract.

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. Grievant has been employed by the Board since 1984 as band director/music teacher at Paw Paw Schools. In addition to the regular 200-day contract the grievant

---

<sup>5</sup>The record does not indicate whether the grievant was ever provided notice and an opportunity to request a hearing prior to the recommendation for consideration or the final recommendation for transfer; however, accepting grievant's denial that he ever received the letter of March 22 he was never afforded either notice or a hearing. It should also be noted that even if the grievant had received the letter it only advised him to contact the superintendent if he had any questions; it did not provide him with any notification that he could request a hearing on the matter.



received an extracurricular contract providing for 20 days of additional work with compensation of \$850.00.

2. In 1987 the grievant was suspended for over a month after a student had been left off the bus at a parade in Winchester, Virginia.

3. During the 1988-89 school year the grievant apparently engaged in only two extracurricular band activities, summer camp and a Memorial Day parade.

4. Complaints were made by students and parents regarding the lack of extracurricular events and the band membership dropped significantly.

5. In March 1989 Principal Dennis Beyer recommended to Superintendent Dwight Dials that the grievant be transferred to a position involving only classroom instruction of music.

6. On March 21 Superintendent Dials filed a list of employees, including the grievant, with the Board for consideration regarding transfer and subsequent assignment.

7. On April 18 the Superintendent recommended and the Board approved personnel transfers, including the grievant.

8. On May 23 the grievant was reassigned to a position of itinerant music teacher.

#### Conclusions of Law

1. W.Va. Code §18A-2-7 provides for notice and hearing before an employee's placement on a transfer or reassignment list is approved by a board of education. It must be

complied with strictly. Morgan v. Pizzino 256 S.E. 2d 592 (W.Va. 1979).

2. Such hearings are to be detached and independent evaluations of the employee's case and if a decision has already been made and the employees have been prejudged, the process is meaningless. Lavender v. McDowell County Board of Education, 327 S.E.2d 691 (W.Va. 1984); Lambert v. Pocahontas County Board of Education, Docket No. 89-38-143 (Feb. 28, 1990); Fox v. Summers County Board of Education, Docket No. 45-78-174 (Dec. 22, 1987).

3. The Board's vote on March 21 to consider specific employees for transfer prior to providing the employee with notice and the opportunity to present their positions invited prejudgment on the recommendation made on April 18 and was inconsistent with the concept that the Board is to make a detached and independent evaluation, thereby rendering the transfer improper.

Accordingly, the grievance is **GRANTED** and the Board is Ordered to reinstate the grievant to the position he held during the 1988-89 school year.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Morgan 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: March 29, 1990

Sue Keller

SUE KELLER

SENIOR HEARING EXAMINER