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**MARY CUNNINGHAM**

**v.**

**Docket No. 89-45-522**

**SUMMERS COUNTY BOARD OF EDUCATION**

**DECISION**

Grievant, Mary Cunningham, is employed by the Summers County Board of Education (Board) as a Cook III/Custodian I. She initiated a grievance at Level I June 9, 1989, alleging:

I feel like 18A-2-7 of the West Virginia Code has been violated. I do not think that I was given a meaningful hearing on my proposed transfer. This grievance could be resolved by placing me in the position that I held for the past 3 years before the duties of Laura Carter were added on.

Grievant's supervisor was without authority to grant relief and, upon appeal to Level II, the grievance was denied following hearing held August 2, 1989. At Level III, the Board voted to uphold the the Level II decision and appeal to Level IV was made September 1, 1989, where hearing was held October 31, 1989. Proposed findings of fact and conclusions of law were received by December 20, 1989.

The facts giving rise to the grievance are not in dispute. During the 1988-89 and two previous school terms, grievant was assigned to Avis School, an educational center for physically and

mentally handicapped students. The center consists of four buildings and grievant's duties there entailed preparation of two meals and custodial tasks. 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 proposal and, in a letter dated May 3, 1989, Mr. Tassos explained that Ms. Laura Carter, a custodian assigned to the Avis Special Education Office (AVSE),<sup>1</sup> would be retiring and he intended to combine her duties with those grievant was currently performing. Grievant requested, pursuant to the provisions of W.Va. Code §18A-2-7, a hearing on the proposal, which was held May 11, 1989. The Board subsequently accepted the recommendation that she be placed on the transfer list. On May 31, 1989, the position of "1/2 time Cook III and 1/2 time Custodian I (Cook) duties: Avis School, Custodial duties: Avis School and Avis Offices" was posted. Grievant applied for the job but noted in her application letter that "I am applying under fear that if I do not apply, I will lose my job." She was subsequently awarded the position.

Grievant contends there was not a valid reason for her transfer and that she was not afforded a meaningful hearing prior to the Board's action. The Board maintains the transfer was justified due to the need to eliminate Ms. Carter's position and

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<sup>1</sup>This office is in close proximity to Avis School and apparently houses Board personnel responsible for the administration of its various special education programs.

conform to student service personnel employee ratios mandated by the State Department of Education. The Board also asserts grievant was sufficiently apprised of the reasons for the proposed transfer during the May 11 hearing.

Because the grievant is correct in her assertions concerning the hearing, the issue of whether there existed a need for the transfer needs to be addressed only briefly. At Level IV the testimony of Mr. Charles Rhodes, Assistant Superintendent in charge of food and maintenance services, revealed that, while there would be some loss of efficiency incurred as a result of the elimination of Ms. Carter's position, the janitorial duties at AVSE could be performed reasonably well by the grievant. A chart he had developed (Board's Exhibit No.2) established that other cooks in the school system were already preparing more meals per hour than grievant. A similar chart detailing square footage per custodian at other schools (Board's Exhibit No.1) showed that, even with the imposition of cleaning duties at AVSE, grievant would still be responsible for a smaller area than at least seven other custodians. The testimony of Mr. Tassos established that there was a need to eliminate Ms. Carter's position due to declining student enrollment.

The focus, however, in a case where a grievant alleges denial of a meaningful transfer hearing, is not upon what evidence the Board presents in support of its actions once grievance procedures are initiated. Such evidence is of little consequence in a determination of whether the hearing was sufficient when it is presented for the first time during a Level IV grievance

proceeding. Fox v. Summers County Board of Education, Docket No. 89-45-435 (December 29, 1989); Parker v. Summers County Board of Education, Docket No. 89-45-434 (December 14, 1989).

W.Va. Code §18A-2-7, in pertinent part, provides:

The superintendent, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter. However, an 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. Any teacher or employee who desires to protest such proposed transfer may request in writing a statement of reasons for the proposed transfer. Such statement of reasons shall be delivered to the teacher or employee within ten days of the receipt of the request. Within ten days of the receipt of the statement of 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. At the hearing, the reasons for the proposed transfer must be shown.

As stated in Fox, the obvious purpose of the hearing on contemplated transfers is to allow the affected employee the opportunity to explore the reasons given and provide his or her own reasons against the action. Only then can the Board, with which the final authority to transfer rests, make an informed decision. Id., note 3. The process necessarily requires, to some extent, an adversarial stance on the part of both employees and persons representing the administration. Although the measure of due process to which the employee is entitled during the hearing is flexible and may vary depending upon the particular circumstance of the case, Edwards v. Berkeley County Board of Education, Docket No. 89-02-234 (November 28, 1989); Fox, supra;

Parker, supra, the hearing must be meaningful. Lavender v. McDowell County Board of Education, 327 S.E.2d 691 (W.Va. 1984).

In the present case, the evidence overwhelming supports the grievant's contention that she was denied the opportunity to explore and, therefore, counter the administration's reasons for its proposal.

John Roush, attorney for the West Virginia School Service Personnel Association, testified that he was present as an observer during the May 11 hearing.<sup>2</sup> He stated that Mr. Tassos started the meeting by reading verbatim his May 3 letter. Mr. Roush also testified that, when pressed for further details by grievant's counsel, Mr. Tassos refused to make further statements responding that he was under no obligation to do so. He stated that Mr. Tassos then informed the Board that he would explain his refusal once the grievant and her counsel had left. Once grievant briefly explained to the Board why she thought the imposition of extra duties related to AVSE would result in poor services at Avis School, Mr. Roush stated the hearing was concluded. Grievant's testimony essentially confirmed this sequence of events.

Mr. Tassos did not deny that he refused to provide any reason for the proposed transfer and explained that, during hearings held in previous years, he and his staff had been forced

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<sup>2</sup>Ms. Kimberly Levy, another attorney for WVSSPA, actually represented grievant during the hearing and also at the Level IV hearing.

to testify by the Board for long periods of time and he did not feel he should be subjected to such a process. He stated he gave this explanation to the Board once the grievant and counsel had departed. On cross-examination, Mr. Tassos conceded that none of the information presented at Level IV had been provided to the Board on May 11, but he did recollect bringing out that Ms. Carter's position was to be eliminated because of declining enrollment.

While it is perhaps understandable that neither Mr. Tassos nor his staff wished to be questioned concerning a proposal which they were convinced was both necessary and for the benefit of the school system, these concerns cannot take precedence over the right of the grievant to fully explore the reasons for an action which would substantially affect the conditions of her employment. Depending on the circumstances, the exercise of that right might involve lengthy questioning of administration officials as well as the affected employee. In grievant's case, however, it would have been a relatively simple matter for Mr. Tassos to respond to reasonable questions and provide her the figures compiled by Mr. Rhodes. Student school service employee ratio calculations and figures on projected savings to be realized by the transfer could also have been provided. The facts of the case do not require further definition of what the administration should provide an employee in a transfer hearing. Each case must be decided on its own merits. Edwards, supra. It is sufficient to hold that the refusal of Mr. Tassos to provide information,

other than what was contained in his May 3 letter to the grievant, denied her a meaningful hearing.

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

#### FINDINGS OF FACT

1. Grievant, a Cook III/Custodian I assigned to Avis School during the 1986-87, 1987-88 and 1988-89 school terms, was notified by letter dated April 13, 1989, that she was being considered for transfer for the 1989-90 school term. Grievant requested and was given a statement concerning the reason for the proposal in a letter dated May 3, 1989.

2. At a hearing held May 11, 1989, Superintendent of Schools Demetrius Tassos read the May 3, 1989 letter and refused to respond to questions from grievant's counsel. Grievant was subsequently placed on a transfer list and reassigned to a position which included her duties at Avis School and additional janitorial duties at the Avis Special Education office.

#### 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. Fox v. Summers County Board of

Education, Docket No. 89-45-435 (December 29, 1989); Parker v. Summers County Board of Education, Docket No. 89-45-434 (December 14, 1989).

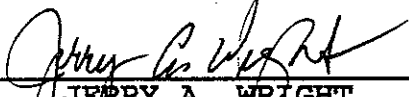
2. At the transfer hearing the administration must inform the employee and the Board of the reasons for the action. The employee must be given the opportunity to question members of the administration and present his or her reasons why the action should not be taken. The measure of due process to which the employee is entitled is flexible and may vary depending upon the particular circumstances of the case. The hearing must be a meaningful one. Lavender v. McDowell County Board of Education, 327 S.E.2d 691 (W.Va. 1984); Fox, supra; Parker, supra; Edwards, supra.

3. The refusal of Mr. Tassos to respond to questions posed by grievant's counsel denied her the opportunity to fully explore the reasons for the proposed transfer and provide a sufficient response thereto.

Accordingly, the grievance is **GRANTED** and the Summers County Board of Education is hereby **ORDERED** to reinstate grievant to the position which she held during the 1988-89 school term.



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: February 27, 1990