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

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JOSEPH POST

v.

Docket No. 89-17-355

**HARRISON COUNTY
BOARD OF EDUCATION**

DECISION

Grievant Joseph Post, employed by Respondent Harrison County Board of Education as an elementary school teacher, filed a grievance in May 1989 alleging that he was transferred from his fifth-grade teaching position at West Milford Elementary School (West Milford) in violation of W.Va. Code §18A-4-8b and Respondent's transfer policy, GBN. The grievance was denied apparently at Level I due to lack of authority, and at Level II. Respondent waived consideration at Level III and Grievant advanced his claim to Level IV, requesting that the decision be based on the record compiled at Level II.¹

¹Grievant filed at Level IV July 13, 1989, but the transcript of the Level II hearing was not received until November 1. 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.

The facts are not in dispute. Due to a shift in the student population, one of four fifth-grade teaching posts at West Milford was to be eliminated for the 1989-1990 school year. Grievant was selected for transfer because the date he was hired as a regular full-time teacher, August 2, 1983, was more recent than the other three fifth-grade teachers' hire dates. Grievant contends that he was either equally or more senior than one, Eileen Perri, whose hire date was June 21, 1983,² and contends that a random selection system should have been used or that Ms. Perri should have been transferred.

While Grievant asserts that Respondent did not follow its transfer policy, he does not point to any particular transgression of it, and Respondent contends that its transferring Grievance was in accordance with that policy, which provides in pertinent part as follows:

Transfers will be made for regulation of the school system and in emergencies. The best interests of the school must be intended. When the purpose of a transfer is to reduce the number of professionals assigned to a school or a program, the professional(s) with the least amount of county seniority teaching in the referenced licensure or certification who is (are) teaching the referenced subject or who is (are) teaching in the referenced program will be the first candidate(s) for transfer and subsequent assignment. "Program" as used in this particular policy means special education, kindergarten, elementary education grades 1, 2, 3, 4, 5, 6, Chapter I, and/or other programs funded outside the general budget of the Harrison County Board of Education.

²Grievant does not contend that the other two teachers, hired in 1973 and 1979, should have been transferred.

The record does not establish that Grievant was transferred in violation of Policy GBN.

Grievant's contentions are founded on the following provisions of W.Va. Code §18A-4-8b(a):

The seniority of professional personnel shall be determined on the basis of the length of time the employee has been professionally employed by the county board of education. For purposes of establishing seniority as hereinafter provided, when an employee holds valid certification or licensure in one or more areas, the seniority shall accrue in each area. Employment for a full employment term shall equal one year of seniority, but no employee may accrue more than one year of seniority during any given fiscal year. Employment for less than the full employment term shall be prorated. A random selection system established by the employees and approved by the board shall be used to determine the priority if two or more employees accumulate identical seniority.

Grievant initially contends that since he and Ms. Perri both worked the entire 1983-1984 school year they were both entitled to one year's seniority therefor; Respondent's finding Ms. Perri had greater seniority implies that she was given more than one year's seniority for that year, in contravention of the third sentence of the quoted portion of the provision; and a random selection system should have been used. Grievant also argues, apparently alternatively, that 34 days he served as a substitute teacher in Spring 1983 should have counted toward seniority, relying on the fourth sentence of the provision and Harkins v. Ohio Co. Bd. of Educ., 369 S.E.2d 224 (W.Va. 1988).

The provisions Grievant relies on are applicable to filling of teachers' positions and reductions in the number of professional personnel in the employment of a county

board of education,³ but neither of those actions are involved in this matter.⁴ Rather, the only statutory provision applicable to an administrative transfer such as the one here is W.Va. Code §18A-2-7,⁵ which requires no specific method for transfer, based on seniority or otherwise. Morgan v. Wood Co. Bd. of Educ., Docket No. 89-54-470 (Nov. 29, 1989). That provision allows a superintendent of schools and a county board of education great discretion in their power to transfer, although that power must be exercised in good faith for the benefit of the school and not

³A reduction-in-force occurs when personnel are laid off from employment and not otherwise. McCann v. Lincoln Co. Bd. of Educ., Docket No. 22-88-202 (June 12, 1989).

⁴There would be little merit to Grievant's contentions even if the requirements of W.Va. Code §18A-4-8b(a) applied. Regarding Grievant's first argument, the intent of the third sentence of the provision is to disallow an employee from accruing more than a year's seniority by, for example, working in the summer. Moreover, even if an implication such as Grievant suggests could arise where one employee is considered senior to another employee hired in the same fiscal year where both employees were employed for a full term, in this case since Ms. Perri was hired in the 1982-1983 fiscal year, ending June 30, 1983, and Grievant was hired in the 1983-1984 fiscal year, no such implication could arise. Regarding the second argument, the fourth sentence of the provision does not refer to substitute employment and Harkins only holds that, where a professional employee substitutes for more than 133 days in a given school year, that year must be credited as teaching experience. Substitute service of 34 days would not give Grievant any seniority as a regular employee. See Ginn v. Hardy Co. Bd. of Educ., Docket No. 16-88-185 (Dec. 9, 1988).

⁵"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. ..."

arbitrarily. State ex rel. Hawkins v. Tyler Co. Bd. of Educ., 166 W.Va. 363, 275 S.E.2d 908 (1980); see also Morgan; Edwards v. Berkeley Co. Bd. of Educ., Docket No. 89-02-234 (Nov. 28, 1989).

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

Findings of Fact

1. Due to a shift in student population, one of four fifth-grade teaching positions was to be eliminated at West Milford Elementary School and one fifth-grade teacher was to be transferred.

2. Grievant, as the fifth-grade teacher with the most recent hire date as a regular full-time teacher, was administratively transferred.

Conclusions of Law

1. There is no requirement of W.Va. Code §18A-2-7 that administrative transfers be based on seniority or that the seniority requirements of W.Va. Code §18A-4-8b(a) control administrative transfers.

2. Respondent did not abuse its discretion in transferring Grievant on the basis that his hire date as a regular professional employee was the most recent of the fifth-grade teachers at West Milford, for the record does

not establish that it exercised its transfer power arbitrarily or not in good faith for the benefit of the school system, see State ex. rel. Hawkins v. Tyler Co. Bd. of Educ., 166 W.Va. 363, 275 S.E.2d 908 (1980); Morgan v. Wood Co. Bd. of Educ., Docket No. 89-54-470 (Nov. 29, 1989); Edwards v. Berkeley Co. Bd. of Educ., Docket No. 89-02-234 (Nov. 28, 1989), nor was Grievant's transfer in violation of Respondent's policy.

Accordingly, the grievance is **DENIED**.

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.



SUNYA ANDERSON
HEARING EXAMINER

Dated: February 20, 1990