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

GASTON CAPERTON
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PAMELA SURBER

v.

Docket No. 89-29-662

MINGO COUNTY BOARD OF EDUCATION

DECISION

Grievant, Pamela Surber, is employed by Respondent Mingo County Board of Education as a Special Education Aide and is presently assigned to Cline Grade School. She filed a Level IV grievance appeal on November 14, 1989, in which she alleged a transfer in violation of W.Va. Code §18A-2-7, as well as harassment as defined by W.Va. Code §18-29-2(n).¹ The grievance was denied at Levels I and II and consideration was waived by the board of education at Level III. A hearing was held at Level IV on December 21, 1989, and proposed findings of fact and conclusions of law were received from the parties on and before January 5, 1990.

¹ As no evidence was offered in support of this allegation at the Level IV hearing and it was not addressed in Grievant's post-hearing submission, it will be considered abandoned.

Grievant was first regularly employed by Respondent in September 1981 as a Chapter I reading aide at Gilbert Grade School. In September 1982 she became a special education aide at Gilbert Grade, a position she held until September 5, 1989. On that date, Grievant received a telephone call at work from Mr. Charles Patterson, Director of Special Education for Respondent. Mr. Patterson informed Grievant that effective September 6, 1989, she was to report for work at Cline Grade School. The reason given for this transfer of work site was that the student with whom Grievant had worked exclusively for the previous two years was being moved from Gilbert to Cline.

Grievant argues that the transfer was in violation of W.Va. Code §18A-2-7 as it was not effectuated within the appropriate time frame. Respondent argues that the student's transfer was necessary to comply with the National Rehabilitation Act as well as a directive of the United States Department of Education's Office for Civil Rights, and Grievant was moved in order to continue the mainstreaming of the student in regular education programs and activities.

The essential facts surrounding this transfer are undisputed. In the spring of 1989, a proposed transfer list of aides was acted upon by Respondent. This action was in compliance with W.Va. Code §18A-2-7 and Grievant was not included on this transfer list.

At the beginning of school year 1989/90, Grievant reported to her job as Special Education Aide at Gilbert

Grade School where she would assist the same student with whom she had worked the previous two years.² At approximately this same time, a conference was held between Mr. Patterson and the student's parents³ wherein the parents expressed concern that the physical plant at Gilbert Grade School limited their child's access to educational programs and other activities. As a result of this conference, the decision was made to transfer the student from Gilbert Grade School to Cline Grade School, which is barrier-free with the exception of two classrooms. The decision to transfer Grievant along with the student was made to assure the continued mainstreaming of the child. While there was some discrepancy as to the exact contents of the September 5 telephone call,⁴ it was undisputed that Mr. Patterson told Grievant that she was transferred and to report to Cline Grade School the following morning.

Grievant also testified that the move to Cline resulted in her incurring additional mileage every day. Grievant travels to Cline by one of three ways. When she drives

² The student to whom Grievant is assigned is physically handicapped, being confined to a motorized wheelchair.

³ Mr. Patterson testified that this conference was held sometime within the two weeks preceding September 5, 1989.

⁴ Grievant testified that she was told by Mr. Patterson to report to Cline or he would recommend that her job be terminated. Mr. Patterson admitted placing the call to Grievant and telling her she had been transferred, but does not remember making the move "totally final."

herself to work she goes 10.9 miles per day more than when she went to Gilbert. When she meets the school bus at her student's house and rides it to Cline, the mileage difference is 5.2 miles. Finally, when the school bus is inoperable, Grievant drives her vehicle to her student's house and continues on to Cline. On these days, the difference is 19.7 miles. Grievant submitted as evidence a calendar detailing the method of transportation used each day along with the mileage differentials for the period September through December 1989. Based upon this evidence, she requested reimbursement in the amount of twenty cents per mile for a total of ninety-eight dollars and thirty-eight cents. Respondent conceded that Grievant's mileage and reimbursement figures were correct.

Respondent offered into evidence a letter from Theodore G. Nixon, Director, Elementary and Secondary Education Division, Office for Civil Rights, United States Department of Education. This letter, written in August 1988 and addressed to Respondent's Superintendent, accompanied a list of assurances agreed upon by Respondent and the Office for Civil Rights to "resolve the areas of noncompliance with Section 504" of the National Rehabilitation Act of 1973. Respondent's Exhibit 1. These assurances deal with modifications to the physical facilities of Respondent's school buildings and, more specifically, require changes to the restrooms and water fountains at both Gilbert and Cline. Respondent also cites to the undersigned 34 C.F.R. §104.21

prohibiting discrimination against qualified handicapped persons because of inaccessible facilities. Respondent argued that these assurances and regulations required it to transfer the student from Gilbert to Cline. While this evidence may, as a practical matter, have required Respondent to transfer the student to a more accessible educational environment, it cannot be used as authority to transfer Grievant in violation of W.Va. Code §18A-2-7.⁵

Although the transfer was based on logical and practical reasoning and appeared to be in the best interest of the student, such transfers are not permitted by W.Va. Code §18A-2-7. This statute expressly provides that employees are to be notified on or before the first Monday in April if they are being considered for transfer and that the board of education shall act upon recommended transfers on or before the first Monday in May. Although the timeframes were extended somewhat for transfers effective the 1989-90 school

⁵ This case is factually analogous to the situation discussed in Board of Education of the County of Harrison v. DeFazio, No. 18238 (W.Va. March 9, 1989). In that case, the Board of Education closed two elementary schools and reassigned the pupils to two other elementary schools. This action created a need for five additional teachers at the schools receiving the reassigned pupils. The Board of Education then moved the five most senior teachers from the closed schools to the schools receiving the pupils. The court noted that these moves were made because familiar teachers would ease the pupils' reassignment trauma and would be knowledgeable about the students' educational and social backgrounds. Nevertheless, it was held that the Board was without authority to reassign the teachers and the newly-created positions must be posted.

year, it is undisputed that Respondent did not meet any such timeframes or otherwise process Grievant's change of schools as a transfer. There is no statutory provision for the involuntary transfer of employees at any other time.⁶

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

FINDINGS OF FACT

1. Grievant is employed by the Mingo County Board of Education and is presently assigned as a Special Education Aide at Cline Grade School.

2. Prior to September 5, 1989, Grievant was assigned as a Special Education Aide at Gilbert Grade School where she had worked exclusively with a physically handicapped student for the previous two years.

3. Prior to September 5, 1989, Mr. Charles Patterson, Respondent's Director of Special Education, held a conference with the student's parents regarding the parents' concerns about the accessibility of the Gilbert facilities to their child. At the conclusion of the conference, it was agreed by Mr. Patterson and the parents that the child would be transferred to Cline Grade School.

⁶ The last paragraph of W.Va. Code, §18A-2-7 permits a waiver of the time limits in an emergency situation only where the building has been damaged or destroyed through an unforeseeable act.

4. On September 5, 1989, Mr. Patterson telephoned Grievant at Gilbert Grade School and instructed her to report to Cline Grade School the following morning.

5. As a result of moving to Cline Grade School, Grievant has driven 491.9 miles more than she would had she remained at Gilbert Grade School.

CONCLUSIONS OF LAW

1. An employee shall be notified in writing by the superintendent on or before the first Monday in April if she is being considered for transfer to be transferred. W.Va. Code §18A-2-7. These timeframes were extended somewhat for transfers effective the 1989-90 school year.

2. The notice and hearing requirements prior to transfer as set forth in W.Va. Code §18A-2-7 demand strict compliance. Lavender v. McDowell County Board of Education, 327 S.E.2d 691 (W.Va. 1984); Morgan v. Pizzino, 256 S.E.2d 592 (W.Va. 1979).

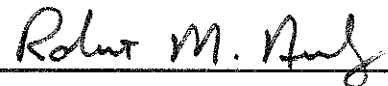
3. The statutory guidelines specifically provide only one exception to the time limits set forth in the transfer procedure and do not permit exemptions in other "emergency" situations.

4. Respondent has failed to comply with the statutory requirements of W.Va. Code §18A-2-7 thereby rendering the transfer improper.

5. Grievant is entitled to reimbursement at a rate of twenty cents per mile for the additional 491.9 miles she had driven as a result of this transfer, for total of ninety-eight dollars and thirty-eight cents.

Accordingly, this grievance is **GRANTED**. Respondent is Ordered to return Grievant to her position at Gilbert Grade School and reimburse her for mileage as stated above.

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



ROBERT M. NUNLEY
HEARING EXAMINER

Dated: January 31, 1990