WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

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PATRICIA WILLIAMS

v. Docket No. 90-06-006

CABELL COUNTY BOARD OF EDUCATION

D E C I S I O N

Patricia Williams, an employee of Respondent Cabell County Board of Education, filed this grievance at Level I on October 2, 1989, alleging

> A violation of. . .[W.Va. Code] §18A-2-7 when Grievant was reassigned without notice and hearing. The assignment of a secondary student to Grievant, an elementary homebound teacher, is subject to the provisions. . .on transfer and reassignment.

After denials there and at Level II[1] and waiver at Level III, Grievant advanced her claim to Level IV, for resolution on the record constructed below, on January 4, 1990. The parties requested and were given until January 19 to submit fact-law proposals, and with those presentations, the case is mature for disposition.

Grievant has been a homebound instructor for Respondent since 1970, providing services to students unable to appear

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[1] The extensive Level II hearing transcript and its exhibits are of record at Level IV and form the bulk of the record upon which this Decision is rendered.

in a traditional school setting. At the time she was hired, she was certified only as an elementary teacher, although a document appended to her contract of employment characterizes her simply as "homebound." In 1982, she received her certification in Physically Handicapped, grades K-12. Over the years, several of her pupils have not been literally homebound but instead have been confined to hospitals in Cabell County.

Grievant claims that she was hired and has always been an elementary homebound teacher. In support of this, she cites a recent directory published by Respondent, Gr. Ex. 6, which lists five "Home/Hospital Teachers," including Grievant, in which she is further identified as "Elementary" while the other four instructors are "Secondary." Grievant also asserts that "past practice" of the Cabell County Schools is that homebound personnel are assigned either elementary or secondary students, but not both. See, e.g., T. 22. Her complaint centers upon the fact that she involuntarily was placed, in September 1989, as homebound teacher for K.C., a nineteen-year-old severely handicapped female, undisputedly functioning on an elementary or pre-elementary level.

Respondent's defense has several grounds. First, it is argued that Grievant has indeed had secondary students in the past. Grievant, indeed, admits that she has had responsibility for secondary students, although she characterizes this responsibility as "facilitative" only. T. 13, T. 66.

However, at T. 67-68, she admits she has "students who are not chronologically in elementary school," but only in the hospital.[2]

Second, Respondent contends that it does not employ homebound/hospital teachers in specific secondary or elementary assignments. Grievant's counters to this include references to her salary and its payment from elementary education funds;[3] her performance evaluation, which characterizes her as a "K-6" or "K-8" instructor; and the aforementioned school directory. See, e.g., T. 24, Gr. Ex. 5.

Finally, Respondent points out that K.C.'s Individual Education Plan (IEP) clearly reveals her not to function as a secondary student. Grievant admits that K.C. "is not being taught on a secondary level." T. 31. She contends, however, that "Public Law 94-142" identifies K.C. as a secondary pupil.[4] In rather convincing testimony,

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[2] Grievant, claiming she doesn't "know how to teach" physically-handicapped secondary pupils, explained she utilizes nursing and medical students on assignment in the hospitals "to help. . .in math or science, chemistry, whatever." She defined her facilitative tasks as, "I tell them to get their homework, they bring it in, the teachers send the homework in, I send it back to -- the parent takes it back to the school -- or to the school." T. 13.

[3] In another context, the manner in which a worker is paid has been characterized as not controlling his classification of employment. Cox v. Bd. of Educ. of Hampshire Co., 355 S.E.2d 365,370 (W.Va. 1987).

[4] The undersigned has not been provided a copy of this legislation and is not otherwise informed as to its specific identity. Since "Public Law" and other similar designations
(Footnote Continued)

Respondent's Director of Special Education and Student Support Services, William L. Capehart, interpreted this provision as requiring the placement of students able to attend school in institutions serving persons of their relative general age group, which would earmark K.C. as "secondary" for those purposes. However, he further explained, "94-142 speaks. . .of. . .an appropriate education plan being mandated for any child in a district.. . .. Therefore, the county would be compelled to have the teacher that would be most certified to deal with [K.C.'s] IEP. . .." T. 60.

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

> [A]n employee shall be notified in writing. . .on or before the first Monday in April if he is being considered for transfer. . .. Any. . .employee who desires to protest. . .[is entitled to] hearing on the proposed transfer. . .on or before the first Monday in May.

For transfers effective the 1989-90 school year, the time frames were extended somewhat; however, it is undisputed that Respondent did not meet any such timeframes or otherwise process the addition of K.C. to Grievant's schedule as a transfer. Clearly then, if such was a transfer,

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(Footnote Continued)
are superseded by references to W.Va. Code, U.S. Code, etc., once passes into law, parties would be well-advised to provide those citations if they desire a specific provision of law to be analyzed and considered.

In this case, the parties' comments on P.L. 94-142's content will be accepted and reviewed as any other testimonial evidence.

Respondent is in violation of Code §18A-2-7 and Grievant is entitled to relief. See Surber v. Mingo Co. Bd. of Educ., Docket No. 89-29-662 (Jan. 31, 1990); Froats v. Hancock Co. Bd. of Educ., Docket No. 89-15-414 (Dec. 18, 1989).

The case of Dunleavy v. Kanawha Co. Bd. of Educ., Docket No. 20-89-008 (Feb. 23, 1989), is instructive. In Dunleavy, the grievant, a psychologist, complained of "the addition of two schools to his schedule after the commencement of the 1988-89 school term." Id., p. 1. The two new institutions were secondary and at the distant end of the county from his already-assigned ten elementary schools.[5] Mr. Dunleavy claimed that his employer had violated Code §18A-2-7 by augmenting his schedule in this fashion. With notation that adjustments "'which do not include duties or responsibilities outside of an employee's presently utilized area of certification, discipline or department. . .[are generally not] assignments amounting to a transfer,'" he was denied relief.

The remainder of this Decision will be presented as formal findings of fact and conclusions of law.

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[5] As part of his employment, Mr. Dunleavy also serviced a parochial elementary school midway between his former ten and his later two additional assignments.

FINDINGS OF FACT

1. Grievant is employed as a homebound/hospital teacher by Respondent. She has served in this capacity for approximately twenty years.

2. During this period, most of her students have been elementary, although she has had some responsibility for secondary students.

3. Grievant is certified in elementary education and also in physically handicapped instruction, K-12.

4. In September 1989, she was assigned an additional homebound student, K.C., who is nineteen years of age and listed as "secondary" for certain purposes. In intellectual terms, K.C. functions as an elementary or pre-elementary pupil, according to her Individual Education Plan.

5. Grievant was not given notice or an opportunity for a hearing on this addition, which she characterizes as an improper transfer per W.Va. Code §18A-2-7. In support of this, she claims she was hired and has always functioned as an elementary homebound teacher.

CONCLUSIONS OF LAW

1. "'[S]chedule adjustments which do not include duties or responsibilities outside of an employee's presently utilized area of certification, discipline or department. . .[are generally not] assignments amounting to a transfer.

. ..' VanGilder v. Mineral Co. Bd. of Educ., Docket No. 28-87-320-2 (June 16, 1988), p. 4." Dunleavy v. Kanawha Co. Bd. of Educ., Docket No. 20-89-008 (Feb. 28, 1989). See also Kidd v. Fayette Co. Bd. of Educ., Docket No. 89-10-452 (Dec. 19, 1989).

2. The addition of an homebound student, nineteen years of age but elementary-level in intellectual capacity, to Grievant's schedule is not a transfer per W.Va. Code §18A-2-7.[6]

Accordingly, this grievance is **DENIED**.

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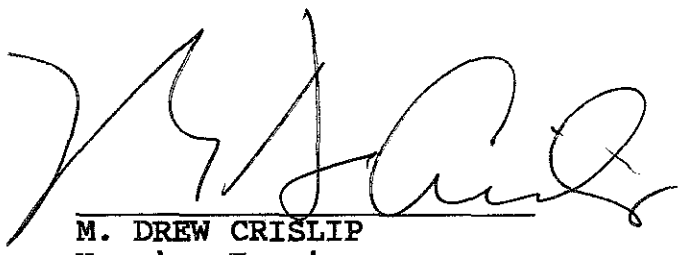
[6] The issue of whether Respondent's homebound teachers are or have ever been divided between elementary and secondary students, for all official purposes, thus need not be reached.

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



M. DREW CRISLIP
Hearing Examiner

DATE: January 31, 1990