MELINDA McCOY,

Grievant,

v. **Docket No. 94-50-063**

WAYNE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

This grievance has been submitted for decision on the record developed at the level two hearing held on February 2, 1994. The case involves whether the grievant, Melinda McCoy, was properly transferred to another school. As is frequently true in education employee grievances, there is little or no dispute as to the salient facts. The pertinent facts are set forth below. (See footnote 1)

Findings of Fact

1. The grievant has been employed by the Wayne County Board of Education as an Aide for sixteen years and is currently classified as an Aide III. During the 1993-1994 school year, the grievant was employed as a special education Aide at Ceredo-Kenova Middle School.

2. By letter of December 16, 1993, the Director of Special Education informed the grievant that she was being temporarily suspended with pay effective the next day "pending a resolution of accusations of inappropriate physical contact" with a handicapped middle school student (Exh. 3).

3. Thereafter, at the suggestion of the Superintendent, the grievant agreed through her representative to transfer to an Aide position at Buffalo High School until the investigation was completed in an effort to ease the situation with the disgruntled parent of the handicapped student.

4. The Superintendent and the grievant's representative did not discuss the length of the transfer or whether it would be permanent. The agreement was not reduced to writing and the grievant's representative did not remember any request by the Superintendent for her to submit written confirmation of the oral agreement.

5. The grievant did not discuss the transfer directly with the Superintendent. The grievant did

not understand the transfer to be permanent and would not have agreed to the transfer had she known it was to be permanent.

6. Sometime later the grievant requested to return to the Ceredo-Kenova Middle School but the Superintendent refused and stated the transfer was permanent.

7. A written grievance was filed at level one on January 25, 1994, alleging a violation of W. Va. Code §§ 18A-2-7 and 18A-4-8a (Exh. A).

8. The Superintendent has refused to share any information with the grievant concerning the alleged misconduct.

Discussion

The first issue that must be addressed is whether this grievance has been mooted by events subsequent to the level two hearing. According to the respondent's proposed findings of fact and conclusions of law, the grievant bid on and was awarded a position at a third school, Buffalo Middle School, in March 1994. The respondent therefore contends this case is now moot. The undersigned requested the grievant's representative to respond to the mootness argument, and, by letter of June 22, the grievant's representative asserted that the grievant's acceptance of another position did not render the issues moot, because the grievant intends to return to her former position at Ceredo-Kenova Middle School if the grievance is sustained.

The undersigned concludes this grievance is not moot. A grievance is moot when a decision by the Grievance Board would have no practical effect on the grievant and would merely serve to vindicate the employee's argument. See State ex rel. Durkin v. Neely, 276 S.E.2d 311, 313 (W. Va. 1981). For example, if thegrievant's aide position at Ceredo-Kenova Middle School had been eliminated in a reduction in force at the end of the 1993-1994 school year, then this case would be moot at this time. (See footnote 2) Harrison v. Cabell County Bd. of Educ., 351 S.E.2d 604 (W. Va. 1986). Here, the grievant seeks to return to her former position at a particular school and is not presenting an abstract question from which she can derive no benefit. Although school employees have no vested right to be assigned to a particular school in the county, see State ex rel. Hawkins v. Tyler County Bd. of Educ., 275 S.E.2d 908, 911-12 (W. Va. 1980), once an employee lawfully holds a position he or she cannot be transferred to another school in contravention of statute or applicable

regulations. It is therefore concluded that the grievant's acceptance of another job does not, as a matter of law, preclude her from continuing to challenge her transfer.

The dispositive issue in this case is whether the respondent violated W. Va. Code § 18A-2-7 by refusing to allow the grievant to return to her position and by not affording her notice and, in particular, a hearing on the charge before the county board of education. (See footnote 3) This provision vests the county superintendent,subject to approval by the county board of education, with broad authority to transfer school personnel. Nonetheless, the notice (See footnote 4) and hearing requirements of this statute must be strictly followed. Lavender v. McDowell County Bd. of Educ., 327 S.E.2d 691 (W. Va. 1984).

Although precious little evidence was introduced at level two, the record supports, and indeed compels, the conclusion that the grievant did not agree to a permanent transfer. By their proposals the parties have acknowledged that the grievant agreed through her representative to a transfer until the investigation was concluded in order to defuse the situation. The grievant, in agreeing to a temporary transfer, must have reasonably assumed that the investigation would be completed within a reasonable period of time, at which time a determination would be made as to what, if any, discipline would be appropriate in the circumstances. Instead, the respondent refused to reveal any information concerning the investigation and refused to allow the grievant to return to her position at Ceredo-Kenova Middle School. The grievant has neither been charged nor afforded a hearing in regard to her transfer. On these facts it must be concluded that the grievant did not waive her rights under the transfer statute, W. Va. Code § 18A-2-7, and that the respondent's actions violated that statute.

Notwithstanding the foregoing discussion concerning the applicability of and the violation of W. Va. Code § 18A-2-7, another independent ground exists for sustaining this grievance, i.e., the respondent failed to meet its burden under W. Va. Code § 18-29-6 ¶5 of proving the grievant committed the act relied upon for the disciplinary transfer. (See footnote 5) It is apparent that the superintendent refused to rescind the grievant's transfer based upon the opinion that such action was not in her best interest, and was not in the best interest of the student, the parents and the school system. Hence, the transfer and the refusal to rescind the transfer were directly tied to the allegation that the grievant had engaged in misconduct. No evidence was ever introduced, however, to establish the grievant actually engaged in inappropriate physical contact with a student.

Consequently, this grievance must be upheld.

Conclusions of Law

1. It is incumbent upon a grievant to prove the allegations of his or her complaint by a preponderance of the evidence. Heim v. Harrison County Bd. of Educ., Docket No. 17-88-045-2 (Jan. 18, 1989)(written waiver of transfer rights upheld).

2. The grievant did not consent to a permanent transfer or waive her rights under W. Va. Code § 18A-2-7.

3. The grievant has established that she was improperly denied the right to return to her Aide position at Ceredo-KenovaMiddle School and, hence, was effectively transferred without being accorded a hearing before the board of education in violation of W. Va. Code § 18A-2-7.

4. The respondent failed to meet its burden of establishing the grievant engaged in the alleged misconduct that resulted in her permanent disciplinary transfer.

Accordingly, this grievance is **GRANTED** and the respondent is **ORDERED** to return the grievant to her Aide position at Ceredo-Kenova Middle School at the beginning of the next school year.

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

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RONALD WRIGHT

Administrative Law Judge

Date: July 14, 1994

Footnote: 1 This case was reassigned for administrative reasons to the undersigned from the docket of another administrative law judge. The evidentiary record consists of a twenty-two page level two transcript and three exhibits including the original grievance form.

Footnote: 2 It is noted that certain recognized exceptions exist to the mootness doctrine, one of which involves issues that may repeatedly arise yet escape review simply because of their fleeting nature. See Hairston v. Lipcomb, 178 W. Va. 353, 359 S.E.2d 571 (1987)

Footnote: 3 Because the grievance must be sustained on this issue, it is not necessary to address whether the grievant's daily work schedule was changed without her written consent in violation of W. Va. Code § 18A-4-8a, or whether the transfer was effected in violation of State Board of Education Policy No. 5300. See Holland v. Bd. of Educ. of Raleigh, 327 S.E.2d 155 (w. Va. 1985).

Footnote: 4 This is not to say that the notice must be given on or before the first Monday in April as is required in the case of an administrative transfer.

Footnote: 5 According to the respondent's proposed findings and conclusions, a parent complained that the grievant physically shoved her handicapped child.