DANIEL WEBB, .

Grievant, .

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v. . Docket Number: 94-20-362

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KANAWHA COUNTY BOARD OF EDUCATION, .

Respondent. .

DECISION

Daniel Webb (hereinafter Grievant) filed this complaint against his employer, the Kanawha County Board of Education (hereinafter Board) on May 16, 1994, pursuant to the provisions of West Virginia Code §18-29-1 et seq. Grievant claims that the Board has abused its discretion in assigning certain job duties and responsibilities to him and, in turn, violated W. Va. Code §18A-4-7a. His claim was denied at the lower two levels and the Board waived participation in the grievance at level three pursuant to W. Va. Code §18-29-4(c). Grievant appealed to level four on July 28, 1994. A level four evidentiary hearing was held in this matter on November 4, 1994, at the Grievance Board's Charleston, West Virginia office. At this hearing, the parties supplemented therecord developed through level two and the case became mature on that date.

The following findings of fact have been properly deduced from the evidentiary record developed in the case.

Findings of Fact

1. Grievant is employed by the Board as a Community Education Coordinator and he works under the immediate supervision of James Simmons, Assistant Superintendent. Grievant's stated goal is to function as an administrator of all community education programming and activities.

2. The 1993 job description created for Grievant's position states that Grievant is responsible for supervising community education supervisors and teachers. The job description contains no fewer than seventy-seven performance responsibilities which could be required of Grievant. Further, said job description was to be reviewed and revised annually.

3. The Board has divided Kanawha County into geographic regions for purposes of implementing its community education program. Since 1989, Grievant has worked primarily within the area which includes George Washington, East Bank and Dupont High Schools.

4. As with many boards of education throughout the State, the Board has recently deemed it necessary to eliminate various administrative positions, including those coordinators responsible for its Homebound program.

5. By letter dated May 9, 1994, Grievant was notified by Mr. Simmons that he was to assume the position of summer school principal at East Bank High School for the 1994 term and also the responsibility of coordinating the homebound services for the George Washington/Herbert Hoover area beginning with the 1994-1995 school year.

6. Grievant's job description was revised on June 29, 1994, to contain reference to these additional responsibilities.

7. Grievant was not given notice prior to May 9, 1994 that these additional duties were going to be assigned to him.

Discussion

Grievant asserts that the duties assigned to him on June 29, 1994, were not consistent with the nature of the duties described by his then-current job description; therefore, said assignment was tantamount to a transfer for which he was not given the required notice and opportunity for hearing pursuant to W. Va. Code §18A-2-7. He requests that these additional job duties be removed from his responsibility until such time as the Board can comply with the due process requirements of this Code section. The Board contends that it has neither abused its discretion nor violated Code §18A-2-7.

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

> The superintendent, subject only to the approval of the board, shall have the 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 whodesires to protest such proposed transfer may request in writing a statement of the 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 the 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, except for the school year one thousand nine hundred eighty-nine--ninety only, the hearing shall be held on or before the fourth Monday in May, one thousand nine-hundred ninety. At the hearing, the reasons for the proposed transfer must be shown.

This statute provides school personnel with the standard procedural due process guarantees of notice and an opportunity for a hearing, along with providing specific time frames within which to fulfill these requirements. The statute further requires that reasons be given for any proposed transfer. The initial question in this case is whether Grievant was transferred as a result of being assigned additional duties on June 29, 1994. If the additional duties assigned to him created a transfer, then the revised job description would be invalid pursuant to Code §18A-2-7.

In Matthews v. Preston Co. Bd. of Educ., Docket No. 39-88-239 (July 27, 1989), it was held that "a transfer may consist of the reassignment of an employee to a different position, a different location or significantly different duties or responsibilities. The addition of similar duties does not constitute a transfer." Matthews, conclusions of law, nos. 1, 2. In Dunleavy v. Kanawha Co. Bd. of Educ., Docket No. 20-89-008 (Feb. 23, 1989), it was held that "schedule adjustments which do not include duties outside of an employee's presently utilized area of certification, disciplineor department . . . [are generally not] assignments amounting to a transfer . . ." Dunleavy, conclusion of law, no. 1, citing, VanGilder v. Mineral Co. Bd. of Educ., Docket No. 27-87-320-2 (June 16, 1988).

In Matthews, the grievants were custodians who alleged that they had been illegally transferred because they were each assigned a revised workload which consisted of work in different schools, additional duties and increased responsibilities on weekends. The grievants had originally been assigned and worked at only one campus. A portion of the new assignment mandated that they perform duties off of that same campus. The administrative law judge held that the grievants had not been transferred with respect to the additional duties assigned to them at the same geographic

location. It was also held that all of the duties performed were duties similar in nature to the other custodial duties which they had been performing. However, it was determined that the grievants had been transferred with respect to the duties assigned them at a school not on the same campus where they had previously been working. The focus of the issue of whether the grievants had been transferred was the geographical location of the performance of their duties.

In Dunleavy, the grievant was a school psychologist who argued that he had been transferred because he was given two additional schools to service in addition to the ten that he had already been serving. Grievant had been serving schools in the St. Albans and Charleston areas when he was assigned two additional schools in the Sissonville area. The administrative law judge held that Mr.Dunleavy had not been transferred. The rationale for that holding was that Mr. Dunleavy was an itinerant employee who was responsible for ten schools before the change in schedule and that his job duties had not changed nor was he responsible to produce any more work.

In Dunleavy, the fact that grievant was already required to travel as a necessary part of his work obviously played a part in the conclusion that he was not transferred. However, in Matthews, because the two custodians were required to travel to a different school out of their normal area of responsibility, a finding that they had been transferred was made. Consistent with the holding in Dunleavy, the fact that Grievant has been assigned duties outside of the area he had been serving does not mandate a finding that he was transferred. The more important question is whether he has been assigned "significantly different duties or responsibilities" from those he has been required to perform.

Based upon a review of the numerous responsibilities listed in Grievant's job description, it is hereby determined that the additional duties imposed upon him in May 1994 were significantly different than those which he had been responsible for performing. It is recognized that Grievant's position of Coordinator contains within it many of the same requirements that other administrators of different programs must possess. However, he has been asked to completely coordinate an entirely different type of program, substantively, from that for which he was originally assigned. Further, acting as a principal at a school encompasses dutiesdifferent from those required for supervising and coordinating teachers and administrators in an out-of-school setting. It also carries with it a requirement that Grievant spend much more time away from his regularly assigned duties working with students as opposed to adults. Given these facts, it is determined that Grievant was improperly

transferred as a result of Mr. Simmons' assignment of additional duties to him.

The foregoing discussion of the case is hereby supplemented by the following appropriately made conclusions of law.

Conclusions of Law

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

> The superintendent, subject only to the approval of the board, shall have the 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. . .

2. "A transfer may consist of the reassignment of an employee to a different position, a different location or significantly different duties or responsibilities. The addition of similar duties does not constitute a transfer." Matthews v. Preston Co. Bd. of Educ., Docket No. 39-88-239 (July 27, 1989), Conclusions of Law, nos. 1, 2.

3. The assignment of duties to Grievant on May 9, 1994, resulted in Grievant being transferred within the meaning of W. Va. Code §18A-4-7a.

4. Grievant was not given notice or an opportunity for a hearing by the Board prior to being transferred; therefore, the Board violated Code §18A-4-7a.

Therefore, this grievance is **GRANTED**. The Board is hereby **ORDERED** to rescind its May 9, 1994 assignment of additional duties to Grievant (those which he is presently performing or which are still contained within his current job description) until such time as it has complied with the mandates of W. Va. Code §18A-4-7a as that section deals with personnel transfers as discussed in this Decision.

Any party may appeal this decision to 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 Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

ALBERT C. DUNN, JR.

Administrative Law Judge

January 31, 1995