ELISE ADKINS,

Grievant,

v. **DOCKET NO. 97-23-216**

LOGAN COUNTY BOARD OF EDUCATION,

Respondent, and

JOHN HAGAR,

Intervenor.

D E C I S I O N

This grievance was filed by Grievant Elise Adkins against the Logan County Board of Education ("LBOE") in late April or early May of 1997, alleging she had been improperly transferred, in violation of W. Va. Code §§ 18A-2-7, 18A-4-7a and 18A-2-2. (See footnote 1) She requested as relief that her transfer be rescinded so that she would be restored to a teaching position at Chapmanville High School. (See footnote 2) The Level II decision correctly found that Grievant "was not the subject of a transfer, but rather was displaced due to the settlement of another grievance and the grievant failed to intervene, although she was fully aware of the other grievance, the grievance i[s] therefore **DENIED**."

The following facts pertinent to the resolution of this matter have been made from the evidence presented at Levels II and IV.

Findings of Fact

1. Grievant is employed by LBOE as a classroom teacher, and has been teaching 15 years. Her certification is General Science 10-12 and Biology 7-12.

2. In July 1996, LBOE posted a tenth grade science teaching position at Chapmanville High School ("CHS"). This position had been vacated by the Intervenor, John Hagar, when he was selected for a Dean's position at CHS. Grievant bid on the posted position.

3. When Grievant became aware that LBOE had awarded other posted positions, she called

LBOE's Central Office to inquire about the science position. A secretary, Ms. Browning, told Grievant the position had not been posted the way the principal wanted it posted. Grievant then contacted the CHS principal, Mr. Amburgey. He told Grievant a grievance was filed by Corky Griffith after the position was posted.

4. Grievant began the 1996-97 school year teaching at Logan Central Junior High. That school was slated to close at the end of the year, and did, in fact, close. 5. In October 1996, Brenda Skibo, Assistant Superintendent and Director of Personnel, told Grievant if the CHS science position were awarded, she would be selected. Ms. Skibo told her, however, there was a grievance "posted against the job."

6. Grievant was a member of the American Federation of Teachers ("AFT") (See footnote 3) . At some point, she contacted Moss Burgess, President of the local branch of the AFT, regarding the posted science position not being filled. Grievant believed Mr. Burgess subsequently raised this issue at an LBOE meeting. Mr. Burgess, did, in fact, contact LBOE repeatedly on Grievant's behalf, asking at several board meetings that the position be filled. LBOE repeatedly explained to Mr. Burgess that there was a pending grievance and it was reluctant to fill the position. The position was finally filled because of Mr. Burgess' insistence that it be filled, and Grievant began teaching tenth grade science at CHS on January 27, 1997.

7. Grievant also contacted her AFT representative, Steve Angel, regarding the grievance filed by Corky Griffith. Mr. Angel informed Grievant that she was not involved in that grievance and could not intervene in it. He also told her that if Mr. Griffith prevailed, Mr. Hagar could be returned to his former position, and she could be displaced. (See footnote 4) Grievant did not ask to intervene in Mr. Griffith's grievance.

8. No employee of LBOE said specifically to Grievant that there was a possibility of Mr. Hagar being returned to the position if Mr. Griffith prevailed in his grievance. She understood thatthe job was not filled promptly due to the pending grievance. She assumed when the position was finally filled that she was "home free," as it was a permanent job. She did not inquire of any LBOE employee or of any AFT representative whether this assumption was correct.

9. Corky Griffith's grievance was denied at Level II. After that, LBOE recognized that Ms. Skibo had used the wrong set of criteria to fill the CHS Dean's position, and settled the grievance sometime after April 1, 1997. Grievant agrees that LBOE had erred in awarding the CHS Dean's position to Mr.

Hagar. LBOE placed Mr. Griffith in the CHS Dean's position. LBOE tried to return everyone to where they were prior to the grievance. Thus, Mr. Hagar was returned to his former science position at CHS. Grievant would have been returned to Logan Central Junior High School, but it was closing and her former position no longer existed after the end of the school year. LBOE tried to determine where Grievant would have gone when the junior high closed, and decided she would have been placed in a science position at Logan High School ("LHS").

10. In the course of settling Mr. Griffith's grievance, LBOE's representative discussed Grievant's placement at LHS with Mr. Angel. Those employees affected by the settlement who did not have a representative were personally contacted by LBOE to let them know the effect of the settlement.

11. Ms. Skibo called Grievant on April 23, 1997, and told her she was going to be transferred to LHS due to the Corky Griffith "grievance hearing and board action," because Mr. Hagar was going to be returned to his CHS science position.

12. LBOE approved Grievant's placement at LHS at its meeting on April 23, 1997. Grievant chose not to attend this meeting. 13. The April 23, 1997 LBOE meeting minutes state Mr. Griffith, Mr. Hagar and Grievant were "transferred", because LBOE tries to be discreet about grievances, and did not want to make public that these three were moved due to the settlement of a grievance. John Myers, Logan County Superintendent of Schools, explained to LBOE at its April 23, 1997 meeting that these moves were the result of the settlement of a grievance.

Discussion

Although Grievant argued she was not properly notified she was being transferred, her primary argument, and the real issue to be decided is whether LBOE's settlement of the Corky Griffith grievance may be reexamined in this grievance. One cannot employ the grievance procedure to attack a final decision rendered in a prior grievance. Toney v. Lincoln County Bd. of Educ., Docket No. 95-22-118 (June 30, 1995). This principle has been extended to the settlement of a grievance. Vance v. Logan County Bd. of Educ., Docket No. 95-23-190 (Mar. 15, 1996). The burden of proof is upon Grievant to prove by a preponderance of the evidence that the settlement agreement was not fairly made or was in contravention of some law or public policy. Id.

> "The law favors and encourages resolution of controversies by contracts of compromise and settlement rather than by litigation; it is the policy of the law to uphold

> and enforce such contracts if they are fairly made and not in contravention of some law or public policy." McDowell County Bd. of Educ. v. Stephens, 191 W. Va. 711, 447 S.E.2d 912 (W. Va. 1994). If settlement agreements could be nullified by non-parties at some later date, employers would be discouraged from entering into such contracts or settlement agreements with its employees.

Vance, supra.

Grievant has not shown the settlement agreement entered into between the parties to the Corky Griffith grievance was entered into unfairly or in contravention of some law or public policy. Id. To the contrary, Grievant agrees that Mr. Griffith should have prevailed in his grievance. Thus,had she been a party to that grievance, she would have agreed with the settlement, until it came time to deal fairly with Mr. Hagar. Grievant's argument is with LBOE's method of backing out of its mistake. To this end, she argued, as did the grievant in Vance, supra, that she was not given an opportunity to intervene in Mr. Griffith's grievance. Although LBOE was not required to inform Grievant of Mr. Griffith's grievance (See Vance, supra), Ms. Skibo and Grievant's representative both told Grievant the Griffith grievance existed. She was not denied Intervenor status, as she made a conscious decision not to ask to intervene. She was given the opportunity to intervene.

Grievant further asserted she was an innocent victim. The testimony, however, shows a fully informed Grievant. She knew when she accepted the position that a grievance had been filed, and that if Mr. Griffith won, one of the possible consequences was that Mr. Hagar would be returned to this position. It is of no moment that no LBOE employee or representative specifically told Grievant that Mr. Hagar could be returned to his former position. She was aware of this when she accepted the position.

Grievant believes it is more fair to let her remain in Mr. Hagar's position and move Mr. Hagar, or to create a position for her at CHS, than to return Mr. Hagar to where he would have been had LBOE not mistakenly placed him in the CHS Dean's position. But for LBOE's admitted error, Grievant would never have been in Mr. Hagar's science position. It was fair and reasonable for LBOE to admit its mistake and return Mr. Hagar to his former position. It was fair and reasonable for LBOE to try to return everyone to where they would have been. In fact, LBOE made the effort to contact everyone who would be affected by this settlement, including Grievant through her AFT representatives, to explain how they would be affected. Had Logan Central Junior High not closed,Grievant would have been returned to her position there. (See footnote 5) Grievant has presented no valid reason to disturb the settlement.

Finally, Grievant argued LBOE violated W. Va. Code § 18A-2-7, by not notifying her prior to April 1 that she was being transferred from her position at CHS, and failing to give her a hearing prior to its decision to transfer her. Grievant was not transferred from CHS, and Grievant knew this. As Ms. Skibo told Grievant, she was being moved from her position at CHS as a result of the settlement of the Griffith grievance. Grievant was not misled by the language used in the Board minutes or in the letter she received. The notice and hearing provisions of W. Va. Code § 18A-2-7 are not applicable.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. "Settlement agreements prior to final administrative decision in a grievance matter are not subject to challenge by employees who were not parties to the prior grievance, unless those employees can prove by a preponderance of the evidence that the settlement agreement was not fairly made or was in contravention of some law or public policy." Vance v. Logan County Bd. of Educ., Docket No. 95-23-190 (Mar. 15, 1996).

2. Grievant failed to prove by a preponderance of the evidence that the settlement of the Corky Griffith grievance was not fairly made or was in contravention of law or public policy. 3. Grievant was not transferred when she was removed from the CHS science position in settlement of a grievance.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Logan 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.

_____

BRENDA L. GOULD

Administrative Law Judge

Dated: September 29, 1997

Footnote: 1

The grievance form alleges a violation of W. Va. Code § 18A-29-2. Since no such Code provision exists, it is assumed the nine was a typographical error, and it should have read 18A-2-2.

Footnote: 2

This grievance was denied at Level I on May 2, 1997. A Level II hearing was held on May 13, 1997, and a decision denying the grievance at Level II was issued on May 22, 1997. Grievant waived Level III and appealed to Level IV on May 28, 1997. A Level IV hearing was held on July 31, 1997, at which time John Hagar was granted Intervenor status. This matter became mature fordecision on August 18, 1997, with receipt of Intervenor's Proposed Findings of Fact and Conclusions of Law. Grievant declined to submit written argument.

Footnote: 3

After the events leading to this grievance, Grievant changed her union affiliation, and was represented by the West Virginia Education Association in this grievance.

Footnote: 4

Mr. Angel also represents Mr. Hagar as the Intervenor in this matter, and represented Corky Griffith in his grievance. John O'Neal of the AFT represented Mr. Hagar as an Intervenor in Corky Griffith's grievance.

Footnote: 5

In fact, technically, she was returned to that position, but it no longer existed, so she was placed in another position. Grievant did not argue that she was not placed in the proper position as the result of Logan Central Junior High School closing, or that she was not given proper notice and a hearing before being moved from Logan Central Junior High School to LHS, and those issues will not be addressed. See W. Va. Code § 18A-4-8f.