

TALMADGE O. HARPER,

Grievant,

v.

Docket No. 00-29-310

MINGO COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Talmadge O. Harper, employed by the Mingo County Board of Education (MCBOE) as a principal, initiated grievance proceedings on May 12, 2000, alleging a violation of W. Va. Code §18A-2-7 when he was not provided timely notification of his proposed transfer from Lenore Middle School (LMS) to an unassigned position for the 2000-2001 school term. Grievant further alleged that the transfer was an act of retaliation because of his absence from work due to medical problems, and discrimination, based on age and seniority. For relief, Grievant requested reinstatement at LMS. On August 14, 2000, Grievant filed a second complaint alleging that his reassignment as a principal/teacher at Cline Elementary School (CES) was a demotion, and that he was being forced into early retirement due to his age. Grievant again requested reinstatement as principal at LMS.

The grievances were consolidated, and denied following an evidentiary hearing at level two. The matter was advanced to level four on September 25, 2000. Grievant, represented by Anita Mitter of WVEA, and MCBOE, represented by Hannah B. Curry, Esq., agreed that a level four decision could be made on the record. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law submitted by both parties on November 6, 2000. The following findings of fact are derived from the record in its entirety, including the level two transcript and exhibits.

Findings of Fact

1. Grievant has been employed by MCBOE for approximately thirty years, and served as principal at LMS beginning in 1987. LMS currently consists of grades five through eight, with a student enrollment of approximately three hundred, and a staff of thirty.

2. By memorandum dated September 15, 1999, Superintendent John T. Mattern notified Grievant that he would be placed on a plan of improvement to correct certain deficiencies, including

matters relating to student behavior and building maintenance. The plan began September 20, 1999, and concluded on October 22, 1999. Grievant's performance on the plan was satisfactory to the degree that another plan was not developed.

3. Grievant was hospitalized on February 7, 2000, and presently remains on sick leave under a doctor's care for high blood pressure.

4. By letter dated March 31, 2000, and sent by certified mail, Superintendent Mattern advised Grievant he would recommend that he be placed on transfer, effective at the conclusion of the 1999-2000 school year. The post office placed a "Sorry We Missed You!" notification, dated April 1, 2000, in Grievant's mail box.

5. Grievant did not receive the March 31, 2000, letter from Superintendent Mattern until Friday, April 7, 2000.

6. By letter dated April 10, 2000, Grievant requested that Superintendent Mattern provide him a written statement of the reason for his transfer. Superintendent Mattern responded by letter of April 12, 2000, that the reason for the proposed transfer was "because your leadership and management style and technique [sic] does not match or meet the needs of Lenore Middle School."

7. At Grievant's request, MCBOE conducted a hearing on the proposed transfer on April 18, 2000.

8. Grievant was notified by letter dated May 5, 2000, that MCBOE had accepted Superintendent Mattern's recommendation to place him on transfer at the conclusion of the 1999-2000 school year. The reason given for the action was that Grievant's "leadership and management style and technique do not match or meet the needs of Lenore Middle School"

9. In August, Grievant was reassigned as a Principal/Teacher at Cline Grade School. This position was later amended to simply Principal after an additional art teacher was assigned to the school. Grievant suffered no loss of salary as a result of this reassignment.

Discussion

Grievant first argues that the transfer was in violation of W. Va. Code §18A-2-7, which provides that "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" Although Grievant was out of town several days the first week in April, his brother Nathan testified that he checked the mail Monday through Wednesday, and that the transfer letter did not arrive during Grievant's absence. Grievant stated that the mail was not checked on Thursday, and that he collected the letter from the

post office on April 7, 2000. MCBOE submitted a "certified mail receipt" stamped March 31, at Williamson, West Virginia, to establish that the letter was timely issued.

MCBOE has established that the notice was issued before Monday, April 3, 2000, and that the post office placed notification of attempted delivery in Grievant's mail box on April 1, 2000. As to why the letter was not accepted prior to April 7, Grievant explained that "a lot of times they get your mail mixed up down there too." He further conceded, "[t]hey could have sent it out . . . sometimes they get their mail mixed up." (L.II Trans. p. 23) Grievant argues that the notice should have been issued earlier to allow for postal errors, etc.

While it does not appear that the issue of timely notification and receipt has been addressed by the Grievance Board within the context of W. Va. Code §18A-2-7, guidance may be found in the closely related cases involving defaults. When evaluating whether a grievance decision has been timely issued, this Grievance Board has determined that the controlling event is when the decision is effectively transmitted to the grievant, not the date it was received. Snyder v. Marion County Bd. of Educ., Docket No. 00-24-263D (Oct. 23, 2000); Wensell v. W. Va. Regional Jail & Correctional Auth., Docket No. 98-RJA-490D (Jan. 25, 1999); Gillum v. Dep't of Transp., Docket No. 98-DOH-387D (Dec. 2, 1998); Harmon v. Div. of Corrections, Docket No. 98-CORR-284D (Oct. 6, 1998). Because a respondent has no control over the postal system, or when the employee collects his or her mail, the transmittal date is also the proper event to determine whether timely notice of transfer has been provided. MCBOE has established that notice was provided in compliance with statutory requirements. [\(See footnote 1\)](#)

Grievant additionally asserts that the transfer was disciplinary, and therefore was in violation of West Virginia State Board of Education Policy 5300 (6)(a), which requires that any decision regarding transfer be based upon evaluation, and after the employee has been given an opportunity of improving his job performance, prior to the action. Grievant notes that he successfully completed the 1999 plan of improvement, and no further plans were required. Finally, Grievant claims that the transfer was in reaction to his ongoing health problems, and/or was motivated by his age. At fifty-four, he opined that the administration was attempting to force him into early retirement.

MCBOE denies the transfer was disciplinary, but rather claims that it was administrative in nature, and was simply made to advance the educational program at LMS. MCBOE notes that LMS was placed on "seriously impaired" status after a State Department of Education on-site team had visited

the school, and that Grievant's style and techniques simply did not meet the needs of the school. The claims relating to health and age were also denied.

Review of the level two testimony establishes that Superintendent Mattern's explanation of how Grievant's leadership and management style were not meeting the school's needs was somewhat vague and ill-defined. However, his concerns regarding the school's status, and his lack of confidence in Grievant to rectify that particular situation, were apparent. The transfer was not disciplinary because Grievant was not being punished or corrected. His performance as a principal was acceptable, as indicated by the transfer to another principalship, with no loss in salary. It was not a matter that Grievant was doing anything wrong, but rather, Superintendent Mattern simply did not believe that Grievant's approaches and preferences would turn LMS around.

The evidence of record does not support Grievant's claim that the transfer was actually motivated by his health. Superintendent Mattern acknowledged that he had spoken with Grievant and Mrs. Harper regarding Grievant's health, and suggested that the transfer to a smaller school should decrease the amount of workplace stress. However, even if Grievant's prolonged absence were the reason for the transfer, it would not be improper. A county board of education must treat its employees humanely, but must also act in the best interest of the schools. Certainly, a school on "seriously impaired" status is in need of a full-time, on-site administrator.

Neither did Grievant prove his claim relating to his age. There is simply no evidence that MCBOE wants him to retire, or that he can retire at his current age.

Because this transfer was administrative in nature, and does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6. Grievant's sole request for relief is to rescind the transfer. He has suffered no loss of salary or benefits, and requests no relief for any other harm suffered. He simply prefers to work at LMS. Grievant has no vested right to be assigned to any particular school in the county. State ex rel. Hawkins v. Tyler County Bd. of Educ., 166 W. Va. 363, 375 S.E.2d 911 (1980). Grievant has failed to prove that the transfer was in violation of W. Va. Code §18A-2-7, Department of Education Policy 5300, or was otherwise improper.

In addition to the foregoing findings of fact and narration, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. MCBOE provided Grievant timely notification of the proposed transfer, pursuant to W. Va. Code §18A-2-7, when it placed the certified letter in the mail. Notice is timely made when it is effectively transmitted to the grievant, not the date it is received. Snyder v. Marion County Bd. of Educ., Docket No. 00-24-263D (Oct. 23, 2000); Wensell v. W. Va. Regional Jail & Correctional Auth., Docket No. 98-RJA-490D (Jan. 25, 1999); Gillum v. Dep't of Transp., Docket No. 98-DOH-387D (Dec. 2, 1998); Harmon v. Div. of Corrections, Docket No. 98-CORR-284D (Oct. 6, 1998).
2. Grievant failed to prove that his transfer was disciplinary in nature, i.e., based on prior misconduct or incompetency, thereby triggering application of West Virginia State Board of Education Policy 5300(6)(a), which requires the board to bring the employee's deficiencies to his attention through evaluation, and provide him an opportunity to improve prior to the transfer of his services.
3. Because this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6.
4. Grievant failed to prove that the transfer was in violation of W. Va. Code §18A-2-7, or was improperly based upon his health or age.

Accordingly, the grievance is **DENIED**.

Any 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 Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. Va. Code §29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: November 27, 2000 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

[Footnote: 1](#)

Grievant initially claimed a second procedural error, that he was not given a written statement of the reason for the proposed transfer; however, MCBOE submitted a copy of the letter as an exhibit, noted that it was not returned and it included notification of the date for the board hearing on the proposed transfer. Since Grievant appeared and presented a case, MCBOE asserted that all these factors indicate that he did receive the April 12, 2000, letter. This issue was not addressed in Grievant's level four proposed findings of fact and conclusions of law, and is therefore deemed to be abandoned.