

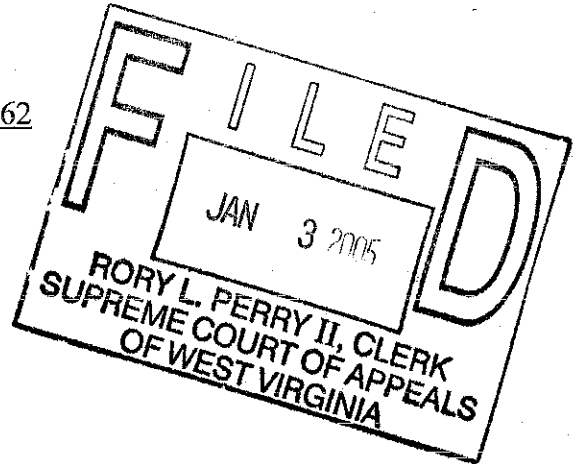
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

VICKIE L. VANCE,  
Appellant/Grievant

v.

No. 32162

WEST VIRGINIA BUREAU OF  
EMPLOYMENT PROGRAMS/  
ELKINS JOB SERVICE,  
Appellee/Respondent



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FROM THE CIRCUIT COURT OF KANAWHA COUNTY  
Civil Action No. 02-AA-68

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APPELLANT'S BRIEF ON APPEAL

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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**VICKIE L. VANCE,**  
**Appellant/Grievant,**

v.

**Civil Action Number: 02-AA-68**

**WEST VIRGINIA BUREAU OF  
EMPLOYMENT PROGRAMS/  
ELKINS JOB SERVICE,**  
**Appellee/Respondent.**

**APPELLANT'S MEMORANDUM OF LAW**

Comes now the Appellant, Vickie L. Vance, by and through her attorney, Frank P. Bush, Jr., and pursuant to Rule 1 of the West Virginia Supreme Court of Appeals' Rules of Appellate Procedure, to appeal the decision of the Circuit Court of Kanawha County upholding the denial of her grievance and submits the following Memorandum of Law in support of her appeal:

**PROCEDURAL HISTORY**

Vickie Vance originally filed this grievance on June 18, 2001, objecting to her involuntary transfer from her position as Manager of the Elkins Job Service to a position of Systems Coordinator. Prior to her transfer, the position of systems coordinator did not exist in the Civil Service System. At the time of the transfer, a description of systems' coordinator did not exist nor was the position posted system wide. Ms. Vance was not consulted or given an explanation to why she was being transferred. Ms. Vance contends that all of the foregoing violated West Virginia Bureau of Employment Programs own internal personnel rules and policies. At Level I and Level II, this grievance was denied. Level III proceedings in this case took place on September 13, 2001. Evaluator Jennifer Taylor denied Ms. Vance's grievance at this stage on December 7, 2001. Ms. Vance's grievance was appealed to Level IV and was heard by Senior Administrative Law Judge Sue Keller on February 21, 2002. Ms. Vance's

grievance was denied at the Level IV stage on April 30, 2002. Ms. Vance appealed this decision to the Kanawha County Circuit Court in accordance with § 29-6A-7 of the West Virginia Code on May 28, 2002. The Kanawha County Circuit Court, Judge Jennifer Walker presiding, upheld the decision of the Administrative Law Judge's Level IV denial of Ms. Vance's grievance on April 30, 2004. It is to the decision of the Kanawha County Circuit Court that Ms. Vance now appeals.

### FACTS

The Appellant, Vickie Vance, has been employed by the Respondent Bureau of Employment Programs ("Bureau" hereinafter) for twenty-five years. Level III Grievance Hrg. Transcr. 19 (September 13, 2001) ("Level III Transcr." hereinafter). During the tenure of her employment, Ms. Vance has never been the subject of any disciplinary action. Level III Transcr. 21. Prior to June 4, 2001, Ms. Vance had been employed as a Manager of the Elkins Job Service in Elkins, West Virginia. This position is a well-established one that has been funded entirely through the U.S. Department of Labor for many years and is not likely to change its classification in the near future. Level III Transcr. 27-28. The current classification of the Manager position has remained unchanged since 1970. Level III Transcr. 29. To reclassify such a position would require the reclassification of all of the office Manager positions throughout the state. *Id.*

By correspondence dated June 4, 2001, Ms. Vance was informed by the Bureau that she was being involuntarily transferred from her position as the Manager of the Elkins Job Service office to the position of System Coordinator with Region 6. *See* Record of Kanawha County Circuit Court, Grievant's Exhibit 1, Memo. from Robert Smith to Vickie Vance (June 4, 2001). Ms. Vance neither requested nor agreed to a transfer from her previous position as Manager to the position of Systems Coordinator. Level III Transcr. 35. Steven Frantz was Ms. Vance's unit supervisor at the time of Ms.

Vance's transfer. Level III Trancsr. 32. Mr. Frantz did not initiate contact with Ms. Vance regarding the involuntary transfer. *Id.* The Bureau's notice of the involuntary transfer did not include any explanation as to why Ms. Vance was being reassigned. Level III Trancsr. 21.

The Systems Coordinator position was a new position at the time, which lacked even a job description and was able to be reclassified virtually at the will of the head of the Division of Personnel. Level III Trancsr. 28. The Systems Coordinator position was never posted throughout the Bureau. Level III Trancsr. 22. Prior to June 26, 2001, no job description had ever been prepared for the Systems Coordinator position. Level III Trancsr. 24-25. This new position of Systems Coordinator was occupied by only one person in the entire civil service system – Vickie Vance. Level III Trancsr. 25.

Civil service employees are grouped into cost centers. An employee's seniority rights are only enforceable within his or her cost center. Level III Trancsr. 37. Ms. Vance's previous position as Manager is a position that is within cost center 0602. Level III Trancsr. 36. This cost center could not have been changed without changing the cost center of the entire work location in Elkins. Level III Trancsr. 36. By changing the cost center of all of the employees in the same unit as Ms. Vance, her seniority rights would have remained unaffected. Level III Trancsr. 37. When she was initially transferred to the position of Systems Coordinator, Ms. Vance was placed in a different cost center. Level III Trancsr. 43-44. Ms. Vance was transferred to her previous cost center during the pendency of this grievance. *Id.* However, the cost center of the Systems Coordinator position could easily be changed with little effort and no effect on any other employee's seniority rights. Level III Trancsr. 38. If this occurred, Ms. Vance would lose her twenty-five years of seniority.

Ms. Vance's job duties as Systems Coordinator are completely different from her previous duties as Manager of the Elkins Job Service. Level III Trancsr. 45. As Systems Coordinator for Region 6, Ms. Vance does not have enough work to keep her busy despite asking her supervisor for more assigned

tasks. Level III Trancsr. 49. She does not supervise any persons nor are there any other staff persons in her present office. Level III Trancsr. 26.

The June 4 letter did not indicate a reason for Ms. Vance's involuntary transfer to the new position. Level III Trancsr. 21. Ms. Vance was given no documentation regarding the reason for her transfer until the present grievance was at the Level III stage of these proceedings. Level III Trancsr. 35. At that time, Ms. Vance's counsel solicited information regarding a reason for the transfer during cross-examination of the Bureau's witness, Steve Dailey, for the first time. Level III Trancsr. 110. The Bureau's own direct examination of this witness did not reveal this information. *Id.* During this cross-examination, the Bureau's witness revealed that one of the reasons why Ms. Vance was involuntarily transferred to the position of Systems Coordinator was because there had been grievances filed against her by other staff members at the Elkins Job Service. Level III Trancsr. 110-112. Ms. Vance was never provided with any documentation that this was one of the reasons that she was being transferred. Level III Trancsr. 112.

Despite the fact that the Bureau now offers these grievances as justification for Ms. Vance's involuntary transfer to her new position, this reason was not mentioned at either the Level I or Level II stages of Ms. Vance's grievance. After reluctantly admitting that the grievances filed against Ms. Vance was the reason for the involuntary transfer, the Bureau, upon redirect examination, submitted charts and graphs of the number of grievances filed in the Elkins office compared with the number of grievances filed statewide. The Bureau subsequently focused its argument on those grievances filed by the employees under Ms. Vance as the reason justifying her involuntary transfer. The grievances filed by staff members were all denied. Level III Trancsr. 114. Given that the employer only first revealed this information at the Level III grievance proceedings, it is apparent that Ms. Vance was never given the real reason that she was transferred prior to the event.

## **QUESTION PRESENTED**

Under Administrative Directives 6000.11, 6000.40 and 6500.40, which collectively state that a position must be posted when it becomes available and that a worker must be provided with adequate notice of a reason prior to an involuntary transfer, does a grievant succeed on appeal when she can establish that the position to which she was involuntarily transferred was not posted throughout the agency and that she did not receive notice as to the reason for her involuntary transfer?

## **DISCUSSION**

### **STANDARD OF REVIEW**

The Court articulated the proper standard of review in McClung v. Board of Education of Nicholas County:

It is well settled that “[a] final order of the hearing examiner for the West Virginia Education and State Employees Grievance Board, made pursuant to *W.Va. Code 29-6A-1, et seq* [1988], and based upon findings of fact, should not be reversed unless clearly wrong.” Syllabus, *Quinn v. W. Va. Northern Community College*, 197 W. Va. 313, 475 S.E.2d 405 (1996). Furthermore, “although we accord great deference to the findings of fact of the West Virginia Educational Employees Grievance Board, n4 we review, *de novo*, questions of law.” Syl. pt. 2, *Maikotter v. Univ. of W. Va. Bd. of Trustees*, 206 W.Va. 691, 527 S.E.2d 802 (1999) (footnote added).

584 S.E.2d 240, 243 (W. Va. 2003).

### **THE DECISION BY THE KANAWHA COUNTY CIRCUIT COURT WAS CONTRARY TO LAW OR LAWFULLY ADOPTED RULE, REGULATION AND WRITTEN POLICY OF THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD**

- A. **The Bureau failed to follow its own procedures set forth in Administrative Directive 6000.40 for the process of Ms. Vance’s involuntary transfer by not consulting Ms. Vance prior to the involuntary transfer and not providing Ms. Vance with any documentation as to the need for her transfer.**

By subjecting Vickie Vance to the involuntary transfer in June of 2001, the Bureau violated a number of its own Administrative Directives (hereinafter "Directives"). Directive 6000.40 sets forth the rule that involuntary transfers are recognized as being "traumatic" to employees and not preferable to the alternatives. *See R., Grievant's Ex. 2.* "It shall, therefore, be the policy of this Bureau that routine employee transfers will be on a voluntary basis," the Directive states. *Id.* Under this Directive, if an involuntary transfer becomes necessary, the employee is to be "consulted prior to the fact" of the transfer by his or her supervisor: "It is the responsibility of the unit supervisor to initiate through channels a request to fill an authorized vacancy, justifying any request for any involuntary movement or a specific individual's transfer." *Id.* Ms. Vance was never consulted about this transfer prior to the June 4, 2001, letter that informed her that she was being transferred to the new position. Her supervisor, Mr. Frantz, did not initiate contact with Ms. Vance regarding the involuntary transfer. Level III Transcr. 32. This alone means that the Bureau was in violation of Directive 6000.40.

A further violation of Directive 6000.40 is the Bureau's failure to provide Ms. Vance with any documentation as to the reason or reasons for her involuntary transfer. Under this Directive, if an involuntary transfer becomes necessary, the employee is to be provided with written reasons why the need for his or her involuntary transfer exists. *See R., Grievant's Ex. 2.* The June 4 letter recognizes no existing reason for the necessity of transferring Ms. Vance to the new position. *See R., Grievant's Ex. 1.* The only justification that Ms. Vance was ever given for her involuntary transfer came out in the Level III proceedings during cross-examination of a Bureau witness by Ms. Vance's counsel. Level III Transcr. 110-112. If Ms. Vance's counsel had not posed that line of questioning to the witness, Ms. Vance would presumably never have been given a justification for her transfer.

The Bureau argued that by stating that the involuntary transfer was ordered "in order to maintain a high quality of service to our customers within the Elkins Job Service office," it has satisfied the

requirement of informing Ms. Vance of the reason of her transfer. Level III Transcr. 109. To accept this argument would serve to render Administrative Directive 6000.40 void. Such an interpretation of that Directive constitutes a misinterpretation of the Bureau's rule, as this interpretation is not consistent with the stated policy within the Directive itself.

**B. In the course of events leading up to and including Ms. Vance's involuntary transfer, the Bureau violated Administrative Directives 6000.11 and 6500.40 by not posting the Systems Coordinator position throughout the Agency.**

Administrative Directive 6000.11 provides that "[w]henver a job opening occurs in the classified service, the hiring agency **must** post a notice throughout the agency that candidates will be considered to fill the job opening." (emphasis added). *See R., Grievant's Ex. 4.* Additionally, Directive 6500.40 states that "[i]t **shall** be the policy of the Bureau of Employment Programs (BEP) to advertise vacancies in order that qualified full-time employees with permanent status may have an opportunity to be considered." (emphasis added). *See R., Grievant's Ex. 3.* When these Directives are read together, it is apparent that the Systems Coordinator position should have been posted throughout the Bureau to allow all eligible staff to voluntarily apply for the position. However, despite the mandate of both of these Directives, the position of Systems Coordinator was never posted prior to Vickie Vance's involuntary transfer. Level III Transcr. 22. At the Level IV proceedings, Senior Administrative Law Judge Sue Keller found that the Bureau had indeed violated its own internal policies in this regard. *See R., Dec. of A.L.J. Keller (April 30, 2002).*

**C. The decision of the Kanawha County Circuit Court was contrary to the Administrative Directives of the West Virginia Bureau of Employment Programs and was therefore clearly wrong and should be overturned.**

In this case, the Bureau has repeatedly and flagrantly violated Administrative Directives 6000.11, 6000.40 and 6500.40, its own established policies and procedures for the involuntary transfer of an employee. The Bureau did not give Ms. Vance an alternative to an involuntary transfer, as required by

6000.40; did not give Ms. Vance proper notice as to the reason(s) for her transfer, as required by Directive 6000.40; did not properly post the available position of Systems Coordinator throughout the agency, as required by Directives 6000.11 and 6500.40; and did not properly consider other qualified candidates for the position before hiring Ms. Vance, as required by 6000.11. Therefore, it was "clearly wrong" for the Kanawha County Circuit Court to uphold the Administrative Law Judge's decision in favor of the Bureau, and the decision of both the Administrative Law Judge and the Kanawha County Circuit Court should be reversed under the standard established in McClung v. BOE. 584 S.E.2d 240.

West Virginia Code of State Rules, Division of Personnel's Administrative Rule § 143-1-2, states "The general purpose of the Division of Personnel is to attract to the service of this State personnel of the highest ability and integrity by the establishment of a system of personnel administration based on merit principles and scientific methods governing the appointment, promotion, transfer, layoff, removal, discipline, classification, compensation, and welfare of its employees, and other incidents of state employment." C.S.R. § 143-1-2 (2000).

Under West Virginia Code of State Rules, Division of Personnel's Administrative Rule § 143-1-21(1), "All agencies' officers and employees shall comply with and aid in all proper ways in carrying out the provisions of W. Va. Code §29-6-1 et seq., and the rules and orders promulgated in accordance with W. Va. Code §29-6-1 et seq. All officers and employees shall furnish any records or information which the Director or the Board may request for any purpose of W. Va. Code §29-6-1 et seq. All officers and employees shall comply with all rules, policies and orders of the Director or the Board and shall not increase nor diminish any benefits afforded any classified employee by the rules, or orders." C.S.R. § 143-1-21 (2000).

Under these Administrative rules, the state of West Virginia has recognized the importance in following procedures relating to employees. This recognition continues in the court system as well. In Powell v. Brown, 160 W.Va.723, 238 S.E.2d, 220 (1977), this Court held that "An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs."

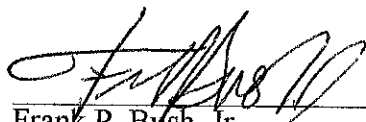
It has been a longstanding policy in West Virginia that administrations need to follow the rules it

creates for its employees. In this case, the Appellee has not followed rules it created in regard to its employee procedures and the Court should rule the Circuit Court of Kanawha County was clearly wrong in its decision and rule in favor of the Appellant.

**CONCLUSION**

For all of the foregoing reasons, Appellant respectfully requests that the Honorable Supreme Court of Appeals of West Virginia vacate the decision of the Circuit Court of Kanawha County based on the finding that the decision by the Kanawha County Circuit Court was contrary to law or lawfully adopted rules, regulations, and written policies of the West Virginia Bureau of Employment Programs and remand for further proceedings with instructions that the involuntary transfer should be set aside, that she be restored to her former position as Manager of the Elkins Job Service with full benefits, restored any loss of seniority, and grant the Appellant her costs and attorney's fees and any other relief that this Court deems just and proper.

Respectfully Submitted,  
Vickie Vance,  
By Counsel,



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**CERTIFICATE OF SERVICE**

I, Frank P. Bush, Jr., counsel of record for the Grievant/Appellant, Vickie Vance, do hereby certify that a true copy of the "APPELLANT'S BRIEF ON APPEAL" and was served upon Counsel of Record, by depositing a true copy of the same, in the United States mail, postage prepaid, addressed as follows:

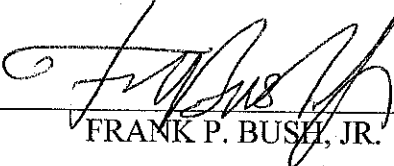
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DATED: This 30<sup>th</sup> day of December, 2004.

  
FRANK P. BUSH, JR.