WILLIAM GEORGE McCUNE, .

Grievant, .

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v. . Docket Number: 94-20-265

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KANAWHA COUNTY BOARD OF EDUCATION, .

Respondent. .

DECISION

William McCune (hereinafter Grievant) filed this complaint against his employer, the Kanawha County Board of Education, pursuant to West Virginia Code §18-29-1 et seq., on or around the middle of June, 1994. Grievant is challenging his transfer made pursuant to the Board's Policy 31.02. The parties entered into a joint set of stipulations of fact at level two in lieu of having an evidentiary hearing and a decision denying the grievance was issued based solely upon those stipulations. Grievant then appealed to level four by virtue of appeal form dated June 29, 1994. He has again requested that this Decision be based solely upon the joint stipulations of fact which makes up the entire record at level two. The following stipulations are herein accepted as the Undersigned's formal findings of fact:

Stipulations of Fact

1. Grievant, William G. McCune, is a properly certified teacher employed on a regular, full-time basis by Respondent, the Kanawha County Board of Education.
2. Grievant transferred to a position at Respondent's Cabell Alternative High School that had

been posted as physical education/health.

3. Grievant was the only certified physical education teacher assigned to Cabell During the 1993-94 employment term.

4. During the 1993-94 employment term, Grievant taught four classes of physical education, one of health and one of social studies, all of which he is certified to teach.

5. Rodney Morris and Mike Moynahan, both less senior than Grievant, also were assigned to Cabell for the 1993-94 employment term. Each of them taught four classes of social studies, for which each is certified, and two classes of physical education, for which neither is certified.

6. Respondent's Superintendent of Schools recommended the elimination of the physical education program at Cabell for the 1994-95 school year. As part of that recommendation, the Superintendent recommended the transfer and subsequent reassignment of Grievant.

7. Grievant appeared before Respondent April 22, 1994, to protest his recommended transfer and subsequent reassignment.

8. Respondent voted, April 22, 1994, to transfer Grievant from Cabell.

9. Grievant challenged his transfer and subsequent reassignment by filing this grievance.

Discussion

Grievant alleges that the Respondent violated its own administrative regulation, Section 31.00, titled Transfer of Professional Personnel/7-12 Classroom Teachers. The relevant portion of this regulation at issue was cited in the level two decision as a conclusion of law. The provisions of section 13.02 read as follows:

> If a reduction in staffing is scheduled to occur commencing with the next ensuing school year as a result of declining enrollment, the principal shall determine how best to meet the curricular needs of the school with the remaining staff. In reaching this determination the principal shall determine the curricular area[s] where reductions could be best absorbed. The least senior classroom teacher currently assigned to teach in the area[s] to be reduced shall be recommended for transfer unless it can be clearly demonstrated that such least senior teacher has teaching responsibilities in another curricular area which may not be absorbed by remaining staff. If such a demonstration is made, classroom teachers within the area to be reduced will be reviewed under the above-described criteria in order to reverse seniority.

Grievant contends that the least senior teacher (either Morris or Moynahan) should have been transferred from the school instead of him because he could have "absorbed" either of their "teaching

responsibilities in another area" due to his being licensed in the field of social studies. Therefore, Grievant asserts that the Respondent has misapplied its own policy.

Respondent contends that Grievant has not met his burden of establishing a violation of either Policy 31.02 or W. Va. Code §18A-2-7. It contends that Grievant has not proven sufficientfacts to support a finding that its decision to transfer him was arbitrary or capricious. It maintains that it was reasonable for Grievant to have been transferred as a result of the elimination of the physical education program at Cabell Alternative High School because he was the only certified physical education teacher assigned to that school.

West Virginia 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.

County boards of education have substantial discretion in matters relating to the assignment and transfer of personnel within its employ. Dillon v. Board of Education of the County of Wyoming, 351 S.E.2d 58 (W.Va. 1986). In the instant case, Respondent has fashioned a policy which it can utilize to guide it in exercising this discretionary authority. In the instant case, Grievant must persuade the undersigned that the principal at Cabell Alternative High School was arbitrary or capricious in deciding that the physical education area was the area which could best withstand the reductions or that either Mr. Morris' or Mr. Moynahan's teaching responsibilities in the field of social studies could not have been "absorbed by the remaining staff." This burden is most difficult given the limited facts of record.

Although the arbitrary and capricious standard of review of county boards of education decisions requires a searching and careful inquiry into the facts, the ultimate scope of review isnarrow, and the undersigned may not substitute his judgment for that of the Board. See generally, Harrison v. Ginsberg, 286 S.E.2d 276 (W. Va. 1982). Generally, a [board's] action can be determined to be arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985). The limited record in this case cannot support a finding that Grievant's transfer was based upon

factors not intended to be considered, that the principal ignored important aspects of the problem or that the decision was based upon reasons so implausible that they cannot be ascribed to a difference of view.

Here, it was determined that Grievant's position was within the "curricular area where the reduction could be best absorbed." In fact, it was determined that the physical education curriculum would be eliminated and Grievant transferred because he was the only certified teacher in that field. Given the undersigned's reading of Policy 31.02, the decision as to whether Mr. Morris or Mr. Moynahan were to be considered for transfer need not have been reached because they taught classes within the area which was not going to be reduced. In addition, there is no evidence as to what concerns the principal at Cabell Alternative High School took into consideration in determining that it was best to keep the two teachers certified in social studies and who were teaching withinthat field, at the school were they where currently teaching, as opposed to having another teacher assume those responsibilities who had previously concentrated on teaching physical education. It is likely that Grievant's services could be better utilized in another Kanawha County school were physical education classes are growing in number or already taxing to the existing staff. Given the general lack of explanation for the principal's decision, it must be determined that Grievant has not shown that said policy was misapplied.

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

Conclusions of Law

1. Grievant has failed to prove by a preponderance of the evidence that the principal at Cabell Alternative High School abused his/her discretion in recommending him for transfer as a result of a reduction in staff.

2. Grievant has failed to establish a violation, misapplication or misinterpretation of Respondent's Policy 32.00 or W. Va. Code §18A-2-7.

Therefore, this grievance is hereby denied.

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

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ALBERT C. DUNN, JR.

Administrative Law Judge

October 31, 1994