HARRY D. HILL, .

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Grievant, .

.

v. . Docket No. 94-20-537

.

KANAWHA COUNTY BOARD OF EDUCATION, .

.

Respondent. .

D E C I S I O N

This is a grievance by Harry D. Hill (Grievant), challenging a decision by the Kanawha County Board of Education (KCBE) to eliminate one of two driver education instructor positions at DuPont High School, resulting in Grievant's transfer to a teaching position at another school. Grievant filed this grievance at Level I on or about June 13, 1994. The grievance was denied by Grievant's immediate supervisor and appealed to Level II, where a hearing was conducted on July 14, 1994. After denial at Level II on July 28, 1994, Grievant appealed to Level III where KCBE waived consideration of the grievance. Thereupon, Grievant appealed to Level IV on August 26, 1994, and an evidentiary hearing was conducted in this Board's office in Charleston, West Virginia on November 29, 1994. As agreed at the conclusion of the hearing,this matter became mature for decision upon receipt of post-hearing submissions on December 14, 1994.

Background

There is little dispute in regard to the facts in this matter, other than the extent to which juniors and sophomores are presently being discouraged from signing up for driver education. (See footnote 1) Accordingly the following facts pertinent to resolution of this grievance have been developed from the hearings at Levels II and IV:

FINDINGS OF FACT

1. Grievant was employed by KCBE as a classroom teacher at DuPont High School (DHS) and has taught driver education and physical education for approximately eight years.

2. During the four years prior to the 1994-95 school year, enrollment at DHS declined by approximately 100 students. L II HT at 26.

3. When there were two driver education teachers at DHS, the average class size was approximately 35 students per teacher. Thus, approximately 140 students per year were accommodated by the DHS driver education program.

4. During the 1993-94 school year, KCBE directed DHS Principal Patrick Law to reduce a teaching position for the 1994-95 school year.

5. Principal Law narrowed his candidates for elimination to industrial arts or driver education. Because elimination of an industrial arts position would cause certain courses to be eliminated from the DHS curriculum, Principal Law elected to eliminate one of two driver education teaching positions for the 1994-95 school year.

6. Prior to elimination of Grievant's position, sophomore students at DHS were discouraged from taking driver education courses and not all eligible sophomores could be accommodated by two driver education teachers.

7. DHS Principal Patrick Law determined that no more than 45 students per semester (90 per year) can be accommodated by a single
driver education teacher. L II HT at 21.

8. During the first semester of the 1994-95 school year, 29 students, including 20 seniors and 9 juniors, were enrolled in the driver education class at DHS taught by the remaining driver education instructor.

9. As a result of elimination of one of two driver education positions, it is highly improbable that any DHS sophomores will be able to take driver education.

10. Since Grievant's position was eliminated, DHS students who attend morning technical training classes at KCBE's Carver Career Center are unable to enroll in driver education.

11. Although Grievant holds an administrative position at another KCBE school, he has retained an extracurricular coaching position as an assistant football coach at DHS. However, due to stress from commuting and other considerations, Grievant resigned from an extracurricular position as an

assistant basketball coach at DHS.

In addition to the foregoing facts, the following provisions in Chapter 18, Article 6 of the West Virginia Code, entitled "Driver Education" are pertinent to this grievance:

> The purpose of this article is to ensure that every secondary school pupil has the opportunity, at or about the time he reaches licensing age, to enroll in a course of driver education designed to train him to drive skillfully and safely under all traffic and roadway conditions and circumstances; to make the driver education course available to out-of-school youths and to adults; and to ensure that commercial driver education schools achieve and maintain a level of driver education equal to the minimum standards that are prescribed for secondary schools.

§ 18-6-1.

> Before any pupil is graduated from a secondary school after the first day of September, one thousand nine hundred seventy-five, he shall first be provided an opportunity and encouraged to successfully complete a driver education course approved by the state board in a public, private, parochial or denominational secondary school within the State. If a pupil has successfully completed a similar course in a secondary school of another state and the course is accepted by the state board as adequately meeting and complying with the course standards established by the state board, the aforementioned requirement shall be deemed fulfilled regarding that pupil.

§ 18-6-8.

> County boards of education, subject to the rules and regulations of the state board, may expend school funds to maintain and repair vehicles used for instructional purposes, to purchase fuel, lubricants, parts andaccessories therefor, to pay the compensation of teachers or instructors and to procure automobile insurance, where the expenditures are for the purpose of establishing or maintaining driver education courses in public secondary schools pursuant to this article. These expenditures, including compensation of teachers or instructors, may be made over a period of twelve months.
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> Each county board of education shall receive from funds specially appropriated for the driver education courses provided in public secondary schools a sum which shall be proportionate to the total amount available for distribution for that purpose to all county boards in the State in the ratio which the number of pupils who are enrolled in driver education courses in public secondary schools in the county bears to the total number of pupils who are enrolled in driver education courses in all public secondary schools within the State, but the payment shall not exceed the sum of thirty-five dollars for each such pupil per school year.

§ 18-6-6.

As noted in Grievant's post-hearing brief, other state statutes specify that certain courses of instruction are required in all schools. In that regard, W. Va. Code § 18-2-9 provides:

> (a) In all public, private, parochial and denominational schools located within this state there shall be given prior to the completion of the eighth grade at least one year of instruction in the history of the state of West Virginia. Such schools shall require regular courses of instruction by the completion of the twelfth grade in the history of the United States in civics, in the constitution of the United States, and in the government of the state of West Virginia... The state board of education shall, with the advice of the state superintendent of schools, prescribe the courses of study covering these subjects for the public schools...
>
> (b) The state board of education shall cause to be taught in all of the public schools of this state the subject of health education, ...
>
> (c) Any person violating the provisions of this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not exceeding ten dollars for each violation, and each week during which there is a violation shall constitute a separate offense. If the person so convicted occupy a position in connection with the public schools, that person shall automatically be removed from such position and shall be ineligible for reappointment to that or a similar position for a period of one year.

DISCUSSION

In order to prevail on claims of this nature, Grievant must prove the allegations in his case by a preponderance of the evidence. Williams v. Lincoln County Bd. of Educ., Docket No. 93-22-386 (Mar. 7, 1994); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Grievant argues that the decision to eliminate one of two driver education teaching positions at DHS was flawed in that the school principal, Patrick Law, failed to comply with the requirements of W. Va. Code §§ 18-6-1, et seq. Therefore, Grievant contends Mr. Law's decision constitutes an abuse of discretion and is arbitrary and capricious.

Grievant is not contending that his transfer violated any provision of school personnel law, such as W. Va. Code § 18A-2-7 governing transfer of professional personnel. Instead, Grievant suggests that §§ 18-6-1, et seq., be read to provide that, notwithstanding a school board's authority under § 18A-4-

7a to transfer employees when it is necessary to reduce the total number of professional personnel, driver education instructors may not be transferred unless a certain teacher-student ratio exists at the school undergoing the reduction in personnel. (See footnote 2) Unfortunately forGrievant, the statute does not contain such a provision and this Grievance Board is reluctant to read such a requirement into the statute.

"County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syllabus Pt. 3, Dillon v. Bd. of Educ., 351 S.E.2d 58, 59 (W. Va. 1986). Here, KCBE determined that the requirements of W. Va. Code §§ 18-6-1, et seq., could be met by one driver education instructor rather than two. In reaching that decision, consideration was given to eliminating other courses of instruction in order to keep two driver education instructors.

Grievant solicits this Grievance Board to review and overturn as an abuse of discretion the underlying educational decision to maintain certain courses in the curriculum while reducing the opportunities for students to partake of another course. Clearly, such decisions fall within the discretion of the county board as noted in Dillon, supra, and, to prevail, a grievant must demonstrate that the decision was arbitrary and capricious. McCune v.Kanawha County Bd. of Educ., Docket No. 94-20-265 (Oct. 31, 1994). See Pockl v. Ohio County Bd. of Educ., 406 S.E.2d 687 (W. Va. 1991).

In applying an "arbitrary and capricious" standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching the decision and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 286 S.E.2d 276, 283 (W. Va. 1982). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, supra, at 286.

In evaluating Grievant's arguments, the undersigned administrative law judge finds that the intended beneficiaries of §§ 18-6-1, et seq., are students, not teachers. As Grievant suggests, this statute creates a certain curricular priority for driver education classes. However, the statute does not impose a mandatory duty on county boards of education to offer driver education to all sophomores who wish to enroll, and certainly does not contain a mandate to the degree that history and health are required under § 18-2-9. Thus, driver education remains an "elective" course of instruction. More

importantly, the statute upon which Grievant relies does not contain a specific formula for determining how many teachers are required to provide an adequate "opportunity" to complete an elective course in driver education.

Obviously, when eliminating positions to compensate for declining enrollment figures, school administrators must make hard choices. While Principal Law did not consider W. Va. Code §§ 18-6-1 et seq., in making his initial decision to eliminate a driver education teaching position at DHS, his uncontradicted testimony makes it clear that his determination was based on an educational judgment that eliminating one of two driver education positions would have the least detrimental effect on DHS students. There was no evidence that this conclusion was reached in bad faith.

Likewise, Grievant has not demonstrated that another teaching position, such as industrial arts, could have been eliminated without any detrimental impact on DHS students. While Grievant has marshalled considerable evidence in support of the merits of providing driver education, as encouraged by § 18-6-8, this evidence falls short of proving that the decision to eliminate one of two driver education teaching positions was arbitrary and capricious. See McCune v. Kanawha County Bd. of Educ., Docket No. 94-20-265 (Oct. 31, 1994).

In addition to the foregoing discussion, the following conclusions of law are appropriate in this matter:

CONCLUSIONS OF LAW

1. Grievant has the burden of proving each element of a grievance of this nature by a preponderance of the evidence. Stout v. Harrison County Bd. of Educ., Docket No. 93-17-081 (Apr. 12, 1994); Randolph v. Harrison County Bd. of Educ., Docket No. 17-88-001-2 (June 30, 1988).

2. W. Va. Code §§ 18-6-1, et seq., operates to make a course in driver education a "required elective" in public secondary schools but does not compel a board of education to maintain a specific ratio of driver education teachers to the student population eligible to complete such a course of instruction.

3. Grievant failed to establish that DuPont High School Principal Patrick Law abused his discretion in recommending the elimination of one of two driver education teaching positions or that such decision was arbitrary and capricious under the circumstances. See Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281 (1974); Dillon v. Bd. of Educ., 351 S.E.2d 58 (W. Va. 1986);

Harrison v. Ginsberg, 286 S.E.2d 276 (W. Va. 1982); McCune v. Kanawha County Bd. of Educ., Docket No. 94-20-265 (Oct. 31, 1994).

Accordingly, this grievance is **DENIED**.

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.

LEWIS G. BREWER

Administrative Law Judge

Dated: March 22, 1995

Footnote: 1Grievant introduced the results of a "survey" which was "randomly" distributed to DHS students. The survey forms are entitled "FACT SHEET FOR DuPONT STUDENTS WHO WANTED TO ENROLL IN A DRIVER EDUCATION COURSE BUT COULD NOT DO SO." The undersigned is unable to give any weight to these documents as they contain hearsay statements and the circumstances under which they were obtained do not warrant according them any probative value. See W. Va. R. Evid. 803. However, most of the pertinent evidence contained therein is otherwise established by the record and generally conceded by KCBE.

Footnote: 2KCBE took the position in its opening statement at Level IV that Grievant does not have standing to invoke W. Va. Code §§ 18-6-1, et seq., as this is not a "statute ... under which [Grievant] work[s]" within the meaning of W. Va. Code § 18-29-2(a) defining "grievance." However, in its post-hearing submission, KCBE stated:"Please consider the findings and conclusions set forth in Level II decision dated July 28, 1994, ... as Respondent's Proposed Findings of Fact and Conclusion of Law." The Level II decision makes no reference to Grievant's standing to invoke § 18-6-1, simply addressing Grievant's claims on their merits. Accordingly, it appears KCBE decided to abandon this argument after the Level IV hearing was concluded.