CLAUDE BLANKENSHIP

v. DOCKET NO. 95-23-314

LOGAN COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant Claude Blankenship initiated this grievance against the Logan County Board of Education ("LBOE") on or about May 5, 1995. Grievant alleged a violation of W. Va. Code § 18A-4-7a, and requested as relief that his transfer be rescinded so that he would be restored to his former position teaching Language Arts at Man High School. (See footnote 1)

The following facts, except for finding of fact number six, were developed at the Level II hearing held May 25, 1995. Finding of fact number six was stipulated by the parties.

Findings of Fact

1. Grievant's certification is in Health and Physical Education 1-12, and Language Arts 7-9.

2. During the two years preceding his transfer, Grievant was employed by LBOE as a tenth grade Language Arts teacher (See footnote 2) at Man High School. This position was posted, he made application for the position, and he was placed into this position. The county superintendent determined Grievant should be allowed to teach one grade level above his certification pursuant to State Education Policy 5202, Section K-4. Grievant was not issued a permit to teach tenth grade Language Arts, nor did he obtain tenth grade Language Arts certification.

3. On or about April 5, 1995, Grievant received notification that the Logan County Superintendent was recommending his transfer, and he was in fact later transferred to another teaching position. 4. Grievant's transfer was made in connection with a reduction in force and subsequent realignment of personnel.

5. The position reduced was not a Language Arts position.

6. Grievant has more seniority than four other Language Arts teachers at Man High School, including the person who was placed in Grievant's position.

7. The reason given by LBOE to Grievant for his transfer was that a Grievance Board decision and W. Va. Code § 18A-4-7a required that a person teaching in an area for which he was not fully certified be the first person transferred before LBOE could look to other factors in deciding who should be transferred.

Discussion

State Board Of Education Policy 5202, Section K-1 provides:

> The professional educator's assignment is restricted to the endorsement(s) shown on the license. (§18A-3-2)

Grievant, however, was allowed to teach tenth grade Language Arts in accordance with Policy 5202, Section K-4, which provides the following exception:

> The county superintendent may assign an employee, with his/her consent, one grade higher or lower than the grade levels on the employee's certificate. The assignment shall be consistent with the specialization(s) indicated on the certificate. If no employee within the school consents to fill a specific assignment which must be filled, the county superintendent may assign an employee to the position.

LBOE transferred Grievant in the realignment following a reduction in force, because it believed W. Va. Code § 18A-4-7a and a prior Grievance Board decision (See footnote 3) required it to transfer a person teaching out of certification, rather than another employee with less seniority than Grievant. LBOE points to the section of W. Va. Code § 18A-4-7a highlighted below as controlling its decision in this case:

> Whenever a county board is required to reduce the number of professional personnel in its employment, the employee with the least amount of seniority shall be properly notified and released from employment pursuant to the provisions of section two [§ 18A-2-2], article two of this chapter: **Provided, That all persons employed in a certification area to be reduced who are employed under a temporary permit shall be properly notified andreleased before a fully certified employee in such a position is subject to release**... (Emphasis added.)

The highlighted portion of Code § 18A-4-7a is not applicable, because Grievant was not employed in "a certification area to be reduced", and Grievant's position was not, in fact, reduced. (See footnote 4) Grievant was transferred in a realignment of positions in connection with a reduction in

force. It is W. Va. Code § 18A-2-7 which is applicable to Grievant's transfer. That Code § states in pertinent part:

> The superintendent, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter.

Grievant relies upon the following language from Brown v. Logan County Bd. of Educ., Docket No. 90-23-177 (Oct. 31, 1990), to support his position that he had a right to remain in the position:

> Policy 5202 in no way indicates its utilization is designed to set up any sort of temporary employment situation, e.g., until a person "better-suited" can be found; rather, if one is appropriately assigned to a class one grade-level above or below her certification, she assumes all rights to that position as if she had been selected therefor traditionally, i.e., pursuant to Code §18A-4-7a. (See footnote 5)

Brown does not control the outcome of this case. School personnel do not have a right to remain in a particular position. See State ex rel. Hawkins v. Tyler County Bd. of Educ., 275 S.E.2d 908 (W. Va. 1980); Gongola v. Ohio County Bd. of Educ., Docket No. 95-35-276 (Sept. 29, 1995). Rather, "[c]ounty boards of education have broad discretion in personnel matters, including transfers, but must exercise that discretion in a manner which is not arbitrary or capricious." Dodson v. McDowell County Bd. of Educ., Docket No. 93-33-243 (Feb. 15, 1994). The Supreme Court of Appeals of West Virginia has "repeatedly held that the power to transfer teachers must be exercised in a reasonable manner and in the best interests of the school." Townshend v. Bd. of Educ. of County of Grant, 396 S.E.2d 185, 188 (W.Va. 1990). See Dillon v. Bd. of Educ. of County of Wyoming, 351 S.E.2d 58 (W.Va. 1986). The burden is thus on Grievant to demonstrate that LBOE's action was arbitrary and capricious or an abuse of discretion.

The undersigned concludes that the action of LBOE was arbitrary and capricious because the sole reason for transferring Grievant was a mistaken belief that it was required by law to doso. In fact, it appears from the record that LBOE may have chosen to transfer a less senior employee had it not concluded it had no choice but to transfer Grievant. To simply grant the grievance, however, would remove LBOE's discretion to decide which employee should have been transferred. For these reasons, this matter should be remanded to LBOE to determine whether Grievant should have been transferred.

Conclusions of Law

1. The burden of proof is on Grievant in this matter to prove all the allegations of his grievance by a preponderance of the evidence. Vance v. Logan County Bd. of Educ., Docket No. 92-23-045 (May 21, 1992).

2. W. Va. Code § 18A-4-7a is not applicable to this grievance, because Grievant was not employed in "a certification area to be reduced", and Grievant's position was not, in fact, reduced.

3. "County boards of education have broad discretion in personnel matters, including transfers, but must exercise that discretion in a manner which is not arbitrary or capricious." Dodson v. McDowell County Bd. of Educ., Docket No. 93-33-243 (Feb. 15, 1994); Dillon v. Bd. of Educ. of County of Wyoming, 351 S.E.2d 58 (W.Va. 1986).

4. Grievant demonstrated that LBOE acted in an arbitrary and capricious manner by basing its decision to transfer him upon a mistaken belief that it had to do so.

Accordingly, this grievance is **GRANTED IN PART AND DENIED IN PART**. This grievance is **ORDERED REMANDED** to the Logan County Board of Education for a decision on whether Grievant should have been the person transferred in the realignment of positions.

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: December 29, 1995

Footnote: 1 This grievance was denied at Levels I and II, and Level III was waived by Grievant. A Level IV hearing was scheduled for September 21, 1995. However, on that date the parties agreed to submit this matter for decision on the lower level record. The parties used the scheduled hearing time for oral argument, and this matter became mature for

decision at the conclusion of the oral arguments.

Footnote: 2 At one point in the record Grievant identified his former teaching position as English/Language Arts, but later referred to it several times simply as a Language Arts position. A finding that it was an English/Language Arts position would not affect the outcome of this case.

Footnote: 3 A Grievance Board decision was mentioned at the transfer hearing before LBOE on April 10, 1995, but was not clearly identified. The undersigned has been unable to find any Grievance Board decision which required a county board of education to transfer a person teaching out of field before looking at any other personnel to transfer.

Footnote: 4 A permit, as that term is used in W. Va. Code § 18A-4-7a, is defined by Policy 5202, Section 7-A-1 as "a one-year license issued at the request of the employing superintendent to staff a specific position. The county superintendent verifies that the applicant is the most qualified candidate." Grossl v. Mingo County Bd. of Educ., Docket No. 93-29-496 (July 21, 1994). Grievant was not issued a permit; therefore, it is not clear that the highlighted language of this Code Section would ever be applicable to Grievant's situation. That issue, however, need not be addressed.

Footnote: 5 This Grievance Board has also determined that when a county superintendent assigns a teacher one grade level above or below hiscertification under Policy 5202, it is an interim measure. Chapman v. Harrison County Bd. of Educ., Docket No. 17-87-180-2 (Mar. 1, 1989). In a footnote, Brown questioned whether a teacher assigned to a position one grade level beyond her certification must "obtain a permit and pursue certification in her newly-assigned area, for Code §18A-3-1 restricts an educator's assignment to the endorsements upon her professional certificate and this standard is expressly embraced by Policy 5202 itself (Section K-1). Certainly, if such is required, full compliance therewith would be necessary before the teacher gained 'all rights as if she had been selected for the position traditionally.'"