MARLENE STEWART, ET AL.,

Grievants,

v. Docket No. 96-20-370

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants, Marlene Stewart, Greg Cyrus, Barbara Hill, Barbara Barnett, and Valisa Vealey, are teachers employed by the Kanawha County Board of Education ("KCBOE"). On May 10, 1996, they filed a grievance to protest being put on the transfer list without placement into specific positions. They request as relief that KCBOE be required to RIF the least senior teachers in Grievants' areas of certification, and then place them in these specific positions. At Level I Grievants' principals were without authority to act. This grievance was denied at Level II and waived at Level III. On appeal to Level IV, the parties agreed to submit the case on the record. This case became mature for decision on October 1, 1996, the deadline for the submission of the parties' proposed findings of fact and conclusions of law.

The facts in this case are not in dispute, and the issue before the undersigned is a question of law.

Findings of Fact

1. In Spring 1996, KCBOE placed Grievants on transfer and subsequent reassignment, placement not yet determined.

2. The reasons for Grievants' placement on the transfer list varied, and included declining enrollment, proposed reduction of federal funds, and displacement by a teacher more senior in their certification area.

3. Grievants were not assigned a specific position, but were to bid on posted vacancies. Grievants were more senior in their areas of certification than some other teachers placed on transfer.

4. Some less senior, transferred teachers were placed in specific positions.

5. As of September 27, 1996, all Grievants, with the exception of Grievant Vealey, had been placed in regular positions. Grievant Vealey is currently employed as a long-term substitute at Roxalana Elementary. (See footnote 1)

6. Since 1991, KCBOE's practice is to match or "tag" vacant positions for the more senior, transferred teachers to bid on and receive. After there are no more vacant positions for the transferred teachers, KCBOE then RIF's the least senior teachers, in the required certification areas, to allow for the placement of the rest of the transferred teachers.

7. All transferred and regular teachers have the right to bid on the vacant positions, so it is possible for the senior, transferred teacher to not receive the "tagged" position. Almost always, the transferred teacher receives the position. 8. KCBOE has utilized this procedure for transferred employees to decrease the number of employees it must RIF.

Issues

Grievants argue KCBOE violated W. Va Code §18A-4-7a when it did not allow them to displace the least senior teacher in their area of certification. They argue KCBOE should be required to follow the requirements of this Code Section.

KCBOE avers W. Va. Code §18A-4-7a does not apply to Grievants because they were "not subject to release", and transfers do not trigger the requirements of the statute. KCBOE also argues a reduction-in-force is not triggered until sufficient vacancies do not exist to provide placement for the transferred teachers. Further, KCBOE states Grievants have failed to identify any statutory requirement it has violated, and since it has followed this policy for many years and adopted it as the result of a Kanawha County Circuit Court Decision, its actions cannot be seen as arbitrary and capricious.

Discussion

W. Va. Code §18A-4-7a discusses RIF's and states in pertinent part:

> an employee subject to release shall be employed in any other professional position where such employee is certified and was previously employed or to any lateral area for which such employee is certified and/or licensed, if such employee's seniority is greater than the seniority of any other employee in that area of certification and/or licensure: Provided further, That, if an employee subject to release holds certification and/or licensure in more than one lateral

> area and if such employee's seniority is greater than the seniority of any other employee in one or more of these areas of certification and/or licensure, the employee subject to release shall be employed in the professional position held by the employee with the least seniority in any of those areas of certification and/or licensure.

It has been repeatedly ruled by this Grievance Board that this Code Section does not apply to transferred employees, as they are not "subject to release", and the CodeSection which does apply to transferred employees is W. Va. Code §18A-2-7. Morgan v. Wood County Bd. of Educ., Docket No. 89-54-470 (Nov. 29, 1989).

W. Va. Code §18A-2-7 grants broad discretion to a superintendent, and gives him the authority to transfer school personnel subject only to the approval of the board. Post v. Harrison County Bd. of Educ., Docket No. 89-17-355 (Feb. 20, 1990). Further, teachers have no right to be assigned to a particular school, and transfers are not based on seniority, but are based on the needs of the school, as decided in good faith by the superintendent and the board. Hawkins v. Tyler County Bd. of Educ., 166 W. Va. 363, 275 S.E.2d 592 (1979) and Post, supra. See Jochum v. Ohio County Bd. of Educ., Docket No. 91-35-396 (Jan. 31, 1992). Thus, whether a transfer was properly conducted is judged by the arbitrary and capricious standard. Lester v. McDowell County Bd. of Educ., Docket No. 93-33-256 (Jan. 31, 1994); See also Hawkins, supra; LaMastus v. Wyoming County Bd. of Educ., Docket No. 55-87-290-4 (Mar. 23, 1988); Tenny v. Barbour County Bd. of Educ., Docket No. 01-87-166-2 (Nov. 13, 1987).

KCBOE's method of transferring Grievants was not arbitrary or capricious. The purpose of the transfer was to reallocate staff where the need existed, and to ensure that senior teachers had a position prior to the beginning of the school year. All Grievants had a position and none lost any work time, benefits, or salary as the result of the transfer. (See footnote 2)

Grievants' allegation of discrimination, arguing they were treated differently than other transferred employees, is also without merit. W. Va. Code §18-29-2(m) definesdiscrimination as "differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing."

To prove discrimination a grievant must establish a prima facie case which consists of demonstrating:

> (a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated [to] actual job responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

If a grievant establishes a prima facie case, a presumption of discrimination or favoritism exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, a grievant may still prevail if he can demonstrate the reason given by the respondent was pretextual. Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievants have failed to demonstrate a prima facie case. They were not similarly situated as the less senior, transferred teachers. The need to RIF employees did not exist until the vacancies were filled. Grievants have also failed to demonstrate Respondent's method of transfer and subsequent reassignment has been detrimental to them. As teachers with more seniority and more certifications, they were very likely to receive the "tagged" positions, for which they applied. Also, this method allows Grievants more control in their subsequent placement. If they do not bid on a position, they are placed prior to thestart of the school year. Thus, Grievants have failed to demonstrate that KCBOE discriminated against them.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusion of Law

1. There is no requirement in W. Va. Code §18A-2-7 that transfers be based on seniority or that the seniority requirements of W. Va. Code §18A-4-7a control transfers and subsequent assignments. Jochum v. Ohio County Bd. of Educ., Docket No. 91-35-396 (Jan. 31, 1992). See also Post v. Harrison County Bd. of Educ., Docket No. 89-17-355 (Feb. 20, 1990).

2. Professional employees are not entitled to an assignment in any particular school. State ex rel. Hawkins v. Tyler County Bd. of Educ., 166 W.Va. 363, 275 S.E.2d 908 (1980).

3. Absent any evidence that a board abused its discretion or acted in an arbitrary and capricious manner, an administrative transfer of an employee must be upheld. Lester v. McDowell County Bd. of Educ., Docket No. 93-33-256 (Jan. 31, 1994); See also Hawkins, supra; LaMastus v. Wyoming County Bd. of Educ., Docket No. 55-87- 290-4 (Mar. 23, 1988); Tenny v. Barbour County Bd. of Educ., Docket No. 01-87-166-2 (Nov. 13, 1987).

4. KCBOE did not violate W. Va. Code §18A-4-7a when it transferred Grievants without designating their specific, subsequent placement.

5. KCBOE did not abuse its substantial discretion or act in an arbitrary or capricious manner in the transfer and subsequent placement of Grievants. 6. KCBOE's method of transferring its more senior and less senior staff is not discriminatory, decreases the number of unnecessary RIF's, and is in the best interest of the school and its educational programs. See Cowan et al. v. Harrison County Bd. of Educ., 195 W.Va. 377, 465 S.E.2d 648 (1995).

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.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: January 31, 1997

Footnote: 1

No information was received about her placement, and whether she preferred this substitute position in this location to a regular position in another location.

Footnote: 2

Even though Grievant Vealey did not have a permanent position at the beginning of the school year, she was placed in a full-time, long-term substitute position. It is assumed she is currently treated as a regular full-time employee, as required by statute, for all intents and purposes, as no specific allegations were raised about this issue.