JOY AGEE,

Grievant,

v.

DOCKET NO. 96-50-475

WAYNE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Joy Agee, filed a grievance on September 13, 1996, alleging a "[v]iolation of WV Code 18A-2-7 in regard to grievant's transfer from assignment to Fifth grade to teaching a Kindergarten class at Crum Elementary School." Grievant seeks to be reinstated to the fifth grade position. The grievance was denied at the lower levels of the grievance process, and Grievant appealed to level four on November 20, 1996. A hearing was held on January 10, 1997. Upon agreement of the parties, the record was left open for submission of additional information from the Superintendent, which was received on or about January 24, 1997. The parties submitted stipulations on January 31, 1997, and filed proposed findings of fact and conclusions of law on March 3, 1997, at which time this case became mature for decision.

The material facts in this case are not in dispute and are set forth in the following findings of fact.

Findings of Fact

1. Grievant has been employed by the Wayne County Board of Education ("Board") as a classroom teacher for four years.

2. Grievant's teaching history with the Board prior to the 1995-96 school year includes 1st grade, 3rd grade, a 3/4 split, and a gifted program.

3. During the 1995-96 school year, Grievant was employed as a fifth grade teacher at Crum

Elementary School.

4. There were two fifth grade teachers during the 1995-96 school year at Crum Elementary.

5. There were three Kindergarten teachers at Crum Elementary during the 1995-96 school year, including Billie Simms, who was employed on a substitute basis.

6. The Board's projected enrollment for the 1996-97 year anticipated enough students to employ two fifth grade teachers and two Kindergarten teachers.

7. Due to this projected enrollment, Billie Simms, the substitute, was placed back on the substitute list. (See footnote 1)

8. At the beginning of the 1996-97 school year, the actual student enrollment indicated that only one fifth grade teacher was needed, but three Kindergarten teachers were needed.

9. Crum Elementary Principal Dawson determined that the most efficient and expeditious way of dealing with this enrollment problem would be to realign Grievant, the least senior fifth grade teacher, to the Kindergarten position.

10. Principal Dawson called a meeting on September 6, 1996, and informed the faculty that Grievant would be realigned to the Kindergarten position. Grievant told Principal Dawson she refused to take the position. Principal Dawson told Grievant that the desks would be moved in the fifth grade classrooms and the Kindergarten classrooms to accommodate the change, and that she better not call in sick because there would be a classroom of Kindergarten students waiting for her the next day.

11. Grievant took the Kindergarten position under protest, because she felt her job was in jeopardy if she did not accept the assignment.

12. The two fifth grade classes were combined resulting in a total of 28 students in one fifth grade class taught by Cheryl Carr, the more senior fifth grade teacher. (See footnote 2)

13. In November and December 1996, three additional students enrolled in the fifth grade at Crum Elementary, resulting in a total of 31 students in Ms. Carr's classroom.

14. Superintendent Carman elected to add a substitute to assist the fifth grade teacher with the overage for the remainder of the year, rather than move Grievant back into the fifth grade, which would disrupt the Kindergarten children she had been teaching. Further, by adding a substitute to assist, should the enrollment decline back down to 28sometime during the year, the substitute could simply be relieved of that position at that time.

15. The total number of teachers at Crum Elementary did not increase from the 1995-96

school year to the 1996-97 school year.

Discussion

Grievant first alleges her assignment to the Kindergarten class is a violation of W. Va. Code § 18A-2-7, specifically, the notification requirements of that Section, which provide:

> 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. However, an employee shall be notified in writing by the superintendent on or before the first Monday in April if he is being considered for transfer or to be transferred . . . .

There is no dispute that Grievant was not notified or put on transfer in the preceding Spring of the 1995-96 school year. The Board contends that Grievant's assignment was not a transfer under W. Va. Code § 18A-2-7.

In Matthews v. Preston County Bd. of Educ., Docket No. 39-88-239 (July 27, 1989), it was held that “a transfer may consist of the reassignment of an employee to a different position, a different location or significantly different duties or responsibilities. The addition of similar duties does not constitute a transfer.” Id., Conclusions of Law, Nos. 1, 2. In Dunleavy v. Kanawha County Bd. of Educ., Docket No. 20-89-008 (Feb. 23, 1989), it was held that “schedule adjustments which do not include duties outside of an employee's presently utilized area of certification, discipline or department . . . [are generally not] assignments amounting to a transfer . . .”. Dunleavy, Conclusion of Law, No. 1, citingVanGilder v. Mineral County Bd. of Educ., Docket No. 27-87-320-2 (June 16, 1988). The inquiry is whether Grievant has been assigned significantly different duties or responsibilities outside her presently utilized area of certification, discipline or department.

While the above general principles apply, the outcome depends upon the particular facts of this case. See Kidd v. Fayette County Bd. of Educ., Docket No. 89-10-452 (Dec. 14, 1989). It has been held that a professional employee is not entitled to an assignment in any particular school. State ex. rel. Hawkins v. Tyler County Bd. of Educ., 275 S.E.2d 908 (W. Va. 1980). Further, boards are not required to post grade-specific elementary teaching positions, and an employee who is hired as an elementary school teacher is not entitled to any specific grade assignments within an elementary school. Pascoli v. Ohio County Bd. of Educ., Docket Nos. 91-35-229/239 (Nov. 27, 1991). Elementary education teachers are certified and qualified to teach any elementary grade and are,

therefore, interchangeable. These positions require no specific criteria or skills and elementary certification qualifies all holders to teach in all of the designated grade areas, usually 1-6, K-6, or 1-8. Pascoli, supra.

Grievant is certified in elementary education, K-8. Grievant has been employed by the Board for five years, and in those five years has taught 1st grade, 3rd grade, a 3/4 split, a gifted program, and fifth grade. It is clear Grievant is certified to teach any level in the elementary school setting, and she cannot, and does not, claim that her duties as an elementary education teacher have changed significantly as a result of her assignment to teach Kindergarten.

Grievant has not demonstrated that she has been assigned significantly different duties or responsibilities outside her presently utilized area of certification, discipline ordepartment, i.e., elementary education. Thus, Grievant's reassignment to the Kindergarten teacher position in the same school does not constitute a transfer. See Blackburn v. Mingo County Bd. of Educ., Docket No. 95-29-489 (Mar. 27, 1996).

Grievant's second argument is that the Kindergarten teacher position was an established, existing, or newly created position which should have been posted and was not, in violation of W. Va. Code § 18A-4-7a. That Code Section provides, in pertinent part:

> Boards shall be required to post and date notices of all openings in established, existing or newly created positions in conspicuous working places for all professional personnel to observe for at least five working days.

However, paragraph 11 of that Code Section provides the following exception to the posting requirements of paragraph 10, above:

> Notwithstanding any other provision of the code to the contrary, where the total number of classroom teaching positions in an elementary school does not increase from one school year to the next, but there exists in that school a need to realign the number of teachers in one or more grade levels, kindergarten through six, teachers at the school may be reassigned to grade levels for which they are certified without that position being posted: Provided, That the employee and the county board of education mutually agree to the reassignment.

W. Va. Code § 18A-4-7a, ¶ 11, like Code § 18A-4-7a, ¶¶ 6 and 12, which relate to the filling of certain elementary school teaching positions, creates an exception to the posting requirements of Code § 18A-4-7a, ¶ 10. Unless Code § 18A-4-7a, ¶¶ 6, 11, or 12, applies to the vacancy, it must be

posted. See Glover v. Pendleton County Bd. of Educ., Docket No. 95-36-408 (Oct. 19, 1995); Thomas v. Kanawha County Bd. of Educ., Docket No. 91-20-287 (Nov. 14, 1991), citing Lloyd v. Kanawha County Bd. of Educ., Docket No. 91-20-327 (Oct. 29, 1991), aff'd Circuit Court of Kanawha County, Civil Action No. 91-AA- 251 (Dec. 6, 1993). The total number of classroom teaching positions in Crum Elementarydid not increase from the 1995-96 school year to the 1996-97 school year, therefore, this exception to the posting requirements of Code § 18A-4-7a is applicable, and the Board could legally reassign Grievant from the fifth grade to the Kindergarten teaching position.

However, this case raises an issue which has not been previously addressed by this Grievance Board. Paragraph 11 of Code § 18A-4-7a provides that the employee and the county board of education must mutually agree to the reassignment. Grievant did not agree to the reassignment, but believed her job was in jeopardy if she refused. Since Paragraph 11 is merely an exception to the posting requirements, if no mutual consent exists to the reassignment, the Board is required to either try to reassign another teacher to the position, or to post the position in accordance with Paragraph 10 of W. Va. Code
§ 18A-4-7a. In the instant case, Grievant did not agree to the reassignment, but took the position rather than face possible discipline, following which she filed this grievance. Because Grievant did not agree to the position, the Board violated W. Va. Code § 18A-4- 7a, by not attempting to fill that position with someone other than Grievant.

The remaining issue, then, is that of the relief to which Grievant is entitled under these circumstances. Grievant wishes to be reinstated to her original fifth grade position. Because the school year is almost over, the undersigned declines to reinstate Grievant to her original fifth grade position, which would only serve to unnecessarily disrupt both the fifth grade and Kindergarten classrooms. However, because the Board violated the applicable provisions of W. Va. Code § 18A-4-7a, Grievant shall be instated into a fifth grade position at Crum Elementary for the 1997-98 school year. (See footnote 3)

Conclusions of Law

1. The realignment of Grievant from a fifth grade teaching assignment to a Kindergarten teaching assignment during school year 1996-97 did not entail significantly different duties or responsibilities outside of Grievant's presently utilized area of certification, elementary education, and

thus does not constitute a transfer under W. Va. Code § 18A-2-7. See Blackburn v. Mingo County Bd. of Educ., Docket No. 95-29-489 (Mar. 27, 1996); Kidd v. Fayette County Bd. of Educ., Docket No. 89-10-452 (Dec. 14, 1989); Matthews v. Preston County Bd. of Educ., Docket No. 39-88-239 (July 27, 1989); Dunleavy v. Kanawha County Bd. of Educ., Docket No. 29-89-008 (Feb. 23, 1989).

2. W. Va. Code § 18A-4-7a, ¶11, relating to the filling of certain elementary school teaching positions, creates an exception to the posting requirements of Code § 18A-4-7a, ¶ 10. Unless Code § 18A-4-7a, ¶ 11, or any other Section providing an exception, applies to the vacancy, it must be posted. See Glover v. Pendleton County Bd. of Educ., Docket No. 95-36-408 (Oct. 19, 1995); Thomas v. Kanawha County Bd. of Educ., Docket No. 91-20-287 (Nov. 14, 1991), citing Lloyd v. Kanawha County Bd. of Educ., Docket No. 91-20-327 (Oct. 29, 1991), aff'd Circuit Court of Kanawha County, Civil Action No. 91-AA-251 (Dec. 6, 1993).

3. W. Va. Code § 18A-4-7a, ¶ 10, requires a county board of education and an employee to mutually agree to a reassignment of teaching duties at the elementary school level.

4. As Grievant did not agree to accept the Kindergarten teaching assignment at issue, she has proven by a preponderance of the evidence that the Board violated that Code Section. Accordingly, this grievance is **GRANTED** and the Board is hereby **ORDERED** to instate Grievant into a fifth grade teaching position at Crum Elementary School for the 1997-98 school year.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wayne 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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MARY JO SWARTZ

Administrative Law Judge

Dated: May 7, 1997

Footnote: 1

No other evidence was presented as to the status of the regular teacher, if any, for whom Ms. Simms was substituting, although it is clear there was a third Kindergarten class at Crum Elementary during the 1995-96 school year.

Footnote: 2

W. Va. Code § 18-5-18a establishes a maximum pupil-teacher ratio of 25 students per teacher for a fifth grade classroom. However, with the permission of the state superintendent of schools, a fifth grade classroom may legally have 3 students over the maximum pupil-teacher ratio. No evidence was presented whether or not the state superintendent had given permission for the overage.

Footnote: 3

Because Grievant has remained employed by the Board for the 1996-97 school year, she is not entitled to any back pay.