HENRY BAISDEN,

Grievant,

v. **DOCKET NO. 97-29-298**

MINGO COUNTY BOARD OF EDUCATION,

Respondent,

and,

LINDA STATON,

Intervenor.

DECISION

This grievance was filed by Grievant Henry Baisden against Respondent Mingo County Board of Education ("MBOE"), alleging that his transfer, and the subsequent posting of his old position, was arbitrary and capricious, and was in violation of W. Va. Code §§ 18A-2-7 and 18A-4- 8b. (See footnote 1) As relief, Grievant seeks reinstatement to his former custodial position at the building which now houses Burch Middle School, and compensation for expenses incurred as a result of his assignment to Burch High School for the 1997-98 school year. The following Findings of Fact necessary to the Decision reached, are made based upon the evidence presented at the Level II and Level IV hearings. (See footnote 2)

Findings of Fact

1. Grievant is employed by MBOE as a custodian. During the 1996-97 school year he was employed at Delbarton Elementary School.

2. After the end of the 1996-97 school year, Delbarton Elementary School (K through 5) was closed, and the building housing Burch Middle School was closed. Burch Middle School was moved to the building which had housed Delbarton Elementary School, and Burch Middle School's grade levels were changed to 4 through 8, from 6 through 8. Most of the students in grades K through 3 who would have attended Delbarton Elementary School had it remained open, will attend Varney

Elementary School during the 1997-98 school year, and a few will attend Lenore Elementary School.

3. In the Spring of 1997, MBOE placed all service personnel at Delbarton Elementary School, including Grievant, on transfer.

4. During the 1996-97 school year there were three custodians employed at Delbarton Elementary School. During the 1997-98 school year three custodians will be employed in that same building. MBOE posted the three custodial positions.

5. Intervenor Linda Staton was a custodian at the old Burch Middle School during 1996- 97, and was placed on transfer in the Spring of 1997. One secretary at the old Burch Middle Schooldid not have enough seniority to transfer or bid into another position, and was reduced in force. All other service personnel at that building were transferred or bid into other positions.

6. Two of the custodians at Delbarton Elementary School bid into the custodial positions which remained at that school building. Both have more seniority than Grievant. Ms. Staton and Grievant also bid on the three custodial positions. Ms. Staton is more senior than Grievant, and was placed in the third position.

7. Grievant bid on a posted custodian position at Burch High School, and was placed in that position for the 1997-98 school year.

Discussion

Grievant bears the burden of proving the allegations of his grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (March 28, 1996). Grievant argued MBOE should have returned him to his custodial position at the building now housing Burch Middle School. He pointed to the holding in Burgess, et al., v. Raleigh County Bd. of Educ., Docket No. 95-42-253 (Sept. 28, 1995), in support of his argument. Indeed, that case held that when the grade levels are changed at a building, but the size of the custodial staff and their duties at the building remain the same, those custodial positions are not newly created positions, and the board of education is not required by statute (W. Va. Code § 18A-4-8b) to post the positions. That case, however, has no bearing on the issue in this case. The issue in this case is whether MBOE could transfer Grievant. Clearly it could, and the fact that it posted the custodial positions at issue here when it was not required to do so, has no bearing on Grievant. It does not affect whether Grievant could be transferred. Another view of Grievant's argument is that MBOE had no reason to transfer

Grievant, because the custodial jobs at the school did not change. This view looks at Grievant's position in a vacuum. In this case, MBOE placed all the custodians at Delbarton Elementary School on transfer, knowing there would be displacements, and would have to be changes in assignments with the closure of the Burch Middle School building. MBOE essentially placed a more senior displaced custodian in Grievant's position. While MBOE could have left all the custodians at the Delbarton Elementary School building, it did not have to do so. MBOE had the discretion to place all the custodians on transfer, and to place them in the same position or in different positions, so long as its action was not arbitrary and capricious. See Dillon v. Bd. of Educ. of County of Wyoming, 351 S.E.2d 58 (W. Va. 1986); Eckenrode v. Kanawha County Bd. of Educ., Docket No. 96-20-302 (Jan. 22, 1997); Conner, supra; Wellman v. Mercer County Bd. of Educ., Docket No. 95-27-327/300 (Nov. 30, 1995); Mullins v. Logan County Bd. of Educ., Docket No. 94-23-283 (Sept. 25, 1995); and Dodson v. McDowell County Bd. of Educ., Docket No. 93-33-243 (Feb. 15, 1994).

The evaluation of a personnel decision under the arbitrary and capricious standard entails close examination of the process used to make the decision. Considerable deference must be afforded the professional judgment of those who made the decision. Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648 (1995). Baird v. Kanawha County Bd. of Educ., Docket No. 95-20-445 (Sept. 16, 1996). "In applying the `arbitrary and capricious' standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that 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, 169 W. Va. 162, 286 S.E.2d 276 (1982). Moreover, a decision of less than ideal clarity may be upheld if theagency's path in reaching that conclusion may reasonably be discerned. Bowman, supra, at 286." Hill and Cyrus v. Kanawha County Bd. of Educ., Docket No. 96-20-362 (Jan. 30, 1997). MBOE's action in transferring Grievant was a reasonable response to the circumstances, and was neither arbitrary nor capricious.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The burden of proof is upon Grievant to prove the elements of his grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (March 28, 1996).

2. "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). See Dillon v. Bd. of Educ. of County of Wyoming, 351 S.E.2d 58 (W. Va. 1986).

3. Grievant failed to prove that the Mingo County Board of Education abused its broad discretion or acted in an arbitrary and capricious manner when it transferred him.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mingo 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: November 19, 1997

Footnote: 1

In his post-hearing written submission, it appears Grievant raised a claim that he had been discriminated against. This is the first time this argument was raised by Grievant, and accordingly, is considered not properly raised, as Respondent was not placed on notice that this was an issue. Beckley v. Lincoln County Bd. of Educ., Docket No. 95-22-107 (Feb. 29, 1996).

Footnote: 2

The record does not reflect the date this grievance was filed, or what occurred at Level I. A Level II hearing was held, and the grievance was denied at Level II on June 19, 1997. Grievant waived Level III, appealing to Level IV on June 27, 1997. A Level IV hearing was held before the undersigned Administrative Law Judge on August 18, 1997, and this grievance became mature for decision on September 15, 1997, upon receipt of the parties' written arguments.