G. O'DELL DINGESS,

Grievant,

v. Docket No. 98-22-053

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, G. O'Dell Dingess, filed the following grievance:

> **Violation of W. V. Code 18A-4-7a in regard to grievant[']s reduction-in-force as assistant principal at Harts H. S. and his transfer to Duval H. S. Further his nonselection as head teacher a Harts H. S. related directly in (sic) his transfer. Relief sought is to be reinstated to Harts H.S. as assistant principal or head teacher and compensated for travel to Duval.**

In terms of the procedural history, apparently Grievant had originally filed three grievances. Prior to the Level II hearing, the parties agreed to "re-do" the grievances. Grievant dropped one of his grievances and had a Level II hearing on the above-stated issues. A Level II Decision issued February 16, 1998, denied these grievances and Grievant elected to by-pass Level III. A Level IV hearing was held on April 6, 1998, and this case became mature for decision on April 20, 1998, the deadline for the parties' proposed findings of fact and conclusions of law. (See footnote 1) **After a detailed review of the record in its entirety the undersigned Administrative Law Judge makes the following Findings of Fact and Conclusions of Law.**

Findings of Fact

1. Grievant has been employed by the Lincoln County Board of Education ("LCBOE") for twenty-two years. For eight of these years he has served as an Assistant Principal.

2. Prior to his transfer to Duval High School ("DHS"), Grievant worked at Harts High School ("HHS").

3. During the 1995-1996 school year, Grievant's Assistant Principal contract was reduced from 220 days to 213 days.

4. During the 1996-1997 school year, Grievant's position was changed from Assistant Principal to Assistant Principal/Teacher. Grievant did not teach while he was in this position.

5. In the Spring of 1997, Grievant received timely notice that he would be transferred from HHS to DHS with the same title and number of days. This change occurred because the position of Assistant Principal/Teacher was eliminated at HHS.

6. The position of Assistant Principal/Teacher was changed to a Head Teacher position at HHS and to Dean of Students at Hamlin High School, the two smaller high schools in Lincoln County. The only two remaining Assistant Principal/Teacher positions with 213 days were at DHS and Guyan Valley High School, the two largest high schools in Lincoln County.

7. When Grievant was transferred from HHS to DHS, he bumped the least senior employee within his classification. 8. This downsizing of administrative positions was the result of fiscal cutbacks. 9. After Grievant received his transfer letter, the Head Teacher position was posted at HHS. This position was for 200 days and open to teachers at HHS. This position contained many of the duties Grievant had performed as Assistant Principal/Teacher. Grievant believed he could not apply for the position as he was not a teacher at HHS. (See footnote 2)

10. At his transfer hearing, Grievant was informed he did not have to take the DHS position and could apply for any posting for which he was qualified. Grievant did not apply for any positions.

11. DHS is forty miles from Grievant's residence. (See footnote 3)

Arguments

Grievant makes several arguments. First, he argues he was reduced-in-force as Assistant Principal/Teacher at HHS. Second, he believes a need exists for him to retain his Assistant Principal/Teacher position at HHS. Third, Grievant argues he was not allowed to apply for the position of Head Teacher at HHS, and this action was unfair to him. Finally, Grievant contends he should be placed as Principal at Ranger Elementary as he believes he is more senior than the principal there. He avers the lateral transfer list allows him to be placed in this position.

The relief Grievant sought varied throughout these proceedings. He stated he would be willing to take the Head Teacher position with adecreased number of days. However, when questioned by the undersigned Administrative Law Judge, Grievant stated he wished to be reinstated to the Assistant Principal/Teacher position at HHS and to retain his 213 day contract.

Respondent maintains the transfer of Grievant was correct as it moved Grievant from an Assistant Principal/Teacher position that was being eliminated to a Assistant Principal/Teacher position that was not eliminated. When Grievant was placed in this position he "bumped" the least senior Assistant Principal/Teacher and maintained his administrative position and number of days.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

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

> **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, however, That 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 those areas of certification and/or licensure, the employeesubject 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.**

Although Grievant states he has been reduced-in-force, this is not the case. His 213 day Assistant Principal/Teacher position at HHS was eliminated and replaced with a 200 day Head Teacher position. Grievant was transferred from his position at HHS to a like position at DHS.

As it has been repeatedly ruled by this Grievance Board, W. Va. Code § 18A-4-7a does not apply to transferred employees, as they are not "subject to release", and the Code Section which does apply to transferred employees is W. Va. Code § 18A-2- 7. Stewart v. Kanawha County Bd. of Educ., Docket No. 96-20-370 (Jan. 31, 1997). See also, Hawkins v. Tyler County Bd. of Educ, 166 W. Va. 363, 275 S.E.2d 908 (1980); Eckenrode v. Kanawha County Bd. of Educ., Docket No. 96-20-302 (Jan. 22, 1997); Morgan v. Wood County Bd. of Educ., Docket No. 89-54-470 (Nov. 29, 1989).

W. Va. Code § 18A-2-7 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. 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,**
>
> **. . .**
>
> **Any teacher or employee who desires to protest such proposed transfer may request in writing a statement of the reasons for the proposed transfer. Such statement of reasons shall be delivered to the teacher or employee within ten days of the receipt of the request. Within ten days of the receipt of the statement of the reasons, the teacher or employee may make written demand upon the superintendent for a hearing on the proposed transfer before the county board of education. The hearing on the proposed transfer shall be held on or before the first Monday in May, except that for the school year one thousand nine hundred eighty-nine_ninety only, the hearing shall be held on or before the fourth Monday in May, one thousand nine hundred ninety. At the hearing, the reasons for the proposed transfer must be shown.**
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> **The superintendent at a meeting of the board on or before the first Monday in May shall furnish in writing to the board a list of teachers and other employees to be considered for transfer and subsequent assignment for the next ensuing school year,**
>
> **. . .**
>
> **All other teachers and employees not so listed shall be considered as reassigned to the positions or jobs held at the time of this meeting. The list of those recommended for transfer shall be included in the minute record of such meeting and all those so listed shall be notified in writing, by certified mail, return receipt requested, to such persons' last known addresses within ten days following said board meeting, of their having been so recommended for transfer and subsequent assignment and the reasons therefor.**

This is the Code Section that applies to Grievant .

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, supra; 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, in the absence of a county policy requiring seniority be considered. Lester v. McDowell County Bd. of Educ., Docket No. 93-33-256 (Jan. 31, 1994); See also Hawkins, supra; LeMastus 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).

The arbitrary and capricious standard of review requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the decision-maker. See generally, Harrison v.Ginsberg, 286 S.E.2d 276 (W. Va. 1982). Generally, an action by a board of education is considered arbitrary and capricious if the decision-maker did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem or situation, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985). See Snodgrass v. Kanawha County Bd. of Educ., Docket No. 97-20-255 (Mar. 19, 1998).

LCBOE's transfer of Grievant from an Assistant Principal/Teacher position to another Assistant Principal/Teacher position was not arbitrary and capricious. He was placed in a position with like responsibilities and duties and with the same compensation. The fact that he was not placed in a position of his own choosing is not violative of any Code Section.

Grievant's argument that LCBOE was incorrect in its decision to not retain an assistant principal at HHS will be discussed next. County boards of education have substantial discretion in matters relating to the hiring and assignment of school personnel. That

discretion must be exercised in the best interests of the schools, and in a manner which is neither arbitrary nor capricious. See Hyre v. Upshur County Bd. of Educ., 412 S.E.2d 265 (W. Va. 1991). Given its current funding problems, LCBOE did not abuse its substantial discretion when it decided to eliminate the Assistant Principal/Teacher positions at the smaller high schools. Although it is true that some aspects of Grievant's former position remain in the new Head Teacher position, Grievant did not demonstrate this position was insufficient for the needs of HHS. Grievant's mere allegations are not proof. Grievant's argument that he was not allowed to apply for the Head Teacher position, and this action was not fair, was unproven. There was no testimony as to when the position was posted. A requirement of the position was to be a teacher at HHS. Although Grievant was classified as an Assistant Principal/Teacher, he did not teach. This issue, given the lack of specific information, must be resolved against Grievant as he did not prove he was unfairly prevented from applying for the position, or that he met the qualifications for the position.

Grievant's argument that he should be allowed to replace the principal at Ranger Elementary is based on the "List of Lateral Positions" submitted into evidence, and his belief that he is more senior than the current Principal based on his interpretation of the law. The "List of Lateral Positions" document is unclear, and the undersigned Administrative Law Judge will not "guess" at its meaning. However, this Grievance Board has previously ruled that an Assistant Principal cannot "bump" a Principal as "such a displacement would constitute a 'vertical' transfer, not a permissible lateral transfer, because a principal occupies a higher employment plane than does an assistant principal." Carson v. Harrison County Bd. of Educ., Docket No. 89-17-279 (Feb. 28, 1991). Thus Grievant's argument is without merit on two counts. First, he did not prove he was more senior than the current Principal, and second, Grievant cannot move into a promotion through a lateral transfer. Additionally, Grievant's position, Assistant Principal/Teacher, was not on the list of lateral transfers.

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

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of

proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. County boards of education have substantial discretion in matters relating to the hiring and assignment of school personnel. The exercise of that discretion must be in the best interests of the schools, and in a manner which is neither arbitrary nor capricious. See Hyre v. Upshur County Bd. of Educ., 412 S.E.2d 265 (W. Va. 1991).

3. Grievant was not reduced-in-force, he was transferred.

4. LCBOE's transfer of Grievant from an eliminated position to a like position was not arbitrary and capricious or an abuse of discretion.

5. Grievant did not demonstrate LCBOE's decision to change the position of Assistant Principal/Teacher at HHS to Head Teacher was arbitrary and capricious given that HHS was a smaller school and LCBOE was experiencing funding difficulties.

6. Grievant did not demonstrate that requiring the Head Teacher at HHS to be a teacher at the school was incorrect or violative of some rule, regulation, or statute.

7. An Assistant Principal cannot "bump" a Principal as "such a displacement would constitute a 'vertical' transfer, not a permissible lateral transfer, because a principal occupies a higher employment plane than does an assistant principal." Carson v. Harrison County Bd. of Educ., Docket No. 89-17-279 (Feb. 28, 1991). 7. Grievant did not demonstrate he was entitled to be placed in the Principal position at Ranger Elementary.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Lincoln 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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JANIS I. REYNOLDS

Administrative Law Judge

Dated: May 29, 1998

Footnote: 1

At Level IV, Grievant was represented by Susan Hubbard, and the Lincoln County Board of Education was represented by attorney Charles Damron.

Footnote: 2

This issue was not questioned at hearing. No information was given at hearing about when the position was posted.

Footnote: 3

It is noted that Grievant is not required to travel. He was informed at this transfer hearing that he could decline this position and be placed on the undesignated transfer list, but he could not be promised a position near his home.