CYNTHIA ANN BLEVINS,

Grievant,

v. **DOCKET NO. 97-41-314**

RALEIGH COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Cynthia Ann Blevins, filed this grievance against Respondent, the Raleigh County Board of Education, in May of 1997, alleging her removal from her position as a social studies teacher at Woodrow Wilson High School was arbitrary and capricious, and in violation of W. Va. Code § 18A-4-7a, in that she was not the least senior social studies teacher. She also alleged she had been promised by Superintendent Dwight Dials that she would not be removed from her position, but that the least senior person in the social studies department would be reduced in force, if such were necessary. Grievant requested as relief reinstatement to her position as a social studies teacher at Woodrow Wilson, back pay and legal expenses. (See footnote 1) For reasons explained below, the grievance must be denied.

The following Findings of Fact are made based upon the evidence presented at Level II.

Findings of Fact

1 1.

Grievant has been a teacher for Raleigh County Board of Education ("Respondent") for approximately 25 years. She is an excellent teacher and employee. 2 2.

In 1993 she bid upon a social studies teaching position at Woodrow Wilson, and was awarded that position.

3 3.

Frank Rakes had also bid upon that position, and filed a grievance when Grievant was awarded the position. Grievant was aware that Mr. Rakes had filed a grievance at some point during the spring of 1994, if not earlier. Grievant did not intervene in Mr. Rakes' grievance.

4 4.

Grievant had been assured by Superintendent Dials that, if Mr. Rakes won his grievance, Grievant would either remain at Woodrow Wilson or be returned to Beckley Junior High School, where she had been assigned prior to taking the position at Woodrow Wilson. Both assignments would have been satisfactory to Grievant. Consequently, she did not feel a need to intervene in Mr. Rakes' grievance, as her own employment would not, in her view, be negatively affected even if Mr. Rakes won.

5 5.

Mr. Rakes' grievance was granted at Level IV, and Respondent was required to instate him into the position held by Grievant. The Level IV decision was affirmed by the circuit court, and the Supreme Court of Appeals refused to hear the appeal in November 1996.

6 6.

Mr. Rakes was placed in the position beginning the second semester of the 1996-97 school year, being assigned what would have been Grievant's schedule of classes and students, had Grievant remained in the position. Grievant was given a schedule of social studies classes at Woodrow Wilson, which was created by “splitting” existing classes (other than Mr. Rakes'). For example, another teacher's World History I class, with thirty students, was split so that the teacher and Grievant both taught World History I classes to fifteen students. The position thus created for Grievant for the second semester of 1996-97 was not posted at any time. 7 7.

The position occupied by Grievant during the second semester of the 1996-97 school year was eliminated at the end of the school year. Woodrow Wilson had the same number of social studies teachers at the beginning of school year 1997-98 as it had at the beginning of 1996-97.

8 8.

Grievant was transferred in April 1997, after due notice and opportunity to be heard.

9 9.

Grievant was not the least senior social studies teacher at Woodrow Wilson.

Discussion

The burden of proof is upon Grievant to prove the elements of her grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (March 28, 1996). Here, Grievant alleged that Respondent violated W. Va. Code §18A-4-7a by transferring her through a reduction-in-force (RIF) when she was not the least senior social studies teacher at Woodrow Wilson; that Superintendent Dials had created and breached an oral contract with her; and that

Respondent's transfer of her was arbitrary and capricious. Each allegation will be discussed separately.

RIF/TRANSFER ALLEGATION:

The record below makes abundantly clear that there was no RIF undertaken by Respondent in this instance. No teacher's employment was terminated, and the RIF provisions of W. Va. Code §§18A-4-1, et seq., are inapplicable here. The action taken was a transfer of a regularly employed teacher, which was necessitated not by a need to reduce the number of teachers county-wide, but by the outcome of a legal action addressing selection for a vacancy.

ORAL CONTRACT ALLEGATION:

Grievant asserted throughout the transfer proceedings that Superintendent Dials had createdan oral contract with her, to the effect that she would either not be transferred out of Woodrow Wilson at all, or would be moved back to her prior assignment at Beckley Junior High School. At the Level II hearing, Superintendent Dials specifically denied making promises to Grievant in this regard. Consequently, a credibility determination is required to decide this factual issue.

An Administrative Law Judge is responsible for determining the credibility of the testimony before her. Perdue v. Dept. of Health and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1994). The fact that this testimony is offered in written form does not alter this responsibility. Browning v. Mingo County Bd. of Educ., Docket No. 96-29-154 (Sept. 30, 1996) (Browning I).

As this grievance is decided upon a written record, I had no opportunity to observe the witnesses. Credibility must still be determined; it is simply based upon other factors than witness demeanor. Some factors to be considered when assessing credibility of written testimony include the witness's opportunity or capacity to perceive and communicate; reputation for honesty; attitude toward the action; and admission of untruthfulness. Other factors include the presence or absence of bias, interest, or motive; the consistency of prior statements; the existence or nonexistence of any fact testified to by the witness; and the plausibility of the witness's information. Browning I, supra, citing Harold J. Asher and William C. Jackson, Respresenting the Agency before the United States Merit Systems Protection Board 152-153 (1984). Determinations of credibility in this case were based on consistency of prior statements, attitude toward the action, responsiveness to questions, and plausibility of the witnesses' testimony, in addition to the overall impression received.

Grievant was consistent in describing the statements made to her, throughout the proceedings connected to this grievance. The record of the transfer hearing before Respondent shows consistencywith her later Level II grievance testimony. She was specific in her allegations, stating that the assurances given were not conditional. She was not accusatory in tone, when she stated, “[I]f I had been told from the beginning that that [the assurance] was a possibility, that this is what we'll try to do, Cynthia, but you know other factors may [be involved]...” she would have acted to protect her interests, and certainly would not have grieved her transfer. (Joint Exhibit 6, pp. 80-81.) She acknowledged the legal difficulties created for Respondent by the Rakes grievance, and the extent of her own responsibility. The overall impression one gets from Grievant's testimony is of an honest and sincere witness, who retains the ability to be reasonable and objective about the factual situation.

Also in the earlier transfer hearing, Superintendent Dials made several statements which suggested that he had given Grievant assurances about her placement, and which differ significantly from the outright denial made at Level II. For example, he stated “we were trying to make assurances before and actually got beat when we thought we were doing the right thing.” (Joint Exhibit 6, p. 68.) Although subject to other interpretations, it appears he was referring to assurances given to Grievant that she would not be moved even if Respondent lost the Rakes grievance. More pointedly, Superintendent Dials stated to Grievant,

> [W]hen agreements are made or when comments are made, we can't control other things that may happen later that day or tomorrow. I don't think that anybody deliberately deceived or misled you. You can think whatever you want, and I'm sure you will. But let me tell you something. Other things happen that a superintendent and the director of personnel can't control.

(Id. at 80.) These and similar statements, and other factors such as the general tenor of Superintendent Dials' statements during the transfer hearing, indicate that his recollection was colored by later events, including the advice given by attorneys and threats of grievances were he to maintain Grievant at Woodrow Wilson. I find that Superintendent Dials did, in fact, assure Grievant that, even if Mr. Rakes won his grievance, she would either continue to teach social studies at Woodrow Wilson or be moved back to teach social studies at Beckley Junior High School. I further find that, because of these assurances, Grievant did not think it necessary to intervene in Mr. Rakes' grievance.

However, the question remains whether Superintendent Dials' promises can create a binding oral contract, as Grievant asserts. It is well settled that a supervisor's oral representation is not binding on an agency, where that supervisor does not possess authority to actually make that determination. Ollar v. W. Va. Dept. of Health and Human Serv., Docket No. 92-HHR-186 (Jan. 22, 1993) (where supervisor's representations regarding pay during an interview were held not binding, as only agency head and governor have final hiring authority). In describing this case, the authoring administrative law judge later stated that,

> HHR was not legally bound on either an oral contract or an estoppel theory by the salary representations of its agents. The evidence in Ollar revealed that local HHR supervisors lacked final hiring authority... therefore... no oral contract had been formed and... any statements by its agents about future salary levels would not be legally binding on HHR...

Fraley v. W. Va. Dept. of Health and Human Resources, Docket No. 92-HHR-448 (Mar. 12, 1993), at 3-4.

"A state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers and all persons must take note of the legal limitations upon their power and authority. [Citation omitted.]" Syl. Pt. 2, W. Va. Public Employees Ins. Bd. v. Blue Cross Hosp. Service, Inc., 174 W. Va. 605, 328 S.E.2d 356 (W. Va. 1985). The important public policy consideration underlying this strict rule is that "'[a]ny other rule would deprive the people of their control..., and leave the status and tenure of all employees to be governed by whatever arrangements incumbentadministrators may agree to or prescribe.' [Citation omitted.]" Freeman v. Poling, 175 W. Va. 814, 338 S.E.2d 415, 421 (W. Va. 1985). See also, Parker v. Summers County Bd. of Educ., 185 W. Va. 313, 406 S.E.2d 744, 748 (1991).

As in Ollar, the person making assurances here, Superintendent Dials, lacked final authority to either create a new position at Woodrow Wilson for Grievant or transfer her back to Beckley Junior High School, as he himself could not take either action unilaterally. See Haney v. Mingo County Bd. of Educ., Docket No. 97-29-292 (Oct. 30, 1997), and cases cited therein. At most, Superintendent Dials could have properly represented to Grievant that he would recommend such actions to the board of education.

In these circumstances, there can be no legally binding oral contract. Malone v. Marion County Bd. of Educ., Docket No. 96-24-084 (May 30, 1996). See Chapman v. Dept of Transp., Docket No.

97-DOH-261 (Nov. 24, 1997), and discussion therein. Individual superintendents must “play by the rules” for creating and filling positions, and employees of the boards of education must act based upon the fact that the boards, not the superintendents, make final decisions on their employment.

Although it is a harsh rule, it is one espoused by the Court and by this Grievance Board in earlier decisions. Thus, while promises may have been made to Grievant, Grievant must accept the consequences of relying upon them when they were not made by the board of education, which had final authority to act. No “oral contract” was created, due to lack of authority on the part of the person making the promises.

ARBITRARY AND CAPRICIOUS TRANSFER:

In assessing the legal sufficiency of this transfer, it must be remembered that classroomteachers have no vested right to be assigned to a particular school in the county. State ex rel. Hawkins v. Tyler County Bd. of Educ., 166 W. Va. 363, 275 S.E.2d 908 (W. Va. 1980). "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). 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, 183 W. Va. 418, 396 S.E.2d 185, 188 (W. Va. 1990). See Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (W. Va. 1986). The burden of proof in this case is upon Grievant to demonstrate by a preponderance of the evidence that MBOE's action was arbitrary and capricious or an abuse of discretion. Tibbs v. Mercer County Bd. of Educ., Docket No. 96-27-074 (Oct. 31, 1996).

The evaluation of a personnel decision under the arbitrary and capricious standard entails close examination of the process used to make the decision. Nonetheless, 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)." Hill and Cyrus v. Kanawha County Bd. of Educ., Docket No. 96-20-362 (Jan. 30,

1997). Grievant did not meet her burden of proving Respondent's action was an abuse of discretion or arbitrary and capricious. Grievant's argument that her seniority among the social studies teachers should have been a consideration in deciding who should be transferred, per W. Va. Code § 18A-4-7(a) is misplaced. Transfers must be made in accordance with the provisions of W. Va. Code § 18A-2-7.

> "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)." Stewart, et al., v. Kanawha County Bd. of Educ., Docket No. 96-20-370 (Jan. 31, 1997).

* * *

> Boards of education are not required by law to base transfer decisions on seniority, or to consider seniority as a factor in making transfer decisions. Transfer decisions "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 [v. Harrison County Bd. of Educ., Docket No. 89-17-355 (Feb. 20, 1990)]. See Jochum v. Ohio County Bd. of Educ., Docket No. 91-35-396 (Jan. 31, 1992)." Stewart, et al., v. Kanawha County Bd. of Educ., Docket No. 96-20-370 (Jan. 31, 1997). 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, [supra]." Stewart, supra.

Browning v. Mingo County Bd. of Educ., Docket No. 97-29-236 (Sept. 19, 1997).

Respondent was not required to consider seniority as a factor in deciding which social studies teacher at Woodrow Wilson would be transferred. Respondent chose to transfer Grievant, as it was the position Grievant had been filling which was the subject of Rakes. Moreover, Respondent's discretion to transfer teachers is quite broad, and it could have chosen to transfer Grievant, even if Mr. Rakes had not prevailed in his selection grievance.

Grievant's argument that it was arbitrary and capricious to transfer her because Rakes did not require it, is inapposite. Rakes required that Mr. Rakes be placed in the position which Grievant held. The only way to accomplish that was to first remove Grievant from that position. It was up to Respondent to determine how to remove Grievant from the position. Respondent could legally have chosen to create a new social studies position at Woodrow Wilson, or to transfer another teacher from Woodrow Wilson while transferring Grievant into the position vacated. In other words, Respondent could have chosen to honor Superintendent Dials' promise, without statutory

impediment. However, it chose to transfer Grievant to an existing, vacant position at an elementary school, a position for which Grievant was properly certified. This choice was also legally authorized, and non-arbitrary reasons undergird Respondent's action.

It may be argued that, once Superintendent Dials made promises to Grievant, Respondent abused its discretionary authority by choosing not to honor them. However, cases where promises were, in essence, deemed binding involved promises made by the board of education itself, or made by both the board and the superintendent. See e.g., Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648 (W. Va. 1995) (where board itself had assured grievants a specific certification was unnecessary, and later changed its decision so as to require the certification). There is no evidence here that the board of education, or any of its individual members, made any representations to Grievant, and this case may be distinguished on that fact alone.

In cases such as this one, it must be remembered that what is offensive to notions of moral fairness is not necessarily contrary to law. Because of the clear precedent that one without authority to make promises cannot bind the entity actually vested with authority to act, and the fact that the board itself did not make any promises here, I decline to hold that abuse of discretion was proven. To do otherwise would amount to doing indirectly what I cannot do directly_ require Respondent to honor Superintendent Dials' unauthorized representations.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1 1.

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

2 2.

Grievant failed to prove that a reduction in force occurred.

3 3.

Superintendent Dials' promises to Grievant did not create a binding oral contract which Respondent was legally compelled to honor. Haney v. Mingo County Bd. of Educ., Docket No. 97-29-292 (Oct. 30, 1997); Malone v. Marion County Bd. of Educ., Docket No. 96-24- 084 (May 30, 1996). See Chapman v. Dept of Transp., Docket No. 97-DOH-261 (Nov. 24, 1997). Cf. Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648 (W. Va. 1995).

4 4.

"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, 177 W. Va. 145, 351 S.E.2d 58 (W. Va. 1986).

5 5.

"`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).' Stewart, et al., v. Kanawha County Bd. of Educ., Docket No. 96-20-370 (Jan. 31, 1997)." Browning v. Mingo County Bd. of Educ., Docket No. 97-29-236 (Sept. 19, 1997).

6 6.

Teachers have no vested right to be assigned to a particular school in the county. State ex rel. Hawkins v. Tyler County Bd. of Educ., 166 W. Va. 363, 275 S.E.2d 908 (W. Va. 1981). 7 7.

Grievant failed to prove that the Raleigh County Board of Education abused its broad discretion or acted in an arbitrary and capricious manner when it transferred her to an elementary school teaching position for which she is certified, as a result of an Order entered in a prior grievance requiring another teacher to be instated into the position Grievant had been filling.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Raleigh 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.

Dated: January 29, 1998 _____

JENNIFER J. MEEKS

Administrative Law Judge

Footnote: 1

Grievant's supervisor was without authority to act on the grievance, but noted he would recommend that she remain in the social studies position if he were able to do so. Grievant appealed to Level II, and after a hearing held on July 1, 1997, the grievance was denied on July 11, 1997. Grievant bypassed Level III, appealing to Level IV on July 14, 1997. The parties agreed to submit this matter for decision on the record developed at Level II, and this matter became mature for decision upon receipt of Grievant's post-hearing written submission on September 5, 1997. This matter was subsequently reassigned several times for administrative reasons, being finally assigned to me on December 15, 1997.