EDWINA MORRIS,

Grievant,

v. **Docket No. 99-20-200**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Edwina Morris (Grievant) is a teacher employed by Respondent Kanawha County Board of Education (KCBE). Grievant filed this grievance on March 26, 1999, alleging that she was improperly selected for transfer. This grievance was denied by Immediate Supervisor Robert Paxton (Paxton), Principal of Elkview Middle School (Elkview), on April 15, 1999. A Level II hearing was held on April 29, 1999, with Grievant represented by Perry Bryant of the W. Va. Education Association, and KCBE represented by James W. Withrow, Esq. The grievance was denied at Level II, by Grievance Evaluator Nancy Douglas, on May 17, 1999. As authorized by W. Va. Code § 18-29-4(c), Level III proceedings were waived. The parties agreed that the grievance could be submitted at Level IV based upon the record developed at the lower levels. The parties were given until June 25, 1999, to submit proposed findings of fact and conclusions of law. (See footnote 1) This grievancebecame mature for decision on that date. The facts in this matter are undisputed. Accordingly, the following Findings of Fact are established by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant is a seventh grade English teacher assigned to Elkview. She holds certifications in Language Arts 1-9 and Elementary Education 1-8. She has 28 years of seniority. (See footnote 2)

2. The seventh grade at Elkview is divided into teams: the Dolphins and the Bears. Grievant taught on the Dolphins team.

3. Other members of the Dolphins team are Nancy Chrest (Chrest), who teaches Math and has 21 years seniority; Tom Smith (Smith), who teaches Science and has 22 years seniority; and Bobbie

Johnston (Johnston), who teaches Social Studies and has 17 years seniority. Johnston holds certification in both Social Studies and English/Language Arts.

4. A member of the Bears team, Bruce Greene (Greene), has 24 years seniority and holds certification in Social Studies and Elementary Education.

5. Due to declining enrollment, Paxton had to cut two half-time positions and two full-time teaching positions for the 1999-2000 school year at Elkview. He determined that the cuts in the full-time teaching positions could best be made among seventh grade teachers, as Elkview's seventh grade had lower enrollment than any other grade. 6. Paxton was not obligated to keep the Dolphins team, or the Bears team, intact, but could cut any two seventh grade full-time teaching positions and realign the teams as needed.

7. KCBE Policy § 31.02 mandates that, in a reduction in staff caused by declining enrollment, a principal shall determine the curricular area where the reduction could best be absorbed, and then transfer the least senior teacher in that area, unless it is demonstrated that the teacher has teaching responsibilities in another curricular area which may not be absorbed by remaining staff. If such a demonstration is made, classroom teachers within the area to be reduced will be reviewed under the above-described criteria in order of reverse seniority.

8. Paxton had four curricular areas from which to cut: Math, English, Science, and Social Studies.

9. Paxton determined that the curricular area where the reduction could best be absorbed was Social Studies.

10. Paxton decided to cut Grievant's position. He offered her the choice of being placed on the transfer list, or being assigned to teach sixth grade Science and Math at Elkview.

11. Grievant has elderly parents near Elkview. To avoid the possibility of a transfer to a distant school, she agreed to teach sixth grade Science and Math at Elkview, with the understanding that she would be offered the first available English position.

12. Grievant is an excellent teacher who would be an asset for any school.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991); Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

West Virginia Code § 18A-2-7 states, in pertinent part: "[t]he superintendent, subject only to the approval of the board, shall have the authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter."

County boards of education have substantial discretion in matters relating to the assignment and transfer of personnel within their employ. Dillon v. Wyoming County Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986). KCBE has fashioned a policy to guide it in exercising this discretionary authority: Policy § 31.00, titled Transfer _ Middle/Junior, High School Classroom Teachers. The relevant portion of this regulation is § 31.02, titled Reduction/Declining Enrollment:

> If a reduction in staffing is scheduled to occur commencingwith the next ensuing school year as a result of declining enrollment, the principal shall determine how best to meet the curricular needs of the school with the remaining staff. In reaching this determination the principal shall determine the curricular area[s] where reductions could be best absorbed. The least senior classroom teacher currently assigned to teach in the area[s] to be reduced shall be recommended for transfer unless it can be clearly demonstrated that such least senior teacher has teaching responsibilities in another curricular area which may not be absorbed by remaining staff. If such a demonstration is made, classroom teachers within the area to be reduced will be reviewed under the above-described criteria in order of reverse seniority. (See footnote 3)

Grievant alleges that KCBE violated this policy in selecting her for transfer. Grievant contends that Paxton never made the demonstration, required by Policy § 31.02, that the least senior teacher had teaching responsibilities in another curricular area which may not have been absorbed by remaining staff or, in the alternative, that another teacher in the area to be reduced, one with less seniority, should have been cut.

KCBE responds with two formalistic legal arguments. First, that Grievant cannot grieve her transfer, because she was not transferred, Grievant having accepted the sixth grade teaching

position. Second, that the appropriate process for contesting a proposed transfer is to request a hearing before KCBE, pursuant to West Virginia Code § 18A-2-7. If KCBE approves her transfer, it argues, a grievance may then be filed protesting the Board's action.

KCBE's first argument fails. West Virginia Code § 18-29-2(a) states, in pertinentpart: " '[g]rievance' means any claim by one or more affected employees of . . . . county boards of education . . . . alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work[.]" Grievant argues that KCBE Policy § 31.02 was violated in selecting her for transfer. If Grievant was wrongly selected for transfer, her subsequent acceptance of an offer to teach sixth grade, an offer that would not have been made were it not for the proposed transfer, should not constitute a waiver of her right to contest her selection for transfer. Her situation was different than a grievant who voluntarily signs an agreement terminating her contract, thus waiving her transfer rights. Heim v. Harrison County Bd. of Educ., Docket No. 17-88-045-2 (Jan. 18, 1989). Under West Virginia Code § 18-29-2(a), KCBE's alleged violation of Policy § 31.02 plainly constitutes a grievable event.

KCBE's second argument also fails. West Virginia Code § 18-29-1 states, in pertinent part: "[t]he purpose of this article is to provide a procedure for employees of . . . . county boards of education . . . . to reach solutions to problems which arise between them[.]" Although West Virginia Code § 18A-2-7 creates a process for contesting a proposed transfer with a hearing before KCBE, (See footnote 4) the grievance procedure creates an alternative process. KCBE has cited no authority to the contrary.

KCBE Policy § 31.02 gives a principal considerable discretion in determining "the curricular area[s] where reductions could best be absorbed." However, once a principalselects a curricular area to be reduced, the policy requires that s/he select the least senior classroom teacher in that area for transfer, "unless it can be clearly demonstrated that such least senior teacher has teaching responsibilities in another curricular area which may not be absorbed by remaining staff. If such a demonstration is made, classroom teachers within the area to be reduced will be reviewed under the above-described criteria in order of reverse seniority."

Under this policy, once Paxton selected Social Studies as the curricular area to be cut, he was required to cut the least senior seventh grade Social Studies teacher, Johnston, unless it was clearly demonstrated that the remaining teachers could not absorb her teaching responsibilities.

As noted in Finding of Fact eight, Paxton had four curricular areas from which to cut: Math,

English, Science, and Social Studies. He chose to keep the core areas of Math, English, and Science. Because Johnston was certified in both Social Studies and English, Chrest was certified in Math, and Smith was certified in Science, Paxton reasoned that he could staff the Dolphins team's core curricula without Grievant, with Johnston teaching English, Smith picking up an endorsement in Social Studies, Chrest being reassigned to the Bears team and her position being posted as requiring certification in both Math and Social Studies, and Grievant being offered the choice of sixth grade or transfer. This alignment gave the Dolphins team one teacher certified in English, one teacher certified in Math, and one teacher certified in Science, with all three of them certified in SocialStudies. (See footnote 5)

With this alignment, Paxton arguably demonstrated that the least senior teacher, Johnston, had teaching responsibilities in another curricular area, English, which may not have been absorbed by remaining staff. Given the substantial discretion county boards of education have in matters relating to the assignment and transfer of personnel within their employ, Dillon, supra, the undersigned cannot conclude that this decision violated KCBE Policy § 31.02.

However, having made this demonstration, Policy § 31.02 required Paxton to cut a classroom teacher in the area to be reduced, Social Studies, “in order of reverse seniority.” He apparently did not.

The record supports Grievant's argument that a member of the Bears team, Greene, who has 24 years seniority, and holds certification in Social Studies and Elementary Education, should have been cut instead of Grievant. Having decided to cut from among the seventh grade teachers, in the Social Studies area, and having demonstrated that Johnston need not be cut, Paxton was obligated by Policy § 31.02 to cut the next least senior Social Studies teacher after her, Greene. Paxton testified that he was not obligated to keep the Dolphins team, or the Bears team, intact, but could cut two teaching positions as needed and realign the teams. He demonstrated his authority to do this when he reassigned Chrest to the Bears team. Accordingly, Policy § 31.02 dictates that Paxton cutGreene instead of Grievant.

An agency must abide by the procedures it properly establishes to conduct its affairs. Vitarelli v. Seaton, 359 U.S. 535, 79 S. Ct. 968, 3 L. Ed. 2d 1012 (1959), Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977), White v. W. Va. Div. of Corrections/Anthony Correctional Center, Docket No. 98-CORR-424 (Feb. 3, 1999). See Pauls v. Bd. of Directors/West Liberty State College, Docket No. 98-

BOD-242 (Nov. 30, 1998), Finver v. W. Va. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-271, (Oct. 15, 1997), Cromley v. Mason County Bd. of Educ., Docket No. 94-26-573 (Apr. 27, 1995).

Accordingly, KCBE will be ordered to rescind its decision to select Grievant for transfer, and to instead select Greene for transfer. As all involved in this grievance clearly had the best interests of the students foremost in their consideration, and as Paxton testified that Grievant is an excellent teacher who would be an asset for any school, the outcome of this grievance should not be completely unwelcome to KCBE.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, Grievant has the burden of proving her 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. KCBE Policy § 31.02 mandates that, in a reduction in staff caused bydeclining enrollment, a principal shall determine the curricular area where the reduction could best be absorbed, and then transfer the least senior teacher in that area, unless it is demonstrated that the teacher has teaching responsibilities in another curricular area which may not be absorbed by remaining staff. If such a demonstration is made, classroom teachers within the area to be reduced will be reviewed under the above-described criteria in order of reverse seniority.

3. An agency must abide by the procedures it properly establishes to conduct its affairs. Vitarelli v. Seaton, 359 U.S. 535, 79 S. Ct. 968, 3 L. Ed. 2d 1012 (1959), Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977), White v. W. Va. Div. of Corrections/Anthony Correctional Center, Docket No. 98-CORR-424 (Feb. 3, 1999). See Pauls v. Bd. of Directors/West Liberty State College, Docket No. 98-BOD-242 (Nov. 30, 1998), Finver v. W. Va. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-271, (Oct. 15, 1997), Cromley v. Mason County Bd. of Educ., Docket No. 94-26-573 (Apr. 27, 1995).

4. KCBE's selection of Grievant for transfer under Policy § 31.02 constituted a grievable event,

as West Virginia Code § 18-29-2(a) defines “grievance” as any claim by one or more affected employees of county boards of education alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work.

5. Although West Virginia Code § 18A-2-7 creates a process for contesting a proposed transfer with a hearing before KCBE, the grievance procedure creates an alternative process.

6. Grievant has established a violation, misapplication or misinterpretation ofRespondent KCBE's Policy § 31.02.

Accordingly this Grievance is hereby **GRANTED**. Respondent Kanawha County Board of Education is **ORDERED** to rescind its decision to select Grievant for transfer, and to instead select Greene for transfer.

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. However, the appealing party is required by W.Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated July 27, 1999

Footnote: 1

This grievance was transferred, for administrative purposes, to the undersigned administrative law judge, and received by the Grievance Board's Beckley office on July 6, 1999.

Footnote: 2

All seniority levels have been calculated to the end of the 1998-1999 school year.

Footnote: 3 *Policy § 31.02 has been considered by this Grievance Board only once before. McCune v. Kanawha County Bd. of Educ., Docket No. 94-20-265 (Oct. 31, 1994).*

Footnote: 4 *It is noted that a delegation consisting of Grievant and other Elkview employees appeared twice before KCBE to oppose the Board's proposed cuts. A Board member moved to direct the Superintendent to retain all four members of the seventh grade Dolphin team at Elkview, but the Motion failed by a vote of four to one.*

Footnote: 5 *The record does not reveal why Grievant was not offered the chance, offered to Smith, to pick up the Social Studies endorsement, and so remain in her position.*