PHYLLIS HOWARD,

Grievant,

v. **Docket No. 99-29-241**

MINGO COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Phyllis Howard, filed this grievance when the Mingo County Board of Education ("MBOE") decided to transfer her from her special education teaching position at Williamson High School to Burch High School. She alleged the transfer violated W. Va. Code §§ 18A-2-7 and 18A-4-7a. She requested as relief that she be returned to Williamson High School. (See footnote 1)

The following Findings of Fact are made from the evidence presented at Levels II and IV.

FINDINGS OF FACT

1. Grievant is employed by MBOE as a special education teacher, and has been teaching in Mingo County since 1985. She was most recently employed at Williamson High School. Her certification is in elementary education 1-6, Mental Retardation ("MR") K-12, and Specific Learning Disabilities ("SLD").

2. The least senior special education teacher at Williamson High School is certified in Behavioral Disorders ("BD"). (See footnote 2) Grievant is not certified in BD.

3. MBOE reduced the number of teaching positions county-wide for the 1999-2000 school year, and reduced the number of special education teachers at Williamson High School by one and a half teachers. Grievant was transferred to Burch High School. The least senior special education teacher was allowed to remain at Williamson High School because of her BD certification.

4. MBOE does not have a written policy requiring that seniority be considered in transfer decisions. It is the practice, however, of MBOE to make seniority the primary consideration when all

other factors are equal.

5. MBOE has been trying for several years to staff all middle schools and high schools in the county with at least one teacher with BD certification, so that if a student is diagnosed with BD, a certified teacher is available as is required. In addition, a BD certified teacher is required to participate in the student assistanceprocess for students whose behavior is a concern, to design behavior plans. Behavior has increasingly become an area of concern at the middle and high school levels. All middle and high schools in the county have a BD certified teacher on staff.

6. MBOE's Special Education Director, Karen Browning, told all special education teachers in the county that they needed to look at getting BD certification.

7. There are no BD students at Williamson High School, and no students currently diagnosed with BD will be entering Williamson High School in the next year from any feeder schools. There are four to six students in Mingo County schools whose primary disability is diagnosed as BD, but 18 other students at Williamson High School alone are on behavior plans. Any teacher certified in an area of special education can serve the needs of students on a behavior plan, once the plan is developed.

8. Students are continually evaluated, and it is possible a student who is currently enrolled at Williamson High School could be diagnosed with BD. If a BD student were enrolled at Williamson High School at any time during the school year, MBOE would have to take s ome action to provide services to this student through a teacher certified in BD.

9. In order to become certified in BD, Grievant must successfully complete six college credit hours, and a practicum. She is enrolled at Marshall University for three credit hours for the fall semester, and the other three credit hours are offered during the spring semester. She may be able to complete the practicum next summer, so that she may have her BD certification by next fall. 10. There are three visually impaired and four hearing impaired students in Mingo County schools. One itinerant teacher serves the special needs of all visually impaired students, and one itinerant teacher serves the special needs of all hearing impaired students.

11. One itinerant teacher serves the special needs of the elementary school children in Mingo County diagnosed with BD, as well as those diagnosed with autism. He will spend one-half of his day in one location with an autistic child during the 1999- 2000 school year.

DISCUSSION

Grievant bears the burden of proving the elements of her grievance by a preponderance of the evidence. Tibbs v. Mercer County Bd. of Educ., Docket No. 96- 27-074 (Oct. 31, 1996). Grievant contends that seniority should have been used as the determining factor. She pointed out that MBOE could have taken several different courses of action rather than transferring her. While this may be true, MBOE was not required to choose a different course of action, so long as Grievant's transfer was not arbitrary and capricious or an abuse of discretion.

"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, 183W. Va. 418, 396 S.E.2d 185, 188 (1990). See Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986).

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 the agency'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).

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. (See footnote 3) 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). Classroom teachers have no vested right to be assigned to a particular school in the county. Hawkins, supra. 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.

Finally, this Grievance Board has previously found that it is not arbitrary and capricious for a county board of education to retain a teacher with BD certification to serve the needs of any BD student who might enroll at a future point in time, even though there were no BD students enrolled at the school in question at the time this decision was made. Belladonna v. Logan County Bd. of Educ., Docket No. 97-23-321 (Oct. 16, 1997).

It is not unreasonable for MBOE to try to staff every middle and high school with a special education instructor certified in BD, so that it is capable of serving the needs of any BD students. Grievant pointed out that elementary schools are not so staffed, even though it is best that behavioral problems be diagnosed at the earliest possible age. She felt she had been discriminated against because BD certification is not required in elementary schools. She also pointed to the fact that one itinerant teacher is used to serve all children in the county who are visually impaired and hearingimpaired. MBOE pointed out that it experiences the most behavioral problems at its middle and high schools.

W. Va. Code § 18-29-2(m) defines discrimination, for purposes of the grievance procedure, as:

> any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.

A grievant alleging discrimination must establish a prima facie case by demonstrating:

> (a) that he is similarly situated in a pertinent way, to one or more other employee(s);
>
> (b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

> (c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once a prima facie case has been established, a presumption exists, which the employer may rebut by demonstrating a "legitimate, nondiscriminatory reason" for its action. Grievant may still prevail by establishing that the rationale given by the employer is "mere pretext". Id.

While it is not clear that Grievant was in fact treated differently from any other employee, assuming she was, MBOE has given a legitimate, nondiscriminatory reason for its action. While MBOE's action may not appear to be the most logical approachto Grievant, that does not make it wrong, discriminatory, or unreasonable. Grievant presented no evidence that the rationale given by MBOE was mere pretext.

Grievant also pointed out that MBOE employs an itinerant teacher with BD certification, and felt that person could also be used at Williamson High School should a BD student enroll. Whether this employee's schedule would allow this is unknown. She also suggested other alternatives, such as including BD certification in the recent posting for a half-time position at Williamson High School, (See footnote 4) or allowing her to obtain a temporary permit in the area should a teacher with BD certification be needed. MBOE pointed out that a BD student may require attention all day, so a half-time teacher certified in BD would not necessarily be sufficient, and that it could not require any teacher to apply for a temporary permit. David Temple, MBOE's Administrative Assistant, also testified MBOE would prefer to employ fully certified teachers, rather than applying for temporary permits for teachers who did not hold the necessary certification. Accordingly, neither of these suggested options seemed to be the best plan of action. Further, the availability of other options to MBOE does not render the decision to transfer Grievant arbitrary and capricious or clearly wrong.

Finally, Grievant argued evaluations should have been considered, and she had demonstrated the ability to handle behavioral problems at the high school, and to diffuse racial tensions, and was an asset to the high school. Evaluations are not aconsideration here as Grievant did not hold the desired certification. There is no indication in the record that the teacher certified in BD is unable to likewise handle behavioral problems at the high school. As this is her area of certification, one would think she would be qualified in this area. In addition, the teacher retained at Williamson High School holds the certification necessary to serve the needs of any BD student who enrolls at the school, so that MBOE would not face the problem of having to hire a teacher just for that student's needs. Certainly, Burch High School will benefit from Grievant's talents, just as Williamson High School has.

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 her grievance by a preponderance of the evidence. Tibbs v. Mercer County Bd. of Educ., Docket No. 96-27-074 (Oct. 31, 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). Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986).

3. "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. ofEduc., 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).

4. Classroom teachers have no vested right to be assigned to a particular school in the county. Hawkins v. Tyler County Bd. of Educ., 166 W. Va. 363, 275 S.E.2d 592 (1979)

5. 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 chose to transfer her from Williamson High School in order to staff that school with a teacher certified in BD. Belladonna v. Logan County Bd. of Educ., Docket No. 97-23-321 (Oct. 16, 1997).

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. Any 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: September 16, 1999

Footnote: 1

This grievance was filed on or about May 12, 1999. Grievant's supervisor responded on May 14, 1999, that he was without authority to grant the grievance. Grievant appealed to Level II, where a hearing was held on May 25, 1999, and a decision denying the grievance was issued on June 4, 1999. Grievant waived Level III, appealing to Level IV on June 7, 1999. A Level IV hearing was held on August 16, 1999. Grievant was represented by Sidney Fragale, and Respondent was represented by Hannah B. Curry, Esquire. This matter became mature for decision on September 7, 1999, upon receipt of the parties' written arguments.

Footnote: 2

The evidence presented does not reflect this teacher's name or whether she held other certifications, although MBOE's representative stated in his closing argument at Level II that she was also certified in MI and SLD.

Footnote: 3

Some counties have adopted policies which require them to consider seniority in transfer situations. MBOE did not have such a policy. See Allen v. Harrison County Bd. of Educ., Docket No. 96-17-176 (July 31, 1996). See also, Dyer, et al., v. Lincoln County Bd. of Educ., Docket No. 95-22-494 (June 28, 1996).

Footnote: 4

MBOE transferred two special education teachers from Williamson High School, and then posted a half-time position to reach its goal of reducing the special education staff by one and a half teachers.