KATHLEEN H. WARNER,

Grievant,

v. **Docket No. 99-20-166**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

On March 30, 1999, Kathleen H. Warner (Grievant), initiated this grievance pursuant to W. Va. Code §§ 18-29-1, et seq., alleging that Respondent Kanawha County Board of Education (KCBE) had improperly eliminated her position as Director of Information Systems and Research, resulting in her reduction in force (RIF). The grievance was waived at Level I as Grievant's immediate supervisor was without authority to resolve the grievance. Grievant proceeded to Level II where an evidentiary hearing was conducted on April 7, 1999. The grievance was denied by the Superintendent's designee, Leonard Allen, in a Level II decision issued on April 27, 1999. Grievant elected to waive Level III, as authorized by W. Va. Code § 18-29-4(c), appealing to Level IV on April 29, 1999. Grievant further indicated that this matter could be decided on the basis of the record established at the lower levels of the grievance procedure. In accordance with an established briefing schedule, both parties submitted timely written arguments on May 24,1999, and this matter became mature for decision upon receipt of a transcript of the Level II hearing on May 27, 1999. (See footnote 1)

Based upon a preponderance of the credible evidence contained in the record established through Level II, the following Findings of Fact pertinent to resolution of this grievance have been determined.

FINDINGS OF FACT

1. Grievant is employed by Respondent Kanawha County Board of Education (KCBE) as its Director of Information Systems and Research, a central office administrator's position.

2. Grievant has been employed by KCBE since 1989. She does not hold any professional certifications from the West Virginia Department of Education as a teacher or school administrator.

3. Dr. Ron Duerring is employed by KCBE as its Superintendent.

4. Consistent with a trend that has developed in recent years, KCBE's student enrollment declined by 642 students during the 1998-99 school year as compared to the 1997-98 school year.

5. Declining enrollment results in reduced funding from the State of West Virginia under the West Virginia Department of Education's state aid formula. 6. During the fall and winter of the 1998-99 school year, KCBE discussed the need to reduce administrative, professional and service personnel to more closely match the number of positions receiving state funding.

7. In early February 1999, Superintendent Duerring discussed his plan to reduce the number of teaching and service personnel positions with KCBE. Ultimately, 70 professional and service personnel positions were identified for elimination.

8. On or about February 12, 1999, Eric Eyre, a reporter for the Charleston Gazette, contacted Grievant to ask her how she felt about being on the list of KCBE administrators being recommended for a reduction in force (RIF). RIF HT at 17. Grievant discussed this conversation with Superintendent Duerring who advised her that all 20 locally-funded positions, including the position occupied by Grievant, were being considered for RIF, but no decision on which positions to eliminate had yet been made.

9. On February 24,1999, KCBE encouraged Superintendent Duerring to make additional reductions in the administrative staff. Superintendent Duerring was specifically asked to consider reductions in those positions which are not centrally funded by the State of West Virginia.

10. On March 8, 1999, Superintendent Duerring informed KCBE during a board meeting that he intended to recommend the elimination of two locally-funded central office positions: the Director of Information Systems and Research, and the School-Community Affairs Coordinator. 11. After this information was presented to the board, KCBE Board Member Jarvis made a motion to reject Superintendent Duerring's “recommendation for the cuts he has proposed.” This motion was seconded and defeated by a 4-1 vote. G Ex 4 at L II.

12. On or about March 15, 1999, Superintendent Duerring issued written notice to Grievant indicating that he was recommending her contract be terminated at the end of the 1998-99 school year, based upon a need to reduce the number of cental office administrators. The notice provided

that Grievant could request a hearing before KCBE to contest the recommendation. G Ex 1 at L II.

13. After Grievant requested a hearing, KCBE conducted an extensive RIF hearing on March 25, 1999. At the conclusion of that hearing, Superintendent Duerring's recommendation to terminate Grievant through the RIF process was approved by a 3-2 vote.

14. The essential duties of Grievant's position as Director of Information Systems and Research can be absorbed by other KCBE employees.

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. Grievant contends KCBE's actions deprived her of rights guaranteed by W. Va. Code §§ 18A-2-2 and 18A-4-7a. W. Va. Code § 18A-4-7a provides, 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, That all persons employed in a certification area to be reduced who are employed under a temporary permit shall be properly notified and released before a fully certified employee in such a position is subject to release: 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 employee subject 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.

The portion of W. Va. Code § 18A-2-2 pertinent to this issue provides:

> The continuing contract of any teacher shall remain in full force and effect except as modified by mutual consent of the school board and the teacher, unless and until terminated (1) by a majority vote of the full membership of the board before the first of April of the then current year, after written notice, served upon the teacher, return receipt requested, stating cause or causes, and an opportunity to be heard at a meeting of the board prior to the board's action thereon . . . .

Grievant contends KCBE failed to strictly comply with the procedural safeguards provided in the foregoing statutes by the manner in which her RIF was effected. In particular, Grievant relies upon the decision of the West Virginia Supreme Court of Appeals in Lavender v. McDowell County Board of Education, 174 W. Va. 513, 327 S.E.2d 691 (1984), contending that the circumstances of her RIF are substantially similar to the situation addressed in that decision. Ordinarily, county boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Syl. Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986). However, in Lavender the Court found that the employee's case had been improperly prejudged when the Superintendent proposed elimination of Grievant's position, obtaining the county board's “tentative approval” before formally notifying the employee of his “proposed” RIF. The Court explained its holding that the statute was violated in the following manner:

> The statute requires that a superintendent not submit an employee's name for proposed transfer or other action to the board of education, or discuss such actions with the board, until after the superintendent has notified the employee directly and afforded him an opportunity to request a hearing before the board. Such a procedure is consistent with the concept that the board is to make a detached and independent evaluation of the employee's case.

In accordance with Lavender, the ultimate issue to be determined is whether or not the circumstances under which KCBE approved the Superintendent's recommendation in this matter deprived Grievant of a “detached and independent evaluation” of her case. The undersigned Administrative Law Judge is not persuaded that Grievant's rights were violated under the facts presented.

Unlike the situation in Lavender, Superintendent Duerring did not solicit KCBE's approval of his recommendation to eliminate Grievant's position. He simply informed the Board that he had complied with their instructions to consider eliminating administrative positions, further noting he had identified two positions, one of which was held by Grievant,that he was planning to recommend for elimination. Superintendent Duerring never asked the board to approve his actions. Instead, Board Member Jarvis attempted to circumvent the statutory procedures by urging the board to disapprove Superintendent Duerring's planned actions. By voting down Board Member Jarvis' motion to reject

the superintendent's recommendation, KCBE effectively avoided prejudging the merits of Grievant's RIF.

Subsequently, in addition to receiving formal notice from Superintendent Duerring that he was proposing to eliminate her position, Grievant requested, and received, a full hearing before KCBE regarding the merits of that recommendation. (See footnote 2) After reviewing the transcript of that hearing, including the questions asked and comments made by individual board members, there is no indication that the prior proceedings deprived Grievant of a detached and independent evaluation of her case. Therefore, the undersigned concludes that the Lavender precedent is not controlling in this instance.

Grievant also contends that the decision to eliminate her position was arbitrary and capricious, and KCBE failed to establish that her duties can be absorbed by other employees. The arbitrary and capricious standard of review does not permit an administra tive law judge to simply substitute his judgment for that of the school board. Bradley v. Bd. of Directors, Docket No. 96-BOD-030 (Jan. 28, 1997). See generally, Bedford County Memorial Hosp. v. Health & Human Serv., 769 F.2d 1017 (4th Cir. 1985); Staton v.Wyoming County Bd. of Educ., 184 W. Va. 369, 400 S.E.2d 613 (1990). Moreover, the reviewer's role is limited to determining whether relevant factors were considered in reaching the decision, and whether there has been a clear error of judgment. See Bowman Transp., Inc., v. Arkansas-Best Freight System, Inc., 419 U.S. 285 (1974); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982).

The record in this matter indicates that Superintendent Duerring consulted with Grievant's supervisor regarding the essential duties of her position, thereafter making a systematic and reasoned effort to verify that other qualified employees were able to take on her duties. While these remaining employees may need to spend additional time to get up to speed on some of Grievant's functions, and it may take longer for them to complete her duties than Superintendent Duerring has predicted, this does not detract from the conclusion that the school system can complete its essential mission without a Director of Information Systems and Research. Ultimately, a county board has considerable discretion in determining the numbers and types of employees it retains to perform its educational functions. See Hill v. Kanawha County Bd. of Educ., Docket No. 94-20-537 (Mar. 22, 1995); aff'd sub nom. Hill v. Raglin, Cir. Ct. of Kanawha County, No. 95-AA-106 (Jan. 8, 1997). Although reasonable minds may differ about the essentiality of Grievant's position, as reflected in the

3-2 vote approving Superintendent Duerring's recommendation, the decision reached is not so implausible that it cannot be ascribed to such a difference of view. See Bedford County Memorial Hosp., supra.

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

CONCLUSIONS OF LAW

1. 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.

2. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986). See Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648 (1995).

3. Under the facts and circumstances presented, Grievant was not denied a detached and independent evaluation of the merits of the Superintendent's proposal to eliminate her position and terminate her employment through a reduction in force. See Lavender v. McDowell County Bd. of Educ., 174W. Va. 513, 327 S.E.2d 691 (1984).

4. In applying an "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). A decision of less than ideal clarity may beupheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, supra, at 286.

5. Grievant failed to establish that the decision to eliminate her position as Director of Information Systems and Research, shifting the duties of her position to other employees, was either arbitrary and capricious or an abuse of discretion. See Hill v. Kanawha County Board of Education,

Docket No. 94-20-537 (Mar. 22, 1995), aff'd sub nom. Hill v. Raglin, Cir. Ct. of Kanawha County, No. 95-AA-106 (Jan. 8, 1997).

6. Grievant failed to demonstrate that KCBE violated, misapplied, or misinterpreted W. Va. Code §§ 18A-2-2, 18A-4-7a, or any other statute, policy, rule, or regulation, by the manner in which it decided to eliminate her position through a reduction in force.

Accordingly, this grievance is **DENIED**.

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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: July 29, 1999

Footnote: 1

Grievant was represented by Perry Bryant with the West Virginia Education Association. Respondent was represented by its General Counsel, James Withrow.

Footnote: 2

In Lavender, the employee was notified by the Superintendent that his reassignment recommendation had previously been "tentatively approved" by the county board. The employee never requested the hearing offered in the notice, opting instead to seek relief through the courts.