ROSANNA VALLO,

Grievant,

v. **Docket No. 99-33-308**

MCDOWELL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Rosanna Vallo, alleges in this grievance that the McDowell County Board of Education's ("MBOE") decision to transfer her was arbitrary and capricious. She requested as relief that she be returned to her teaching position at Welch Middle School. (See footnote 1)

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

Findings of Fact

1. Grievant is employed by MBOE as a classroom teacher, and has been teaching in McDowell County 26 years. She had been at Welch Middle School 14 years, and was the third most senior teacher at the school. Her certification is in elementary education 1-8 and social studies 1-9.

2. Dennis Jarvis has 23 years of seniority in McDowell County. He is certified in social studies 7-9 and physical education 7-12.

3. During the 1998-99 school year two employees taught social studies at Welch Middle School, Grievant and Mr. Jarvis. Grievant taught four social studies classes and one language arts class, and Mr. Jarvis taught three social studies classes and one physical education class.

4. At the end of the 1998-99 school year, MBOE employed more professional personnel than the state aid formula allows.

5. The principal of Welch Middle School, James Spence, and MBOE's special education director reviewed student enrollment projections for the school. They recommended that two teaching positions be eliminated. This was not the first year this recommendation had been made, but MBOE

had not accepted the recommendation in previous years.

6. MBOE reduced the number of teaching positions county-wide by 17 for the 1999-2000 school year, and reduced the number of teachers at Welch Middle School by two. A physical education position and Grievant's position were eliminated. Grievant was placed on transfer. Mr. Jarvis was allowed to remain at Welch Middle School.

7. MBOE does not have a written policy requiring that seniority be considered in transfer decisions. Seniority, however, is the primary consideration of MBOE when all other factors are equal.

8. There are four teachers remaining at Welch Middle School who are certified to teach physical education, and those teachers are also needed to teach in their other certification areas of social studies, science, art, and language arts and science. There are three teachers remaining at Welch Middle School who are certified to teach social studies, and four teachers remaining who are certified to teach language arts. Superintendent J. Kenneth Roberts determined that, as between Grievant and Mr. Jarvis, Welch Middle School could handle language arts instruction without Grievant, and would be better able to maintain flexibility to handle physical education instruction if Mr. Jarvis were retained. Seniority was not a consideration.

9. There was no position into which Mr. Jarvis could have been transferred.

10. When MBOE reduced the number of special education teachers at Mount View High School at the end of the 1998-99 school year, it looked at the positions it had in special education at the school, and eliminated two MI positions, two LD positions, and one BD position. It then transferred or reduced in force the least senior employees occupying those positions, regardless of their certifications. As a result, two employees were transferred who were certified in all three areas of special education, while less senior special education employees were retained, due to the factthat MBOE looked solely at the seniority of persons employed in a particular type of special education position, rather than looking at the certifications of all the special education instructors, and their seniority, to see whether more senior employees could be retained if they were employed in another special education area.

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

argued MBOE's decision to transfer her was arbitrary and capricious, because it used a different standard in her case from that used at another school in the county. She contends that seniority should have been used as the determining factor, as she believes was done at Mount View High School. She did not argue that Mr. Jarvis should have been reduced in force, and it cannot be determined from the record whether this is what should have occurred.

"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 (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 2) 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.

In this case, Superintendent Roberts based his recommendation upon the instructional needs of Welch Middle School. While it would appear on its face that Grievant's areas of certification would provide greater flexibility than Mr. Jarvis', Superintendent Roberts' explanation of his rationale was not challenged, and cannot be found to be arbitrary and capricious under the circumstances.

As to Grievant's argument regarding the Mount View High School transfers, while seniority was the final determining factor in that transfer, it was not the only factor, and less senior employees were in fact retained, even though the transferred employees held the same special education certification as these less senior employees. Grievant did not point to any other instances where MBOE has used seniority to determine who should be transferred. Grievant failed to demonstrate the transfer was arbitrary and capricious, or that her seniority should have been considered.

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). See 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. 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).

4. Grievant failed to prove that the McDowell County Board of Education abused its broad discretion or acted in an arbitrary and capricious manner when it chose to transfer her from Welch Middle School.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of McDowell 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: August 31, 1999

Footnote: 1

This grievance was filed on or about April 15, 1999. Grievant's supervisor responded on April 19, 1999, that he was without authority to resolve the grievance. Grievant appealed to Level II, where a hearing was held on May 26, 1999, and a decision denying the grievance was issued on June 7, 1999. Grievant appealed to Level III on June 17, 1999, and the grievance was denied at that level on July 19, 1999. Grievant appealed to Level IV on July 26, 1999, and asked that a decision be made on the lower level record. This matter became mature for decision on August 16, 1999, the deadline for submission of written argument. Respondent declined to submit written argument. Grievant was represented by Anita Maxwell, and Respondent was represented by Jerry Roncella and Dr. J. Kenneth Roberts, Superintendent, at Level II, and by Robert Blair, Esquire, at Level IV.

Footnote: 2

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).