BILLY HUTCHINSON,

Grievant,

v. **Docket No. 99-34-290**

NICHOLAS COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant Billy Hutchinson filed this grievance against Respondent Nicholas County Board of Education ("NBOE") on or about May 4, 1999, alleging "a violation of 18A-2-7 and 18A-4-7a." He sought as relief, "the return of drivers education to his teaching schedule for the 1999-2000 school term." (See footnote 1)

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

Findings of Fact

1. Grievant has been employed by NBOE for 21 years. He is a teacher at Richwood High School. His areas of certification are physical education, driver education, and health.

2. During the 1998-99 school year, Grievant taught two driver education classes and one health class. One other teacher taught driver education.

3. Richwood High School lost three teachers at the beginning of the 1998- 99 school year: one retired, one accepted a position as a counselor at the school, and one accepted a position at Nicholas County High School. Two of those teachers had taught business courses, and the third had taught health.

4. During the fall of 1998, a position was posted for a teacher at Richwood High School. The posting required certification in business, health, and driver education.

5. Derrick Workman was the only applicant for the posted position, and was selected. He is certified in Business 7-12 and Math 7-9. He began teaching health and business courses in January of 1999. He refused to apply for a permit to teach health or driver education, or to take courses toward certification in these areas. He is scheduled to teach only business courses for the 1999-2000

school year.

6. NBOE placed Grievant on in-school transfer at the end of the 1998-99 school year. He is scheduled to teach three health classes at Richwood High School for the 1999-2000 school year. Grievant is the only teacher at Richwood High School certified to teach Health.

7. If the schedule for 1999-2000 is not changed, no one will be teaching the two driver education classes Grievant taught, and driver education classes will be available to about 56 students. Schedules sometimes change over the summer.

8. During the 1998-99 school year driver education was taken by 116 students at Richwood High School. During the preceding two school years the enrollment in driver education classes was 71 and 90 students, respectively.

9. The enrollment at Richwood High School at the end of the 1998-1999 school year was 391 students in grades 10 through 12. The projected enrollment for the 1999-2000 school year is 405 students. The trend has been toward declining enrollment, with a decline from 540 students eight years ago.

10. If only seniors are enrolled in driver education during the 1999-2000 school year, there still will not be enough slots for all the seniors who have not yet taken the course to enroll.

11. Students are required to take health in order to graduate. They are not required to take driver education or any business classes in order to graduate, except that business math can serve as one of the math requirements.

Discussion

Grievant bears the burden of proving the elements of his grievance by a preponderance of the evidence. Tibbs v. Mercer County Bd. of Educ., Docket No. 96- 27-074 (Oct. 31, 1996). Grievant did not submit any written argument to the undersigned, nor did his representative present oral argument at the Level II hearing. The only indication of Grievant's contentions comes from his grievance statement, his testimony, and the summary of Grievant's arguments in the Level II decision, apparently gleaned from a post-hearing written submission. Grievant testified he filed a grievance because, "our kids are suffering. They're not being -- They're losing their privilege of being able -- being able to take driver education." He later stated, "I'll have a sophomore myself that's coming into Richwood High School next year, and I know there's no way that she can take driver education until

she's a senior, and then only half of her senior class will be offered the chance to take driver education, and that's one of the reasons why I'm here." He pointed to W. Va. Code § 18-6-2. He stated he wants "all kids being able to take driver education so that we don't have as many fatalities and accidents out there." The Level II decision states Grievant's primary contention is his transfer violated W. Va. Code § 18-6-2.

It also appears Grievant believes Respondent was wrong in hiring someone who was not certified to teach driver education or health. The Level II decision also states Grievant alleges Mr. Workman's selection violated W. Va. Code § 18A-7-4a, and that Grievant's transfer was arbitrary and capricious.

Respondent argued W. Va. Code § 18-6-2 is for the benefit of students, and Grievant cannot use the grievance procedure to act as a student advocate. It further argued that Code Section grants county boards of education considerable flexibility in scheduling driver education classes, that Grievant had not demonstrated that more driver education classes would not, in fact, be made available "as quickly as possible," as is required by the statute, or that any student who had signed up to take driver education was being denied the opportunity. It further argued Grievant had not demonstrated how Mr. Workman's situation affected him, and that he therefore had no standing to complain of Mr. Workman's certification. Respondent argued Grievant's assignment to teach health classes was not arbitrary and capricious.

Finally, Respondent argued reductions in force are not school specific, but are conducted county-wide; thus what happens with a position at one school may be dependent upon circumstances throughout the county. This final argument will not be addressed further, as there was no indication that any reductions in force or transfers outside Richwood High School at the end of the 1998-99 school year had any impact on what happened to Grievant. Quite simply, Grievant was transferred because Mr. Workman refused to apply for a permit to teach either health or driver education or work toward certification, and Grievant was the only teacher on staff who could teach health.

"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). (See footnote 2)

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).

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.

As to Grievant's contentions regarding the requirements of providing driver education to students, W. Va. Code § 18-6-1 provides:

> The purpose of this article is to ensure that every secondary school pupil has the opportunity, at or about the time he reaches licensing age, to enroll in a course of driver education designed to train him to drive skillfully and safely under all traffic and roadway conditions and circumstances; to make the driver education course available to out- of-school youths and to adults; and to ensure that commercial driver education schools achieve and maintain a level of driver education equal to the minimum standards that are prescribed for secondary schools.

W. Va. Code § 18-6-2 provides, in pertinent part:

> No later than the first day of the public school term beginning in the year one thousand nine hundred seventy-three, there shall be offered in all public secondary schools within the State an approved, comprehensive course in driver education.

> As the first priority, the driver education course shall be made available at no cost to all secondary school pupils at or about the time they reach licensing age.
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> . . .
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> In those counties where sufficient public secondary school driver education courses are not available to meet all requests for the course, county boards of education shall, as quickly as possible, make sufficient courses available to fill those requests.

W. Va. Code § 18-6-8 provides:

> Before any pupil is graduated from a secondary school after the first day of September, one thousand nine hundred seventy-five, he shall first be provided an opportunity and encouraged to successfully complete a driver education course approved by the state board in a public, private, parochial or denominational secondary school within the State. If a pupil has successfully completed a similar course in a secondary school of another state and the course is accepted by the state board as adequately meeting and complying with the course standards established by the state board, the aforementioned requirement shall be deemed fulfilled regarding that pupil.

This Grievance Board has previously held when addressing a board of education decision to decrease the number of driver education courses offered, that "[i]t is not an abuse of discretion, and is the responsibility of a board of education, to decide when `to maintain certain courses in the curriculum while reducing the opportunities for students to partake of another course.' Hill v. Kanawha County Bd. of Educ., Docket No. 94-20-537 (Mar. 22, 1995), aff'd sub nom., Hill v. Raglin, No. 95-AA-106 (Circuit Court of Kanawha County, Jan. 8, 1997). See also Hill and Cyrus v. Kanawha County Bd. of Educ., Docket No. 96-20-362 (Jan. 22, 1997)." McComis v. Mingo County Bd. of Educ., Docket No. 98-29-203 (Sept. 29, 1998). Further, "the intended beneficiaries of §§ 18-6-1, et seq., are students, not teachers. . . . this statute creates a certain curricular priority for driver education classes. However, the statute does not impose a mandatory duty on county boards of education to offer driver education to all sophomores who wish to enroll, and certainly does not contain a mandate to the degree that history and health are required under § 18-2-9." Hill supra. Finally, "W. Va. Code §§ 18-6-1, et seq., operates to make a course in driver education a `required elective' in public secondary schools but does not compel a board of education to maintain a specific ratio of driver education teachers to the student population eligible to complete such a course of instruction." Id.

With regard to Grievant's transfer to teach health at Richwood High School, Grievant is the only teacher certified to teach health, and it is a required subject for all students. It was necessary to schedule him to teach only health courses.

The principal of Richwood High School felt he needed two teachers to cover all the business, health and driver education courses he thought should be offered, but the superintendent would only give him one teacher. Accordingly, he asked for one teacher with all three certifications, knowing no one would have all three. When Mr. Workman was hired he was not told he had to pursue certification in all three areas, so he later refused to obtain these other certifications. While these matters could have been dealt with differently, Grievant has not demonstrated Respondent acted in an arbitrary and capricious manner. Further, even had Mr. Workman been certified in health and driver education, Respondent still could have scheduled Grievant to teach only health had it chosen to do so, as that is one of his areas of certification.

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 his 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. "It is not an abuse of discretion, and is the responsibility of a board of education, to decide when `to maintain certain courses in the curriculum while reducing the opportunities for students to partake of another course.' Hill v. Kanawha County Bd. of Educ., Docket No. 94-20-537 (Mar. 22, 1995), aff'd sub nom., Hill v. Raglin, No. 95-AA-106 (Circuit Court of Kanawha County, Jan. 8, 1997). See also Hill and Cyrus v. Kanawha County Bd. of Educ., Docket No. 96-20-362 (Jan. 22, 1997)." McComis v. Mingo County Bd. of Educ., Docket No. 98-29-203 (Sept. 29, 1998).

4. "[T]he intended beneficiaries of §§ 18-6-1, et seq., are students, not teachers. . . . this statute creates a certain curricular priority for driver education classes. However, the statute does not

impose a mandatory duty on county boards of education to offer driver education to all sophomores who wish to enroll, and certainly does not contain a mandate to the degree that history and health are required under § 18-2-9." Hill supra.

5. Grievant failed to prove that the Nicholas County Board of Education abused its broad discretion or acted in an arbitrary and capricious manner when it chose to transfer him to teach only health courses.

Accordingly, this grievance is **DENIED** .

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Nicholas 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 13, 1999

Footnote: 1

The record does not reflect what occurred at Level I. Grievant appealed to Level II, where a hearing was held on June 8, 1999. A Level II decision denying the grievance was issued on July 22, 1999. Grievant waived Level III, appealing to Level IV on July 30, 1999. The parties agreed that this grievance could be submitted for decision based upon the record developed at Level II. Grievant was represented by Sidney Fragale, and Respondent was represented by Erwin L. Conrad, Esquire. This matter became mature for decision on August 30, 1999, upon receipt of Respondent's written argument. Grievant elected not to file written argument.

Footnote: 2 Although neither party argued what happened to Grievant was not a transfer, and he received notice and an opportunity for a hearing before NBOE, it should be noted that it is certainly arguable that Grievant was not transferred. This Grievance Board has concluded that, "[a] teaching schedule adjustment, not including the assignment of duties or responsibilities outside of a teacher's presently-utilized area of certification, discipline, department or grade level, is not a transfer requiring application of W.Va. Code 18A-2-7." Kidd v. Fayette County Bd. of Educ., Docket No. 89-10-452 (Dec.

14, 1989); Dotson v. Greenbrier County Bd. of Educ., Docket No. 13-87-321-4 (Mar. 7, 1988). However, in this case, it may be that the changes in Grievant's duties were so significant that he was transferred. Kidd, supra.