ARTHUR B. LAMBERT, JR.,

Grievant,

v.

DOCKET NO. 99-41-391

RALEIGH COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Arthur B. Lambert, Jr. filed this grievance against his employer, the Raleigh County Board of Education ("Board") on June 30, 1999:

> I feel the Raleigh County Board of Education, through its agent, WWHS, has violated 18A-4-7a in that they have done illegal transfers of job assignments. They also forced me and other teachers to sign transfer forms under duress; when we did not want to. I have also been discriminated against in scheduling assignments. Favoritism has been shown to other teachers. Illegal use of seniority in filling teaching assignments has been flagrantly used at the school.
>
> Relief sought: Fair and equitable distribution of chemistry classes which would include the following: Chemistry I, AP Chemistry, Technical Chemistry, and Coordinated and Thematic Science 10.

The grievance was denied by level one response dated July 14, 1999, by Charles R. Maynard, Principal of Woodrow Wilson High School (WWHS). On or about July 19, 1999, Grievant filed a level two appeal and a request, by his representative, to extend the time line for the level two hearing (Jt. Ex. 2). The level two hearing was scheduled, at Grievant's request, on August 26, 1999. The grievance was denied at level two by DwightD. Dials, Grievance Evaluator, on September 17, 1999. Grievant by-passed level three and appealed to level four on September 23, 1999, and the parties agreed to submit the case on the record developed at levels one and two. This matter became mature for decision on October 29, 1999, the deadline for the parties' proposed findings of fact and

conclusions of law. Grievant was represented by John O'Neal, W. Va. Federation of Teachers, and the Board was represented at level three by Dr. Emily Meadows, Director of Personnel, and at level four by Erwin L. Conrad, Esq., Conrad and Clay.

SUMMARY OF EVIDENCE

Joint Exhibits

Ex. 1 -

Level I Grievance and Response.

Ex. 2 -

July 19, 1999 letter from Dwight Dials to John O'Neal.

Ex. 3 -

August 18, 1999 letter from Dwight Dials to Arthur Lambert.

Ex. 4 -

Woodrow Wilson High School Implemented Master Schedule.

Grievant's Exhibits

Ex. 1 -

Sealed AP Chemistry transcript of Joe Ketz.

Ex. 2 -

Sealed Chem Com Transcript of Joe Ketz.

Ex. 3 -

Permits and certifications of Arthur Lambert.

Ex. 4 -

Mutual agreement letter of Arthur Lambert.

Ex. 5 -

Mutual agreement letter of Mary Thomas.

Ex. 6 -

Mutual agreement letter of Joe Ketz.

Board Exhibits

Ex. 1 -

Ten letters from Woodrow Wilson High School teachers.

Ex. 2 -

Teaching endorsements of Arthur Lambert.

Ex. 3 -

May 14, 1997 letter from Miller L. Hall to Arthur Lambert; November 6, 1997 letter from Arthur Lambert to Carlton Spicer.

Ex. 4 -

Phase I Chemistry certification of Arthur Lambert.

Ex. 5 -

June 17, 1999 Step I summary of Arthur Lambert.

Ex. 6 -

September 28, 1998 memorandum from Carlton Spicer to Science teachers.

Ex. 7 -

Miscellaneous documentation from Arthur Lambert.

Ex. 8 -

Woodrow Wilson High School condensed master schedule.Ex. 9 -
June 30, 1999 memorandum from Phyllis Barnhart to Arthur Lambert.

Testimony

Grievant testified in his own behalf and presented the testimony of Carlton Spicer, Fred Hill and

Charles R. Maynard.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. Grievant is employed by the Board at Woodrow Wilson High School ("WWHS"), and is certified to teach General Science 7-12, Social Studies 7-9, and Chemistry 9-12. Board Ex. 3.

2. Grievant was initially hired at WWHS as a physical science teacher. In 1990, his position of physical science teacher was scheduled to be eliminated. Because there was an increase in the number of students requesting Chemistry, then-Principal Miller Hall assigned Grievant to teach Chemistry classes, in order to avoid having to reduce-in-force Grievant. The Chemistry teaching position was not posted for competitive bid.

3. In the 1998-1999 school year, a large number of students failed Co-Science 10, requiring them to repeat the class in the 1999-2000 school year. Students have to pass Co-Science 10 before they can take Chemistry classes. This high failure rate resulted in an increased need for Co-Science 10 classes, and a decreased need for Chemistry classes for the 1999-2000 school year.

4. Co-Science 10 can be taught by a teacher holding a general science certification such as biology, chemistry, physics and/or general science. 5. For the 1999-2000 school year, the Co-Science 10 classes are assigned to science teachers at WWHS as follows:

	1st Term	2nd Term
Ben Anderson	2 Co-Sci 10	2 Co-Sci 10
Roy Casto	1 Co-Sci 10	2 Co-Sci 10
Dan Doman	1 Co-Sci 10	1 Co-Sci 10

Marion Harrison

1 Co-Sci 10
1 Co-Sci 10

Joe Ketz

0 Co-Sci 10
0 Co-Sci 10

Arthur Lambert

3 Co-Sci 10
2 Co-Sci 10

Phyllis Newcomb

1 Co-Sci 10
1 Co-Sci 10

Thomas Parham

3 Co-Sci 10
3 Co-Sci 10

Ursula Payne

1 Co-Sci 10
1 Co-Sci 10

6. According to the 1999-2000 master schedule, during the first term, Mr. Ketz is scheduled to teach AP Chemistry, Concept Chemistry, and Chemistry I. During the second term, Mr. Ketz will teach AP Chemistry and two Chemistry I classes. Mr. Ketz does not have a Co-Science 10 class.

7. In order to teach AP Chemistry and Chem Com (also known as Technical Chemistry), there is additional specific training necessary to receive an endorsement in chemistry. At all times pertinent herein, Grievant did not hold the additional endorsement necessary to teach AP Chemistry or Chem Com. (See footnote 1)

8. During the first term of the 1999-2000 school year, Grievant is scheduled to teach three Co-Science 10 classes. During the second term, Grievant will teach one Chemistry I class and two Co-Science 10 classes. 9. On March 26, 1999, following a faculty senate meeting, Principal Charles Maynard met with the faculty to discuss scheduling for the upcoming 1999-2000 school year.

Principal Maynard offered the faculty a mutual agreement form, in which they agreed to teach certain basic skills, introduction to majors, and/or introduction to core courses classes, which were going to be required by the State Board of Education. Principal Maynard told the teachers they did not have to sign this form, but if they did not, it was possible they would be placed on transfer, in order that the administration could ensure coverage of all classes for the 1999-2000 school year.

10. Grievant signed this form on March 29, 1999. Board Ex. 4.

11. Nine other WWHS teachers, who also signed the form, wrote letters indicating they believed the mutual agreement was not a fair and equitable way to distribute classes, and they believed Principal Maynard "threatened" them with transfer if they did not sign the mutual agreement. There are between seventy (70) and one hundred (100) staff members at WWHS.

DISCUSSION

As this is not a disciplinary matter, Grievant bears the burden of proving the allegations in his 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 alleges the class scheduling for the 1999-2000 school year amounts to an "illegal transfer". Grievant also alleges he has been discriminated against, and Mr. Ketzgiven favorable treatment, in the scheduling of Chemistry classes for the 1999-2000 school year. The relief sought by Grievant is (1) to continue teaching all Chemistry I classes; and (2) an equitable distribution of the Co-Science 10 classes between Mr. Ketz and himself.

The Board contends it has committed no violation of statute, rule, law or principal governing the scheduling and assignments of classes among already existing professional personnel.

1.

Illegal transfer.

Grievant alleges the terms of the mutual agreement and assignment of classes for the 1999-2000 school year constitutes an "illegal transfer" in violation of the notice and hearing procedures for school personnel set forth in W. Va. Code § 18A-2-7. This Grievance Board has previously recognized that "[a] transfer may consist of the reassignment of an employee to a different position, a

different location or significantly different duties and responsibilities." Matthews v. Preston County Bd. of Educ., Docket No. 39-88-239 (July 27, 1989). However, "[a] teaching schedule adjustment, not including the assignment of duties and 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). See Carr v. Mercer County Bd. of Educ., Docket No. 94-27-074 (Dec. 30, 1994); Dotson v. Greenbrier County Bd. of Educ., Docket No. 13-87-321-4 (Mar. 7, 1988).

Resolution of grievances alleging an on-site transfer must necessarily depend on the particular facts in each case. See Kidd, supra. However, the focus of the inquiry iswhether Grievant has been assigned significantly different duties or responsibilities outside his presently utilized area of certification, discipline or department. Blackburn v. Mingo County Bd. of Educ., Docket No. 95-29-489 (Mar. 27, 1996).

The Mutual Agreement which was presented to the faculty in the Spring of 1999, provides, in pertinent part:

> I, Art Lambert, a teacher at WWHS School, do hereby mutual agree to a change in my teaching assignment for the 1999-2000 school term. My schedule for the 1998-1999 school year is Chemistry I all periods. I understand that it may be necessary for my 1999-2000 assignment to include basic skills or enrichment, intro to majors & introduction to core majors. This assignment is congruent with my teaching certification(s). I realize this assignment is necessary because of realignment of staff and by signing this mutual agreement it will not be necessary for me to be placed on transfer for the 1999-2000 school term.
>
> If this waiver agreement is signed, I realize that training sessions scheduled by the West Virginia Department of Education in certain curriculum areas must be attended in order for the West Virginia Department of Education to issue me a valid waiver. If training sessions are not attended this mutual agreement is null and void. Failure to attend these mandated training sessions will result with me being placed on the Raleigh County Board of Education transfer list for the 1999-2000 school term. (Emphasis indicates portions of the agreement filled in by Grievant).

Board Ex. 4.

In the Spring of 1999, the Board was informed by the State Board of Education that it would be mandated to offer basic skills instruction as part of the Schools to Work initiative. In accordance with the Mutual Agreement, instruction was offered to all faculty in the Summer of 1999, to be paid by the Board. The faculty was instructed that the Board- paid instruction was a one time offer, and if they did not take instruction that Summer, they would have to pay for it themselves at a later date. The

instruction offered by the StateBoard of Education qualified the participants to teach basic skills and introduction to major or core courses. Grievant participated in the training in the Summer of 1999, and thus was qualified to teach the basic skills courses he was assigned for the 1999-2000 school year.

The site where Grievant works was not changed. Grievant's primary subject matter assignment remains within the same subject-area certifications under which he was employed during the previous years. See Blackburn, supra; Miller v. Mason County Bd. of Educ., Docket No. 94-26-1106 (May 12, 1995); Crawford v. Mercer County Bd. of Educ., Docket No. 94-27-958 (Apr. 13, 1995); Dunleavy v. Kanawha County Bd. of Educ., Docket No. 20-89-008 (Feb. 23, 1989). In addition, Grievant has received instruction offered by the State Board of Education to permit him to teach basic skills and introduction to majors and core courses, thus, those areas can now be considered to be within Grievant's areas of certification. Thus, it is concluded that assigning Grievant to teach basic skills courses during the 1999-2000 school year, for which he received state-mandated and approved training, does not constitute a transfer within the meaning of W. Va. Code § 18A-2-7.

2. Duress.

Grievant alleges he was forced to sign the mutual agreement under duress by Principal Hall. The evidence clearly shows Principal Hall was merely advising the teachers at WWHS of the status of the law when he told them that, if they did not sign the mutual agreement allowing him to assign classes as needed, they would most likely be placed on transfer so that he could effectuate the changes necessary to conform to the state mandated curriculum changes It is neither an abuse of power nor is it arbitrary and capricious for a principal to schedule classes to conform to mandated curriculum changes as directed by the State Board of Education. Neither is it an abuse of power nor arbitrary and capricious for a principal to announce to a faculty senate meeting that, pursuant to state law, notices of transfer might be in order as a result of the state mandated curriculum changes if the mutual agreements were not executed. Such action does not rise to the level of duress or intimidation, but is simply an announcement of state mandated procedures.

3.

Class Assignments.

Grievant alleges the class assignments for the 1999-2000 school year were arbitrary and capricious and constituted an improper use of seniority. He wants his schedule to remain the same

with respect to the number of Chemistry classes he is teaching, but wants the Co-Science 10 classes split evenly between himself and Mr. Ketz. As noted above, Grievant has a total of five (5) Co-Science 10 classes for the 1999-2000 school year, and Mr. Ketz has none.

The evidence shows a large number of students failed Co-Science 10 in school year 1998-1999 and had to repeat that course in school year 1999-2000. This necessarily increased the number of Co-Science 10 courses to be taught. Students cannot take Chemistry classes until they have passed Co-Science 10, which consequently caused the number of Chemistry classes offered to decrease for the 1999-2000 school year. All teachers holding certification in any of the basic sciences can teach Co-Science 10. Therefore, all of the science teachers at WWHS, except for Mr. Ketz, were assigned Co-Science 10 classes. Grievant asserts he is a Chemistry teacher, and as such, should not have to teach basic science courses. In the alternative, Grievant argues, if he is required to teach those courses, Mr. Ketz should also be required to teach them

At the time the 1999-2000 schedule was created, Mr. Ketz was certified to teach AP Chemistry, Honors Chemistry, Technical Chemistry, and Chemistry I. The AP, Honors, and Technical Chemistry courses require additional training and certification, not required for Chemistry I courses. Grievant did not have the additional training and certification, which left only Mr. Ketz to teach those higher level courses. Principal Hall did not want to burden Mr. Ketz with too many prep courses, and thus, assigned more Chemistry I courses to Grievant, the only other teacher certified to teach Chemistry courses. In order to fill up Grievant's schedule, he was also assigned Co-Science 10 classes. Mr. Ketz's schedule was already full, and he was not assigned any Co-Science 10 classes. Grievant alleges Mr. Ketz was given his class schedule due to his seniority as a Chemistry teacher at WWHS, but the evidence clearly demonstrates Mr. Ketz was the only teacher at WWHS certified to teach the upper level Chemistry classes at the time the schedule was developed.

It is the obligation of public school principals to supervise the management and operation of the school or schools to which they are assigned. Under the supervision of the superintendent, the principal shall assume administrative and instructional supervisory responsibility for the planning, management, operation and evaluation of the total education program of the school to which he is assigned. W. Va. Code § 18A-2-9. It is not an abuse of discretion, but instead 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). See also, McComis v. Mingo County Bd. of Educ., Docket No. 98-29-203 (Sept. 29, 1998). Furthermore, tenured teachers do not have a vested right to be assigned to a particular school or to a particular set of duties. Mahon v. Mingo County Bd. of Educ., Docket No. 94-29-305 (Mar. 17, 1995). See State ex rel. Hawkins v. Tyler County Bd. of Educ., 275 S.E.2d 908, 911-12 (W. Va. 1981); Weaver v. Bd. of Educ., 128 W. Va. 42, 35 S.E.2d 679 (1945). Based upon the evidence, Grievant has not shown his class schedule for the 1999-2000 school year was arbitrary or capricious.

4. Discrimination/Favoritism.

Grievant also alleges the Board has discriminated against him, and shown favoritism to Mr. Ketz, by not assigning Mr. Ketz any Co-Science 10 classes.

W. Va. Code § 18-29-2(m) defines “discrimination” 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.” Code § 18-29- 2(o) defines “favoritism” as “unfair treatment of any employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.” In order to establish a claim of discrimination or favoritism, an employee must establish aprima facie case by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(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.

Smith v. W. Va. Bureau of Employment Programs, Docket No. 94-BEP-099 (Dec. 18, 1996); Hendricks v. W. Va. Dept. of Tax and Revenue, Docket No. 96-T&R-215 (Sept. 24, 1996); Martin. V.

Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995). Once the grievant establishes a prima facie case of discrimination or favoritism, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Smith, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Grievant has failed to establish a prima facie case of discrimination or favoritism. First, Grievant attempts to compare himself only to Mr. Ketz, on the basis that they are the only two Chemistry teachers at WWHS. This comparison is too limited, however, as a teacher has no vested right in class assignments, and may be assigned any courses that fall within his certification areas. Thus, while Grievant claims he is a Chemistry teacher, the evidence shows Grievant is also certified to teach General Science 7-12 and SocialStudies 7-9. Board Ex. 3. The comparison thus must be made with all teachers who are certified to teach the Co-Science 10 classes. Reviewing the assignment of classes set forth in Finding of Fact No. 5, it is clear Grievant is not the only science teacher assigned to Co-Science 10 classes, and in fact, there is another teacher who is assigned to teach more Co-Science 10 classes than Grievant.

Second, it is only Grievant's perception that he has been treated in a detrimental manner, because he does not want to teach Co-Science 10, a basic science course. There is no evidence that this is, indeed, an adverse treatment of a science teacher. Grievant is certified to teach the course, and if it is assigned to him, he must teach it.

Finally, while it is true that Mr. Ketz alone does not have any Co-Science 10 classes, the Board has provided a legitimate, non-discriminatory reason why that is so: Mr. Ketz is the only teacher who can teach the AP, Honors, and Technical Chemistry classes, and thus, he must be assigned those courses before others to ensure the programs are offered. As a result of his full Chemistry schedule, Principal Maynard did not assign Mr. Ketz any Co-Science 10 classes for the 1999-2000 school year. For these reasons, Grievant has failed to prove his claim of discrimination and favoritism.

CONCLUSIONS OF LAW

1. A transfer under W. Va. Code § 18A-2-7 may consist of the reassignment of an employee to a different position, a different location or significantly different duties and responsibilities. Matthews v. Preston County Bd. of Educ., Docket No. 39-88-239 (July 27, 1989). 2. A teaching schedule adjustment, not including the assignment of duties and 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). See Carr v. Mercer County Bd. of Educ., Docket No. 94-27-074 (Dec. 30, 1994); Dotson v. Greenbrier County Bd. of Educ., Docket No. 13-87-321-4 (Mar. 7, 1988).

3. Resolution of grievances alleging an on-site transfer must necessarily depend on the particular facts in each case. See Kidd, supra. However, the focus of the inquiry is whether Grievant has been assigned significantly different duties or responsibilities outside his presently utilized area of certification, discipline or department. Blackburn v. Mingo County Bd. of Educ., Docket No. 95-29-489 (Mar. 27, 1996).

4. Assigning Grievant to teach basic skills courses during the 1999-2000 school year, for which he received state-mandated and approved training, does not constitute a transfer within the meaning of W. Va. Code § 18A-2-7.

5. It is neither an abuse of power nor is it arbitrary and capricious for a principal to schedule classes to conform to mandated curriculum changes as directed by the State Board of Education. Neither is it an abuse of power nor arbitrary and capricious for a principal to announce to a faculty senate meeting that, pursuant to state law, notices of transfer might be in order as a result of the state mandated curriculum changes if the mutual agreements were not executed. Such action does not rise to the level of duress or intimidation but is imply an announcement of state mandated procedures. 6. It is the obligation of public school principals to supervise the management and operation of the school or schools to which they are assigned. Under the supervision of the superintendent, the principal shall assume administrative and instructional supervisory responsibility for the planning, management, operation and evaluation of the total education program of the school to which he is assigned. W. Va. Code § 18A-2-9. 7. It is not an abuse of discretion but instead 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). See also, McComis v. Mingo County Bd. of Educ., Docket No. 98-29-203 (Sept. 29, 1998). Furthermore, tenured teachers do not have a vested right to be assigned to a particular school nor to a particular set of duties. Mahon v. Mingo County Bd. of Educ., Docket No. 94-29-305 (Mar. 17, 1995). See State ex rel. Hawkins v. Tyler County Bd. of Educ., 275 S.E.2d 908, 911-12 (W. Va. 1981); Weaver v. Bd. of Educ., 128 W. Va. 42,

35 S.E.2d 679 (1945).

8. Grievant has failed to prove by a preponderance of the evidence that his class assignments for the 1999-2000 school year were arbitrary or capricious, or based on an improper utilization of seniority.

9. Grievant has failed to make a prima facie case of discrimination or favoritism in the assignment of his 1999-2000 class schedule.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of the Raleigh 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: December 30, 1999

Footnote: 1

After class assignments were made for the 1999-2000 school year, and after the informal conference on this grievance, Grievant completed Phase I for AP Chemistry, which certifies him to teach AP Chemistry, effective July 1, 1999.