ROBERT TIPANE,

Grievant,

v. **Docket No. 01-41-532**

RALEIGH COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Robert Tipane, filed this grievance against his employer, the Raleigh County Board of Education ("RBOE"), alleging his transfer from Shady Spring Junior High to Stanaford Elementary School violated W. Va. Code § 18A-2-7. He requested as relief that he be returned to Shady Spring Junior High. (See footnote 1)

Grievant argued he should be returned to his position because RBOE voted to give the restoration of his position first priority, if the finances were available, and therefore, his transfer should have been rescinded before any other employee's transfer was rescinded. He also argued that there was inequity among schools in the county in terms of the number of students compared to the number of music teachers at a particular school. Finally, he argued that Policy 2510 precludes RBOE from teaching music to seventh and eighth graders in the same class, as is done at Shady Spring Junior High, although he did not demonstrate whether this would affect the need for a second full-time music teacher.

RBOE disputed Grievant's interpretation of Policy 2510, arguing that the language used in the Policy means that music has to be taught to seventh graders, and it has to be taught to eighth graders, but it does not state the two grades cannot receive instruction together. Dr. Emily Meadows, RBOE's Director of Personnel, testified that Grievant was quite correct, that at one time the Policy contained language which precluded instruction of the two grade levels together, but that language was removed from the Policy. RBOE disputed that there was any inequity in the number of music teachers at its school, and it explained the reasons why other transfers had to be rescinded. Dr. Meadows explained that RBOE simply did not have the funding to maintain a second full-time music

teacher position at Shady Spring Junior High.

The following Findings of Fact are made based upon the evidence presented at the Level II hearing.

FINDINGS OF FACT

1. Grievant is employed by RBOE as a music teacher. During the 2000-2001 school year, he was employed in a full-time position teaching music at Shady Spring Junior High. His certification is in Music, K-12. During the second semester of the last school year, he taught guitar to 6 students, music to 84 students over 3 class periods, and choral to 17 students.

2. During the 2000-2001 school year, the band director at Shady Spring Junior High, Gary Jones, taught 11 students in woodwind, 13 students in brass, 4 students in percussion, 25 students in band, a current events course, and a skills refinement course. Mr. Jones has more seniority than Grievant.

3. Grievant was notified by Interim Superintendent Charlotte Hutchens, by letter dated March 26, 2001, that Raleigh County would receive state funding for approximately53 fewer professional personnel during the next school year. The letter stated that the curricular needs analysis indicated that a music position could be reduced at Shady Spring Junior High, and as the least senior music teacher at the school, he would be transferred. The letter also notified him of his right to request a hearing. Grievant requested and was granted a hearing before RBOE.

4. On April 24, 2001, RBOE voted to approve Grievant's transfer, with “the stipulation that if the numbers and finances are available the Shady Spring Junior High School music position will be given first priority.” Grievant has been placed in a music teaching position at another school for the 2001-2002 school year.

5. During the 2000-2001 school year, 23 students were enrolled in the beginning band program at Shady Spring Junior High. That number increased to 41 for the 2001-2002 school year. This increase in the number of band students did not affect the number of courses offered in band. The advanced band program has one less student this year. Shady Spring Junior High is not offering the guitar course this year which Grievant taught last year. Mr. Jones is teaching two general music courses this year which Grievant taught last year.

6. Seventh and eighth graders take general music together at Shady Spring Junior High, and

have done so for at least the last five years.

7. After Grievant's transfer was approved, the principal at Shady Spring Junior High determined, based upon enrollment figures for the 2001-2002 school year, that a half- time music teacher would be needed for the new school year. RBOE posted a half-time music teacher position at Shady Spring Junior High in August 2001, to teach music and choir. Grievant did not apply for the position.

8. Mr. Jones and the half-time music teacher at Shady Spring Junior High have 167 students total in the classes they are teaching this year. 9. The 2 music teachers at Beckley-Stratton Junior High provide instruction to 296 students. The 1 ½ music teachers at Independence Junior High provide instruction to 186 students.

10. Cathy Lewis, Patrick Keaton, Milton Webb, Sharon Bailey, Bilie Burnette, Marsha Belcher, Monica Dozier, Connie Paugh, Miriam Foster, Mary Calloway, and Lynette Daniel had their transfers or RIFs (reduction in force) rescinded by RBOE. Ms. Lewis was a kindergarten aide, and her position, as well as five other kindergarten aide positions, were restored when kindergarten pre-enrollments increased to over ten per teacher. RBOE believed it was required by law to return these aide position based upon the enrollment. Mr. Webb's position was federally funded, and his transfer was rescinded when additional federal funding became available after student enrollment figures met the required level. Ms. Daniel was returned to her position when student enrollments at her school increased as a result of student transfers, to the point that her basic skills position was needed, and this in turn caused Patrick Keaton's RIF to be rescinded. Ms. Bailey's transfer was rescinded as a result of an employee retirement. Ms. Belcher and Ms. Dozier had their transfers rescinded when RBOE was notified that the federal program through which they had been employed would again be funded by a grant. This also resulted in Ms. Burnette being restored to her position. Ms. Paugh's position was restored when she obtained the certification necessary to remain in a Title I program. Ms. Calloway was returned to her position when the employee who had been placed in her position transferred to another position. The record does not reflect why Ms. Foster was returned to her position.

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). The statute

Grievant alleges was violated, W. Va. Code § 18A-2-7,is quite lengthy, setting forth the authority of the superintendent to transfer personnel, and notice and hearing requirements. Grievant did not point to any particular provision which he asserts was violated.

"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).

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.

Grievant did not demonstrate that his transfer should have been rescinded. While RBOE

expressed the intent to return Grievant to Shady Spring Junior High if it could afford to do so, no additional funding was forthcoming to restore his former position to full-time, and there was no need to do so. RBOE kept its promise, however, restoring his former position to half-time, because it determined there was a need for a half-time music teacher. Grievant did not wish to work half-time, choosing instead to accept a full-time music teaching position at another school. Grievant has not demonstrated that RBOE was in error in its decision that there was not a need for a full-time music teacher at Shady Spring Junior High.

RBOE's decisions to rescind the transfers or RIFs of other employees have likewise not been proven to be improper. Several of those transfers or RIFs were rescinded when federal funding became available for those particular positions. Others were rescinded because the number of students increased in particular areas, resulting in a need for more teachers or aides, or other employees transferred or retired. Again, Grievant has not demonstrated a need for a full-time music teacher at Shady Spring Junior High, or that he was otherwise entitled to have his former position restored to full-time before any of these RIF's or transfers were rescinded.

As to Grievant's claim that there is an inequity among the schools in terms of the student/music teacher ratio, the evidence clearly does not support the claim. Finally, the only evidence presented to support Grievant's claim that Policy 2510 precludes seventh and eighth graders from receiving music instruction together was the Policy itself, and Grievant's testimony that someone at the State Department of Education had told him several years ago that the Policy precludes this. Dr. Meadows testified that the Policy does not preclude seventh and eighth graders from receiving instruction together, although it did at one time. The language of the Policy pointed to by Grievant reads as follows: “These required programs of study shall be taught at each grade level each year as separate subjects.” Music is listed as one of the required programs of study. This language does not clearly preclude music from being taught to seventh and eighth graders together, although it could be read in such a manner. Absent some interpretation from the State Superintendent of Schools, the undersigned cannot read such a preclusion into this language. Further, as noted earlier, Grievant did not demonstrate that such a reading would result in the need for a second full-time music teacher at Shady Spring Junior High.

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. Grievant failed to prove that the Raleigh County Board of Education abused its broad discretion or acted in an arbitrary and capricious manner when it chose to transfer him from Shady Spring Junior High.

4. Grievant failed to demonstrate that his transfer should have been rescinded.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of 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 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: November 28, 2001

Footnote: 1

This grievance was filed on August 27, 2001. Grievant's supervisor responded on August 31, 2001, that she was without authority to grant the relief sought, and Grievant appealed to Level II on that same date. A Level II hearing was held on September 12, 2001, and a decision denying the grievance was issued on September 27, 2001. Grievant waived Level III, appealing to Level IV on October 4, 2001. The parties agreed to submit this grievance for decision based upon the record developed at Level II. Grievant was represented by Sidney Fragale and Respondent was represented by Erwin Conrad, Esquire. This matter became mature for decision on October 29, 2001, when the parties notified the Grievance Board that

they did not wish to submit written argument.