JERRY RONCELLA,

Grievant,

v. DOCKET NO. 01-33-395

McDOWELL COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievant Jerry Lynn Roncella on April 26, 2001, filed six separate grievances numbered at Level I for identification purposes as Nos. 6-01 through 11-01. For each of these grievances, the relief she is seeking is "Reinstatement to current [Director of Personnel] position and payment of any lost wages and benefits." The various statements of grievance were as follows:

6-01

BOE violated 18A-2-2 & 18A-2-8 (See footnote 1) by failing to provide sufficient notice and a reasonable opportunity to be heard on the elimination of my position and extended employment contract.

7-01

BOE violated WV Codes 18A-2-2, 18A-2-8 by involving itself in the preliminary discussions concerning my position. The actual decision to eliminate my position was made before the hearing with the pre-judgment & pre-determination serving to make my hearing a hollow formality.

8-01

BOE violated WV Codes 18-29-2 (m) and (o) by showing favoritism to a similarly situated employee and by treating mein a discriminatory manner without known or apparent justification.

9-01

BOE violated WV Codes 18A-4-7a, WV BOE Policy 5202, McDowell County Policy 8-052 by not allowing me a lateral transfer to a position for which I am certified and meet

the requirements of the job description.

10-01

BOE violated WV Code 18A-4-7a, WV BOE Policy 5202, McDowell County Policy 8-052 by not allowing me to displace administrators who are on permit. I hold full certification and am entitled to be retained over individuals on permit status.

11-01

BOE violated WV Codes 18A-2-2 & 18A-4-7a by assigning me to a teaching position which was made available by the illegal termination of the employee holding the position. (See footnote 2)

All six grievances were denied in separate Level I decisions issued May 8, 2001. A Level II hearing was held on May 22, 2001, before Grievance Evaluator Erwin Conrad. Grievant was represented by Gary Archer of the West Virginia Education Association, and Respondent was represented by Dr. J. Kenneth Roberts, McDowell County Superintendent of Schools. On June 4, 2001, Mr. Conrad issued separate decisions again denying each grievance. Level III of the Grievance Procedure was waived, and the parties agreed to submit the matter for a decision based on the lower-level record after supplementing the record with some additional documents that had been subpoenaed by Grievant. (See footnote 3) On October 31, 2001, the deadline for the submission of the parties' proposed findings of fact and conclusions of law, this matter became mature for a Level IV decision. Theundersigned has combined the grievances for a decision at Level IV, and based on a preponderance of the evidence contained in the record, makes the following findings of fact:

FINDINGS OF FACT

1. Grievant Jerry Lynn Roncella has been employed by Respondent McDowell County Board of Education for more than 26 years. She has worked in the Personnel Department for McDowell County Schools for the past 16 years and has been Director of Personnel for the past 14 years. In addition to her administrative certifications, she holds teaching certifications in Math and Physical Science, and has Developmental Reading and Middle Childhood authorizations. She had the third-least seniority of the various Central Office Administrators.

2. On March 15, 2001, Grievant was notified both verbally and in writing by McDowell County

Superintendent of Schools Dr. J. Kenneth Roberts that he was going to recommend to the Board that Grievant's position as Director of Personnel be eliminated through a reduction in force (RIF) and her administrative contract terminated. Dr. Roberts gave Grievant a letter at that time stating that she had the right to request a hearing within five days. [Joint Exh. No. 2 of 6-01]

3. Under McDowell County's Lateral Transfer Policy, Grievant would have been able to replace a less-senior Administrator. At the time, there were two positions lateral to a Director Grievant's under Respondent's Lateral Transfer Policy: Specialist and Coordinator. [Lvl. II Joint Exh. No. 7 of 6-01] The Lateral Transfer Policy contains a caveatthat these positions are only lateral if the person transferring is “qualified and meets [the] job description.”

4. At the time of Grievant's transfer, there were two positions that were both lateral to Grievant's and which were staffed by employees with less seniority than Grievant: Title I Specialist and Food Service Coordinator.

5. Grievant was not qualified for the Food Service Coordinator position because it requires specialized skills, and was not qualified for the Title I Specialist position because it required a Master's degree in Remedial Reading that Grievant did not have. But for the degree requirement, Grievant is otherwise qualified to fill the Title I specialist position.

6. Grievant also identified two administrative positions which were not being eliminated and for which she holds certification: Principal of Panther Elementary and Assistant Principal of War Elementary. At the time of Grievant's transfer, these positions were staffed by employees who have administrative permits, but are not fully certified. 7. Although Grievant is fully certified to hold a Principal or Assistant Principal position, she has never been employed as a Principal or Assistant Principal.

8. By letter dated March 19, 2001, Grievant requested a hearing and a copy of the Superintendent's reorganization plan for the central office. [Joint Exh. No. 3 of 6-01] She was then notified by letter dated March 20, 2001 that a hearing would be held on March 26, 2001, and that there was no reorganization plan. [Joint Exh. No. 4 of 6-01]

9. Although the letter notifying Grievant of the date set for the hearing she requested was mailed to Grievant's home on March 20, 2001, Grievant did not receive the notice of hearing until March 23, 2001. 10. Because Grievant worked in the Central Office and routinely prepared the paperwork for RIFs, she was aware of the procedure and her right to a hearing. She was also aware

as early as February 19, 2001 that the last two meetings of the board for RIF considerations would be March 26 and 28, 2001.

11. Grievant appeared at the hearing and notified the Board that she had not received adequate notice of the hearing and was not ready to proceed. She then left the meeting without requesting a continuance or a rescheduled hearing. The Board proceeded to determine that Grievant's position should be eliminated and that she should be transferred per the Superintendent's recommendation.

DISCUSSION

By letter dated and hand-delivered March 15, 2001, Grievant was informed by Superintendent Dr. J. Kenneth Roberts that "due to the reduction-in-force created by the financial need to reduce staff to the State Aid Formula for professional personnel, budget reductions, program changes, the loss of student enrollment, and reorganization of the central office," he would ask the Board to terminate Grievant's administrative contract and to place her on the list of employees to be considered for transfer for the 2001-2002 school year. The letter further stated:

> In conformity with WV Code 18A-2-7, 18A-4-7a and 18A-2-2, you have the right to a hearing before the McDowell County Board of Education prior to this proposed action.
>
> If you desire a hearing you are to present a written request to the Superintendent within five (5) days of receipt of this letter. You also have the right to a representative of your choosing present if you so desire.

On March 19, 2001, Grievant did present a written request for a hearing before the Board on the personnel actions described in the March 15 letter, and additionally made requests under the Freedom of Information Act (FOIA) for a copy of the superintendent's reorganization plan for the central office, "specifying who will handle the duties currently assigned to the personnel department." The following day, March 20, Superintendent Roberts mailed a letter to Grievant's home informing Grievant that the hearing she had requested was set for Monday, March 26, and that there was no written reorganization plan for the central office. Grievant received this letter on the evening of Friday, March 23. Grievant appeared at the hearing, where she told the board that she had consulted with an attorney who told her the Board must give her ten days' notice prior to the hearing, and stated, "I am not prepared to go forward with the hearing tonight based on inadequate notice of the hearing; and two, the Administration's refusal or inability, as the case may be, to provide me with the information that I need in order to have an actual hearing before this board." She then left the meeting room. She

did not expressly ask for a continuance. The Board continued deliberations in her absence and decided to transfer Grievant per the superintendent's recommendation.

Grievant's first grievance complains that she received inadequate notice of this hearing, denying her a meaningful opportunity to be heard prior to the termination of her administrative contract and her subsequent transfer to a teaching position. While her proposed findings of fact assert that her continuing contract was terminated, triggering the procedure contained in W. Va. Code § 18A-2-2, this is clearly not the case. That section only controls the termination of a teacher's continuing contract of employment as describedin that section, where the instant case merely involves a transfer from an administrative position under an administrative contract to a teaching position.

Instead, the process detailed in W. Va. Code § 18A-2-7 (1990) controls the procedure for transfer of school personnel. First, the superintendent must notify the employee in writing before the first Monday in April (See footnote 4) of his intention to transfer the employee. W. Va. Code § 18A-2-7. Grievant received her notice on March 15, so the Superintendent complied with this requirement. The same Code section makes it the duty of the employee to request in writing a statement of the reasons for the transfer, if the employee wishes to do so. Presumably because the March 15 letter did state the reasons for the transfer, Grievant exercised her right to request a hearing before the Board on the transfer and asked for additional information to be used to prepare for the hearing. The requested hearing must be held before the first Monday in May, which occurred in this case.

W. Va. Code § 18A-2-7 does not specify how much notice must be given the employee prior to the hearing. Grievant was effectively given only two weekend days' official notice prior to the hearing. The Supreme Court of Appeals of West Virginia has interpreted a similarly vague notice requirement contained in § 18A-2-2 as follows:

> It is clear under this statute that prior to voting on the termination of a teacher's continuing contract, the Board is required to give notice to theteacher and afford the teacher an opportunity to be heard. While this particular section does not specify the amount of notice that should be given, it is clear that under procedural due process concepts reasonable notice must be afforded. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 94 L. Ed. 865, 70 S. Ct. 652 (1950). *See generally* North v. West Virginia Bd. of Regents, 160 W. Va. 248, 233 S.E.2d 411 (1977).
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> It is an established legal principle, as stated in State ex rel. Hawks v. Lazaro, 157 W. Va. 417, 440, 202 S.E.2d 109, 124 (1974), that "notice contemplates meaningful notice which affords an opportunity to prepare a defense and be heard on the merits." [Citations omitted]

Farley v. Mingo County Bd. of Educ., 179 W. Va. 152, 365 S.E. 2d 816 (1988)

In Farley, the affected teachers received at most two days' notice of a hearing on the proposed termination of their continuing contracts. That case and W. Va. Code § 18A- 2-2 may be distinguished from the issue in this case, however, on at least one significant point: the property interest involved in the termination of a continuing contract of employment is much more significant than the tenuous grasp the employee has on a particular assignment. An administrative transfer is within the discretionary authority of the superintendent, subject to the approval of the Board. W. Va. Code § 18A-2-7.

The notice and hearing requirements of W. Va. Code § 18A-2-7 must be complied with strictly before a school employee is transferred or reassigned. Lavender v. McDowell County Bd. of Educ., 174 W. Va. 513, 327 S.E.2d 691 (1984). Although Grievant was apparently informed by an attorney that these requirements included a ten-day notice period, that information was incorrect; no such time limit is imposed by W. Va. Code § 18A- 2-7. Instead, that section merely sets out the ordered procedure that must be followed.

Respondent argues that Grievant had actual knowledge of her hearing date as early as February 2001, and at the minimum 11 days prior to the hearing when she was notifiedon March 15 that she could have a hearing if she requested one. Given the low threshold over which the reasonableness of the Superintendent's recommendation for transfer must be scrutinized, Respondent's argument that this was sufficient compliance with the notice requirement of W. Va. Code § 18A-2-7 is tenable. Grievant knew the reasons for the Superintendent's recommendation at least eleven days prior to the hearing, ample time to have prepared.

Grievance 7-01 charges that the Board involved itself in discussions relative to Grievant's transfer prior to the hearing. Although there is evidence that the Superintendent did mention his upcoming recommendations to two of the Board members in separate private conversations, there is no evidence that these conversations tainted the entire Board or resulted in prejudice at the March 26 meeting. One of these Board members voted against the recommendation. There was no evidence that the board as a whole deliberated or discussed Grievant's transfer prior to the meeting. Grievant has not met her burden of proof on this issue.

Grievance 8-01 alleges discrimination and favoritism by the Board, evidenced by the fact that another central office administrator, whose position was also slated to be eliminated, was not

terminated or transferred. A grievant seeking to prove discrimination or favoritism may establish a *prima facie* case by demonstrating:

(a) that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that she has, to her detriment, been treated by her 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 other employee(s), and were not agreed to by the grievant in writing.

If a grievant does establish a *prima facie* case, a presumption of discrimination or favoritism exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, a grievant may still prevail if she can demonstrate the reason given by the respondent was pretextual. Rice v. Dept. of Transp./Div. of Highways, Docket No. 96-DOH-180 (Aug. 29, 1997); Steele, *supra*.

Grievant has failed to articulate an argument that fits within the discrimination/favoritism paradigm. In the Level II hearing, Grievant argued that when Superintendent Roberts made the recommendation to eliminate both her position and Mr. Copolo's position, in what she characterizes as an attempt to eliminate the only other position to which she could laterally transfer, that was a discriminatory action. However, Grievant failed to identify any similarly situated employees who were treated differently, and failed to prove that she was actually harmed by the Superintendent's recommendation. (See footnote 5) Had Grievant argued that the Board's decision not to transfer the Title I Specialist was discrimination or favoritism, she still would not have made a *prima facie* showing of either charge, because she failed to demonstrate that this employee was similarly situated.

Grievance 9-01 alleges that, when Grievant's position was eliminated, there was an administrative position that she was entitled to laterally transfer to based on her qualifications and seniority. Grievant contends she was not permitted to take over the TitleI specialist position although she was qualified to do so. Respondent originally denied the transfer on the grounds that the position was also being considered for elimination, and that Grievant lacked a required Master's degree in Remedial Reading. Grievant counters these arguments with the fact that the Respondent did not eliminate the position, and that the degree requirement was improperly added to the position

description.

Under Respondent's Policy 8-052, “Definition of Lateral Positions” [Lvl. II Joint Exh. No. 7 of 6-01], “For making determinations during a reduction in force, lateral positions, in priority order, are listed with the assignment to be made on the basis of seniority and certification.” Positions lateral to Supervisor and Director positions are Coordinator and Specialist positions, “If qualified and meets job description.” The Title I Specialist Job Posting, dated July 23, 1999 [Lvl. II Joint Exh. No. 3 of 8-01 and 9-01] lists under “Qualifications:”

1) MA degree in Remedial Reading

2) Experience in Title I Program

3) Holds a valid certificate in supervision and administration.

Grievant meets requirements two and three, but lacks the MA degree in Remedial Reading. Grievant's argument that this degree requirement was improperly added to the job description, over two years ago, must go unheard. Grievant is without standing to protest the employment status of another employee. "Standing, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy." Wagner v. Hardy County Bd. of Educ., Docket No. 95-16-504 (Feb. 23, 1996). At the time this action was taken, Grievant had no interest in the position, and in fact was complicit in the action. “An employee does not ordinarily have standing in the grievance procedure toprotest the employment status of a fellow employee unless harm is shown. W. Va. Code 18-29-2(a); See Shobe v. Latimer, 253 S.E.2d 54 (W. Va. 1979).” Farley v. W. Va. Parkways Auth., Docket No. 96-PEDTA-204 (Feb 21, 1997). The fact that the result of a prior possibly improper act continues to exist is not in itself a separate Grievable event. Respondent properly applied its lateral transfer policy in denying Grievant transfer to a lateral position for which she was not qualified under the terms of its job posting.

Grievant's remaining claim is that she was not allowed to transfer to one of two administrative positions which at the time were filled by personnel holding administrative permits rather than certificates. Grievant is fully certified to hold the principal and vice principal positions she identified. While Grievant admits that these positions are not lateral to her Director's position under the county Lateral Transfer Policy, she contends that W. Va. Code § 18A-4-7a gives her preference over the employees on permit. The relevant portion of that section states:

> (j) 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. The provisions of this subsection are subject to the following:
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> (1) 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;
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> (2) 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;

[Emphasis added] This section would only allow her displace another, less senior employee, if Grievant had previously been employed in a principal or vice principalposition. Grievant testified that she "was never officially appointed as an assistant principal or as a principal at a school," but had "functioned in that capacity for a number of years."

Grievant was referring to her prior employment as a classroom teacher at Bartley Elementary School in 1985. She testified that the principal of the school was "a wonderful person but not much of an administrator," and that "to compensate for whatever ineptness" the principal had, she handled many of the discipline problems other teachers had and did all the class scheduling, bus and lunch duty scheduling, fund raising, and assisted with the year-end reports for the school.

Grievant relies on Smith v. McDowell County Bd. of Educ., Docket No. 89-33-588 (June 19, 1990) as authority that mandates Respondent's use of this experience to grant her preference as if she had been appointed to a principal or vice principal position. However, this case merely compared a Grievant's unofficial experience with the experience of another candidate for a posted position. While the Grievance was granted in that case, the decisive issue was one of seniority, a matter undisputed in that case. Simply put, Grievant, never having had an appointment as a principal or vice principal, is not entitled to preference by W. Va. Code § 18A-4-7a over administrators currently in those positions, regardless of whether the other employees are fully certified or on permit.

Consistent with the foregoing, the following conclusions of law are appropriate:

CONCLUSIONS OF LAW

1. Because this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rulesof the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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 §§ 18-29-2, 18-29-6.

2. An administrative transfer is within the discretionary authority of the superintendent, subject to the approval of the Board. W. Va. Code § 18A-2-7. That power must be exercised in a reasonable manner and in the best interests of the school, rather than arbitrarily and capriciously. State ex rel. Hawkins v. Tyler County Bd. of Educ., 166 W. Va. 363, 275 S.E.2d 908 (1980).

3. The notice and hearing requirements of W. Va. Code § 18A-2-7 must be complied with strictly before a school employee is transferred or reassigned. Lavender v. McDowell County Bd. of Educ., 174 W. Va. 513, 327 S.E.2d 691 (1984). However, those requirements do not include a ten-day notice period prior to the hearing.

4. Grievant received notice of the reasons for her recommended transfer on March 15, 2001, and she was given the opportunity to dispute the reasons at a Board meeting held on March 26, 2001, eleven days later. Although the notice of the specific hearing date was received by Grievant only 3 days prior to the hearing, the orderly procedure required by W. Va. Code § 18A-2-7 was substantially complied with before the Board transferred Grievant.

5. A grievant seeking to prove discrimination or favoritism may establish a *prima facie* case by demonstrating:

> (a) that she is similarly situated, in a pertinent way, to one or more other employee(s);
>
> (b) that she has, to her detriment, been treated by her 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 other employee(s), and were not agreed to by the grievant in writing.

If a grievant does establish a *prima facie* case, a presumption of discrimination or favoritism exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, a grievant may still prevail if she can demonstrate the reason given by the respondent was pretextual. Rice v. Dept. of Transp./Div. of Highways, Docket No. 96-DOH-180 (Aug. 29, 1997); Steele, *supra*. Grievant failed to make a prima facie showing of discrimination or

favoritism.

6. West Virginia Code § 18-29-3(k) states: “Any change in the relief sought by the grievant . . . may be granted at level four within the discretion of the hearing examiner.” Because W. Va. Code § 18-29-5(b) further empowers the undersigned to “provide relief found fair and equitable . . . for the fair resolution of grievances,” the relief sought for Grievance 9-01is hereby changed to instatement in the Title I specialist position.

7.

Grievant failed to establish a *prima facie* case of discrimination or favoritism.

8. Grievant is without standing to contest the employment status of Mr. Copolo. "Standing, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy." Wagner v. Hardy County Bd. of Educ., Docket No. 95-16-504 (Feb. 23, 1996). “An employee does not ordinarily have standing in the grievance procedure to protest the employment status of a fellow employee unless harm is shown. W. Va. Code 18-29-2(a); See Shobe v. Latimer, 253 S.E.2d 54 (W. Va. 1979).”Farley v. W. Va. Parkways Auth., Docket No. 96-PEDTA-204 (Feb 21, 1997). The fact that the result of a prior possibly improper act continues to exist is not in itself a separate Grievable event.

9. West Virginia Code § 18A-4-7a(j)(2) would only allow Grievant to displace less senior administrators holding positions in which Grievant had previously been employed.

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.

Dated: December 27, 2001

M. Paul Marteney

Administrative Law Judge

Footnote: 1 *Grievant clarified at the Level II hearing that the references to W. Va. Code § 18A-2-8 should actually be to § 18A-2-7.*

Footnote: 2 *This grievance was withdrawn at Level IV.*

Footnote: 3

At Level IV, Grievant is represented by WVEA UniServ Consultant Gary E. Archer and Respondent is represented by Howard E. Seufer, Jr., Esq. of Bowles, Rice, McDavid, Graff & Love.

Footnote: 4

Both parties mistakenly argue that the entire transfer action must be concluded by the first day of April. W. Va. Code § 18A-2-7 (1990) unambiguously sets a deadline of the first Monday in April for the Superintendent to notify the employee of his decision to recommend a transfer, but the hearing on the proposed transfer must be held on or before the first Monday in May, and the Superintendent has until the first Monday in May to present the Board with a list of employees to be transferred the following school year.

Footnote: 5

Mr. Copolo's position was not, in fact, eliminated and Grievant failed to show that she was entitled to laterally transfer into that position.