JANE MCGUFFEY,

Grievant,

v. **Docket No., 01-54-492**

WOOD COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Jane McGuffey, employed by the Wood County Board of Education (WCBE) as a teacher, filed a level one grievance on March 18, 2001, in which she alleged discrimination when she was transferred from a Title I Math position to third grade. For relief, Grievant seeks reinstatement to a Title I Math position. After a prolonged delay at level one, the Grievant's immediate supervisor lacked authority to grant the requested relief. An evidentiary hearing was conducted at level two on August 10, 2001. Following denial at that level, Grievant elected to bypass consideration at level three, as is permitted by W. Va. Code § 18-29-4(c), and advanced her appeal to level four on August 22, 2001. A level four hearing was conducted in the Grievance Board's Morgantown office on September 18, 2001. The matter became mature for decision on that date when Grievant, representing herself, and WCBE, represented by Dean Furner, Esq., of Spilman, Thomas & Battle, agreed to waive the opportunity to file proposed findings of fact and conclusions of law.

The evidence in this matter is undisputed, and may be set forth as the following formal findings of fact.

Findings of Fact

1. Grievant has been employed by WCBE as a teacher for thirty-seven years, and has been assigned as a Title I Math teacher at Lincoln School for the past thirteen years.

2. Lincoln School was closed at the end of the 2000-2001 school year.

3. As a result of the school closure, a number of professional employees were subject to a reduction in force to facilitate the transfer of those teachers from Lincoln with more seniority.

4. The displaced teachers were permitted to transfer into vacated positions within their areas of certification. Since no Title I Math positions were available, Grievant elected to accept a third grade position.

5. Grievant is certified to teach Music (1-12) and Elementary Education (K-8).

6. The Title I Math program requires no specific or additional certification beyond Elementary Education.

7. Grievant was subsequently transferred to a third grade position at the Madison School.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence Procedural Rules of 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 §18-29-6.

Grievant asserts that she has been denied the same rights given to other employees who were permitted to transfer into other positions of the same subject matter. Specifically, Grievant stated that the physical education, Special Education, and Title IReading teachers, and the school librarian were all permitted to transfer into same subject area positions.

An employee seeking to establish discrimination must first establish a prima facie case of discrimination under W. Va. Code §18-29-2(m) by demonstrating the following:

(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 the other employee(s) and were not agreed to by the grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason to substantiate its actions. Thereafter, a grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

Grievant has established a prima facie case of discrimination in that she was similarly situated to

the other teachers at Lincoln School, that unlike other teachers, she was not transferred into a position teaching the same subject matter, and did not agree to the change in writing. In response, WCBE argues that all of the employees cited by Grievant were transferred within their areas of certification, that Title I Math does not require a special certification, and Grievant was allowed to select her current position from the elementary education vacancies created by the reduction in force. WCBE notes that during the current school year it employs only three Title I Math teachers, and that none of those positions were vacated as a result of the reduction in force. This explanation constitutes a legitimate and non-discriminatory basis for its action.

While it is regrettable that an employee of Grievant's tenure could not be assigned to teach the subject matter she prefers, W. Va. Code § 18A-2-7 states in pertinent part:

The Superintendent, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter. However, an employee shall be notified in writing by the superintendent on or before the first Monday in April if he is being considered for transfer or to be transferred.

This provision grants broad discretion to a superintendent, and gives him the authority to transfer school personnel subject only to the approval of the board. Post v. Harrison County Bd. of Educ., Docket No. 89-17-355 (Feb. 20, 1990). Further, teachers have no right to be assigned to a particular school, and transfers are not based on seniority, but 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 908 (1980). See Jochum v. Ohio County Bd. of Educ., Docket No. 91-35-396 (Jan. 31, 1992). Thus, whether a transfer was properly conducted is judged by the arbitrary and capricious standard. Lester v. McDowell County Bd. of Educ., Docket No. 93-33-256 (Jan.31, 1994); Tenney v. Barbour County Bd. of Educ., Docket No. 01-87-166-2 (Nov. 13, 1987).

The arbitrary and capricious standard of review requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the decision-maker. See generally, Harrison v. Ginsberg, 286 S.E.2d 276 (W. Va. 1982). Generally, an action by a board of education is considered arbitrary and capricious if the decision-maker did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem or situation, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford

County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985). See Snodgrass v. Kanawha County Bd. of Educ., Docket No. 97-20-255 (Mar. 19, 1998).

In situations involving the transfer of teachers as the result of school closures or consolidation, W. Va. Code § 18A-4-8f states in pertinent part:

when a majority of the classroom teachers . . . vote to do so, the board shall give priority to classroom teachers in any school or schools to be closed as a result of a consolidation or merger when filling positions in the new school created by consolidation or newly created positions in existing schools as a result of the merger. The teachers in the school or schools to be closed shall have priority in filling new positions in the new or merged schools for which the teachers are certified and meet the standards set forth in the job posting on the basis of seniority within the county: Provided, That a teacher shall only receive priority for filling a position at a school impacted by a merger, or consolidation with the position being created by the influx of students from a consolidated or merged school into the school receiving students from their closed school or grade level.

The transfer of Grievant from a Title I Math position to a third grade position was in compliance with W. Va. Code § 18A-4-8f, and was not arbitrary and capricious. Grievant now holds a position requiring the same certification, and with the same compensation, as she held in prior years. The fact that Grievant was not offered a subject matter position of her preference is not violative of any Code section. Dingess v. Lincoln County Bd. of Educ., Docket No. 98-22-053 (May 29, 1998).

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following conclusions of law.

Conclusions of Law

___1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence Procedural Rules of 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 §18-29-6.

2. An employee seeking to establish discrimination must first establish a prima facie case of discrimination under W. Va. Code §18-29-2(m) by demonstrating the following:

(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 the other employee(s) and were not agreed to by the grievant in writing.
Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

3. Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason to substantiate its actions. Thereafter, a grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

4. Grievant established a prima facie case of discrimination in that she was similarly situated to the other teachers at Lincoln School, that unlike other teachers, she was not transferred into a position teaching the same subject matter, and did not agree to the change in writing.

5. WCBE provided an explanation which constitutes a legitimate and non- discriminatory basis for its action. Grievant did not assert the reason was pretextual.

6. 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 v. Harrison County Bd. of Educ., Docket No. 89-17-355 (Feb. 20, 1990). 7. Whether a transfer was properly conducted is judged by the arbitrary and capricious standard. Lester v. McDowell County Bd. of Educ., Docket No. 93-33-256 (Jan. 31, 1994); Tenney v. Barbour County Bd. of Educ., Docket No. 01-87-166-2 (Nov. 13, 1987).

8. Generally, an action by a board of education is considered arbitrary and capricious if the decision-maker did not rely on factors that were intended to be considered,entirely ignored important aspects of the problem or situation, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985). See Snodgrass v. Kanawha County Bd. of Educ., Docket No. 97-20-255 (Mar. 19, 1998).

9. The transfer of Grievant from a Title I Math position to a third grade position was not arbitrary and capricious.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wood County and 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.

Date: September 25, 2001 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE