GERTIE BEAVERS,

Grievant,

v. **DOCKET NO. 03-33-221**

McDOWELL COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Gertie Beavers, (Grievant) filed this grievance against McDowell County Board of Education, (Respondent) on April 28, 2003, stating: "Grievant claims violations of WV State Code § 18A-4-8f, §18-5-13, §18-5-13a, §18-4-10, §18A-2-7 and WV State BOE Policy, Title 126-Series 176 when they moved Panther Elementary students and staff to Iaeger Elementary and then transferred [G]rievant out of Iaeger Elementary."

Grievant stated the relief sought as: "Grievant seeks reinstatement/reassignment to Iaeger Elementary school for the 2003-2004 school year."

Having been denied at all lower levels, the parties submitted the matter to level four for a decision based on the foregoing record. Grievant was represented by Sidney Fragale of the American Federation of Teachers-W. Va., and Respondent was represented by counsel, Kathryn Reed Bayless, Esq. This matter became mature for decision on September 8, 2003, when the undersigned received the record of the prior proceedings.

Based on a preponderance of the credible evidence contained in the record, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant, for the 2002-2003 school year, was employed by Respondent as a third grade

teacher at Iaeger Elementary School, where she had taught for eight years. Level II Trans., p. 9.

2. In May 2002, a flood destroyed Panther Elementary School, and the teachers and students from that school were assigned to Iaeger, in effect merging those schools.

3. The assignment of the Panther teachers to Iaeger was temporary. Prior to the beginning of the 2002-2003 school year, Superintendent Mark A. Manchin exercised his emergency powers and notified all Panther teachers that they would be assigned to Iaeger for one year.

4. Prior to the beginning of the 2003-2004 school term, Panther Elementary had been condemned, but not officially closed. Superintendent Manchin again notified the Panther teachers, on April 16, 2003, that they would be temporarily assigned to Iaeger for the 2003-2004 school year.

5. Respondent prepared a comprehensive portfolio entitled Reasons and Supporting Data for Proposed Closure of Panther Elementary School in March 2003. After a public hearing, the West Virginia Board of Education approved the closure of Panther Elementary and consolidation (See footnote 1) with Iaeger on April 17, 2003, effective June 30, 2003.

6. Grievant was notified in March, 2003, that she would be recommended for transfer for the 2003-2004 school term. On April 22, 2003, Superintendent Manchin advised Grievant by letter that the Board had approved her transfer, due to “The need to reduce the cost of professional personnel by reducing professional positions countywideto bring the county's personnel funding within the state aid formula.” Grievant was not transferred to a particular position, but was advised that she “will need to apply for all posted vacancies” for which she qualified. Level II Joint Exhibit No. 3.

7. Grievant is the least senior Iaeger teacher and also has less seniority than the Panther teachers who were assigned to Iaeger. Level II Trans., p. 14.

8. Grievant was transferred to Mount View Middle School, but subsequently bid on and received a position at Bradshaw Elementary School.

9. Respondent did not permit the county faculty senates to vote on the seniority rights of the teachers affected by the merger of Panther into Iaeger, as required by W. Va. Code § 18A-4-8f, because Panther had not been officially closed by the time the staffing decisions needed to be made prior to the beginning of the 2003-2004 school year.

DISCUSSION

This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's

allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. Grievant's argument is that if Respondent had conducted a W. Va. Code § 18A-4-8f vote, "Grievant would not have been placed on transfer out of Iaeger Elementary. The teachers from Panther Elementary would be eligible for any new positions created by the influx of Panther students only after given priority from the faculty senate vote." (See footnote 2) Respondent argues the initial closure of Panther and its merger into Iaeger was due to an emergency, and it followed all procedures it could practically follow at the time it did so. "A school board may close any school which is unnecessary and assign the pupils of the school to other schools, and may consolidate schools. *See* W. Va. Code § 18-5-13. In order to do so, it must (1) prepare and reduce to writing its reasons and supporting data regarding the school closing or consolidation; (2) provide notice for and conduct a public hearing; and (3) receive findings and recommendations from any local school improvement council representing an affected school relating to the proposed closure or consolidation prior to or at the public hearing. W. Va. Code § 18-5-13a." Jarvis v. Mason County Bd. of Educ., Docket No. 03-26-103 (June 6, 2003). Grievant alleges an unspecified violation of this section, but the evidence shows Respondent did complete all these steps prior to the official merger being approved by the State Board of Education. Presumably, Grievant refers to the initial merging of the schools due to the flood, but as is discussed later, that action was an emergency measure.

West Virginia Code §18A-4-8f mandates that a school board, when proposing a merger or consolidation, give the faculty of the county schools the opportunity to create "super seniority" for the teachers affected by the action. It states, in part:

> Notwithstanding any provision of this article to the contrary, when a majority of the classroom teachers, as defined in [W. Va. Code § 18A-1-1], who vote to do so, in accordance with procedures established herein, and who are employed by a county board of education, 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. Each year a consolidation or merger is proposed, *prior to the implementation of that plan*, the superintendent shall cause to be prepared and distributed to all faculty senates a ballot on which teachers may indicate whether or not they desire those affected by school closings to be given priority status in filling new positions. . . . 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 aschool 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 most senior teacher in the closed school or schools shall be placed first, the second most senior shall be placed next and so on until all the newly created positions are filled. . . .

> For purposes of this section only, a merger shall mean when one or more schools are closed or one or more grade levels are removed from one or more schools and the students who previously attended the closed schools or grade levels are assigned to another existing school.

[Emphasis added].

While Grievant has met her burden of proving the facts on which her argument relies, she has not proven any connection between the facts that would allow the leap of logic made by her conclusion. Respondent did merge Panther into Iaeger, but did not do so until after this grievance was filed. Before the merger, Respondent did fail to hold the required "super seniority" vote. However, as Respondent points out, the initial merger was an emergency action taken by the Superintendent due to the flooding of Panther. A county Superintendent, acting under authority of W. Va. Code § 18-4-10(10) shall:

> Act in case of emergency as the best interests of the school demand: Provided, That an emergency as contemplated in this section shall be limited to an unforeseeable, catastrophic event including natural disaster or act of war: Provided, however, That nothing in this section shall be construed as granting the county superintendent authority to override any statutory or constitutional provision in the exercise of said emergency power except where such authority is specially granted in the particular code section.

While Respondent, prior to the 2003-2004 school year, did have a plan to finalize the merger, it did not hold the vote, despite the clear statutory mandate that it do so beforehand. Nevertheless, Grievant has shown no connection between this failure and her employment situation. Indeed, her argument seems to be based on the assumption that the various faculty senates would vote to allow the super seniority, an assumption that is entirely based on speculation.

Had a vote been held, and super seniority granted, Grievant would still have been affected by the RIF. The super-seniority only applies to newly-created positions at the merged school, and whether these were filled improperly before the RIF or properly after the RIF, Grievant would have been in the same situation. She had less seniority than other Iaeger teachers and other Panther teachers who would have been eligible to take the newly-created positions resulting from the merger. When it came time to reduce the number of professional positions at the merged school, she would still have been one of the personnel whose position should be eliminated. West Virginia Code § 18A-2-7 governs

the transfer of professional employees of a county board of education, and provides, in pertinent part:

> (a) 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. Only those employees whose consideration for transfer or intended transfer is based upon known or expected circumstances which will require the transfer of employees shall be considered for transfer or intended for transfer and the notification shall be limited to only those employees. . .

While Grievant alleges a violation of this section, and several others, she does not explain how it was violated or what the prejudicial effect of the violation may have been. "[M]ere allegations alone without substantiating facts are insufficient to prove a grievance." Baker v. Bd. of Trustees/W. Va. Univ. - Parkersburg, Docket No. 97-BOT-359 (Apr. 30, 1998).

Lastly, Grievant was re-employed for the 2003-2004 school year, without any loss of pay or benefits. While she still feels entitled to her original assignment at Iaeger,"Classroom teachers have no vested right to be assigned to a particular school in the county." Hawkins v. Tyler County Bd. of Educ., 166 W. Va. 363, 275 S.E.2d 908 (1980).

The following conclusions of law support this decision:

CONCLUSIONS OF LAW

1. This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't. of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

2. "A school board may close any school which is unnecessary and to assign the pupils of the school to other schools, and may consolidate schools. *See* W. Va. Code § 18-5-13. In order to do so, it must (1) prepare and reduce to writing its reasons and supporting data regarding the school closing or consolidation; (2) provide notice for and conduct a public hearing; and (3) receive findings and recommendations from any local school improvement council representing an affected school relating to the proposed closure or consolidation prior to or at the public hearing. W. Va. Code § 18-5-13a." Jarvis v. Mason County Bd. of Educ., Docket No. 03-26-103 (June 6, 2003).

3. West Virginia Code § 18A-2-7 governs the transfer of professional employees of a county board of education, and provides, in pertinent part:

> (a) 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 tobe transferred. Only those employees whose consideration for transfer or intended transfer is based upon known or expected circumstances which will require the transfer of employees shall be considered for transfer or intended for transfer and the notification shall be limited to only those employees. . .

4. A county Superintendent, acting under authority of W. Va. Code § 18-4- 10(10) shall:

> Act in case of emergency as the best interests of the school demand: Provided, That an emergency as contemplated in this section shall be limited to an unforeseeable, catastrophic event including natural disaster or act of war: Provided, however, That nothing in this section shall be construed as granting the county superintendent authority to override any statutory or constitutional provision in the exercise of said emergency power except where such authority is specially granted in the particular code section.

5. "[M]ere allegations alone without substantiating facts are insufficient to prove a grievance." Baker v. Bd. of Trustees/W. Va. Univ. - Parkersburg, Docket No. 97-BOT-359 (Apr. 30, 1998).

6. “Classroom teachers have no vested right to be assigned to a particular school in the county.” Hawkins v. Tyler County Bd. of Educ., 166 W. Va. 363, 275 S.E.2d 908 (1980).

7. Grievant has failed to sustain her burden of proving she should not have been transferred from her position at Iaeger.

For the foregoing reasons, this grievance is hereby **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 GrievanceBoard. 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.

Date: September 30, 2003 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Although the action was a merger, the State Board used the term "consolidation" to describe it.

Footnote: 2

Grievant's proposed Findings of Fact and Conclusions of Law, p. 4.