SUZANNE CARTE,

Grievant,

v v.

Docket No. 03-20-058

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Suzanne Carte, filed this grievance on January 7, 2003, against her employer the Kanawha County Board of Education ("KCBOE"). Her Statement of Grievance asserts:

> KCBOE Failed [sic] to post 9th grade positions at the new St. Albans High School in violation of W. Va. Code § 18A-4-8f. The principal at St. Albans instead, realigned his staff and then posted positions that no one on his staff wanted[,] instead of posting positions that were created as a result of the influx of the 9th grade students.

Grievant's Relief Sought has varied somewhat during the grievance process. Currently, Grievant seeks the "staffing for St. Albans High School be redone." (See footnote 1) Additionally, since Grievant was the most senior applicant, she requests she receive a classroom of her own when the postings are redone, and she receives the position of ninth grade American History teacher. This grievance was denied at all lower levels, and Grievant appealed to Level IV on March 3, 2003. A Level IV hearing was held April 16, 2003, and this case became mature for decision on May 19, 2003, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 2)

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is currently employed by KCBOE as a ninth grade American History teacher at Hayes Junior High School.

2. Grievant has taught at Hayes for 17 years, 13 of them teaching ninth grade American History.

3. Approximately four or five years ago, the teachers at Hayes and McKinley Junior High Schools learned the ninth graders from their schools would be moved to St. Albans High School, and Hayes and McKinley would become middle schools.

4. Teachers at Hayes were asked to decide if they wanted to go to St. Albans or stay at Hayes. Grievant decided to go with the ninth graders to St. Albans.

5. On December 6, 2002, a vote by the county's faculty senates was held pursuant to W. Va. Code § 18A-4-8f, and the results gave priority status to those teachers at McKinley and Hayes who would be affected by the merger.

6. Prior to the merger, KCBOE and Thomas Williams, St. Albans principal, met with various unions and staff and faculty to discuss the merger. Dr. Williams was informedhe could realign his staff prior to the merger to see what positions would need to be filled, and Dr. Williams said he planned to do this.

7. Dr. Williams did realign his staff. One of his twelfth grade American History teachers, who had more than 30 years of experience, and whom Dr. Williams viewed as an excellent teacher, asked to teach the ninth grade American History courses. Dr. Williams granted this request.

8. On December 6, 2002, the positions for St. Albans High School for the school year 2003 - 2004 were posted. These postings were not grade specific.

9. The only posting for which Grievant could apply due to her certification was "Social Studies 9-12 - schedule includes Psychology, Law/Legal, Sociology, and Travel West Virginia (WVDE training required for Travel WV)." Grt. No. 3 at Level II.

10. Grievant did apply for this position even though she was not interested in teaching any of these classes.

11. Because of the priority vote and her seniority, Grievant was offered the position.

12. One of the things Grievant had heard about the St. Albans positions was that teachers would not have individual classrooms. This rumor was true; no teachers at the enlarged St. Albans High School will have a classroom of their own full-time. (See footnote 3)

13. Dr. Williams scheduled a meeting with all new employees, including Grievant. Grievant asked about the lack of a personal classroom and was informed she would not have one.

14. Grievant turned down the position because she would not be teaching American History, she would not have only ninth graders, and she would not have a classroom of her own. (See footnote 4)

15. Dr. Williams does not believe high school teachers should only teach in one grade level because this does not promote an integration of all students and faculty.

16. Grievant refused the St. Albans position, and then she filed this grievance. (See footnote 5)

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. "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 employer has not met its burden. Id. See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997). W. Va. Code §18A-4-8f deals with seniority rights and school consolidation and states:

> Notwithstanding any provision of this article to the contrary, when a majority of the classroom teachers, as defined in section one [§ 18A-1-1], article one of this chapter, 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 total number of votes shall be tabulated and the provisions of this section shall be implemented only if a majority of the total number of teachers who cast a ballot vote to do so. 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 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. . . . (Emphasis added).

> For the purposes of this section only, a consolidation 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 a new school. 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.

Grievant asserts this section means the ninth grade positions should be posted as ninth grade positions, and she is assured of teaching only American History to ninth graders because this was her prior position. She was told by two principals that she would probably be teaching ninth graders because no one else would want to teach them. No one in authority ever told Grievant she would be teaching only ninth graders and would be teaching only American History; basically she assumed this would happen.

Pursuant to KCBOE regulations, staff at the high school level can be realigned during a merger prior to posting, because no grade level is being removed. When a junior high school becomes a middle school, the realignment occurs first, because a grade level is lost. Grt. No. 1 at Level II. After this realignment, priority placement is given to ninth grade teachers for all ninth grade vacancies or assignments. A teacher's assignment is to teach classes in one or more curricular areas. Grievant's assignment would be social studies, which includes classes in history, psychology, and government. See G44A in Grt. No. 1 at Level II.

The above-cited Code Section does not state a teacher is assured of a certain grade or course. It does state the teacher "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," and will be given priority for filling these newly created positions that resulted from the merger. Grievant had priority, she was the most senior, she was offered the position, but she turned it down.

The key issue raised by Grievant is **when** Dr. Williams is allowed to realign the faculty at St. Albans High School to meet effectively the needs of the students. Clearly the staffing of St. Albans High School would need to be realigned. Because of the increase in students there would not only be the ninth grade courses to teach, but additional courses, sections, and electives would be added. For

example, Travel West Virginia, one of the courses offered to Grievant, could now be taught. Grievant wants to be assigned her ninth grade courses in American History first and then have the rest of the faculty assigned to the remaining courses. What actually occurred is Dr. Williams was told he could realign his staff pursuant to KCBOE's regulations. He then discussed the changes with his current teachers, realigned his staff, and posted the remaining positions. The teachers at McKinley and Hayes were given priority for these positions. The posted position in Grievant's area of certification was not one she wanted, so Grievant refused the offer of employment at St. Albans High School.

While Grievant was entitled to a position at St. Albans High School in her area of certification, she was not entitled to dictate what courses and grade level she would teach for the time she would be a teacher there. Within the high school setting most teachers are expected to teach several courses and several grade levels. These courses may vary during the school year and from year to year. Teachers are not usually allowed to pick and choose specific grade levels and courses. (See footnote 6) Even if the undersigned Administrative Law Judge were to place Grievant at St. Albans High School, there would be no way the undersigned Administrative Law Judge could properly assure Grievant she would always remain in the ninth grade American History course. These are decisions within the discretion of the principal of the school, based on the needs of the students.

Grievant has interpreted the phrase "priority for filing a position . . . created by the influx of students . . . from the grade level" to mean she is entitled to a position teaching only ninth grade American History. It is understandable Grievant wants to teach what shehas taught for so many years and enjoys teaching, but this interpretation would undercut the discretion of the principal, the manager of the school, and could create a situation where there was a need for a class, and no one to teach it. For example, what if no one wanted to teach the previously mentioned new course, Travel West Virginia? This course will now be offered because with the influx of new students, there will be enough demand for this elective. In this instance, Dr. Williams did not leave this decision to chance. He placed the course within the responsibilities of the posted position, and this course will be the new Social Studies Teacher's responsibility.

It is interesting to note that these positions are typically posted as "Social Studies 9-12." If that had been the case here, Grievant could have accepted the position thinking she would teach American History to ninth graders, only to find out later that she would not because a faculty member

with much greater seniority had selected these courses for himself with the approval of Dr. Williams.

As for Grievant's relief of requesting a classroom of her own, this relief cannot be granted. While Grievant's concerns in this regard are understood, she needs a permanent place to put the American History teaching aids, the undersigned Administrative Law Judge cannot grant Grievant something no other teacher at St. Albans High School will have. Grievant cannot be treated differently than all other teachers.

Additionally, other courses of action might have been available to the undersigned Administrative Law Judge if the requested relief in this situation was not "all or none," i.e., Grievant wants to teach ninth grade American History in her own classroom. The undersigned Administrative Law Judge considered designing a relief that gave Grievant some of what she wanted, but not all. However, at hearing, the undersigned AdministrativeLaw Judge asked if some of the relief requested was negotiable, and the reply appeared negative. Since Grievant cannot be granted all the relief requested, to teach only ninth grade American History in her own classroom while she remains at St. Albans High School, the undersigned Administrative Law Judge will not attempt to design an alternative. Additionally, the undersigned Administrative Law Judge wonders if Grievant had accepted the position, and then engaged in negotiations with other teachers or the principal, if there might have been a way for Grievant to get some of what she wants.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (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. "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 employer has not met its burden. Id.; See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29,

1997).

3. W. Va. Code § 18A-4-8f entitled Grievant, because of her priority, to a teaching position at St. Albans High School in her area of certification, but it did not entitleher to dictate the grade level and specific courses she would teach for the entire time she would be there, if she accepted the position.

4. Grievant did not meet her burden of proof and demonstrate a posting violation.

5. Grievant is not entitled to a classroom of her own because this would be preferential treatment over all other teachers at St. Albans High School.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha. 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.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: August 12, 2003

Footnote: 1

This relief, as stated, cannot be granted, as Ms. Carte is the only named grievant, and the requested relief can only be directed to a specific grievant's situation.

Footnote: 2

Grievant was represented by Anita Mitter of the West Virginia Education Association, and KCBOE was represented by its attorney, Jim Withrow.

Footnote: 3

It appears some teachers may occupy the same room for three of the four teaching blocks, but no teachers will remain in their rooms for their planning periods.

Footnote: 4

The failure to have a classroom was a key in Grievant's decision as revealed by Grievant's testimony at Level II when she stated, "[B]ut when they told me I would not have a classroom I said that I can't accept your position." Trans. at Level II at 28. See also testimony on page 27.

Footnote: 5

Grievant will remain at Hayes.

Footnote: 6

Although not clearly presented by the evidence, the undersigned Administrative Law Judge supposes that teachers with great seniority and longevity at a school may receive preference in selection within their departments.