DIANA BIBEY and

CYNTHIA FITZWATER,

Grievants,

v. **Docket No. 04-01-212**

BARBOUR COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Diana Bibey and Cynthia Fitzwater ("Grievants") initiated this proceeding on April 15, 2004, alleging they should not have been transferred from their teaching positions for the 2004-2005 school year. They seek to have one of their transfers rescinded, based on a lottery, due to their identical seniority date. On April 15, 2004, Grievants were advised by their immediate supervisor that he lacked authority to resolve the grievance at level one. At level two, Grievants and Respondent submitted joint stipulations of fact on May 27, 2004, in lieu of a hearing, and agreed to waive the grievance to level four. A level four appeal was filed on May 28, 2004, and a hearing was conducted in Westover, West Virginia, on June 30, 2004. Grievants were represented by William White of the WVEA, and Respondent was represented by counsel, Kimberly Croyle. This matter became mature for consideration upon receipt of the parties' fact/law proposals on July 26, 2004.

The following findings of fact are made based upon a preponderance of the evidence of record and the parties' joint stipulations.

Findings of Fact

1. Grievants were classroom teachers at Belington Elementary School during the 2003-2004 school year. 2. Grievant Fitzwater taught second grade and is certified in Elementary Education 1-6.

3. Grievant Bibey taught fourth grade and is certified in Elementary Education 1-6.

4. On March 16, 2004, Grievants were notified that they were being placed on the Administrative Transfer and Subsequent Assignment List for the 2004-2005 school year. Due to declining enrollment, the total number of teachers at Belington Elementary School had to be reduced.

5. Both Grievants have a seniority date of June 21, 1989.

6. Connie Armentrout and Nancy Shaffer were more senior teachers at Belington Elementary School and “bumped” Grievants from their positions for the 2004- 2005 school year.

7. Ms. Armentrout is certified to teach Health & Physical Education and Elementary Education 1-8. Her seniority date is July 2, 1984. She taught third grade during the 2003-2004 school year.

8. Ms. Shaffer is certified in Elementary Education 1-8 and Social Studies 1-9, and her seniority date is August 17, 1982. She taught first grade in 2003-2004.

9. Melissa Kaiser was employed at Belington Elementary School during 2003- 2004 as a physical education teacher. She is certified in Physical Education K-12 and Driver Education 9-12, and her seniority date is August 12, 2002.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their claims 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.

Grievants contend that, because she was the least senior teacher in the school, Ms. Kaiser should have been bumped by one of the more senior teachers. Due to their identical seniority dates, they propose that a drawing be held to determine which of them should have been bumped, with the other being returned to her previous position. The outcome of this case hinges upon one's interpretation of W. Va. Code § 18A-4-7a(q), which provides:

> Reductions in classroom teaching positions in elementary schools shall be processed as follows:
>
> (1) When the total number of classroom teaching positions in an elementary school needs to be reduced, the reduction shall be made on the basis of seniority **with the least senior classroom teacher being recommended for transfer**; and

> (2) When a specified grade level needs to be reduced and the least senior employee in the school is not in that grade level, the least senior classroom teacher in the grade level that needs to be reduced shall be reassigned to the position made vacant by the transfer of the least senior classroom teacher in the school without that position being posted: Provided, That the employee is certified and/or licensed and agrees to the reassignment.

(Emphasis added.)

Clearly, subparagraph (1) governs the instant situation, but the parties differ in their interpretation of the term “classroom teacher” as used in the statute. Grievants argue that, although she was a physical education teacher who was not assigned to any particular grade level, Ms. Kaiser was the least senior classroom teacher at the school and should have been the first teacher placed on transfer. Conversely, Respondent contends that,pursuant to previous Grievance Board and circuit court rulings, “special programs” teachers are not to be included when reductions are made pursuant to this statute.

As Respondent has argued, this Grievance Board has specifically held that, pursuant to this provision (See footnote 1) “only a teacher in a 'grade level' position in an elementary school may be moved into a vacant 'grade level' position in that school when the total number of classroom teaching positions in that school is reduced.” Lloyd v. Kanawha County Bd. of Educ., Docket No. 91-20-327 (Oct. 29, 1991). This ruling was based upon the circuit court's ruling in Lloyd v. Kanawha County Bd. of Educ., C.A. No. 91-C-823 (Kan. Cir. Ct., Mar. 13, 1991), where the court determined that this portion of the statute must be interpreted as applicable only to grade level classroom teachers, and would not apply to special programs teachers, which it defined as teachers “who may teach, collectively, students of several grade levels of ages.” Id. However, it is important to note that Kanawha County had a specific written policy, which treated special programs teachers differently in transfer situations, and it specifically discussed “Chapter I” and “Special Education” teachers--there was no discussion of whether or not physical education teachers fit into the special programs “category.”

The Lloyd decision was briefly revisited in Cline v. Mingo County Board of Education, Docket No. 95-29-240 (Sept. 29, 1995), where a Chapter One teacher (who did not teach a specified grade level) was transferred, because she was the least senior teacher in her school. Her transfer was upheld,

with the decision noting that the Lloyd ruling was not binding on the parties in Cline, because Mingo County did not have aregulation governing the treatment of special programs teachers. Clearly, Cline supports Grievants' position and involved a similar situation. However, Cline was later overruled in Chafin v. Boone County Board of Education, Docket No. 96-03-201 (Jan. 31, 1997), where it was noted that Cline did not focus on the grievant's status as a special program teacher. In Footnote 3 of Chafin, the Administrative Law Judge observed that "[the statute] does not specifically discuss the rights of elementary special education or special program teachers. As previously stated . . . , to the extent that Cline disagrees with this holding it is overruled." Nevertheless, the ruling in Chafin was not based upon any portion of W. Va. Code 18A-4- 7a(q), because only the grievant's position was being reduced, and there was no reduction in the total number of teachers or any specific grade level. Accordingly, its discussion of Cline is only dicta.

Grievants point to two other statutes which they believe support their contentions. First, they note that W. Va. Code § 18A-1-1 defines "classroom teachers" as "a professional educator who has direct instructional or counseling relationship with pupils, spending the majority of his or her time in this capacity." Obviously, physical education teachers, such as Ms. Kaiser, are considered classroom teachers pursuant to this definition. In addition, W. Va. Code § 18A-4-7a(k) states "[f]or the purpose of this article, all positions which meet the definition of classroom teacher as defined in [18A-1-1] shall be lateral positions." Accordingly, Grievants argue that, because Ms. Kaiser fits within the definition of classroom teacher, and her position would be lateral to other classroom teaching positions, she should have been considered the least senior teacher at Belington Elementary School. Grievants' arguments are compelling, and consideration of them leads the undersigned to the inescapable conclusion that there is no "exception" contained in W. Va. Code § 18A-4-7a(q) for physical education teachers, who are clearly encompassed within the definition of elementary school "classroom teachers" for purposes of seniority-based reductions in force. As was recently recognized in Tye v. McDowell County Board of Education, Docket No. 03-33-413 (Apr. 22, 2004), no subject-specific endorsement is necessary to teach physical education at the elementary grade level--a multi-subject license covering the required grade level is sufficient certification. 126 C.S.R. 136 § 9.8. Accordingly, any more senior elementary school teacher may be placed in the position of a physical education teacher--such as Ms. Kaiser--who is placed on transfer.

Lloyd and Chafin are distinguishable from the instant situation in several important respects. First,

as discussed above, Lloyd dealt with a specific Kanawha County board policy, which does not exist here. Although Respondent maintains that exclusion of special programs teachers has been its "practice," it simply does not have an official board policy on the subject. Moreover, only special education and Chapter One positions were specifically discussed and delineated as "special programs." In light of the observation of Tye, supra, that any certified elementary school teacher can teach physical education, it would appear that inclusion of such teachers in the "special programs" category would be inappropriate. (See footnote 2) Finally, the instant case presents a situation where the least seniorclassroom teacher in the school--Ms. Kaiser--is the individual who must be placed on transfer, pursuant to the unambiguous language of W. Va. Code § 18A-4-7a(q). Therefore, Ms. Kaiser must be placed on transfer, and a drawing must be held to determine which of the Grievants should be allowed to retain her previous position at Belington Elementary School for the upcoming school year.

The following conclusions of law support this decision.

Conclusions of Law

1. In a non-disciplinary matter, Grievants have the burden of proving their claims 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. When the total number of classroom teaching positions in an elementary school needs to be reduced, the teacher with the least seniority must be placed on transfer. W. Va. Code § 18A-4-7a(q); Cline v. Mingo County Bd. of Educ., Docket No. 95- 29-240 (Sept. 29, 1995).

3. Physical education teachers are considered "classroom teachers" for purposes of seniority-based transfers pursuant to W. Va. Code § 18A-4-7a(q). See W. Va. Code § 18A-1-1.

4. Melissa Kaiser was the least senior classroom teacher at Belington Elementary School in the spring of 2004, so she should have been placed on transfer.

Accordingly, this grievance is **GRANTED**, and Respondent is **ORDERED** to conduct a lottery to determine which Grievant should be allowed to retain her previous position at Belington Elementary School and have her transfer rescinded.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Barbour 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: August 13, 2004 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

The Lloyd decision involved the current statute's precursor, W. Va. Code § 18A-4- 7a¶11, but the language at issue is identical.

Footnote: 2

However, in light of the statutory definition of "classroom teacher," along with the provision of W. Va. Code § 18A-4-7a that all classroom teaching positions are lateral for transfer purposes, it would seem that the Lloyd "special programs" exception may also be on shaky ground. Nevertheless, that issue will be reserved for a later day and a more appropriate case.