SUE ANDERSON,

Grievant,

v. **Docket No. 04-51-301**

WEBSTER COUNTY
BOARD OF EDUCATION,

Respondent.

DECISION

This grievance has its genesis in the reconfiguration of Glade Elementary School, where the grievant, Sue Anderson ("Anderson") had been the principal. In her statement of grievance, Anderson alleged that the actions of the Webster County Board of Education ("BOE") with respect to Glade Elementary School "reduced my authority, the number of professionals supervised, demoted me, and reduced my salary without my prior consent and in violation of W. Va. Code 18A-2-12, State Board policies 5300 and 5310 and W. Va. Code 18a-4-7a [sic], and W. Va. Code 18-29-2(m), (o) and (p)."

The relief sought by Anderson is "[r]e-instate proper salary level and benefits of 2002-2003." During the Level IV hearing, Anderson also indicated that she thought she should have been permitted to "bump" into the principal position at either Webster County High School or Webster Springs Elementary School.

The grievance was denied at Level I. An evidentiary hearing was held at Level II on July 21, 2004. A decision denying the grievance was issued on July 26, 2004. Proceedings at Level III were waived, after which the grievance was brought to Level IV. A Level IV evidentiary hearing took place in Charleston on February 8, 2005. Anderson was represented by attorney Joseph Albright, Jr., and BOE was represented byattorney Howard Seufer, Jr. Proposed findings of fact and conclusions of law submitted on behalf of BOE were received on March 8, 2005. There has not been any post-hearing submission on the part of Anderson.

At the request of the parties, the Level IV record remained open for submission of a copy of the

lateral transfer policy in effect in Webster County at the time pertinent to this grievance. A facsimile version of the policy was provided on May 20, 2005, at which time this grievance matured for decision. A hard copy of said policy was received through the mail on May 23, 2005.

After careful review of the entire record, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

FINDINGS OF FACT

1 1. During the school year 2002-2003, Anderson was the principal of Glade Elementary School, which contained pre-kindergarten classes through eighth grade.

2 2. In the course of the 2002-2003 school year, L. Kay Carpenter, Superintendent of Webster County Schools ("Superintendent Carpenter"), became aware that, under the federal No Child Left Behind Act ("the Act"), Glade Elementary School would be designated as a school of choice due to its failure to meet assessment criteria. The result would have been that parents of Glade Elementary students would have the right to insist that their children attend other schools in the county, with BOE bearing the additional expense of transporting the students to those schools and of providing students with support services, such as tutoring, required by the Act.

3 3. Superintendent Carpenter determined that if Glade Elementary were reconfigured into two separate schools each of those schools would start with a clean slate for purposes of the Act.

4 4. A plan was developed to reconfigure Glade Elementary into an elementary school and a middle school, both of which would still be housed in the same building but under different principals.

5 5. If the reconfiguration plan were implemented neither of the new schools would be labeled "a school of choice."

6 6. On February 24, 2003, BOE acted on Superintendent Carpenter's recommendation and adopted the reconfiguration plan, creating Glade Elementary School, consisting of pre-kindergarten through grade 4, and Glade Middle School, consisting of grades 5 though 8. The reconfiguration was to take effect at the beginning of the 2003- 2004 school year.

7 7. BOE also adopted a similar reconfiguration plan for Webster Springs Elementary School.

8 8. Because the new Glade Elementary School ("Glade Pre-K to 4") and the new Glade Middle School ("Glade Middle") would each require its own principal for the 2003- 2004 school year, Superintendent Carpenter recommended that Anderson's name be placed on the "transfer list."

Pursuant to West Virginia Code section 18A-2-7, this is the list of employees “to be considered for transfer and subsequent assignment for the next ensuing school year.”

9 9. After Anderson received notice that Superintendent Carpenter was going to recommend that her name be placed on the transfer list, she exercised her right to request a hearing before BOE. The transfer hearing was held on March 24, 2003.

10 10. By correspondence dated March 25, 2003, Anderson was informed that BOE had voted to place her name on the transfer list “due to the elimination of your current position as a result of the realignment of Glade Elementary School to Glade Elementary School [Pre-K to 4] and Glade Middle School.”

11 11. Anderson's assistant principal at Glade Elementary, James Holbrook and the principal of Webster Springs Elementary, Geoff Ezell, were similarly placed on the transfer list.

12 12. Thereafter, BOE posted principalships for the new Glade Pre-K to 4, Glade Middle, and various other schools in the county.

13 13. Anderson successfully applied for the position of principal at Glade Pre-K to 4, which is the assignment she holds currently.

14 14. Anderson held a 220-day annual contract both before and after Glade Elementary was reconfigured.

15 15. For the 2003-2004 school year, Anderson's salary as principal of Glade Pre-K to 4 was approximately $1,060 less than it had been during the preceding school year, when she was the principal of the original Glade Elementary. This reduction in salary flows from the fact that Anderson supervises fewer professionals. There are only five grade levels at Glade Pre-K to 4, whereas there were nine grade levels, hence more professional staff, at Glade Elementary before the reconfiguration took effect.

16 16. Anderson was told before she took the position that she would make less money as principal of Glade Pre-K to 4 than she had as principal of the pre-reconfiguration Glade Elementary. Despite having been forewarned about the salary difference, Anderson did not really believe that she would be paid less money. However, she was unable to identify any basis for such belief.

17 17. Anderson did not apply for any of the other vacant principal positions for which she was qualified, despite the fact that some of them would have given her a higher salary than she receives for her current position as principal of Glade Pre-K to 4.

18 18. When it turned out that student enrollment was larger than expected at Webster Springs Elementary School, BOE abandoned its plan to reconfigure it into two schools within one building, as had been done at Glade Elementary.

19 19. There were two music teachers and two physical education teachers assigned to Glade Elementary prior to the reconfiguration. Each of these four teachers taught a variety of grade levels from pre-kindergarten through eighth grade. The most senior of each of these two sets of teachers was allowed to choose whether to teach in Glade Pre-K to 4 or in Glade Middle School for the 2003-2004 school year.

Discussion

This grievance does not involve a disciplinary matter. Therefore, Anderson bears the burden of proof. W. VA. CODE ST. R. § 156-1-4.21(2004); *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). This means she must prove her allegations by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-4.21 (2004). "The preponderance standard generally requires proof that a reasonable person would acceptas sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

In her written statement of grievance, Anderson alleged a violation of West Virginia Code section 18A-2-12. This statute relates to performance evaluations for professional employees. It does not appear to have any application to the facts of this grievance, and Anderson did not offer any theory to support her assertion that it was violated. No violation of this statute has been proven. Therefore, this aspect of Anderson's claim lacks merit and will not be addressed further.

Anderson also alleged a violation of West Virginia Code section 18A-4-7a, which relates to hiring, promoting and transferring professional employees in the school system. Although she did not identify any specific provisions she was relying upon, Anderson argued that she should have been permitted to "bump" into the principalship of Webster County High School. (See footnote 1) Bumping comes into play when a school system must implement a reduction in force ("RIF"). Essentially, the provisions of West Virginia Code section 18A-4- 7a(j) permit a more senior employee whose position is being eliminated during a RIF to displace the least senior employee who holds a similar position. However, those statutory provisions have no application to the facts of this case. Anderson did not lose her position as principal of Glade Elementary as a result of a RIF but rather as a result of the

reconfiguration of the school. The elimination of her principalship, through the elimination of Glade Elementary Pre-K to 8, caused her to be placed on the transfer list. As noted, the reconfiguration was planned to avoid having Glade Elementary become a school of choice. Because Anderson was transferred, and not RIF'd, the bumping provisions of West Virginia Code section 18A-4-7a do not apply. (See footnote 2) In other words, Anderson had no statutory entitlement to bump another, less senior employee under these circumstances. Her citation to West Virginia Code section 18A-4-7a does not support her claim for relief. Further, there is no evidence to suggest that BOE has any policy that would expand the bumping rights afforded an employee under West Virginia Code section 18A-4-7a.

Anderson also claimed a violation of Policy 5300 and 5310, both of which are policies of the State Board of Education. Policy 5300 (W. VA. CODE ST. R. § 126-141-1 *et seq*.) deals with the relationship between employees and a board of education. Anderson has failed to specify which portion or aspect of the policy she was alleging had been violated, and no such violation is readily apparent from the record.

Similarly, Anderson has failed to provide a basis for her claim that there was a violation of Policy 5310 (W. VA. CODE ST. R. § 126-142-1 *et seq*.). Policy 5310 generally relates to an employee's right to fair evaluations and honest feedback regarding theemployee's performance. Anderson's placement on the transfer list had nothing to do with her job performance. Nor was her transfer disciplinary in nature. Therefore, Policy 5310 does not appear to have any applicability to this grievance.

Anderson also claimed that BOE violated West Virginia Code sections 18-29-2(m), (o) and (p). The cited code sections contain the definitions for discrimination, favoritism, and reprisal, respectively.

Discrimination is defined as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” W. Va. Code § 18-29-2(m). The Supreme Court of Appeals of West Virginia has recognized that the “crux of such claims is that the complainant was treated differently than similarly situated employees[.]” *Bd. of Educ. v. White*, 605 S.E.2d 814 (2004). Anderson has not identified any similarly situated employees with whom she can legitimately compare herself.

Anderson attempted to compare herself to the most senior of the two music teachers and the most senior of the two physical education teachers who were assigned to Glade Elementary before it

was changed into two separate schools. She claims that those two teachers were permitted to choose whether to be assigned to Glade Pre-K to 4 or to Glade Middle School for the 2003-2004 school year, which was when the reconfiguration went into effect. Anderson argues that, as a matter of professional courtesy, she should have been afforded a similar opportunity to choose her assignment for 2003-2004.

Anderson's attempted comparison lacks validity. Anderson is an administrator. She is attempting to compare herself to teachers. On this point alone, they are not similarly situated. Further, Anderson was placed on the transfer list as the result of the eliminationof her position as principal of Glade Elementary. It is not clear from the record whether those two teachers, with whom she compares herself, were being displaced by the reconfiguration of the former Glade Elementary or were subject to a RIF. Some ambiguous testimony from Superintendent Carpenter suggested that the teachers in question were being affected by a RIF, but this point was never fully developed.

Anderson bears the burden of establishing the basis for her claim of discrimination by a preponderance of the evidence. As noted above, Anderson, as an administrator, was not similarly situated to the two teachers. Further, the lack of clarity in the record regarding the status of the senior music and physical education teachers from the former Glade Elementary at the end of the 2002-2003 school year forecloses a determination that Anderson was similarly situated, in a pertinent way, to those two teachers. This, in turn, means that there was a failure of proof that Anderson suffered discrimination, within the meaning of West Virginia Code section 18-29-2(m).

Favoritism is defined as “unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.” W. Va. Code § 18-29-2(o). Anderson did not specifically identify any employees who received more favorable treatment than she. To the extent that she is attempting to claim that the senior music teacher and the senior physical education teacher from Glade Elementary were treated more favorably than she, the claim must fail for the same reasons discussed in connection with her discrimination claim. Not only were they teachers, rather than administrators, the status of those teachers is simply not clear. Therefore, it is not possible to make a comparison to ascertain whether the teachers were treated more favorably than Anderson. Anderson's written statement of grievance alleges a violation of West Virginia Code section 18-29-2(p), which defines reprisal as “the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself

or any lawful attempt to redress it." There is simply no evidence in the record to suggest that there was any action taken against Anderson as a result of her invocation of the grievance process. This claim must fail. As noted above, Anderson argues that, as a matter of professional courtesy, she should have been allowed to choose between the two principalships that resulted when Glade Elementary was reconfigured, rather than being required to go through the posting process to obtain her current assignment as the principal of Glade Pre-K to 4. Superintendent Carpenter correctly stated that the principalship of Glade Pre-K to 4 was a new position. BOE is required to post all "job vacancies of established existing or newly created positions." W. Va. Code § 18A-4-8b(g). BOE was thus statutorily required to post the two newly created principalships that resulted from the formation of Glade Pre-K to 4 and Glade Middle School. Unfortunately for Anderson, professional courtesy must yield to the dictates of West Virginia Code section 18A-4-8b.

Anderson was not limited in her ability to apply for various vacant positions. She chose to apply for the Glade Pre-K to 4 principalship even though other positions would have paid more money. This was Anderson's choice. The fact that she is making less money in her current position than she did when she was principal of the original Glade Elementary is attributable to the choices Anderson made after her prior position was eliminated. She chose to apply for, interview for, and accept the lower-paying position,after having been made aware that she would make less money. On these facts, her lower salary does not provide a predicate for relief.

In its post-hearing submission, BOE addressed Anderson's argument that BOE "prejudged" the propriety of her transfer. This issue was not contained in her statement of grievance at Level IV and is, therefore, considered abandoned by Anderson. Accordingly, it need not be addressed further.

In summary, Anderson has failed to state any grounds upon which she would be entitled to the relief she seeks in this grievance.

Conclusions of Law

1 1. This is not a disciplinary grievance. Therefore, Anderson, as the grievant, bears the burden of proof. W. VA. CODE ST. R. § 156-1-4.21(2004); *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).

2 2. Anderson must prove her allegations by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-4.21 (2004).

3 3. A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. *Hunt v. W. Va. Bureau of Employment Programs*, Docket No. 97-BEP-412 (Dec. 31, 1997); *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

4 4. "'County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious.' Syl. pt. 3, *Dillon v. Wyoming County Bd. ofEduc.*, 177 W. Va. 145, 351 S.E.2d 58 (W. Va. 1986)." Syl. pt. 2, *Hancock County Bd. of Educ. v. Hawken*, 209 W. Va. 259, 260, 546 S.E.2d 258, 259 (1999)(*per curiam*).

5 5. Pursuant to West Virginia Code section 18A-2-7, Superintendent Carpenter is afforded broad discretion to transfer school personnel, subject to the approval of BOE. *Post v. Harrison County Bd. of Educ.*, Docket No. 89-17-355 (Feb. 20, 1990).

6 6. "[W]hether a transfer was properly conducted is judged by the arbitrary and capricious standard, in the absence of a county policy requiring seniority to be considered." *Conn v. Mingo County Bd. of Educ*., Docket No. 04-29-314 (Dec. 16, 2004). Anderson did not establish the existence of any such seniority policy in the county. Therefore, the arbitrary and capricious standard applies to the resolution of this grievance.

7 7. An action is recognized as "arbitrary and capricious when it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 614, 474 S.E.2d 534, 544 (1996) (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

8 8. The decision to reconfigure Glade Elementary School, with the consequent elimination of Anderson's former position, was a reasonable response to the possibility that Glade Elementary would likely become a school of choice under the Act.

9 9. The decision to place Anderson on the transfer list was reasonable in light of the elimination of her former position as principal of Glade Elementary. Placement of Anderson on the transfer list was in the best interest of the schools. It cannot be considered an arbitrary and capricious decision and did not constitute an abuse of discretion on the part of either Superintendent Carpenter or BOE.

10 10. The elimination of Anderson's former position as principal of Glade Elementary School (Pre-K to 8) was not part of a reduction in force. The bumping rights that come into play, pursuant to West Virginia Code section 18A-4-7a, during a reduction in force are, therefore, inapplicable.

11 11. There is nothing to support Anderson's assertion that, as a professional courtesy, she should have been offered her choice of one of the new principalships without being required to go through the application process. To the contrary, BOE was statutorily- obligated to post the two new principalships that resulted from the reconfiguration of Glade Elementary into two new schools. W. Va. Code § 18A-4-7a(o).

12 12. Anderson has failed to prove that there was any discrimination, favoritism, or reprisal in connection with the personnel action at issue herein.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Webster 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 West Virginia Code section 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: May 25, 2005

_____**JACQUELYN I. CUSTER**

Administrative Law Judge

Footnote: 1

Anderson appears to have a misconception that she could select whatever position was most to her liking. However, bumping does not create a self-serve smorgasbord from which an employee can select a position. If bumping had applied, Anderson would have been allowed to displace the least senior principal in the county. The principal at Webster County High School was not the least senior principal. Therefore, even if Anderson had been entitled to "bump" another employee, it would not have been the principal at Webster County High School.

Footnote: 2

As a matter of fact, two principalships resulted from the reconfiguration of Glade Elementary. This distinguishes this grievance from State ex rel. Board of Education v. Casey, 176 W. Va. 733, 349 S.E.2d 436 (1986), in which closure of the

school where Casey was principal resulted in a reduction in the number of principalships in the county school system.