NANCY TONKERY,

Grievant,

v. **Docket No. 05-24-233**

MARION COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Nancy Tonkery ("Grievant") initiated this proceeding on May 11, 2005, alleging she was improperly transferred for the 2005-2006 school year, and she seeks reinstatement to her previous position at North Marion High School. The grievance was denied at level one on May 12, 2005. A level two hearing was held on June 15, 2005, the grievance was denied in a decision dated June 28, 2005. Level three consideration was bypassed, and Grievant appealed to level four on July 6, 2005, requesting that a decision be made based upon the record developed below. The parties submitted fact/law proposals by August 23, 2005, (See footnote 1) and this matter was assigned to the undersigned administrative law judge for a final decision on August 26, 2005.

The following material facts have been proven by a preponderance of the credible evidence of record.

Findings of Fact

1. Pursuant to a vacancy posting, Grievant was placed in the position of Journalism Instructor at North Marion High School ("North Marion") at the beginning of the2002-2003 school year. Although a Journalism degree was preferred, Grievant was considered qualified for the position as a result of her certifications in English/Language Arts, 5-12, and School Librarian/Media, K-12.

2. For reasons not stated in the record, it was decided that the Journalism instructor position at North Marion would be eliminated, effective for the 2005-2006 school year.

3. Grievant was placed on the transfer list as a result of the decision to eliminate her position at

North Marion, and she was assigned to Dunbar Middle School as School Librarian/Media.

4. There are no other Journalism Instructors at North Marion. The Journalism classes are considered to be part of the "Language Arts Department" at North Marion.

5. At the time of Grievant's transfer, there was a less senior language arts teacher employed at North Marion, who had the same certifications as Grievant, but who taught only English classes.

6. It has been the practice in Marion County that, when positions in a specific subject area need to be transferred, the least senior teacher in that particular certification area would be placed on transfer.

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 (2004); Holly v. LoganCounty 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 argues that, based on previous practice, the least senior teacher in the "Language Arts Department" should have been transferred. However, Respondent contends that it was not a Language Arts position being eliminated, but specifically Journalism, with Grievant being the only teacher for that subject. As discussed by witnesses at the level two hearing, past cases implicating Marion County's seniority-based transfer process usually involved the elimination of a specific type of class, such as biology, whereby the least senior teacher of that subject would be transferred.

Neither party has explained what the impetus for Grievant's transfer was, so the undersigned must assume that there was no reduction in force (RIF) involved. As recently discussed in Anderson v. Webster County Board of Education, Docket No. 04-51-301 (May 25, 2005), when an employee is merely transferred, and not RIF'd, the bumping provisions of West Virginia Code §18A-4-7a do not apply. (See footnote 2) Therefore, Grievant's alleged right to displace a less senior employee would only be based upon county practice, not a particular statutory right.

The statute which governs transfers is W. Va. Code § 18A-2-7, which 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 onor before the first Monday in April if he is being considered for transfer or to be transferred,
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> . . .
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> Any teacher or employee who desires to protest such proposed transfer may request in writing a statement of the reasons for the proposed transfer. Such statement of reasons shall be delivered to the teacher or employee within ten days of the receipt of the request. Within ten days of the receipt of the statement of the reasons, the teacher or employee may make written demand upon the superintendent for a hearing on the proposed transfer before the county board of education. The hearing on the proposed transfer shall be held on or before the first Monday in May, except that for the school year one thousand nine hundred eighty-nine_ninety only, the hearing shall be held on or before the fourth Monday in May, one thousand nine hundred ninety. At the hearing, the reasons for the proposed transfer must be shown.
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> The superintendent at a meeting of the board on or before the first Monday in May shall furnish in writing to the board a list of teachers and other employees to be considered for transfer and subsequent assignment for the next ensuing school year,
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> . . .
>
> All other teachers and employees not so listed shall be considered as reassigned to the positions or jobs held at the time of this meeting. The list of those recommended for transfer shall be included in the minute record of such meeting and all those so listed shall be notified in writing, by certified mail, return receipt requested, to such persons' last known addresses within ten days following said board meeting, of their having been so recommended for transfer and subsequent assignment and the reasons therefor.

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). 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, supra; Post, supra. See Jochum v. Ohio County Bd. of Educ., Docket No. 91-35-396 (Jan. 31, 1992). Thus, whether a transfer wasproperly conducted is judged by the arbitrary and capricious standard, in the absence of a county policy requiring seniority to be considered. Lester v. McDowell County Bd. of Educ., Docket No. 93-33-256 (Jan. 31, 1994); See also Hawkins, supra; LeMastus v. Wyoming County Bd. of Educ., Docket No. 55-87-290-4 (Mar. 23, 1988); Tenny v. Barbour County Bd. of Educ., Docket No. 01-87-166-2 (Nov. 13, 1987).

Although Respondent agrees that it has followed an informal seniority-based transfer policy in the past, it contends that Grievant has misinterpreted that policy. Respondent contends that, when a particular type of position must be eliminated, it looks to the certification of the teachers involved. Because Journalism was the only course being eliminated, Respondent believes it was correct to consider Grievant as the least senior and only teacher of the subject being eliminated. Conversely, Grievant argues that, because Journalism has been grouped together with other Language Arts courses in a department, Respondent was required to transfer the less senior Language Arts teacher, although she did not teach Journalism.

The evidence indicates that, in the past, transfers have, in fact, been based on seniority. However, the present situation differs to some extent from those situations, because Grievant was the only teacher of the subject involved. Previously, a school would need to eliminate a biology position or a physics position, and the least senior teacher of that particular subject would be transferred. Here, however, there is no other teacher of Journalism, and Grievant's argument would require the transfer of someone who is teaching only Language Arts/English classes. This particular school's grouping of Journalism as a Language Arts class should not necessarily be the determinative factor. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Res., Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts.

Under the circumstances presented, the undersigned cannot conclude that Grievant's transfer was arbitrary and capricious. There is no evidence in the record of a similar situation where a teacher who was the only instructor of a particular subject has been allowed to remain at a school, resulting in

the transfer of a less senior teacher of an entirely different subject. Indeed, the evidence indicates that, if a biology position needed to be eliminated, the least senior teacher in the entire science department would not be transferred, but only the biology teachers (rather than physics or chemistry teachers) would be involved in the transfer process. Moreover, as aptly noted by Respondent, if it had originally been able to hire an applicant with a Journalism certification, as was preferred, there would be no other teacher with the applicable certification implicated in this transferdecision. Therefore, Respondent's conclusion that Grievant was the least senior and only teacher of the course being eliminated, necessitating her transfer, cannot be found unreasonable.

The following conclusions of law support this Decision.

Conclusions of Law

1. In a non-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 (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). See W. Va. Code § 18-29-6.

2. W. Va. Code § 18A-2-7 gives the Superintendent the right to transfer employees, subject to the approval of the board. See Watts v. Lincoln County Bd. of Educ., Docket No. 98-22-348 (Nov. 30, 1998); Post v. Harrison County Bd. of Educ., Docket No. 89-17-355 (Feb. 20, 1990).

3. The power to transfer employees must be exercised reasonably and in the best interests of school systems and may not be exercised arbitrarily or capriciously. State ex rel. Hawkins v. Tyler County Bd. of Educ., 166 W. Va. 363, 275 S.E.2d 908 (1980). See Hyre v. Upshur County Bd. of Educ., 186 W. Va. 267, 412 S.E.2d 265 (W. Va. 1991).

4. Employees have no right to be assigned to a particular position, and transfers are not based on seniority, but are based on the needs of the school system, as decided in good faith by the superintendent and the board. Hawkins, supra; Dingess v. LincolnCounty Bd. of Educ., Docket No. 98-22--52 (May 29, 1998); Post, supra. See Jochum v. Ohio County Bd. of Educ., Docket No. 91-35-396 (Jan. 31, 1992).

5. Whether a transfer was properly conducted is judged by the arbitrary and capricious standard, in the absence of a county policy requiring seniority be considered. Lester v. McDowell

County Bd. of Educ., Docket No. 93-33-256 (Jan. 31, 1994). See also Hawkins, supra; LeMastus v. Wyoming County Bd. of Educ., Docket No. 55-87-290-4 (Mar. 23, 1988); Tenny v. Barbour County Bd. of Educ., Docket No. 01-87-166-2 (Nov. 13, 1987).

6. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Res., Docket No. 93-HHR-322 (June 27, 1997)

7. Although Respondent has followed a seniority-based transfer process in the past, Grievant was the only Journalism teacher at North Marion High School, and Respondent's conclusion that her seniority should not be compared to teachers of other subjects cannot be found to be arbitrary and capricious or unreasonable under the circumstances.

8. Grievant did not meet her burden of proof and demonstrate her transfer was arbitrary and capricious, an abuse of discretion, nor did she establish a violation of any statute. Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Marion 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: September 20, 2005

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant was represented by Frank Caputo of the American Federation of Teachers, and Respondent was represented by counsel, Stephen R. Brooks.

Footnote: 2

The provisions of West Virginia Code § 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.