WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

DONNA ROGERS,

Grievant

v.

Docket No. 07-27-309

MERCER COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Donna Rogers, employed by the Mercer County Board of Education ("MCBOE") as the media teacher, filed a level two grievance on April 30, 2007, in which she alleged a violation of W. Va. Code . 18A-4-7a(q), when she was placed on the transfer list. For relief, Grievant requested reinstatement as media teacher for Brushfork Elementary. Grievant bypassed the level one conference. A transfer hearing was conducted on April 17, 2007, before the MCBOE. The grievance was denied following hearing at level two (See footnote 1), and Grievant elected to bypass consideration at level three. Appeal to level four was made on June 4, 2007. Grievant's representative Ben Barkey, West Virginia Education Association, and MCBOE counsel John H. Shott agreed to submit the grievance for decision based upon the lower-level record. The grievance became mature for decision upon receipt of the parties' proposed findings of fact and conclusions of law on June 26, 2007. For administrative reasons, the matter was reassigned to the undersigned on October 26, 2007.

Synopsis

Grievant was transferred out of her school during a reduction in force. Grievant had less seniority

than the Chapter I math teacher whose position was being eliminated. Grievant argued that a Chapter I reading teacher assigned to her elementary school had less seniority, and Grievant should have been allowed to bump into that reading teacher assignment. MCBOE argues that the Chapter I math teacher was not certified to serve as a Chapter I reading teacher, and, as such, she could not bump the Chapter I reading teacher with the least seniority. (See footnote 2)

The least senior teacher at the school was employed on a temporary permit to teach Chapter I reading. Accordingly, she should have been placed on transfer or bumped by a more senior classroom teacher, when the total number of classroom teaching positions in her elementary school was reduced. The legislative intent in the transfer statute is clear that the least senior classroom teacher is transferred during a reduction in force at a particular school. This grievance is granted.

The following facts have been derived from a preponderance of the credible evidence made part of the record at level two.

Findings of Fact

1. During the 2006-2007 school year, Grievant was assigned to teach media at Brushfork Elementary School. 2. Subsequently, MCBOE determined that due to a reduction in Chapter I funds, a Chapter I math teacher at Brushfork needed to be eliminated.

3. Grievant had less seniority than the Chapter I math teacher whose position was being eliminated.

4. In the Spring of 2007, MCBOE notified Grievant of its decision to transfer her for the 2007-2008 school year.

5. A transfer hearing was held before the MCBOE on April 17, 2007. At the hearing, it was disclosed to Grievant that her position was not eliminated but that she was being bumped by the more senior Chapter I math teacher.

6. Because Grievant is not certified to teach special needs students and not certified in a Chapter I program, she was placed on the transfer list. This action was taken by MCBOE even though a Chapter I position requires no special certification and any certified elementary education teacher is qualified to hold the position.

7. The least senior teacher assigned to Brushfork, Angela Neal, was employed as a Chapter I reading teacher pursuant to a temporary permit.

8. The next least senior teacher assigned to Brushfork, Wendy Hicks, was employed as a special

education teacher pursuant to a temporary permit.

9. Grievant was transferred, even though these teachers in her elementary school had less seniority.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her claim 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. (See footnote 3)

The record in this case is very limited and somewhat murky. Grievant contends that, because she was not the least senior teacher in school, she should have been allowed to bump one of the less senior teachers. MCBOE argues that it acted in compliance with the applicable statute, subsection (2) of W. Va. Code . 18A-4-7a(q), because the Board's action involved a reduction in a specified grade level and did not involve a reduction in the total number of classroom teaching positions. In addition, MCBOE asserts that because the Chapter I math teacher, whose position was being eliminated, was not certified or licensed to serve as either a Chapter I reading teacher or a special education teacher, she could not bump the Chapter I reading teacher who had the least seniority, or the special education teacher who had the second least seniority. MCBOE reasons that because the Chapter I math teacher was not certified to serve as an elementary special education teacher, the Chapter I math teacher could bump the teacher with the third least seniority, Grievant. The outcome of this case is guided by a reading of W. Va. Code . 18-4-7a(q), which provides:

> Reduction 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).

One thing clear from the record is that the eliminated position was a Chapter I math teacher at Brushfork. As a Chapter I teacher, she was not assigned to a specific grade level; rather she rotated through the classrooms, working with groups of eligible students.

The evidence also establishes that the MCBOE eliminated a Chapter I math teacher at Brushfork due to a reduction of Chapter I funds. This would indicate that the reduction went to the "total number of classroom teaching positions" since the record lacks any evidence that the loss of Chapter I funds lead to a reduction in a "specified grade level." Therefore, the limited record of this grievance led to the conclusion that the position eliminated was a classroom teacher and subsection (1) governs the instant situation and subsection (2) is not applicable. Respondent's argument that the eliminated position could not bump the Chapter I teacher, who had the least seniority, is without merit. There are decisions from this Board indicating 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. *See Lloyd v. Kanawha County Bd. of Educ.*, Docket No. 91-20-327 (Oct. 29, 1991). However, it is important to note in *Lloyd* 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. Due to the lack of a specific written policy by MCBOE providing for special program teachers being treated differently in transfer situations, the least senior employee teaching pursuant to a Chapter I reading permit does not enjoy this differential treatment. Subsection (1) is clear that the least senior classroom teacher is transferred during a reduction in the total number of classroom teaching positions in an elementary school.

Furthermore, Respondent's reliance on *Brown v. Wetzel County Bd. of Educ.*, Docket No. 06-52-292 (Oct. 23, 2006) is misplaced in this instance. In *Brown*, the grievants were transferred out of their schools, resulting in a specific grade level reduction. Grievant Brown was the least senior Kindergarten teacher assigned at the Short Line School ("SLS") for the 2005-2006 school year. The Wetzel County Board of Education determined that one kindergarten position would need to be

eliminated for the 2006-2007 school year. Grievant Brown was certified to teach pre-kindergarten and kindergarten, but was not certified to teach in any special education classification. Two teachers at SLS had less seniority than Grievant. The least senior teacher at SLS was a half-time Early Startteacher of children with special needs. The next least senior teacher taught Early Start at SLS. Grievant argued that since the Early Start teachers had less seniority, she should have been allowed to bump into that assignment. The grievance was denied based on the failure of the grievant to challenge that the Early Start teacher would have been the least senior classroom teacher at SLS. Neither did Grievant claim to hold certification required to teach any type of special education, a requirement under subsection (2) of the statute. (See footnote 4)

The outcome of this grievance, with this set of facts, is closer to the holding in *Cline v. Mingo County Bd. of Educ.*, Docket No. 95-29-240 (Sept. 29, 1995). Grievant was a Chapter I teacher, who was the least senior educator at Gilbert Grade School ("GGS"). Although the facts are somewhat unclear, apparently a sixth grade position at GGS was being reduced. The least senior sixth grade teacher was transferred to the grievant's Chapter I position. The grievant in *Cline* argued she should not be transferred, and the sixth grade teacher should not be allowed to take her position because she was a special program teacher and was exempt from the statute. This Board held that as the grievant was the least senior teacher at GGS, she could be placed on transfer or bumped by a more senior classroom teacher. This reasoning was based on the application of the "total number of classroom positions" being reduced and/or a "specified grade level" needing to be reduced. (See footnote 5) The instant case involves the elimination of a Chapter I position which was the elimination of one teaching position, not a specific grade level. It is a simple case of reduction in force of the least senior teacher in the school, because the total number of positions at the school was reduced by one. Accordingly, the least senior classroom teacher in the school _Angela Neal _ is the employee who must be placed on transfer, pursuant to the unambiguous language of W. Va. Code . 18A-4-7a(q).

Due to the limited record, it is unclear whether or not the Chapter I math teacher could bump into Chapter I reading or bump Grievant, resulting in Grievant being reassigned at Brushfork. Nothing from the record indicates that Grievant would be prohibited from bumping into the Chapter I reading position. Nevertheless, Ms. Neal must be placed on transfer, and Grievant should be allowed to retain her employment at Brushfork Elementary School for the upcoming school year.

The following conclusions of law support this decision.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her claim 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. Reduction 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, thereduction 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. *See* W. Va. Code . 18-4-7a(q).

3. 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. *Bibey/Fitzwater v. Wetzel County Bd. of Educ.*, Docket No. 04-01-212 (Aug. 13, 2004); *Cline v. Mingo County Bd. of Educ.*, Docket No. 95-29-240 (Sept. 29, 1995).

4. Angela Neal was the least senior classroom teacher at Brushfork Elementary School for the 2006-2007 school year, so she should have been placed on transfer.

Accordingly, this grievance is **GRANTED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Mercer County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7 (repealed) (*but see Executive Order No. 2-07*, May 8, 2007). Neither the West Virginia Public 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 Grievance Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: November 29, 2007

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Ronald L. Reece

Administrative Law Judge

Footnote: 1

Evidence submitted at the level two hearing consisted entirely of the transfer hearing transcript.

Footnote: 2

This reasoning relies on the application of subsection (2) of W. Va. Code . 18A-4- 7a(q), which is misplaced.

Footnote: 3

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and Stat e Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes and rules, which continue to control the proceedings in this case

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Footnote: 4

This Board's decisions relating to transfer and reduction in force hinge on the underlying facts of a particular case, and, as such, require a careful reading.

Footnote: 5

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