



REPLY TO:
101 Harper Park Drive
Suite D
Beckley, WV 25801
Telephone: 255-6155

Members
James Paul Geary
Chairman
Orton A. Jones
David L. White

**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**
ARCH A. MOORE, JR.
Governor

Offices
240 Capitol Street
Suite 508
Charleston, WV 25301
Telephone: 348-3361

CLIFFORD BROGGI

v.

Docket No. 34-88-111

NICHOLAS COUNTY BOARD OF EDUCATION

D E C I S I O N

The grievant, Clifford Broggi, has been employed by the Nicholas County Board of Education as a teacher of gifted children assigned to Richwood Junior High School. He filed a grievance in May 1988 alleging his termination in a reduction in force was improper. Levels I and II were mutually waived and a Level III hearing was held before the Board on May 26, 1988. The Board subsequently voted to stand on its decision to terminate. A Level IV hearing was held July 11, 1988.

Grievant was first employed by the Board at the beginning of the 1986-87 school term. At that time he held a Bachelors degree in social studies, grades 7 through 12, and a first class permit for substitute teaching with no particular area of certification. He was assigned to teach gifted children at Richwood

Junior High School despite his lack of certification in that area and completed the school term in that assignment. Mr. Broggi received a first class permit on August 26, 1987 with a specialization in gifted, grades 5 through 12, and was assigned to the same position at the beginning of the 1987-88 school term. During the second semester of the 1987-88 school term, Mr. Luther Baker, Director of Special Programs, conducted interviews of parents with prospective students in the gifted program and made projections on how many students would enroll in the programs at Richwood Junior High School and Richwood High School. He concluded the teacher of the program at the high school could assume the grievant's duties.¹ Accordingly, he recommended to the Superintendent of Schools, Robert Bailey, that the programs be consolidated and grievant's position eliminated. (T.__) Mr. Broggi was given notice and the opportunity to a hearing as required by W.Va. Code, 18A-2-2 and the Board subsequently accepted Mr. Bailey's recommendation that grievant's employment be terminated.

Grievant does not contest the sufficiency or timeliness of his notice but alleges there was no lack of need for his services and he was not the least senior teacher in his area of certification. The Board contends the enrollment projections were accurate and

¹The two schools are in close proximity to each other and the consolidation would require no busing of students.

Mr. Broggi was the least senior teacher of gifted children on the junior high level and therefore could not displace or "bump" another teacher and retain his position.

Grievant's contention in regard to seniority is based on a list of employees prepared by the Board in preparation for the reduction in force (Grievant's Exhibit No. 2), which indicates two other teachers of gifted children, Mr. Jeffrey Davis and Ms. Pamela Klawitter, have later employment dates. According to the grievant he should have been allowed to "bump" or displace one of these teachers and his termination was a violation of W.Va. Code, 18A-4-8b(b), which provides:

Whenever a county board of education is required to reduce the number of professional personnel in its employment, the employee with the least amount of seniority shall be properly notified and released from employment pursuant to the provisions of section two, article two of this chapter: Provided, That such employee shall be employed in any other professional position where he had previously been employed or to any lateral area for which he is certified and/or licensed if his seniority of any other employee in that area of certification and/or licensure.

The record, however, indicates Mr. Davis and Ms. Klawitter were elementary teachers with permits for gifted, grades K through 8 and grades 1 through 6 respectively. Grievant's permit was for grades 5 through 12 and therefore he could not have replaced

one of these teachers.² Mr. Baker provided un rebutted testimony which indicated Mr. Broggi and Ms. Susan Bailey were the only two teachers of gifted children on the junior high level in the county at the time the reduction in force was made and Ms. Bailey had nearly five years seniority in her position. (T. __)

Grievant's assertion that there was no lack of need for his services is similarly unsupported by the evidence. Mr. Baker's survey of potential gifted students identified only seventeen (17) high school students and thirteen (13) junior high school students who would enroll in the program in the fall of 1988.

(T. __) Mr. Baker testified that West Virginia Department of Education regulations permitted up to forty (40) students in a class in such a program and past practice indicated some students who expressed an interest in the program would not actually enroll.

(T. __) He conceded there was a possibility that more than thirty (30) students would enroll but that it was not likely. Mr. Broggi based this particular part of his grievance entirely on that possibility and produced no survey or calculation to rebut the Board's findings and projections. The West Virginia

²Grievant did not appear at the Level IV hearing and his representative apparently based the legal argument that he was in the position to "bump" one of these teachers on the assumption that he had certification for grades K through 12. A document purported to be a copy of a permit for those grades (Grievant's Exhibit No. 3) was offered as proof of this assertion but the testimony of Mr. Wilbert Mick, Assistant Superintendent, indicated the document was only a copy of the lower half of a form used when a teacher makes a commitment to remain in a particular teaching field. (T. __)

Education and State Employees Grievance Board has held a grievant must prove by a preponderance of the evidence an allegation that a reduction in force was not properly based on a lack of need. Guella v. McDowell County Board of Education, Docket No. 33-88-100. Grievant's unsubstantiated assertion that there was a possibility of a higher student enrollment in the gifted program is insufficient to meet that burden.

In addition to the foregoing, the following findings of fact and conclusions of law are made.

FINDINGS OF FACT

1. Grievant, Clifford Broggi, was employed by the Nicholas County Board of Education as a teacher of gifted children at Richwood Junior High School from the beginning of the 1986-87 school term until the end of the 1987-88 school term when his position was eliminated in a reduction of force.

2. Grievant presently holds a Bachelor's degree in social studies, grades 7 through 12, and a first class permit for substitute teaching issued by the West Virginia Department of Education with a specialization in gifted, grades 5 through 12.

3. At the time of the reduction in force, grievant and Ms. Susan Bailey were the only two teachers certified and

assigned to teach gifted children on the junior high level and Ms. Bailey was the more senior employee.

CONCLUSIONS OF LAW

1. It is incumbent upon a grievant to substantiate the allegations contained in a grievance by a preponderance of the evidence. Baisden v. Mingo County Board of Education, Docket No. 29-87-207; Harrison v. Kanawha County Board of Education, Docket No. 20-87-134-1; Smith v. West Virginia School of Osteopathic Medicine, Docket No. BOR88-051-4.

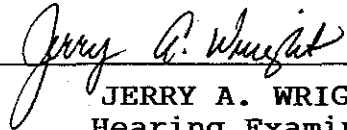
2. Grievant failed to prove by a preponderance of the evidence that the reduction in force initiated by the Board, which resulted in the elimination of his position, was not based on a lack of need for his services.

3. Pursuant to the provisions of W.Va. Code, 18A-4-8b(a) a professional employee whose position is eliminated in a reduction in force may displace or "bump" less senior employees within his or her area(s) of certification. State ex rel. the Board of Education of Kanawha v. Casey, 349 S.E.2d 436 (W.Va. 1986); James v. Gilmer County Board of Education, Docket No. 11-87-181-3; Christian v. Harrison County Board of Education, Docket No. 17-87-146-2.

4. At the time the reduction in force was initiated there were no less senior employees in grievant's area(s) of certification and the Nicholas County Board of Education was in compliance with the provisions of W.Va. Code, 18A-4-b(a) when it eliminated his position.

Accordingly, the grievance is **DENIED**.

Either party may appeal this decision to the Circuit Court of Nicholas County or the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of said decision. (W.Va. Code, 18-29-7) Please inform this office of your intent to do so in order that the record can be prepared and transmitted to the Court.



JERRY A. WRIGHT
Hearing Examiner

Dated: October 26, 1988