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**WEST VIRGINIA EDUCATION AND  
STATE EMPLOYEES GRIEVANCE BOARD**

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MARY SUZZANNE CHAPMAN

v.

Docket No. 17-87-180-2  
18-87-170-2

HARRISON COUNTY BOARD OF EDUCATION

DECISION

Grievant Mary Suzanne Chapman is employed by Respondent Harrison County Board of Education as a health and physical education instructor at Shinnston Middle School. During school years 1985-87, Grievant was the lone kindergarten teacher at Harrison County's Lost Creek Elementary School, a job from which she was involuntarily transferred. Claiming impropriety in that transfer and related occurrences, she filed this complaint at Level I on June 10, 1987. After denials there and waivers at Levels II and III,<sup>1</sup> Grievant initiated this action at Level IV on June 25,

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<sup>1</sup> While W.Va. Code §18-29-4(c) permits a county board of education to waive consideration of a grievance at Level  
(Footnote Continued)

1987.<sup>2</sup> A hearing was conducted on November 18, 1988 in Clarksburg, and the parties submitted their proposed findings of fact and conclusions of law by December 16. The transcript was received on January 13, rendering the matter mature for disposition.<sup>3</sup>

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(Footnote Continued)

III, there is no such provision for Level II and even if Grievant concurred, which she apparently did, Respondent clearly proceeded inappropriately at that step, see Code §18-29-4(b), particularly since there was no transfer hearing in this case. Normally, this situation would be resolved by a remand to Level II for compliance; however, because of the additional delay such would add to this case's already inordinately-prolonged resolution process, this Grievance Board will proceed to decide this controversy on its merits. See State ex rel. Bd. of Educ. v. Casey, 349 S.E.2d 436, 438 (W.Va. 1986).

<sup>2</sup> Her statement of grievance is as follows: "Improper Transfer/Certification; Resolution: Remain in the kindergarten position at Lost Creek Elementary." She filed this revised version of the same complaint at Level IV on July 27, 1987: "Harrison Co. Bd of Ed. removed me from a kindergarten teaching position which I am fully certified and are replacing me with a teacher who is not certified to teach kindergarten."

<sup>3</sup> The procedural history of this grievance is quite convoluted. The matter has repeatedly been scheduled for Level IV hearing at various locations and before no less than three Hearing Examiners by this Grievance Board, only thereafter almost invariably to be proposed for submission on the record of lower level proceedings by the parties. Scheduling conflicts, miscommunications, changes in representatives and a four-and-one-half month stay of proceedings by the Circuit Court of Harrison County have also contributed to the delay in resolving this claim. In late October, 1988, Acting Chief Hearing Examiner Jerry L. Wright and the parties settled on November 18 as the definite date for Level IV hearing.

Proposed findings of fact and conclusions of law which were submitted some months before the Level IV hearing were considered in compiling this Decision, at the request of the parties.

In the Spring of 1987, Respondent instituted a massive reduction-in-force (RIF) due to budget constraints. As a result, it was determined that there would be two less professional positions at Lost Creek Elementary School. Grievant was found to be one of the two Lost Creek teachers with the least seniority with Respondent,<sup>4</sup> and thus, was placed on administrative transfer pursuant to Harrison County Policy GBM, which provides, in pertinent part, as follows:

When the purpose of a transfer is to reduce the number of professionals assigned to a school or a program, the professional . . .with the least amount of county seniority in the referenced licensure or certification who is . . .teaching the referenced subject, or is . . .teaching in the referenced program will be the first candidate. . .for transfer and subsequent assignment. However, when the candidate . . .has a certification which would cause it not to be in the best interest of

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<sup>4</sup> At the Level IV hearing, it was established that Grievant had worked at least 133 days in one school year as a substitute teacher for Respondent prior to her permanent hiring. T. 35-36. In response to this, Respondent's Administrative Liaison Officer Robert A. Skidmore admitted, at T. 53, "we didn't consider this. . .[w]e didn't consider the Harkins [v. Ohio Co. Bd. of Educ., 369 S.E.2d 224 (W.Va. 1988)] rule. . .[i]t wasn't in effect. . . at that time." Harkins merely provides that substitute teachers who work at least 133 days in a given year earn credit toward tenure, and does not grant those teachers seniority as regular employees; neither does Minney v. Nicholas Co. Bd. of Educ., Docket No. 34-88-112 (Oct. 31, 1988) (substitute teachers earn seniority as substitutes in all areas in which they are certified) nor any other authority of which the undersigned is aware. In fact, Respondent's Policy GBM expressly states that "[e]xperience accrued as a substitute may not be computed in determining regular employee seniority." Accordingly, Grievant's substitute employment is of no pertinence herein.

the school system to propose a transfer. . .and when this teacher is the least senior and the subject area is one that has been identified for reduction, then the next candidate with the least amount of county seniority in the referenced licensure or certification subject area will be proposed.

It is without dispute that grades K-6 was a "program" within the meaning of this Policy, and kindergarten and grades 1-6 were not, during school years 1986-88, considered separate "programs."<sup>5</sup>

According to unrefuted testimony at Level IV, Grievant was assured by Myra Townsend, then Director of Personnel for Respondent, that she would be replaced by a more senior and fully-certified kindergarten instructor; as a result, she did not request her statutorily-entitled transfer hearing. See W.Va. Code §18A-2-7. Thereafter, near the end of school year 1986-87, Grievant learned and Mrs. Townsend confirmed that her position was to be filled by one of the remaining Lost Creek staff members, and that none of that group had kindergarten endorsement. Janet Lee Sprout, formerly third grade teacher at the school, was and is assigned to cover

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<sup>5</sup> There is no allegation that Grievant's transfer was related to a reduction-in-force of kindergarten teachers specifically, or that its purpose was other than "to reduce the number of professionals assigned to a school," see Policy GBM.

Kindergarten became a separate "program" from grade one and above effective school year 1988-89. Pratt v. Harrison Co. Bd. of Educ., Docket No. 17-88-176 (Mar. 1, 1989), n. 6.

the kindergarten class.<sup>6</sup> Ms. Sprout's certification from the West Virginia Department of Education is limited to grades 1-6. T. 16.<sup>7</sup>

Respondent cited West Virginia State Board of Education (WVBOE) Policy 5200 as the sole authority upon which it relied to effect placement of Ms. Sprout as kindergarten teacher. T. 26-27. That Policy, titled "Certification Patterns for Licensure" and dated January 11, 1985, provides, in pertinent part:

The purpose of this policy is to establish certification patterns which assure that professional educators have the skills, knowledge, and attitudes necessary to deliver the public school programs of study at pre-kindergarten and kindergarten (Pre-K-K), early childhood (K-4), middle childhood (5-8), and adolescent education (9-12) levels which have been adopted by the West Virginia Board of Education. . . .

Endorsements on a license will relate to approved public school programs and/or areas of study and will be issued at the pre-kindergarten and kindergarten (Pre-K-K), early childhood (grades K-4), middle childhood (grades 5-8), adolescent (grades 9-12), and adult levels and combinations thereof.

#### Transitional Assignments

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<sup>6</sup> Respondent apparently posted this job as vacant in Spring, 1987, but shortly thereafter retracted the posting. T. 11-12.

<sup>7</sup> Ms. Sprout has never had a permit to teach kindergarten. Apparently, neither Policy 5200 nor Policy 5202, both infra, requires such. But see n. 8, infra. At one point during school year 1987-88, Ms. Sprout was noticed that she would be placed on administrative transfer not due to her lack of kindergarten certification but a projected dearth of students. However, this notice was later voided. T. 18-19.

. . .Professional personnel certified prior to the implementation of the new patterns may at the discretion of the county superintendent be assigned [beginning school year 1985-86] within the same building to teach one grade level below or above the grade levels within the endorsement areas on their Professional Certificates without further training.

. . .This transitional provision shall sunset on June 30, 1989 unless readopted by the West Virginia Board of Education.

Post-hearing and without objection from Grievant, Respondent submitted Opin., State Supt. Schools, July 18, 1988 Re: Kindergarten Teacher Certification<sup>8</sup>, which provides, in pertinent part, as follows:

Thank you for your recent letter about some county boards of education posting positions for K-3, etc. when they do not need or want a kindergarten teacher, yet older teachers do not have kindergarten certification because it was not offered or required at the time they acquired their teaching certification; hence, they cannot apply for a position listed K-3, etc.\* [\*Should they apply, they will not be granted an interview or considered for a position.]

You wonder whether this situation is unlawfully discriminatory and suggest some solutions.

The Policies, Rules and Regulations of the West Virginia Board of Education in §5202 do allow a county board of education to place a professional educator one grade below or one grade above the level on the certificate. Consequently, the problem which you apparently have been encountering ought not to be.

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<sup>8</sup> Despite the clear reference to "§5202," Respondent in its "Final Arguments" cites this Opin. as authority for the proposition that WVBOE "has prescribed through policy §5200 that a certificate containing grade 1 in the endorsement area is valid for teaching kindergarten." This is the only instance in the record of this case where WVBOE Policy 5202 is mentioned; however, its applicability is analyzed infra.

Mr. Robert A. Skidmore, Respondent's Administrative Liaison Officer, testified at Level IV that it was Respondent's understanding that Policy 5200's "patterns are given under purpose, 'to implement kindergarten patterns, pre-kindergarten patterns, or early childhood,' or on up through the middle childhood and adolescent. In order to put your building into those kinds of patterns, a [county] superintendent may increase or decrease the grade level on a certification at his discretion." T. 27-28.<sup>9</sup>

WVBOE Policy 5202, which has as its effective date February 24, 1988, provides, in pertinent part:

The professional educator's assignment is restricted to the endorsement(s) shown on the license. . . [W.Va. Code] §18A-3-1. . .

The county Superintendent may assign an employee, with his/her consent, one grade higher or lower than the grade levels on the employee's certificate. The assignment shall be consistent with the specialization(s) indicated on the certificate. If no employee within the school will consent to a specific assignment and the assignment must be filled, the county superintendent may assign an employee to the position.

The remainder of this Decision will be presented as formal findings of fact and conclusions of law.<sup>10</sup>

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<sup>9</sup> Skidmore further stated he knew of no other occurrence of Policy 5200 being so utilized in Harrison County. T. 32. This Grievance Board is aware of at least one other such instance, see Bowers v. Harrison Co. Bd. of Educ., Docket No. 17-87-198-2 (Feb. 16, 1988).

<sup>10</sup> The following issues, as framed by the Grievant, will not be specifically addressed: 1. Does WVBOE Policy 5200 extend to kindergarten?; and 2. May a local school  
(Footnote Continued)

## FINDINGS OF FACT

1. Grievant Mary Suzanne Chapman was employed during school years 1985-87 as kindergarten teacher, Lost Creek Elementary School by Respondent Harrison County Board of Education.

2. Due to a massive reduction-in-force in the County, two positions at Lost Creek Elementary were eliminated effective school term 1987-88; Grievant, as one of the two teachers at the school with the least county seniority, was placed on administrative transfer pursuant to Respondent's Policy GBM.

3. Her kindergarten position was and is filled by Janet Lee Sprout, a remaining Lost Creek Elementary teacher. Neither Ms. Sprout nor any other such remaining teacher was or is specifically certified to teach kindergarten. Ms. Sprout's certification is for grades 1-6.

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(Footnote Continued)

superintendent apply 5200 to fill a kindergarten post if a fully certified teacher is available?

Grievant also expressed concern at level IV that while she was on administrative transfer she was only permitted to bid on kindergarten openings despite her certification in other areas. Respondent admitted this was true and that it was in an attempt to comply with Casey, supra at n. 1. This Grievance Board has previously ruled on a similar issue, e.g., Davis v. Summers Co. Bd. of Educ., Docket No. 45-87-119 (Oct. 13, 1987).

4. Respondent based its placement of Ms. Sprout in the Lost Creek kindergarten role on West Virginia Department of Education Policy 5200.

5. Policy 5200 "established a transitional period during which county superintendents may place professional personnel in positions [in schools to which they are already assigned] one grade level above or below the grade levels within the endorsement areas on their certificates. This transitional period, from 1985 through 1989, was created as part of a master plan for public education which includes certification for [pre-kindergarten and kindergarten, kindergarten-grade four,] middle childhood education, grades five through eight [and adolescent education, grades nine-twelve]. During this time personnel are given the opportunity to complete training which will allow them to extend the grade levels on their certificates to be consistent with the new patterns contained in the master plan." Bowers v. Harrison Co. Bd. of Educ., Docket No. 17-87-198-2 (Feb. 16, 1988), p. 4.

#### CONCLUSIONS OF LAW

1. A county board of education in West Virginia has substantial discretion in matters relating to the assignment and transfer of school personnel. This discretion must be exercised reasonably, in the best interests of the schools,

and in a manner which is not arbitrary and capricious. Dillon v. Wyoming Co. Bd. of Educ., 351 S.E.2d 58, 64-65 (W.Va. 1986); Loughman v. Marshall Co. Bd. of Educ., Docket No. 25-87-131-3 (September 1, 1987).

2. Respondent's Policy GBM, insofar as it provides for placement of those teachers in a given school with the least county seniority on administrative transfer when the numbers of teaching positions in that school is being reduced, is fair and not arbitrary or capricious. See McClure v. Kanawha Co. Bd. of Educ., Docket No. 20-88-131 (Oct. 24, 1988); W.Va. Code §18A-2-7.

3. West Virginia State Board of Education (WVBOE) Policy 5200 allows a county superintendent of schools to assign a teacher within the same facility to work at one grade level below or above her certification during a stated period, for purposes of effecting that school's transition over to the recently-adopted format, i.e., pre-kindergarten and kindergarten, kindergarten-grade four, middle school and/or adolescent education.

4. As Lost Creek Elementary already had kindergarten within its curriculum, and was not otherwise attempting the transition highlighted in Conclusion of Law 1, Policy 5200 did not apply to allow Respondent's Superintendent to place a teacher certified only for grades 1-6 in that position.

5. WVBOE Policy 5202 provides that a teacher's "assignment is restricted to the endorsement(s) shown on. . .[his/her] license," except as provided in Conclusion of Law 6.

6. Policy 5202 provides that when a position must be filled and no one who is qualified therefor is an available candidate, as an interim measure a county superintendent of schools may assign a teacher whose certification includes one grade level above or below that of the job.

7. As teachers in Respondent's employ not teaching kindergarten but with kindergarten endorsement on their certificates are available and willing to assume the Lost Creek kindergarten job, and have been so continuously at least since Ms. Sprout's assignment thereto, Policy 5202 did not and does not apply to allow Respondent to maintain her in that job.

8. WVBOE Policy 5113 provides that "[c]ounty superintendents are obligated to utilize fully qualified teachers when they are available. . . ."11

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<sup>11</sup> WVBOE Policies 5113, 5200 and 5202 must be read in pari materia with one another and with W.Va. Code §18A-3-1; since it has already been determined that neither of Policies 5200 or 5202 applies to allow Ms. Sprout's placement and/or retention as Lost Creek kindergarten instructor, nothing further need be said in that regard. Respondent's argument that 5113 is not pertinent because of  
(Footnote Continued)

9. Any professional educator. . .employed within the public school system of the State shall hold a valid teaching certificate licensing him to teach in the public schools in the specializations and grade levels as shown on his certificate for the period of employment." W.Va. Code §18A-3-1.

Accordingly, this grievance is **GRANTED** only to the extent that Respondent is ordered to vacate and post the position of kindergarten teacher, Lost Creek Elementary School, and to evaluate applicants therefor in accordance with W.Va. Code §§18-5-18,<sup>12</sup> 18A-3-1 and 18A-4-8b(a).

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Harrison County and such appeal must be filed within thirty (30) days

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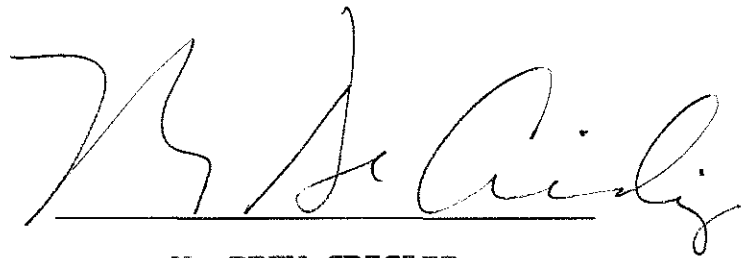
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its primary reference to teachers working under permit or special authorization is not persuasive.

<sup>12</sup> Code §18-5-18, titled "Kindergarten Programs," provides, in pertinent part:

Persons employed as kindergarten teachers. . .shall be required to hold a certificate valid for teaching at the assigned level as prescribed by regulations established by the state board of education (emphasis supplied). Again because neither WVBOE Policy 5200 nor 5202 relates to this case, they may not be said to apply to certify Ms. Sprout for the position she now holds.

County and such appeal must be filed within thirty (30) days of receipt of this decision. See W.Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board or any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate Court.

A handwritten signature in cursive script, appearing to read "M. Drew Crislip", written over a horizontal line.

**M. DREW CRISLIP  
HEARING EXAMINER**

**Dated:** March 1, 1989