JOYCE M. CANTER, .

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Grievant, .

.

v. . Docket No. 94-20-250

.

KANAWHA COUNTY BOARD OF EDUCATION, .

.

Respondent. .

D E C I S I O N

This is a grievance by Joyce Canter (Grievant), an employee of the Kanawha County Board of Education (KCBE), alleging a violation of W. Va. Code § 18A-4-7a in regard to her transfer as a result of the elimination of her "Special Instructional Assignment/Special Education" position in a reduction in force (RIF) action. This grievance was initiated on April 10, 1994 and denied at Level I due to her supervisor's inability to grant the relief requested. Grievant appealed to Level II where her grievance was denied on June 13, 1994 based upon a Stipulation of Facts agreed upon between the parties. Grievant waived Level III and appealed to Level IV on June 17, 1994. Accordingly, a Level IV evidentiary hearing was conducted in this Board's office in Charleston, West Virginia on August 9, 1994. Thereafter, this matter became mature for decision upon receipt of written post-hearing submissions from both parties on August 22, 1994.

BACKGROUND

The parties entered into a Stipulation of Facts at Level II which provides as follows:

1. The Grievant is currently assigned to the St. Albans attendance area in a position designated as "Special Instructional Assignment/Special Education."

2. The Grievant's duties and responsibilities focus on the provision of special

education services to identified handicapped and gifted students. A copy of the Grievant's job description is attached hereto as "Exhibit A."

3. The Grievant has served in her current assignment since August 16, 1989.

4. For purposes of school funding the Grievant is reported as "professional instructional personnel" in connection with the foundational allowance for professional educators.

5. The Grievant was determined to be the least senior "Special Instructional Assignment/Special Education" employee based upon a calculation of seniority using the length of time the affected employees had been employed as "regular full-time certified and/or licensed professional educators."

6. The Grievant has not been credited with "all other professional employee" seniority in a non-teaching area.

7. Other employees have served in the capacity of "Special Instructional Assignment/Special Education" or "Specialist" for periods of time less than served by the Grievant.

8. The Superintendent determined to reduce the total number of "Special Instructional Assignment/Special Education" employees. The Grievant was properly notified of this recommendation and following a hearing held pursuant to W. Va. Code §§18A-2-2 and 18A-2-7 the Board voted to terminate the Grievant's contract and place her on transfer for subsequent assignment.

Grievant's job description, "Exhibit A" referenced in paragraph 2, above, contains the following "Job Goal:"

The person assigned to Special Instructional Assignment/Special Education is assigned to designated schools and is responsible for interpreting curriculum needs of identified handicapped and gifted students. Such persons shall spend a majority of their time in the capacity of direct instructional and counseling relationships with students. This person is responsible for monitoring and assisting teachers of

exceptional students in implementing Individualized Education Programs. Other responsibilities include conferring with parents and school personnel, conducting public awareness, coordinating outside agency involvement, participating in assigned committees pertaining to special education at the state and school level, designing and implementing continuing education programs for professional and paraprofessional personnel, evaluations, re-evaluations, PAC meetings, transition PAC's for exiting seniors, annual reviews and preschool transition.

Additionally, Grievant's job description lists the following "Performance Responsibilities:"

1. Maintains log of referred students.

2. Insures that due process is afforded exceptional students.

3. Discusses purpose, evaluation instruments and procedures utilized in evaluation/re-evaluation with school and/or parent upon request.

4. Insures surrogate parent and interpreter services are secured when appropriate.

5. Evaluates and re-evaluates students referred for special education and related services.

6. Observes referred students in an academic setting.

7. Discusses students' progress and/or problems with referral source.

8. Discusses evaluation results with school personnel and parents.

9. Writes an educational report of test results that identifies strengths and weaknesses of students in compliance wit (sic) West Virginia Regulations for the Education of Exceptional Students.

10. When necessary, serves as chairperson to the Eligibility and IEP Committees as the representative of the local education agency who qualifies to administer or supervise the provision of special educational services.

11. Serves on Placement Advisory Committees to recommend student's eligibility for special education and related services.

12. Plans and develops Individualized Education Program with Placement Advisory Committee.

13. Notifies parent and receiving school of Placement Advisory Committee recommendations by letter, personal contact, and/or telephone call.

14. Obtains parental consent for placement and Individu alized Education Program through conference or home visit.

15. Completes transportation arrangements for students.

16. Insures that all forms for placement and instruction procedures are completed and filed correctly.

17. Transfers materials, forms, and information from

home school to receiving teachers.

18. Insures confidentiality of special education student

files at school.

19. Provides continuing education to general educators serving mainstreamed exceptional students.

20. Monitors class lists.

21. Orders materials/equipment for newly established programs.

22. Monitors orders and inventories for established committees for special education.

23. Consults with elementary and secondary textbook committees for special education.

24. Plans and implements a variety of continuing education activities, including required county inservice, training volunteers, and publication of list of selected professional readings, media presentation, college courses and conferences.

25. Conducts an annual series of orientation meetings for new teachers and aides with follow-up classroom visits.

26. Plans and implements continuing education in area of responsibility for general educators, administrators, support personnel, related agencies, and general public.

27. Recommends expansion of programs and transfer of programs to Director of Exceptional Students.

28. Develops proposals for flow-through and discretion ary funds for program implementation.

29. Coordinates annual on-site review for the purpose of curriculum changes, change in placement and re- evaluation.

30. Evaluates established programs.

31. Participates in planning and implementation of annual "Child Find" and public relations activities.

32. Develops and revises guidelines for program place ment of exceptional students.

33. Participates in the revision of the Kanawha County Schools Program of Studies for Exceptional Students.

34. Serves on Interagency Implementation Committees and monitors annual Implementation of Understandings.

35. Responds to WV State Department complaints and Due Process Hearings.

36. Responds to requests from Kanawha County Schools and

the State Department of Education for participation on

committees and state monitoring teams.

37. Maintains files on new federal, state, and local

laws, regulations, policies, and best practices.

38. Maintains and upgrades professional skills and work

habits.

39. Compiles and organizes information needed to draft

reports on subjects assigned by the Director of

Exceptional Students.

40. Coordinates Kanawha County Schools' responsibilities

for Special Games/Special Olympics.

[No Performance Responsibility numbered "41" appears in the original.]

42. May be asked to perform other assignments related to job by the Director of Exceptional Students.

43. In summary, (per WV State Board Policy 5310) the following teacher responsibilities are part of this job description.

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WVSB 13.1 implementing program of study,

WVSB 13.2 fostering a classroom climate conducive to

learning,

WVSB 13.3 utilizing instructional management systems

models which increase student learning,

WVSB 13.4 monitoring student progress towards mastery of instructional objectives and goals,

WVSB 13.5 communicating within the educational community,

and

WVSB 13.6 meeting professional responsibilities.

Grievant's job description further provides: "Performance of this job will be evaluated in accordance with provisions of Board policy on evaluation of support personnel." G Ex A (emphasis added).

The foregoing evidence was supplemented at Level IV through Grievant's testimony describing in greater detail the duties and responsibilities of her position with KCBE. Grievant testified that she had a "caseload" of three students during the past year and spent no more than one hour per week in a counseling or instructional relationship with those students. Otherwise, Grievant's workweek was devoted to fulfilling the various "Performance Responsibilities" listed in her job description, including conducting reviews of the Individual Education Plans (IEPs) for students in her assigned area.

Grievances contesting reductions in force are generally controlled by W. Va. Code § 18A-4-7a, relevant portions of which are set forth below:

> Whenever a county board 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 [§ 18A-2-2], article two of this chapter. Provided, That all persons employed in a certification area to be reduced who are employed under a temporary permit shall be properly notified and released before a fully certified employee in such a position is subject to release: Provided, however, That an employee subject to release shall be employed in any other professional position where such employee is certified and was previously employed and to any lateral area for which such employee is certified and/or licensed, if such employee's seniority is greater than the seniority of any other employee in that area of certification and/or licensure: Provided further, That, if an employee subject to release holds certification and/or licensure in more than one lateral area and if such employee's seniority is greater than the seniority of any other employee in one or more of those areas of certification and/or licensure, the employee subject to release shall be employed in the professional position held by the employee with the least seniority in any of those areas of certification and/or licensure.

For the purpose of this article, all positions which meet the definition of classroom teacher as defined in section one, article one of this chapter, shall be lateral positions. For all other professional positions the county board of education shall adopt a policy by the thirty-first day of October, one thousand nine hundred and ninety-three, and may modify said policy thereafter as necessary, which defines which positions shall be lateral positions. The board shall submit a copy of its policy to the state board within thirty days of adoption or any modification, and the state board shall compile a report and submit same to the legislative oversight commission on education accountability by the thirty-first day of December, one thousand nine hundred and ninety-three, and by such date in any succeeding year in which any county board submits a modification of its policy relating to lateral positions. In adopting such a policy, the board shall give consideration to the rank of each position in terms of title, nature of responsibilities, salary level, certification and/or licensure, and days in the period of employment.

As referred to in § 18A-4-7a, above, W. Va. Code § 18A-1-1 provides the following definitions relevant to resolution of this grievance:

The definitions contained in section one [§ 18-1-1], article one of chapter eighteen shall be applicable to this chapter. In addition, the following words used in this chapter and in any proceedings pursuant thereto shall, unless the context clearly indicates a different meaning, be construed as follows:

(a) "School personnel shall mean all personnel employed by a county board of education whether employed on a regular full-time basis, an hourly basis or otherwise. School personnel shall be comprised of two categories: professional personnel and service personnel.

(b) "Professional personnel" shall mean persons who meet the certification and/or licensing requirements of the State, and shall include the professional educator and other professional employees.

(c) "Professional educator" shall be synonymous with and shall have the same meaning as "teacher" as defined in section one [§ 18-1-1], article one, chapter eighteen of this Code. Professional educators shall be classified as:

(1) "Classroom teacher": The professional educator who has direct instructional or counseling relationship with pupils, spending the majority of his time in this capacity.

(2) "Principal": The professional educator who as agent of the board has

responsibility for the supervision, management and control of a school or schools within the guidelines established by said board. The major area of such responsibility shall be the general supervision of all the school and all the school activities involving pupils, teachers and other school personnel.

(3) "Supervisor": The professional educator who, whether by this or other appropriate title, is responsible for working primarily in the field with professional and/or other personnel in instructional and other school improvement.

(4) "Central office administrator": The superintendent, associate superintendent, assistant superintendent, and other professional educators, whether by these or other appropriate titles, who are charged with the administering and supervising of the whole or some assigned part of the total program of the county-wide school system.

(d) "Other professional employee" shall mean that person from another profession who is properly licensed and is employed to serve the public schools and shall include a registered professional nurse, licensed by the West Virginia board of examiners for registered professional nurses and employed by a county board of education, who has completed either a two-year (sixty-four semester hours) or a three-year (ninety-six semester hours) nursing program.

DISCUSSION

Respondent correctly notes that under this Board's previous ruling in Andrews v. Putnam County Board of Education, Docket No. 92-40-460 (Dec. 30, 1992), determinations regarding the category to which professional educators belong under W. Va. Code § 18A-1-1, must be made on a "case-by-case, analysis-of-actual-duties basis." Andrews, supra, at 9. In the case at hand, KCBE argues that, consistent with the provision in the Stipulation of Facts that "Grievant's duties and responsibilities focus on the provision of special education services to identified handicapped and gifted students," Grievant is necessarily engaged in a "counseling relationship with pupils" within the meaning of § 18A-1-1(c)(1) defining "classroom teacher." Moreover, Grievant's job description specifically provides that the individual assigned "shall spend a majority of their time in the capacity of direct instructional and counseling relationships with students." (G Ex A.) Additionally, KCBE contends that analysis of the

categories defined in § 18A-1-1(c) leads to the conclusion that Grievant's duties more closely meet the definition of "classroom teacher" than the definitions of "principal," "supervisor," or "central office administrator."

Grievant essentially contends that she functions as a central office administrator in that she is a professional educator who administers "part of the total program of the county-wide school system" (W. Va. Code § 18A-1-1(c)(4)), specifically the special education program in the St. Albans attendance area.

As noted in Dillon v. Cabell County Board of Education, Docket No. 93-06-438 (Aug. 9, 1994) and Brewer v. Mercer County Board of Education, Docket No. 89-027-580 (June 29, 1990), the category of employment under which a school employee functions must ultimately be determined by comparing the circumstances of their employment with the definitions in § 18A-1-1 and, if necessary, § 18-1-1, rather than relying upon the category assigned by their employing board. Consistent with those decisions and Andrews, supra, KCBE's position that Grievant is a "classroom teacher" will not survive scrutiny.

Notwithstanding the statement in Grievant's job description that she is to "spend a majority of [her] time in the capacity of direct instructional and counseling relationships with students," the preponderant evidence indicates that Grievant's work routine focused upon administration of the special education program in her geographic area of responsibility, the St. Albans attendance area. Clearly, the vast majority of "performance responsibilities" listed on Grievant's job description relate to functions of a bureaucraticor administrative nature. While it might nevertheless be possible to spend the majority of her time on "direct teaching or counseling relationships," Grievant's unrebutted testimony indicates that she spends only a few hours each week dealing directly with students. Moreover, KCBE effectively acknowledged the true character of Grievant's position was substantially different from a classroom teacher when it acknowledged in her job description that her evaluations would be done in accordance with evaluation policies applicable to "support personnel."

Additionally, KCBE's argument misinterprets the plain language in W. Va. Code § 18A-1-1(c)(1) defining "classroom teacher" as the "professional educator who has direct instructional or counseling relationship with pupils...." The undersigned finds that the word "direct," as used in § 18A-1-1(c)(1), modifies both "instructional" and "counseling

relationship." Thus, although many of Grievant's duties may relate to "counseling" of individual students in a broad sense, it is by no means "direct," as the students are not present when their educational situation is discussed. Additionally, the "counseling relationship" language was likely included in § 18A-1-1 to encompass guidance counselors in the category of classroom teachers. (See W. Va. Code § 18-5-18b. "School counselors shall be full-time professional personnel, shall spend at least seventy-five percent of work time in a direct counseling relationship with pupils, and shall devote no more than one-fourth of the work day to administrative activities ....") Grievant is a special education teacher performing a "special assignment" that involves administration of the special education program, not "counseling" pupils as that term was intended in § 18A-1-1.

Finally, KCBE's categorization of Grievant as "professional instructional personnel" for purposes of school funding is not a relevant factor in determining Grievant's correct category of employment under § 18A-1-1. Even if it is somehow relevant, it would not be dispositive. Gillespie v. Kanawha County Bd. of Educ., Docket No. 89-20-684 (Jan. 17, 1990).

Given the actual focus of Grievant's duties, it is not difficult to conclude that she is a professional educator charged with administering "some assigned part of the total program of the county-wide school system" (W. Va. Code § 18A-1-1(c)(4).), in particular, the special education program for students in the St. Albans attendance area. This conclusion is also consistent with an opinion of the State Superintendent of Schools issued to Tina Meadows on May 8, 1992.

> You have asked: Is a special education specialist and/or coordinator considered an administrator according to the W.Va. Code? If so, would this position earn administrator seniority the same as a principal?
>
> A special education specialist and/or coordinator is considered to be a central office administrator and, therefore, according to W.Va. Code 18A-4-7a would earn administrative seniority the same as a principal.

Such an opinion by the State Superintendent of Schools, rendered in accordance with W. Va. Code 18-3-6, is entitled to great weight, unless it is clearly erroneous. Lincoln County Bd. of Educ. v. Adkins, 188 W. Va. 430, 424 S.E.2d 775 (1992); Jerden v. Lewis County Bd. of

Educ., Docket No. 93-21-349 (Aug. 19, 1994). Accordingly, KCBE acted contrary to W. Va. Code § 18A-4-7a when Grievant was forced to compete in a reduction in force based upon her seniority as a "classroom teacher" rather than as an employee in the "other professional" category.

Consistent with the foregoing discussion, the following Findings of Fact and Conclusions of Law are appropriate in this matter:

FINDINGS OF FACT

1. The facts contained in paragraphs numbered one through eight of the Stipulation of Facts between the parties are incorporated herein as Finding of Fact Number One.

2. Contrary to the language contained in her job description, Grievant does not spend a majority of her time in the capacity of direct instructional and counseling relationships with students.

3. Grievant's duties are substantially focused upon monitoring and administering the special education program for pupils in the St. Albans attendance area.

CONCLUSIONS OF LAW

1. Grievant has proven by a preponderance of the evidence that her position, designated as "Special Instructional Assignment/Special Education," is properly categorized under W. Va. Code § 18A-1-1(c) as a "central office administrator" as defined in § 18A-1-1(c)(4), rather than as a "classroom teacher" as defined in § 18A-1-1(c)(1), since she is a professional educator charged with administering part of the total program of the county-wide school system and does not spend the majority of her time in a directinstructional or counseling relationship with pupils. See Andrews v. Putnam County Bd. of Educ., Docket No. 92-40-460 (Dec. 30, 1992).

2. By treating Grievant as a "classroom teacher" in the course of a reduction in force, KCBE acted contrary to W. Va. Code § 18A-4-7a, by requiring her to compete on the basis of seniority in the wrong category of employment.

Accordingly, this grievance is GRANTED. The Respondent Kanawha County Board of Education is ORDERED to rescind its action terminating her contract and placing her on a

transfer list and to restore Grievant to her previous position of "Special Instructional Assignment/Special Education."

Any party may appeal this decision to the Circuit Court of Kanawha County and 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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LEWIS G. BREWER

Administrative Law Judge

Dated: December 15, 1994