CONNIE J. ELLIS

v. Docket No. 94-29-213

MINGO COUNTY BOARD OF EDUCATION

D E C I S I O N

Connie Ellis, Grievant (See footnote 1) , is an elementary school teacher with the Mingo County Board of Education ("MCBOE" or "Board"). She grieves her transfer from Gilbert Elementary School ("GES") and states she was treated differently from teachers at Riverside Elementary School ("RES"). Grievant seeks the recession of her transfer. Levels I and III were waived and this grievance was denied at Level II. This case was appealed to Level IV on May 26, 1994. The parties agreed to submit the case on the record and it became mature for decision on July 15, 1994.

Background

Initially, it should be noted the information before the Grievance Board is very limited. Since the Grievant has the burden in this case, the inadequacies of the evidence are attributed to her. Black v. Cabell County Bd. of Educ., Docket No. 06-88-020-4(May 5, 1988). Apparently the superintendent of Mingo County Schools recommended the transfer of the least senior teachers at several schools due to declining enrollment. Grievant received a letter written on March 11, 1994 from MCBOE informing her that she would be recommended for transfer because of "a drop in student enrollment for the 1994-1995 school year, low projected enrollment for the 1994-1995 school year and possible reorganization of the Federal, State, and County Programs." (See footnote 2)

Grievant requested and received a hearing before the Board. Other teachers were at the hearing to protest their transfers as well. Teachers from RES presented testimony that the projected enrollment for their school was incorrect. They argued the figures were too low. It is unknown what testimony Grievant presented to the Board. After these presentations the Board voted on the proposed transfers. The transfers recommended by Superintendent Conn for GES were approved by

MCBOE. The transfers recommended for RES were not. Grievant then filed this grievance stating "this disparate treatment constitutes favoritism."

Evidence presented at the Level II hearing demonstrated GES's enrollment for the 1993-1994 school year was 316 students. That year GES had twenty K-6 teachers. For the 1993-1994 school year RES had 358 students and nineteen K-6 teachers. The projected enrollment for GES for the 1994-1995 school year was 328 students with eighteen teachers. The projected enrollment for RES for the 1994-1995 school year was 332 students with nineteen teachers. Alist of the number of students by grade level was also placed into evidence. (See footnote 3) Assistant Superintendent Fullen testified at the Level II hearing that RES would lose one teacher through retirement. Since this fact was not disputed, it is taken as true. No evidence was presented by Grievant to show this teacher would be replaced, so the number of teachers at RES for the 1994-1995 school year would be eighteen.

Discussion

Grievant's "Statement of Grievance" cited favoritism and disparate treatment as the grievable event. In the Conclusions of Law submitted to Level IV, the Grievant cited Brown v. Logan County Bd. of Educ., Docket No. 90-23-177 (Oct. 31, 1990) and argued that her transfer lost its stated justification before the end of the school year. Grievant's favoritism argument will be discussed first.

W. Va. Code §18-29-2(o) defines "favoritism" as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." The Grievant has not established a prima facie caseand demonstrated she has been treated differently. Although the Board did approve her transfer and not the transfers of the teachers at RES, she has not proven her transfer constituted favoritism or was incorrectly based on the projected enrollment at her school.

Grievant has also not demonstrated she was similarly situated to the RES teachers or that any differences in treatment were unrelated to her actual employment responsibilities. See Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989); Wyatt v. McDowell County Bd. of Educ., Docket No. 92-33-312 (Apr. 21, 1993). Grievant does not contest that she was the least senior teacher at GES. See W. Va. Code §18A-4-7a. In other words, the fact Grievant was transferred and RES teachers were not does not demonstrate favoritism without further evidence.

In terms of Grievant's transfer argument, the evidence demonstrates Superintendent Conn and MCBOE knew on March 2, 1994 of the small projected increase at GES and the projected decrease at RES. This was before the recommendations for transfers were made. Superintendent Conn's recommendation to the Board was based on this data. Although it is unclear exactly what happened at the Board meeting, it is clear the Board decided to accept Mr. Conn's recommendation for the GES transfers and to reject Mr. Conn's recommendation for the RES transfers, apparently, in part, because of the additional information given to them at the Board meeting by the RES teachers.

Grievant has not shown MCBOE's failure to keep her at GES was an incorrect decision based on the minimally projected increase for her school. While it is true the projected enrollment figures at GES showed a slight increase, this fact alone, without information about class size and configuration, does not demonstrate Grievant's teaching position at GES was needed. Thus, Grievant has not met her burden of proof on this issue.

Additionally, as stated in Dillon v. Bd. of Educ. of County of Wyoming, 351 S.E.2d 58 (W. Va. 1986), "[c]ounty boards have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel." Dillon further requires "this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Id. For MCBOE to decide not to transfer teachers from RES after hearing testimony that the projected enrollment numbers were incorrect and too low, cannot be seen as an abuse of discretion or arbitrary and capricious. Similarly, MCBOE's decision to transfer Grievant, even though there was a small projected increase, cannot be found to be an abuse of discretion without further evidence demonstrating Grievant's position was needed at GES.

Findings of Fact

1. Grievant was employed at GES as an elementary school teacher.
2. She was notified in a timely manner that she would be transferred.
3. She asked for and received a hearing before MCBOE.
4. MCBOE voted to transfer the Grievant as recommended by the superintendent, but did not transfer teachers at RES after hearing additional testimony at the Board meeting that the projected enrollment at RES was too low.

Conclusions of Law

1. In a grievance alleging favoritism and illegal transfer the Grievant has the burden of proving her allegations by a preponderance of the evidence. Williams v. Lincoln County Bd. of Educ., Docket No. 93-22-386 (Mar. 7, 1994).

2. Boards of educations have substantial discretion in matters of transfer as long as these acts are not arbitrary or capricious or an abuse of discretion. Dillon, supra.

3. Grievant did not demonstrate by a preponderance of the evidence that her transfer was an abuse of discretion, resulted from any form of favoritism, or violated any statute, rule, or regulation.

Accordingly this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mingo 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.

_____

JANIS I. REYNOLDS

Administrative Law Judge

Dated: October 28, 1994

Footnote: 1Ms. Barbara Grimmett was originally a co-grievant, but withdrew from the grievance by letter dated June 24, 1994.

Footnote: 2Exact reasons for this Grievant's transfer was not specified.

Footnote: 3Although not part of the evidence, the undersigned, in an attempt to understand the Grievant's position, applied W. Va. Code § 18-5-18a to the numbers presented and calculated the number of teachers that would be required by this Code Section barring any other factors. These calculations revealed that the number of teachers that should have been assigned to GES during the 1993-1994 school were seventeen and the number of teachers that should have been assigned to RES during the same year were nineteen. The figures for 1994-1995 were sixteen for GES and eighteen for RES. Of course, a change in the enrollment configuration could also change the number of teachers needed at these schools. Also these figures do not take into account any other information unknown to the undersigned.