JEFFREY R. SQUIRES

v. Docket No. 95-11-221

GILMER COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant Jeffrey R. Squires, a teacher employed by Respon dent Gilmer County Board of Education (GCBE), filed the follow ing complaint:

Violation of WV Code 18A-2-2 and WV Code 18A-4-7a[.] During GCBE's RIF [reduction in force] procedure, I was bumped by an employee who does not have the proper certification. This decision caused me to lose full time employment in Gilmer County Schools.

Grievant requested a level four decision based on the lower level record, and GCBE made no objection. The case became mature for decision on July 3, 1995, the designated day for the parties to complete their submission of written argument and/or rebuttal.1

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1Grievant filed fact/law proposals on or about June 30, 1995. GCBE basically relied on its May 3, 1995 level two decision and additional argument made in its letter/brief, received on July 3, 1995.

There is little, if any, disagreement between the parties as to the salient facts in this case. Based on all matters of record, the following findings of fact are made.2

Findings of Fact

1. Grievant is certified to teach physical education (PE) K-12 and business 7-12.

2. During the 1994-95 school year, Grievant was assigned to teach PE at three schools, "adaptive" PE to handicapped students at Gilmer County High School (GCHS) and Glenville Elementary School (GES) on a half-time basis, and PE at Sand Fork Elementary School (SFE) on a half-time basis.

3. Grievant's schedule for 1994-95 included teaching PE to kindergarten students as well as preschool, four-year-old children at both SFE and GES, although the four-year-old young sters at GES were enrollees in a preschool handicapped program. As best as can be determined from the record, Grievant taught the GCHS/GES schedule one week, and the SFE schedule the next. While it appears Grievant worked with four year old children once a week, at either SFE or GES, the record is silent as to exactly how many children were enrolled in the preschool pro grams.

4. Because of changing needs in GCBE's Chapter I program, GCBE planned to eliminate a Chapter I teaching position,

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2The record consists of relevant portions of the transcript of GCBE's March 27, 1995, transfer hearing, the April 12, 1995 level one decision, the transcript/evidence of the April 26, 1995 level two hearing and the May 3, 1995 level two decision.

effective the end of the 1994-95 school year. Carl Chambers held that position.

5. Mr. Chambers is certified to teach math 7-9, health 1-12, and physical education (PE) 1-12. He received his PE 1-12 certificate upon graduation from Glenville State College in 1974, before kindergarten was included in the PE endorsement.

6. Grievant is less senior than Mr. Chambers.

7. At the time the decision was made to eliminate Carl Chambers' position, school officials determined that Grievant was the least senior person teaching in any area of Chambers' certification. Mr. Chambers was targeted to "bump" Grievant.

8. No full-time teacher with less seniority than Grievant held a position in any area of Grievant's certification, al though a half-time teacher, Diana Sharps, was less senior than Grievant and held a position in an area of Grievant's certifica tion.

9. By letter dated March 16, 1995, GCBE's superintendent notified Grievant of a forthcoming recommendation that Mr. Chambers bump Grievant from the three-school PE job, effective the 1995-96 school year.

10. GCBE's superintendent also intended to recommend that Grievant's full-time contract be replaced with a half-time contract and that he be assigned Ms. Sharp's position for the upcoming 1995-96 school year.

11. Grievant availed himself of a March 27, 1995 hearing before GCBE on the proposed recommendations. Following that hearing and the recommendation to alter Grievant's contract, GCBE voted to accept the recommendation.3

12. In Spring 1995, inquiries were sent by the parties to the State Superintendent of Schools asking whether Mr. Chambers is properly certified to teach PE to K-level and younger stu dents. The State Superintendent declined to render any opin ions.

13. In an April 17, 1995 letter written by State Depart ment of Education employee Sue Bohnert and sent to Grievant's representative, Ms. Bohnert referenced a portion of the State Board of Education's (SBE) Policy 5202, "Minimum Requirements

for the Licensure of Educational Personnel and Advanced Salary Classifications" and wrote, "The teacher holding PE 1-12 certi fication, therefore, may be by policy be placed at the kinder garten level but not in a four-year-old program."

Discussion

The primary issue raised by Grievant in this case involves the four-year-old children at GES and SFE, and whether Mr. Chambers is qualified to teach them. Grievant and GCBE agree that Policy 5202, which, among other things, enables a teacher to teach one grade above or below his or her certification's grade level endorsement, has bearing on the issue.4 Of course,

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3At the time this grievance was filed, Grievant had not been reassigned to Sharp's position.

4Inexplicably, the party most qualified to advance a theory or advisory on this issue is the State Superintendent of Schools, who has declined to comment.

W.Va. Code 18-4-7a has bearing in this case. The statute provides, in pertinent part:

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 certi fied employee in such a position is subject to re

lease: 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 or 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.

Grievant argues that his position is "protected" by W.Va. Code 18A-4-7a, and, as a "fully" certified teacher, he should not be bumped by Mr. Chambers. He claims he is qualified to teach the four-year-old students at GES and SFE because he is certified to teach kindergarten, and under Policy 5202, it is permissible for him to teach one grade level below kindergarten. According to him, the four-year-old children attending SFE and GES constitute one "grade level" below kindergarten. GCBE claims the State Department of Education's certifica tion division has long recognized that PE teachers who graduated from college before kindergarten was routinely included in the PE endorsement are authorized to function at the kindergarten level. In GCBE's view, Policy 5202 additionally permits Mr. Chambers to teach kindergarten level students, and, because four-year-olds are not in any designated grade level, Mr. Chambers may also teach four-year-old children. GCBE also relies on the case of McCune v. Kanawha County Bd. of Educ., Docket No. 94-20-265 (Oct. 31, 1994), and argues that Grievant has not met his burden of proof that other staff at GES and SFE are not available to meet all the teaching needs of the four-year-old students, should it be determined that Mr. Chambers is not qualified to teach them.

The grievant in McCune was a PE teacher assigned to an "alternative" school and scheduled to be transferred to another school because the school board was going to eliminate the PE program at his school. He challenged the transfer and subse quent reassignment on the basis that he was also certified to teach social studies, and two social studies teachers at the school who had less seniority were not transferred. According to the administrative law judge, the grievant had the burden of proof to show that the responsibilities of the two social studies teachers could not be absorbed by any remaining staff. GCBE applies McCune to the instant situation, and argues that Grievant failed to prove by a preponderance of the evidence that other staff at GES and SFE could not "absorb" the PE responsi bilities for the preschool students.

After careful consideration of the record, the parties' arguments and the applicable law, the undersigned concludes that Grievant has not met his burden of proof in this case. Contrary to Grievant's assertions, it does not appear he was "fully certified" to teach all of the students at GES and SFE during the 1994-95 school year, specifically, the four-year-old children. Certainly, there is no evidence of record that Grievant is qualified to teach PE to preschool students, includ ing those enrolled in a preschool handicapped program. Policy 5202 (1993) describes "Certification Patterns for Licensure" and expressly speaks of separate endorsements on a teaching license for "pre-kindergarten and kindergarten (Pre-K-K), early child hood (grades K-4), middle childhood (grades 5-8), [and] adoles cent (grades 8-12)[.]"

Half of Grievant's PE assignment during 1994-95 at was in the "elementary" education area. In particular, SFE and GES are

essentially elementary schools (Preschool and K-6 grade levels) whose staff must include teachers with endorsements in one or more of the Pre-K-K, K-4 and 5-8 grade levels. The record supports that teaching preschool children at GES and SFE com prised just a small portion of Grievant's 1994-95 schedule. Presumably, the teachers at GES and SFE who conduct the pre school program are properly certified in Pre-K-K and are thus qualified to teach all subject areas, including PE. Hence, simply because four year old children were part of Grievant's assignment during the 1994-95 school year does not mean those students must be scheduled in conjunction with the position during the 1995-96 school year.

Grievant does not dispute that he is less senior than Mr. Chambers, the teacher whose position was eliminated. Moreover, Grievant was the least senior full-time teacher holding certification in an area also held by the more senior Mr. Chambers.5 Therefore, in accordance with W.Va. Code 18A-4-7a, GCBE properly instituted procedures so that Mr. Chambers could "bump" Grievant and retain his own full-time status.6

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

Conclusions of Law

1. It is incumbent upon a grievant to prove all the allegations constituting the grievance by a preponderance of the evidence. Rupich v. Ohio County Bd. of Educ., Docket No. 89-35-719 (June 29, 1990); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. Due to the provisions of State Board Policy No. 5202, Carl Chambers, with his PE 1-12 certificate, may lawfully teach physical education to pupils who include kindergarten students.

3. Grievant failed to demonstrate a violation of W.Va. Code 18A-4-7a or any other law, policy or regulation in

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5The undersigned declines to address whether Mr. Chambers may lawfully teach physical education to four-year-old children enrolled in any type of preschool program. This is because that particular assignment is not a major portion of the position in issue, essentially an elementary PE teaching position, and because Grievant has not proven the PE responsibilities for the four-year old students may not be passed on to existing, qualified staff. In other words, the issue has no bearing on whether Grievant was the proper person to be RIFed under Code 18A-4-7a.

6Grievant did not present any argument as to how Code 18A-2-2 may have been violated. It is therefore presumed that he has abandoned that allegation contained in his pleadings. conjunction with his displacement by a more senior teacher whose job was eliminated.

4. Grievant failed to establish that GCBE acted in an abitrary or capricious fashion or otherwise abused its discre tion when it placed Mr. Chambers in the full-time PE teaching position at issue.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Gilmer 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 appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

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NEDRA KOVAL

Administrative Law Judge

Date: July 21, 1995