BEATRICE REDD

v. **Docket No. 95-33-312**

McDOWELL COUNTY BOARD OF EDUCATION

DECISION

The grievant, Beatrice Redd, is employed by the McDowell County Board of Education (Board) as an itinerant elementary school counselor. She filed this grievance April 28, 1995, protesting the Board's decision to accept the recommendation of Superintendent of Schools J. Kenneth Roberts that she be reassigned, effective June 1995, to serve different schools. Her supervisor was without authority to grant relief and the grievance was denied at Level II following a hearing held June 12, 1995. The Board, at Level III, declined to address the matter and appeal to Level IV was made July 20, 1995. The parties subsequently agreed to submit the case for decision on the record developed at Level II. Proposed findings of fact and conclusions of law were received by August 25, 1995.

FACTS

There is no dispute over the facts of the case. The record developed at Level II fully supports the following findings.

1) Because of a drop in student enrollment and a corresponding decrease in state funding, the Board was forced to eliminate several of its professional positions effective the end of the 1994-95 school year.

2) After reviewing the then current counselor staffing pattern and the locations and sizes of the student population served, Superintendent Roberts determined that one of the system's four elementary counselor positions could be eliminated if adjustments were made in the areas served by the remaining three.

3) The elementary counselor positions were identified according to the particular school at which they were "based." All but one of the counselors served two additional schools.

4) Superintendent Roberts ultimately identified the "Anawalt Elementary School position" as the one to be eliminated. The position also served Switchback and Kimball Elementary Schools. The

grievant, the most senior of the counselors, was then occupying the position.

5) The grievant was given notice per W.Va. Code §18A-2-7 (See footnote 1) that Mr. Roberts would recommend that she be placed on a transfer list pending assignment to another position effective the end of the school year. After affording the grievant a hearing on the matter, the Board accepted the recommendation.

6) Michael Yeabower, who was then serving Bradshaw, Jolo, and Panther Elementary Schools and was based at Bradshaw, was identified as the least senior counselor. He was given notice per W.Va. Code §18A-2-2, (See footnote 2) that Superintendent Roberts would recommend that his employment be terminated at the end of the school year. The Board ultimately accepted the recommendation.

7) During the 1994-95 school year, counselor Marilyn Bush, who held counselor certification for grades K through 12, served Northfolk Middle School only. She also was given Code §18A-2-7 notice that she would be transferred.

8) Frances Lambert, the fourth counselor, served Gary, Welch and Fall River Elementary Schools and was based at Gary. She too was placed on the transfer list per Code §18A-2-7.

9) On or about April 15, 1995, the grievant was informed that she would be assigned, effective the beginning of the 1995-96 school year, to the Bradshaw/Panther/Jolo position formerly held by Mr. Yeabower. The Board did not post the position as vacant.

10) Northfolk Middle, Switchback, and Kimball were combined into one position based at Northfolk Middle. This position was posted per W.Va. Code §18A-4-7a, ¶10. (See footnote 3) Since Northfolk Middle served students in grades 10 through 12, the grievant, who had only K through 9 counselor certification was ineligible to apply. (See footnote 4) The position was ultimately awarded to Ms. Bush, who held K through 12 certification. She thereby retained her base school but was required to travel to Kimball and Switchback.

11) Anawalt Elementary was added to Ms. Lambert's Gary/Fall River/Welch position and she remained based at Gary. No posting was involved. Rather, Ms. Lambert was asked and agreed to assume the additional school.

12) The decision to post the Northfolk/Switchback/Kimball position was based on Superintendent Roberts' conclusion that theaddition of two elementary schools to what was formerly a one-middle school assignment, was a significant change and created a new position within the

meaning of W.Va. Code §18A-4-7a, ¶10. He concluded that the addition of another school to Ms. Lambert's service area did not create a vacancy.

13) Superintendent Roberts' decision to simply reassign the grievant to Mr. Yeabower's Bradshaw/Panther/Jolo position without announcing it as vacant was based on his belief that the grievant was the subject of a reduction-in-force; Code §18A-4-7a, ¶6, (See footnote 5) mandated that she displace or "bump" Mr. Yeabower; and posting would, therefore, serve no purpose.

ARGUMENT

The grievant avers generally that her transfer to Mr. Yeabower's position was arbitrary and capricious. She appears to assert that the reorganization of counselor positions should have been based on seniority and that the assignments, includingBradshaw/Panther/Jolo should have been posted. The grievant requests as relief that she be returned to her Anawalt-based position or that a "more fair way to align schools according to seniority" be implemented.

The Board maintains the grievant's transfer was in accordance with Code §§18A-4-7a and 18A-2-7. The Board further asserts that the grievant has failed to prove that any aspect of the process by which the positions were realigned and filled was arbitrary or capricious.

CONCLUSIONS

After a thorough review of the parties' positions, the applicable statutes and the foregoing findings of fact, the undersigned makes the following conclusions of law.

1) In a reduction-in-force of professional personnel, a county board of education must provide notice of termination, per W.Va. Code §18A-2-2, to the least senior teacher then employed in the field targeted for reduction. If that employee possesses certification in other fields and greater seniority than persons then employed in those areas, he may displace or "bump" into those areas. Otherwise his employment must be terminated. W.Va. Code §18A-4-7a, ¶6; Lloyd v. Kanawha County Bd. of Educ, Docket No. 91-20-327 (Oct. 29, 1991).

2) Mr. Yeabower, the least senior counselor, was the subject of the Board's Spring 1995 reduction-in-force of elementary school counselors and was, therefore, the only counselor who hadseniority-based rights, if any, under Code §18A-4-7a, to displace other employees. (See footnote 6)

3) The grievant, the most senior counselor, was merely occupying the position targeted for elimination. To terminate her Anawalt assignment, the Board was only required to afford her the

notice and opportunity to be heard provided for in Code §18A-2-7.

4) The grievant concedes and the record supports that she was provided the procedural protections of Code §18A-2-7.

5) Neither Code §18A-2-7 nor the "arbitrary and capricious" standard of review applicable in transfer cases (See footnote 7) require that the decision to terminate a teacher's assignment to a particular school be based on seniority, but a county board of education may, via formal policy, bind itself to that criterion. See, Chapman v. Harrison County Bd. of Educ., Docket No. 18-87-170-2 (March 1, 1989). The grievant herein has failed to demonstrate that the McDowell County Board of Education has adopted such policy.

6) The addition of Anawalt Elementary School to Ms. Lambert's area of service did not create a vacancy within the meaning of Code 18A-4-7a, ¶10 and, therefore, did not require a posting.

7) The termination of Mr. Yeabower's employment created a vacancy in the Bradshaw/Panther/Jolo position and Code §18A-4-7a,¶10 required that it be posted. See, Board of Educ. of County of Harrison v. DeFazio, 378 S.E.2d 656 (W.Va. 1989); Lloyd; Cutlip v. Wood County Bd. of Educ., Docket No. 90-54-391 (Feb. 7, 1991). The Board erred in its determination that the grievant was the subject of the reduction-in-force, and that it was required by Code §18A-4-7a, ¶6, to place her in the position.

8) While the grievant has shown a violation of Code §18A-4-7a, ¶10, she has not shown entitlement to the specific relief she requests, i.e., a return to her Anawalt position or a "re-reorganization" of the three counselor positions on the basis of seniority. The benefits, if any, to be derived from a posting of the position she now holds are speculative at best. Since the grievant does not seek such relief, it is not awarded.

Accordingly, the grievance is **DENIED.**

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

JERRY A. WRIGHT

ADMINISTRATIVE LAW JUDGE

Dated: September 21, 1995

Footnote: 1 *The statute, in relevant part, provides,*

> *However, an employee shall be notified in writing by the superintendent on or before the first Monday in April if he is being considered for transfer or to be transferred, except that for the school year one thousand nine hundred eighty-nine-ninety only, the superintendent shall have until the fourth Monday of April to provide an employee with such written notice. Any teacher or employee who desires to protest such proposed transfer may request in writing a statement of the reasons for the proposed transfer. Such statement of reasons shall be delivered to the teacher or employee within ten days of the receipt of the request. Within ten days of the receipt of thestatement of the reasons, the teacher or employee may make written demand upon the superintendent for a hearing on the proposed transfer before the county board of education.*

Footnote: 2 *The statute, in pertinent part, provides,*

> *The continuing contract of any teacher shall remain in full force and effect except as modified by mutual consent of the school board and the teacher, unless and until terminated (1) by a majority vote of the full membership of the board before the first day of April of the then current year, after written notice, served upon the teacher, return receipt requested, stating cause or causes, and an opportunity to be heard at a meeting of the board prior to the board's action thereon.*

Footnote: 3 *The statute, in pertinent part, provides,*

> *Boards shall be required to post and date notices of all openings in established, existing or newly created positions in conspicuous working places for all professional personnel to observe for at least five working days. The notice shall be posted within twenty working days of such position openings and shall include the job description.*

Footnote: 4 *It appears that only a small portion of the student population at Northfolk Middle were in grades 10 through 12 in an "alternative school" program. It is also noted that the record suggests but does not confirm that Ms. Lambert also was ineligible for the position.*

Footnote: 5 *The pertinent part of the statute provides,*

> *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 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.*

Footnote: 6 *As indicated in finding of fact 6, Mr. Yeabower was unable to displace another employee. It is assumed that if he did possess certification in other fields, his seniority was less than those employed in those fields.*

Footnote: 7 *See, State ex rel Hawkins v. Tyler County Bd. of Educ., 275 S.E.2d 908 (W.VA. 1980).*