

LONNIE BERRY, .

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Grievant, .

.

v. . Docket No. 95-23-421

.

LOGAN COUNTY BOARD OF EDUCATION, .

.

Respondent. .

### **DECISION**

This is a grievance by Lonnie Berry (Grievant), an employee of the Logan County Board of Education (LCBE), alleging that his transfer from Chapmanville High School violated W. Va. Code § 18A- 4-7a. This grievance was initiated on or about April 2, 1995. Following a Level II hearing on May 25, 1995, the grievance was denied on September 4, 1995. Grievant waived Level III and appealed to Level IV on September 15, 1995. A Level IV hearing was conducted in this Board's office in Charleston, West Virginia, on December 19, 1995. LCBE elected to rely on its oral argument at Level IV, and this matter became mature for decision upon receipt of Grievant's post-hearing submission on January 11, 1996.

### **BACKGROUND**

There is no significant dispute regarding the facts pertinent to resolution of this grievance. Accordingly, the following Findings of Fact are made in this matter.

### **FINDINGS OF FACT**

1. Grievant was employed by LCBE during the 1994-95 school year as a Learning Disabled (LD) teacher at Chapmanville High School (CHS).
2. Sometime in 1995, LCBE determined that it would be necessary to eliminate a special education teaching position at CHS due to lack of need.
3. As of March 23, 1995, Jennifer Baisden, a tenured teacher with less seniority than Grievant, was teaching mentally impaired (MI) and LD students at CHS. Ms. Baisden was fully certified to

teach LD and MI. See EE Ex 2.

4. Prior to March 23, 1995, Grievant was certified to teach LD students only.

5. Grievant was placed on notice of transfer on March 23, 1995. Had Grievant been fully certified in both LD and MI at that time, Ms. Baisden would have been placed on transfer, as the least senior special education teacher at CHS.

6. On March 23, 1995, Grievant was notified that he would be transferred to an LD position at Holden Elementary, displacing Kim Belladonna, the least senior LD teacher employed by LCBE.

7. As of March 23, 1995, LCBE authorities, including Assistant Superintendent Brenda Skibo, were aware that Grievant had completed all requirements for MI certification, except passing the requisite state examination.

8. LCBE did not notify any other teacher with less seniority than Grievant that he or she might be subject to transfer as a result of the elimination of a special education teaching position at CHS.

9. Grievant requested a transfer hearing and LCBE conducted such hearing on April 10, 1995.

10. Grievant took the examination for certification to teach MI on March 11, 1995. On April 10, 1995, he received notice that he had passed the requisite examination and was fully eligible for additional certification in MI. G Ex A. This information was provided to LCBE during the course of Grievant's transfer hearing.

11. Grievant's West Virginia Department of Education MI certificate shows his status changed effective March 11, 1995. G Ex B.

12. After the transfer hearing, Grievant was notified that he would be transferred to displace Carol Sigmon teaching LD & MI at Christian Elementary, rather than going to Holden Elementary. LCBE took this action because Ms. Belladonna, a tenured teacher, was certified to teach LD, while Carol Sigmon, a non-tenured teacher, was teaching MI under a permit.

13. Pursuant to W. Va. Code § 18-2E-5, LCBE was placed under the control of the West Virginia State Board of Education on August 5, 1992. As a result of this takeover, LCBE officials are required to have State Board confirmation that a certification either has been or will be issued, before making a personnel decision requiring specific certification.

14. At some point between April 10 and May 1, 1995, the State Department of Education advised LCBE Assistant Superintendent Skibo that Grievant would be issued certification (G Ex B) to teach MI.

## DISCUSSION

Reduction in force (RIF) actions are governed 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.

Also pertinent to this grievance is W. Va. Code § 18A-2-7, which provides:

The superintendent . . . shall have authority to . . . transfer . . . school personnel . . . 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 . . . 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 the statement of reasons, the teacher or employee may make written demand upon the superintendent for a hearing upon the proposed transfer before the county board of education. The hearing on the proposed transfer shall be held on or before the first Monday in May . . .

The outcome of this grievance is controlled by this Grievance Board's previous decisions in Barberio v. Harrison County Board of Education, Docket No. 89-17-351 (Feb. 13, 1990), and Brown v. Logan County Board of Education, Docket No. 90-23-177 (Oct. 31, 1990). In Barberio, the grievant was placed on a transfer list due to a reduction in force of principals. As the least senior instructor in the areas of the displaced principal's teaching certification, she was identified to be bumped from her position. However, prior to the transfer hearing, the displaced principal bid on and won another position. The respondent nevertheless posted the grievant's position and awarded it to another applicant. The grievant in Barberio prevailed on her argument that no justification remained for her

transfer and that she should have retained her position.

This Board followed Barberio in Brown, declining to rescind the transfer of a kindergarten teacher where the basis for the transfer did not become invalid until after the close of the school term. Nonetheless, the principle of law applicable to these situations was succinctly stated as follows:

When a teacher's transfer, otherwise valid but not initiated by her, loses its stated justification prior to the end of the school-year in which the transfer was processed, absent some extraordinary circumstance, the employee is entitled to reinstatement into the position he would have held but-for the transfer. A county board of education's failure to offer such is, absent the referenced extraordinary circumstance, an abuse of discretion. When the stated justification is lost after the close of the aforementioned school-year, the county board's decision to not offer automatic reinstatement will not, again absent extremely compelling cause, be deemed an abuse of discretion.

Brown, *supra*, at 14. Accord, Kuhns v. Hancock County Bd. of Educ., Docket No. 91-15-360 (Dec. 30, 1991).

Although this Grievance Board has extended Barberio and Brown to RIF actions, Hollins v. Wyoming County Bd. of Educ., Docket No. 92-55-263 (Mar. 18, 1993), this grievance only involves a transfer under § 18A-2-7. W. Va. Code § 18A-4-7a does not apply to this situation because Grievant was not "the employee with the least amount of seniority" in his particular area of certification.

LCBE represented that a previous decision by the Circuit Court of Logan County, Cook v. Logan County, ([See footnote 1](#)) requires the school board to base its decisions on the certifications held by the employees at the time the personnel action is initiated. The record does not indicate the style of that case nor is it clear if an appeal was taken to the West Virginia Supreme Court of Appeals. There was apparent confusion during Grievant's transfer hearing before LCBE regarding the precedence to be accorded this circuit court case versus this Grievance Board's Hollins decision, represented by Grievant to have been upheld by a decision of the Circuit Court of Wyoming County, with the Supreme Court of Appeals of West Virginia later denying review. ([See footnote 2](#)) In Belcher v. West Virginia Department of Transportation, Docket No. 94-DOH-341 (Apr. 27, 1995), it was observed that:

This Grievance Board adheres to the doctrine of stare decisis [footnote omitted] in adjudicating grievances that come before it. Chafin v. W. Va. Dept. of Health & Human Resources, Docket No. 92-HHR-132 (Jul. 24, 1992), citing Dailey v. Bechtel Corp., 157 W. Va. 1023, 207 S.E.2d 169 (1974). This adherence is founded upon a determination that the employees and employers whose relationships are regulated by this agency are best guided in their actions by a system that provides for predictability, while retaining the discretion necessary to effectuate the purposes of the statutes

applied. Consistent with this approach, this Grievance Board follows precedents established by the Supreme Court of Appeals of West Virginia as the law of this jurisdiction. Likewise, prior decisions of this Grievance Board are followed unless a reasoned determination is made that the prior decision was clearly in error.

W. Va. Code § 18-29-1 indicates the purpose and intent of the Legislature in establishing the education employee grievance procedure included providing a "fair process." As implicitly recognized in Belcher, supra, a fair process ought to be consistent and applied uniformly throughout the state, not county by county. Accordingly, the undersigned administrative law judge is compelled to comply with the precedents established by this Grievance Board in Barberio, Brown and Kuhns.

LCBE argues that when there are multiple positions being eliminated in a RIF, it is unduly burdensome for a board of education to contemplate every contingency that might arise in regard to employees obtaining additional certifications impacting on their status, and then having to monitor those situations until the end of the school year. However, providing notice of a potential transfer or RIF to both Grievant and the one teacher at CHS with less seniority than Grievant was not demonstrated to be unduly burdensome. LCBE had no difficulty being flexible when it elected to move Grievant to Christian Elementary instead of Holden Elementary, even though Grievant was not certified to teach at Christian Elementary at the time his transfer was initiated.

Moreover, this Board noted in Brown that a different result might be forthcoming upon a showing of some "extraordinary circumstance." It may well be that the case decided by the Circuit Court of Logan County involved such an extraordinary circumstance. However, the fact that LCBE believes it is bound by a precedent established at the circuit court level does not comprise such an "extraordinary circumstance" as this Grievance Board contemplated in Brown. Likewise, LCBE's takeover by the State Board of Education provides no exemption from these rules.

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

### **CONCLUSIONS OF LAW**

1. "When a teacher's transfer, otherwise valid but not initiated by her, loses its stated justification prior to the end of the school-year in which the transfer was processed, the employee is entitled to reinstatement into the position he would have held but-for the transfer. A county board of education's failure to offer such is, absent the referenced extraordinary circumstance, an abuse of discretion.

When the stated justification is lost after the close of the aforementioned school-year, the county board's decision to not offer automatic reinstatement will not, again absent extremely compelling cause, be deemed an abuse of discretion." Brown v. Logan County Bd. of Educ., Docket No. 90-23-177 (Oct. 31, 1990). Accord, Hollins v. Wyoming County Bd. of Educ., Docket No. 92-55-263 (Mar. 18, 1993); Kuhns v. Hancock County Bd. of Educ., Docket No. 91-15-360 (Dec. 30, 1991); Barberio v. Harrison County Bd. of Educ., Docket No. 89-17-351 (Feb. 13, 1990).

2. "This Grievance Board adheres to the doctrine of stare decisis [footnote omitted] in adjudicating grievances that come before it. Chafin v. W. Va. Dept. of Health & Human Resources, Docket No. 92-HHR-132 (Jul. 24, 1992), citing Dailey v. Bechtel Corp., 157 W. Va. 1023, 207 S.E.2d 169 (1974). This adherence is founded upon a determination that the employees and employers whose relationships are regulated by this agency are best guided in their actions by a system that provides for predictability, while retaining the discretion necessary to effectuate the purposes of the statutes applied. Consistent with this approach, this Grievance Board follows precedents established by the Supreme Court of Appeals of West Virginia as the law of this jurisdiction. Likewise, prior decisions of this Grievance Board are followed unless a reasoned determination is made that the prior decision was clearly in error." Belcher v. W. Va. Dept. of Transp., Docket No. 94-DOH-341 (Apr. 27, 1995). 3. Because Grievant had completed all requirements for MI certification as of April 10, 1995, the basis for his transfer from CHS ceased to exist and LCBE violated W. Va. Code §§ 18A-2-7 in placing him on transfer. Brown, supra; Barberio, supra.

Accordingly, this grievance is **GRANTED**. Respondent Logan County Board of Education is **ORDERED** to rescind Grievant's transfer and reinstate him to an LD/MI teaching position at Chapmanville High School.

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

**LEWIS G. BREWER**

**Administrative Law Judge**

**Dated: March 29, 1996**

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[Footnote: 1](#)

*The undersigned was not provided with a copy of this decision. LCBE did not indicate that a prior decision by this Grievance Board was at issue in Cook.*

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[Footnote: 2](#)

*The files of this Grievance Board indicate that Hollins was appealed to the Circuit Court of Wyoming County (Civil Action No. 93-C-151) in April 1993 but do not otherwise reflect the subsequent history of that matter.*