

RUTH ALLEN

v.

Docket No. 96-17-176

HARRISON COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant Ruth Allen, a teacher employed by Respondent Harrison County Board of Education (HCBE), filed the following level one grievance on or about March 29, 1996:

My position at Gore Middle School [(GMS or Gore)] as English teacher-grade 6 is not being abolished as stated in letter of transfer. In actuality, the health position is being abolished. Therefore, I should be allowed to remain in my position for 1996- 97.

Following adverse decisions at the lower grievance levels, Grievant appealed to level four. The case became mature for decision on July 31, 1996, following a level four hearing in which the parties supplemented the evidence adduced at a March 27, 1996 administrative (transfer) hearing and an April 4, 1996 level two hearing. [\(See footnote 1\)](#) The parties also submitted written fact/law proposals on July 31, 1996.

Background

Based on available information and studies, HCBE projected thirty teacher positions for the 1996-97 school year in excess of the State funding formula for teachers. Additionally, HCBE planned to institute mandated county-wide, all-day kindergarten for the 1996-97 year. Staffing for this endeavor would require twenty teachers. For these reasons, HCBE was faced with the task of implementing a number of teacher realignments for the 1996- 97 school year to staff the kindergarten classes and to reduce teacher overages at various schools. [\(See footnote 2\)](#)

The studies also established that teacher overages were not based upon HCBE's elementary school assignments. Significant overages were found in HCBE's middle schools, schools which typically contain a number of teachers with elementary education certification. These schools also have teachers holding only content-area

certifications or teachers with multiple certifications, including elementary education and one or more separate content areas. HCBE's middle schools do not contain "self-contained" elementary classrooms, where each teacher teaches all subject areas in a given grade level. Rather, HCBE's middle school classes are departmentalized, and middle school teachers teach in a specific content area or discipline.

In particular, GMS had been losing pupil enrollment for a number of years. Projections for the 1996-97 school year showed further loss of enrollment and a teacher overage situation. Therefore, GMS was targeted to reduce staff by one teacher (abolish a position) for fiscal reasons and to meet State funding formulas. In order to effect transfers, teacher seniority and classification patterns had to be scrutinized.

Grievant, with a seniority date of August 29, 1988, is certified in English (7-9), social studies (7-9), elementary education (1-9) and developmental reading (7-8). She has taught English at GMS for eleven years, the first eight years in the eighth grade, when Gore was a junior high school, and the past three years, including the 1995-96 school year, in the sixth grade. Grievant consented to the grade-level change in her teaching assignment following Gore's reconfiguration as a middle school. At that time, Grievant was appointed sixth grade team leader, and was reelected team leader by her team peers the two following years.

Kay Barberio, certified in social studies (4-9), health education (4-12), and physical education (4-12), has a seniority date of August 27, 1973. Kay Barberio taught health education at GMS during the 1995-96 school year. Jennifer Barberio, with a seniority date of August 30, 1976, is certified in elementary education (1-8) and early childhood (N-K). She has taught sixth grade social studies at GMS from the time it became a middle school, up to and including the 1995-96 school year. Prior to that, she taught all elementary education subjects, including English, in a fifth grade elementary education setting/school for seventeen years.

During the 1995-96 school year, there were ten teachers at GMS with less seniority than Grievant. Nine taught speciality courses such as physically handicapped, gifted, developmental reading, behavior disordered and computer, or provided services such as school psychologist and speech therapy. Two of these nine teachers, James

Lopez, who taught behavior disordered, and Timothy Bode, who taught developmental reading, were assigned to GMS on only a half-time basis. Carolyn Bell, certified in generalhome economics (7-12) and general science (5-12), was the only teacher at GMS with less seniority than Grievant who taught in a content area, general science.

Marcel Malfregeot, HCBE's middle school administrator, apparently was responsible for reviewing teacher staffing patterns at GMS, including the seniority of teachers and the certifications held by the teachers. A list of the seven teachers at GMS who held elementary education certification was given to GMS Principal Bill Montgomery. From the list, Mr. Mongomery had to determine who should be transferred from the school. Again, James Lopez and Timothy Bode, both less senior than Grievant, taught speciality courses on only a half-time basis at GMS. They were eliminated from consideration. The other four persons on the list were more senior than Grievant.

By letter dated March 11, 1996, Grievant was notified by HCBE Superintendent Robert F. Kittle she would be recommended for transfer and subsequent assignment for the 1996-97 school year. Mr. Kittle stated in the letter that the "transfer is being recommended because your position will be abolished." Following a transfer hearing on the matter, HCBE voted to place Grievant on transfer and subsequent assignment.

Sixth grade English will not be abolished at GMS. At the level four hearing, HCBE Administrator Robert Skidmore testified that the word "abolished" was used to refer to Grievant's position in her transfer letter because of the processes and terminology utilized in the State's computer system for tracking personnel actions and placements within a school system. Of record is a document, dated April 3, 1996, which indicates that Kay Barberio will be assigned to teach social studies at GMS for the 1996-97 school year. It also appears that the two physical education teachers at GMS during the 1995-96 school year, Shelley Hyde and Neil Gelpi, will teach bothhealth and physical education at GMS during the 1996-97 school year. Jennifer Barberio, who previously taught social studies, is assigned to teach sixth-grade English for the 1996-97 school year. Jennifer Barberio signed a written agreement to a change of assignment (from teaching sixth grade social studies to teaching sixth grade English) in order to remain at GMS.

Some teachers at GMS feel the school's needs will be compromised by the loss of staff. Some believe the loss of Grievant as sixth grade English teacher and team leader will impact adversely upon students. Jennifer Barberio testified at the level four hearing that she would be "more comfortable" teaching social studies than teaching English. However, as of July 31, 1996, Jennifer Barberio had not inquired as to whether any social studies teaching positions had become available at schools other than GMS.

Discussion

Notably, Grievant did not allege a procedural violation with respect to the notice and hearing requirements of W.Va. Code §18A-2-7, relative to her transfer. Moreover, no such violation could be found in the record. Most importantly, aside for the procedural requirement in Code §18A-2-7 when transfer is contemplated, school law does not set forth any particular criteria for the transfer of personnel when a school has a staff overage. Teachers, in fact, have no "vested right" to be assigned to a particular school. State ex rel. Hawkins v. Tyler County Bd. of Ed., 275 S.E.2d 908, 912 (W.Va. 1980). Thus, boards of education have substantial discretion in matters pertaining to the transfer of personnel when necessary due to enrollment changes and program requirements.

At level four Grievant raised the issue that HCBE never promulgated a transfer policy for middle school transfers and otherwise did not follow its transfer policy for secondary education teachers. Grievant also argued that, because her teaching content area is not being abolished, she should not be subjected to transfer. HCBE denied wrongdoing and argued Grievant had not met her burden of proof in this matter.

For reasons more fully set forth below, it is determined that Grievant has not established she is entitled to the relief she seeks. Grievant failed to prove by a preponderance of the evidence that HCBE violated its transfer policy GBM, titled "Professional Personnel Transfer" (PPT), relative to her transfer. PPT addresses transfer procedures for elementary and secondary teachers. Basically, in both areas, the teacher with the least county-wide seniority is to be transferred from a school when the school must reduce staff. However, in the secondary area, staff certification areas

are also taken into consideration. While HCBE has not devised a distinct transfer policy for middle school personnel, it has determined that the scheme for transferring overage secondary teachers should be applied to middle school teaching personnel.

The procedure outlined in PPT for transferring secondary teachers when there is a "Reduction/Declining Enrollment" in a school is as follows:

If a reduction in staffing at a school is scheduled to occur commencing with the next ensuing school year, the principal shall determine how best to meet the curricular needs of the school with remaining staff. In reaching this determination the principal shall determine the curricular area(s) where reduction could best be absorbed. The least senior classroom teacher currently assigned to teach in the area(s) to be reduced shall be recommended for transfer. However, when an employee has multiple certifications the positions(s) held by the least senior professional employee(s) in the building, in the area(s) of certification held by the more senior employee(s) who has been displaced, will be ascertained. The most senior displaced employee may bump the least senior employee in the building in their area(s) of certification, provided the employee(s) certified to teach the subject matter of the least senior teachers(s) total teaching assignment for the subsequent year and the employee and the county board of education mutually agree to the assignment. If agreement is withheld, the teacher(s) shall be recommended for transfer. If such recommended transfers are approved by the board, the positions reflecting the needed assignments shall be posted.

It appears that the realignment of teaching assignments at GMS reflected strict adherence to HCBE's PPT policy.

HCBE had a need to reduce middle school staffing and a concurrent need to place elementary-certified teachers in kindergarten teaching slots. Grievant was the least senior full-time teacher at GMS holding elementary education certification. Kay Barberio was more senior than Grievant and held certification in a content area, social studies, in which a less senior teacher taught. Thus, Kay Barberio had a seniority-based right pursuant to HCBE's transfer policy to remain at Gore over both Jennifer Barberio, a less senior teacher teaching social studies, and Grievant. Kay Barberio's health education program could apparently be absorbed, in whole or part, by the school's two physical education teachers. She agreed to teach social studies instead of health for the 1996-97 school year.

Jennifer Barberio, also more senior than Grievant, was certified in elementary education, and, with her certification and prior experience teaching English to fifth grade students, was qualified to teach in the content area of English. She had a

seniority-based right pursuant to HCBE's transfer policy to remain at GMS over Grievant. Therefore, Jennifer Barberio agreed to an altered teaching assignment for the 1996-97 school year. She agreed to move from her sixth grade social studies teaching assignment to a sixth grade English teaching assignment so she could remain at GMS.

Moreover, the record does not support that HCBE abused its discretion or acted in an arbitrary and capricious fashion with respect to Grievant's transfer from her sixth grade English teaching position at GMS. HCBE had the need to reduce staff at GMS (one teacher) and other schools and to realign personnel certified in elementary education for the mandated implementation of an all-day kindergarten program. See Cowen v. Harrison County Bd. of Educ., 465 S.E.2d 648 (W.Va. 1995). There is no evidence in this record that HCBE acted inconsistently in this matter. For all of the above reasons, Grievant is not entitled to the relief she seeks.

In addition to the foregoing discussion and determinations, the following formal findings of fact and conclusions of law are made.

Findings of Fact

1. During the 1995-96 school term, Grievant taught sixth grade English at GMS and was the designated sixth grade team leader at the school.
2. Due to the need to reduce the teaching staff at various middle schools and the concurrent need to staff a mandated all-day kindergarten program with teachers certified in elementary education for the 1996-97 school year, HCBE had to realign teacher staffing patterns, primarily from its pool of elementary trained and certified teachers placed in middle schools with projected teacher overages for the 1996-97 school year.
3. HCBE utilized its transfer policy for secondary teachers in order to reduce the staff at its middle schools. The policy generally provides that more senior teachers are to be retained in their present schools over less senior teachers, especially when the more-senior teachers hold multiple certification areas and can teach subject/content areas being taught by less senior teachers.

4. Because of GMS' declining enrollment, the school was targeted for the reduction of one teacher.

5. During the 1995-96 school year, Grievant was the least senior full-time teacher at GMS who held elementary education certification and was not teaching in some special education program or some other speciality course at the school.

6. During the 1995-96 school year, there were ten teachers at GMS with less seniority than Grievant. Nine of the teachers less senior than Grievant taught in a specialty area for which they were certified, such as physically handicapped, gifted, developmental reading, behavior disordered and computer, or provided services for which they were certified, such as school psychologist and speech therapy. Two of the nine were assigned to GMS on only a half-time basis. The remaining teacher less senior than Grievant, certified in only general home economics and general science, taught in her certified area of general science. Both of GMS' general science teachers (one is more senior than Grievant) hold general science certification.

7. Following timely notice in Spring 1996 that she would be recommended for transfer and subsequent assignment for the 1996-97 school year because her position was to be abolished, Grievant requested a hearing.

8. HCBE conducted Grievant's transfer hearing in accordance with statutory mandates. Thereafter HCBE voted to accept its superintendent's recommendation to place Grievant on the transfer and subsequent assignment list for the 1996-97 school year.

9. There was no evidence that HCBE acted on the recommendation to transfer Grievant prior to the transfer hearing conducted on March 27, 1996.

10. As a technical matter, Grievant's position at GMS was "abolished" following the March 27, 1996 transfer hearing, in that her staffing code number would thereafter be eliminated from GMS' list of teaching staff.

Conclusions of Law

1. It is incumbent upon a Grievant to establish every element in her 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. A board of education may transfer and reassign teachers due to a reorganization or because of the need to realign staff for fiscal reasons or program purposes. See Gongola v. Ohio County Bd. of Educ., Docket No. 95- 35-276 (Sept 29, 1995); Jocum v. Ohio County Bd. of Educ., Docket No. 91- 33-396 (Jan. 31, 1992); Tracewell v. Wood County Bd. of Educ., Docket No. 90-54-365 (Aug. 2, 1991).

3. Generally, boards of education must follow the policies they have properly established to manage the school system. Powell v. Brown, 238 S.E.2d 220 (W.Va. 1977).

4. Grievant failed to establish that Respondent Harrison County Board of Education violated its transfer policy, or any other law, policy or regulation, in approving the recommended transfer of Grievant from her 1995- 96 assignment at Gore Middle School, effective the 1996-97 school year. See Finamore v. Marion County Bd. of Educ., Docket No. 94-24-511 (Apr. 24, 1996); Hall v. Mingo County Bd. of Educ., Docket No. 95-29-529 (Mar. 28, 1996); Heatwole v. Regional Jail Authority, Docket No. 93-RJA-238 (May 1, 1994); Ellis v. Division of Energy, Docket No. 91-ENGY-181 (Jan. 13, 1993).

5. Grievant failed to establish she was legally entitled to remain at the school she was assigned during 1995-96 as a matter of law.

Accordingly, the grievance is **DENIED**. Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Harrison 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.

NEDRA KOVAL
Senior Administrative Law Judge

Date: July 31, 1996

[Footnote: 1](#)

It is noted that Grievant also filed an action in the Harrison County Circuit Court with respect to her transfer from GMS. HCBE objected because Grievant had not exhausted her administrative remedies. The matter herein was expedited at the request of Judge Lewis Marks so that Grievant could file an immediate appeal and have some final resolution about her assignment before the start of the 1996-97 school year.

[Footnote: 2](#)

Apparently, because of the need to establish and staff its all-day kindergarten program, HCBE was not forced to effect any teacher reduction in force (RIF) actions for the 1996-97 school year.