

**DOW M. OOTEN,**

**Grievant,**

**v.**

**Docket No. 96-29-122**

**MINGO COUNTY BOARD OF EDUCATION,**

**Respondent.**

### **DECISION**

This is a grievance by Dow M. Ooten (Grievant), a professional employee of the Mingo County Board of Education (MCBE), submitted on February 20, 1996. A hearing was held at Level II on March 8, 1996. A Level II decision denying the grievance was issued by Assistant Superintendent John Fullen, the Superintendent's designee, on March 19, 1996. Grievant by-passed Level III, as authorized by W. Va. Code § 18-29- 4(c), appealing to Level IV on March 21, 1996. An evidentiary hearing was conducted in this Board's office in Charleston, West Virginia, on May 6 and 20, 1996. The parties elected to make written post-hearing arguments, and this matter became mature for decision on June 18, 1996, following receipt of the parties' submissions.

### **BACKGROUND**

Although most facts regarding this matter are uncontroverted, there is sufficient disagreement regarding certain aspects of this dispute to warrant a more detailed narration of the circumstances leading up to this grievance. Grievant was previously employed by MCBE as the Principal at Dingess Elementary School (DES) for the 1993-94 school year. As a result of a decision issued by this Grievance Board in Hugh Talbert v. Mingo County Board of Education, Docket No. 93-29-166 (Jan. 20, 1994), Mr. Talbert was reinstated as Principal at DES, displacing Grievant. MCBE reassigned Grievant as Principal of Williamson Middle School (WMS), commencing with the 1994-95 school year.

According to the record, Grievant performed his duties as WMS Principal during the 1994-95

school year in a satisfactory manner. However, early in the 1995-96 school year, Grievant encountered some difficulties at WMS, as well as some health problems, which, in his words, led him to request reassignment from WMS. Grievant described his 1995-96 tenure as WMS Principal as a "real stressful time for everyone" due to the conversion of WMS from a junior high school to a middle school. In addition, significant school employee reduction-in-force actions were creating uncertainty and poor employee morale. After various discussions with MCBE President Theodore Warden and MCBE Superintendent Everett Conn, Jr., Grievant requested to be reassigned.

At Mr. Warden's urging, Grievant met with Superintendent Conn on the morning of October 17, 1995. Grievant stated that at the time of that meeting, he was "very sick." He was taking medication and seeing doctors, including a psychiatrist. [\(See footnote 1\)](#) He agreed that it was in the mutual interest of himself and MCBE that he be reassigned from his duties as WMS Principal. Grievant testified that he was assured during those discussions that he would continue to receive the same amount of pay, that he would continue to accrue seniority as a principal, and that he would be put on transfer the following Spring. Grievant asked Superintendent Conn if he would be transferred as a principal or a teacher, and received the response: "There is only one transfer list."

Superintendent Conn also testified regarding his October 17 meeting with Grievant. While he agreed with Grievant's recollection regarding his response to the question about the transfer list, and that Grievant would continue to receive the same salary for the remainder of the year, he disagreed with Grievant on several particulars. It was Superintendent Conn's understanding that Grievant was voluntarily resigning his position as WMS Principal, as he had already "cleaned out" his office by the time he arrived for the meeting with Superintendent Conn. Superintendent Conn further indicated that Grievant asked to be placed in a teaching position closer to his home, as he recognized that he would be taking a pay cut in the ensuing school year. He agreed to add the last paragraph to the reassignment letter at Grievant's request, because Grievant was not being removed for cause. Both Superintendent Conn and Assistant Superintendent Fullen stated that this was standard language contained in all transfer notices. See G Ex A.

At the conclusion of their meeting on October 17, 1995, Superintendent Conn issued the following letter to Grievant:

Please be advised that after a visit to your school yesterday, Monday, October 16th, and reviewing schedules and school records, and as per our discussion today, I believe it is in the best interest of you and the school to remove you from the

principal's position and assign you to the ECIA Program at Myrtle and Lenore Grades for the remainder of the 1995-96 school term. I will advise you before the first Monday in April that I intend to place you on the transfer list for the ensuing school term.

This does not reflect on your administrative duties as a principal at Williamson Middle School.

G Ex 1 at L II.

Accordingly, at the following board meeting, Superintendent Conn recommended that:

we transfer Dow Ooten as per request from Principal position at Williamson Middle School to ECIA Program at Myrtle and Lenore Grade for the remainder of the 1995-96 school term only. Effective 10-17-95. That was after Mr. Ooten and I had discussion and we both considered it was in the best interest of his health and teaching profession.

J Ex 1. MCBE approved this recommendation.

Subsequently, on January 23, 1996, Superintendent Conn notified Grievant of his proposal to transfer him to another position for the next school year in the following terms:

You are hereby notified that at a meeting of the Board of Education of the County of Mingo to be held prior to April 1, 1996, I will, pursuant to the provisions of West Virginia Codes, Chapter 18A, Article 4, Section 7a, Chapter 18A, Article 2, Section 3 and Chapter 18A, Article 2, Section 7, recommend that you be terminated as a principal and transferred, within the county, for the ensuing school year (1996-97).

\* \* \*

The reason for the anticipated transfer is the consolidation of schools, a drop in student enrollment during the 1995-96 school year, low projected enrollment for the 1995-97 (sic) school year, and possible reorganization of the Federal, State, and County Programs. This transfer in no way reflects on your performance as a teacher.

G Ex A (emphasis added). Superintendent Conn credibly explained that the underlined language was included to give notice that Grievant would no longer be paid an administrator's salary during the ensuing school year. Both Superintendent Conn and Assistant Superintendent Fullen maintained that MCBE no longer considered Grievant to be a principal, in accordance with his previous transfer

to a teaching position. Therefore, there was no reference in the notice to W. Va. Code § 18A-2-8, or any statement of cause to justify terminating Grievant as a principal.

MCBE thereafter conducted a transfer hearing on February 12, 1996, where Grievant raised the contention that he should be allowed to transfer laterally as a principal, bumping a less senior principal in accordance with county policy. MCBE did not agree with Grievant's position, and Superintendent Conn notified him of the Board's decision in a letter dated February 23, 1996:

You are hereby notified that at a meeting of the Board of Education of the County of Mingo held on February 22, 1996, I did, pursuant to the provisions of West Virginia Codes, Chapter 18A, Article 2, Section 6, Chapter 18A, Article 2, Section 7 and Chapter 18A, Article 4, Section 8b, recommend that you be transferred, as a teacher, within the county, to Lenore Grade School, for the ensuing school year (1996-97). This recommendation has been approved by the Board.

G Ex B.

MCBE also introduced a copy of a hand-written letter which Grievant sent to Mingo County Circuit Judge Elliott Maynard on October 13, 1996, in which Grievant stated, "I'm more than willing to resign my position if that would reconcile matters." R Ex 1. MCBE argued that this statement represented Grievant's true state of mind when he met with Superintendent Conn on October 17, 1996. Superintendent Conn testified that Grievant gave him a copy of that letter during their October 17 meeting.

### **DISCUSSION**

Initially, MCBE alleges that this grievance was not timely filed in accordance with W. Va. Code § 18-29-4(a)(1), which provides:

Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

A timeliness defense is an affirmative defense which the moving party must establish by a preponderance of the evidence. Hale v. Mingo County Bd. of Educ., Docket No. 95-29- 315 (Jan. 25, 1996). MCBE contends that this grievance should have been filed within 15 days of October 17, 1995, the date when Grievant was relieved of his duties as WMS Principal. Grievant takes the

position that he had no quarrel with being temporarily reassigned to a teaching position, subject to the understanding that he was still a principal, eligible for lateral reassignment in that capacity for the 1996-97 school year. It was only when he was notified that MCBE was proposing to transfer him as a teacher, and not as a principal, that he had a dispute with the Superintendent. Moreover, it was only following his transfer hearing, when MCBE elected to transfer him to another teaching position, that the "event" occurred which gave rise to this grievance.

Grievant's position is consistent with W. Va. Code § 18-29-4(a)(1). See Spahr v. Preston County Bd. of Educ., 391 S.E.2d 739 (W. Va. 1990); Eastham v. Cabell County Bd. of Educ., Docket Nos. 95-06-317/318 (Apr. 9, 1996). Accordingly, the issue of Grievant's transfer to a teaching position, rather than a principal's position, was timely filed. ([See footnote 2](#))

Turning to the merits of this grievance, Grievant alleges that MCBE violated W. Va. Code § 18A-4-7a by transferring him to a teaching position at Myrtle Grade School (MGS), rather than to a lateral principal's position somewhere in the county. As this grievance does not involve a disciplinary matter, Grievant must prove the allegations in his case by a preponderance of the evidence. Williams v. Lincoln County Bd. of Educ., Docket No. 93-22-386 (Mar. 7, 1994); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Adjudication of this dispute hinges upon establishing the circumstances of Grievant's reassignment to Myrtle and Lenore Grade Schools (M&LGS). Grievant believed that he was being temporarily relieved as WMS Principal, that he would be assigned to a teaching position at M&LGS for the remainder of the 1995-96 school year, and that he would be notified not later than April of 1996 of the principal's position which he would receive for the 1996-97 school year. He interprets Mr. Conn's letter of October 17, 1995, to support his interpretation, further noting that MCBE continued to pay him the same salary he received as WMS Principal while he was teaching at M&LGS. In addition, Mr. Conn's statement that "there is only one transfer list," in response to Grievant's inquiry regarding the meaning of the letter, supports this interpretation, in Grievant's view. Grievant and MCBE agree that Grievant was only to be assigned to the Chapter I ECIA teaching position for the remainder of the 1995-96 school year. MCBE submits that this was based upon plans to close MGS, while Grievant contends that this reflected part of the understanding he reached with Superintendent Conn.

After careful consideration of all evidence of record, the undersigned administrative law judge

finds that MCBE's position is supported by a preponderance of the evidence. In particular, the documentary evidence better corroborates Superintendent Conn's recollection of the circumstances surrounding Grievant's departure from WMS. His letter of October 17, 1995, unequivocally states "it is in the best interest of you and the school to remove you from the principal's position and assign you to the ECIA Program at Myrtle and Lenore Grades for the remainder of the 1995-96 school term." G Ex 1 at L II (emphasis added). The ordinary meaning of "remove" in the employment context equates to a termination or dismissal. See Watts v. W. Va. Dept. of Health & Human Resources, 465 S.E.2d 887 (W. Va. 1995).

Under these circumstances, it was incumbent upon Grievant to obtain a clear and unambiguous verification of his status from MCBE, rather than relying on some arguable ambiguity. Clearly, Superintendent Conn's addendum, "[t]his does not reflect on your administrative duties as a principal at Williamson Middle School," merely documents that Grievant was not being terminated as a principal for cause. It does not indicate that "even though you are now a classroom teacher, we still consider you as a principal for purposes of any future transfer decisions," the interpretation which Grievant seeks to read into this document. Likewise, Superintendent Conn's verbal statement that there "is only one transfer list" was completely ambiguous, providing no assurance whatsoever.

MCBE's position is further supported by reading the statutory language which governs employment of professional school personnel. W. Va. Code § 18A-1-1(c) identifies two classes of "professional educator." The professional educator who has direct instructional or counseling relationship with pupils is classified as a "classroom teacher." W. Va. Code § 18A-1-1(c)(1). The professional educator who as agent of the board has responsibility for the supervision, management and control of a school or schools is recognized as a "principal." W. Va. Code § 18A-1-1(c)(2). When these statutory definitions are applied to the circumstances of this case, it is clear that once Grievant was reassigned to a teaching position at the grade school level, he no longer had any responsibility for the supervision, management and control of a school or schools. Thus, Grievant was no longer serving as a principal, regardless of what he was paid by MCBE. [\(See footnote 3\)](#) Therefore, MCBE's decision to transfer Grievant to another teaching position for the 1996-97 school year did not violate W. Va. Code § 18A-4-7a and was not arbitrary or capricious under the circumstances.

In addition to the foregoing discussion, the following findings of fact and conclusions of law are appropriate in this matter:

## **FINDINGS OF FACT**

1. Grievant is employed by the Mingo County Board of Education (MCBE) as a professional educator.
2. At the beginning of the 1995-96 school year, Grievant was assigned as the Principal of Williamson Middle School (WMS).
3. Grievant performed his duties as WMS Principal in a satisfactory manner and was not terminated for cause.
4. On October 17, 1996, MCBE Superintendent Everett Conn agreed to reassign Grievant, at his request, from his position as WMS Principal to an ECIA (Chapter 1) teaching position at Myrtle and Lenore Grade Schools (M&LGS) for the remainder of the 1995-96 school year.
5. Grievant was provided written confirmation of his reassignment from WMS Principal to M&LGS. This document contains no provision stating that MCBE will continue to treat Grievant as a principal, even though he is performing the duties of a classroom teacher.
6. Following his transfer from WMS to M&LGS, Grievant continued to receive the same pay that he had received while serving as WMS Principal.
7. At the time Grievant was reassigned from WMS, Superintendent Conn did not have a vacant permanent teaching position available near Grievant's residence, as Myrtle Grade School (MGS) was slated to be closed and consolidated with Lenore Grade School (LGS) at the end of the 1995-96 school year.
8. On January 23, 1996, Superintendent Conn issued written notice to Grievant, advising that he was to be reassigned to another teaching position for the 1996-97 school year.
9. MCBE conducted a hearing regarding Grievant's proposed transfer to another teaching position on February 12, 1996.
10. Following the transfer hearing, MCBE decided to transfer Grievant to a teaching position at LGS for the 1996-97 school year.
11. At the time MCBE approved Grievant's transfer to LGS, there were one or more principals employed by MCBE with less seniority as administrators than Grievant.
12. This grievance was submitted at Level I on February 20, 1996.

## **CONCLUSIONS OF LAW**

1. Grievant has the burden of proving each element of a grievance of this nature by a

preponderance of the evidence. Stout v. Harrison County Bd. of Educ., Docket No. 93-17-081 (Apr. 12, 1994); Randolph v. Harrison County Bd. of Educ., Docket No. 17-88- 001-2 (June 30, 1988).

2. A timeliness defense is an affirmative defense which the moving party must establish by a preponderance of the evidence. Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

3. The "event" which gave rise to this grievance within the meaning of W. Va. Code § 18-29-4(a)(1) was MCBE's decision on February 12, 1996, to transfer Grievant to another classroom teaching position. Thus, this grievance was timely filed within fifteen days of that event. See Spahr v. Preston County Bd. of Educ., 391 S.E.2d 739 (W.Va. 1990); Eastham v. Cabell County Bd. of Educ., Docket Nos. 95-06-317/318 (Apr. 9, 1996).

4. Grievant was reassigned from his position as Principal at WMS to a teaching position at another school at his own request. At the time MCBE elected to transfer Grievant to another teaching position for the 1996-97 school year, Grievant was no longer serving as a principal, and MCBE had no legal obligation to transfer him to another principal's position, "bumping" a less senior principal. See W. Va. Code §§ 18A-1-1(c), 18A-2-7, 18A-4-7a.

Accordingly, this grievance is **DENIED**. Any party may appeal this decision to the Circuit Court of Mingo County or 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: July 31, 1996**

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[Footnote: 1](#)

*Grievant testified that he was later hospitalized for depression for a period of 23 days extending through December 18, 1995.*

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[Footnote: 2](#)



*However, to the extent that Grievant's evidence might support the contention that his reassignment in October 1996 was involuntary or obtained through coercion, such claims would clearly be untimely under W. Va. Code § 18-29-4(a)(1).*

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[Footnote: 3](#)

*Given the foregoing language, it is not certain if MCBE has authority to consider a professional educator as a principal when they are actually serving as a classroom teacher. However, that issue does not need to be decided here. It is sufficient to note that any such arrangement would have to be stated in far more explicit language than was employed in this situation.*