

MARY KINSER, ET AL.,

Grievants,

V. DOCKET NO. 95-29-280

MINGO COUNTY BOARD OF EDUCATION,

Respondents,

and

BEVERLY C. BAILEY AND SUSAN RUNYON,

Intervenors.

DECISION

Grievants, Mary Kinser, Donna Hurley, and Mildred Ooten ([See footnote 1](#)) are certified Multi-subject teachers, and allege the Mingo County Board of Education ("MCBOE") was inconsistent and arbitrary and capricious when it RIF'd and transferred teachers for the 1995-1996 school year. They argue that less senior teachers were retained in middle school positions they are qualified to fill. They request relief that their RIF's be rescinded, and that they be placed in teaching positions with all back pay and benefits. Intervenor Bailey is also a Multi-subject teacher, but the status of Intervenor Runyon is unknown, as she did not appear at either the Level II or Level IV hearing. This grievance was denied at Levels I and II, and waived at Level III. Grievants then appealed to Level IV, and, after numerous continuances, a hearing was held on January 9, 1996. This case became mature for decision on March 11, 1996, the deadline for the parties' proposed findings of fact and conclusions of law.

The basic facts of this case, while confusing, are not in dispute, and will be set out below.

Findings of Fact

1. Grievants are certified Multi-subject teachers, K-8. Grievant Ooten is also certified in Remedial Reading, K-12.

2. Grievant Kinser's seniority date is January 5, 1988, and Grievant Hurley's is April 13, 1988.

Grievant Ooten's seniority date is unknown, but she began teaching duties some time during the 1989-1990 school year. (Level II transcript at 5).

3. Intervenor Bailey's seniority date is September 13, 1989, and Intervenor Runyon's is unknown.

4. At the time of the RIF, Grievant Hurley taught 8th grade English at Matewan Junior High, Grievant Ooten taught Reading at Burch Junior High, and Grievant Kinser taught 7th grade science and 9th grade health at Lenore Junior High. Intervenor Bailey taught 8th grade reading at Burch Junior High, and her former position was changed to a Language Arts position. It is unknown what and where Intervenor Runyon taught.

5. In February 1995, Grievants received notice they would be RIF'd at the end of the school year.

6. All MCBOE junior high schools were changed to middle schools before the start of the 1995-1996 school year.

7. Some teachers with less seniority than Grievants were allowed to remain in their positions in various middle schools, and some less senior teachers were placed on the transfer list.

8. All the teachers referred to in Finding of Fact Number 7 were teaching in the junior high schools at the time of the RIF and were certified in the content areas in which they taught or to which they were transferred.

9. Some individuals teaching in the middle schools and certified in content areas were RIF'd because they had insufficient seniority to be retained. For example, if there were too many certified science teachers, the least senior science teacher was RIF'd. [\(See footnote 2\)](#)

10. Some teachers with Multi-subject certification, K-8 or Elementary Education certification, 1-6, who were teaching in the junior high/middle school setting at the time of the RIF, remained in their positions. All these teachers had more seniority than the Grievants, as they had been employed by MCBOE for 10 or more years. 11. It is, and has been, MCBOE's policy for many years, to fill junior high or middle school positions with teachers certified in content areas. If such a certified teacher was not available, these positions may have been filled by a Multi-subject, K-8 teacher.

12. Some RIF'd or transferred teachers with less seniority than Grievants were selected to fill middle school, Chapter I Math positions. These positions were posted as math positions, and the teachers selected to fill these positions were certified in Math, 5-8.

13. After the RIF's, the principals at the various new middle schools had an opportunity to review

and assess their schools' needs for the rest of the year, and many Multi-subject, K-8 positions were posted. At the time of the hearing, all Grievants and Intervenors had received positions.

Discussion

Grievants do not contest they were the least senior multi- subject teachers in the county when a reduction-in-force was required. However, Grievants contend that since MCBOE has allowed teachers with Multi-subject, K-8 certification to fill junior high and middle school positions in the past, that MCBOE must allow them to "bump" any content certified teacher teaching core content who has less seniority than they. In other words, their seniority required MCBOE either to retain them at their schools, or to place them on a transfer list and allowed them to "bump" these less senior content-certified middle school teachers who taught in the core subject areas. MCBOE contends it violated no applicable law, and that it is within its discretion to select content certified teachers to fill positions in the middle schools, as this is in the best interest of the students. MCBOE also argues these decisions were not arbitrary and capricious.

The pertinent section of W. Va. Code §18A-2-2 states:

[A] continuing contract shall not operate to prevent a teacher's dismissal based upon the lack of need for the teacher's services pursuant to the provisions of law relating to the allocation to teachers and students ratios. But in case of such dismissals, the teachers so dismissed shall be placed upon a preferred list in the order of their length of service with that board, and no teacher shall be employed by the board until each qualified teacher upon the preferred list, in order, shall have been offered the opportunity for reemployment in a position for which they are qualified. . . .

The pertinent sections of W. Va. Code §18A-4-7a state:

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 . . . : 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: 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 these 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.

All professional personnel whose seniority with the county board is insufficient to allow their retention by the county board during a reduction in work force shall be placed upon a preferred recall list. As to any professional position opening within the area for which they had previously been employed or to any lateral area where they have certification and/or licensure, such employee shall be recalled on the basis of seniority if no regular, full-time professional personnel, or those returning from leaves of absence with greater seniority, are qualified, apply for and accept such position.

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The first issue to resolve is whether Grievants should have been placed on the preferred recall list. Grievants argue they are certified, by their Multi-subject certification, to teach in the less senior content-specific teacher's positions. Grievants did not submit the original postings for these positions, and the testimony at hearing from Assistant Superintendent Johnny Fullen indicated all these positions were posted as content-specific. For example, an English position would be posted as requiring an English certificate. Given that some of the original postings were so long ago, it appears, that at times, Multi-subject teachers were selected to fill some of these positions when a content certified teacher was not available.

W. Va. Code §18A-4-7a requires county boards of education to transfer teachers, subject to release, to any other position for which they are certified and were previously employed or to any lateral area for which they are certified or licensed over less senior teachers. This Code Section has a limited purpose. In a RIF situation, it provides placement of a displaced teacher, with sufficient seniority, in a position held by the least senior teacher in the displaced teacher's area of certification. Donofoe v. Hancock Bd. of Educ., Docket No. 93-15-188 (Nov. 30, 1995); Accord Woodson v. Monroe County Bd. of Educ., Docket No. 92-31-282 (Feb. 10, 1993). "[T]he multi-certified displaced teacher with bumping rights may not choose some preferred subject area to teach from among his or her subject-area certifications." Donofoe, supra. Since Grievants hold only one certification, Multi-subject, they may only "bump" those teachers who have like certifications. Id. An individual's transfer rights are limited to the areas in which an employee is certified or licensed; here Multi-subject, K- 8. W. Va. Code §18A-4-7a; Accord Woodson, supra. All Multi- subject, K-8 teachers, who were retained in their positions or who were transferred, were more senior than Grievants and Intervenors.

Further, Grievants' certification is in Multi-subject, K-8, and a superintendent has the option of employing Multi-subject teachers outside a self-contained classroom in middle school or junior high

schools if the depth and breadth of the material stays the same as that taught in a self-contained classroom. Thus, a county board could utilize Multi-subject teachers to teach core content in a middle school setting if it chose to do so. MCBOE has chosen not to do so. MCBOE has set a standard for the certification of its junior high and middle school teachers, that of requiring content-specific certification in all subjects when at all possible. "A board of education's right to set standards is crucial, especially when it desires to hire the most qualified person for a specific position[,] and the potential field of applicants may include the most minimally certified or qualified persons." Gilkey v. Brooke County Bd. of Educ., Docket No. 91-05- 489 (June 25, 1992).

"The notion of favoring in-depth teachers for any content area . . . is educationally sound and directly relates to the interest of the schools." Id. Because "appropriate subject-matter certification is the most basic of qualifications for a position", and since Grievants do not have this certification, they cannot be awarded these positions. Argabright v. Wyoming County Bd. of Educ., Docket No. 93-55-03 (Apr. 6, 1993). Thus, although Grievants could be allowed to teach some subjects in a middle school setting by their certification, they are not certified to fill the positions at issue because they do not possess the certification posted and required by MCBOE. Because Grievants are not certified to fill these positions, MCBOE took the proper action by placing them on the preferred recall list.

Additionally, it is well-settled that "[c]ounty boards of education have substantial discretion in matters relating to hiring, assignment, transfer and promotion of school personnel" as long as they exercise this discretion "reasonably, in the best interest of the school, and in a manner which is not arbitrary and capricious." Dillon v. Bd. of Educ. of County of Wyoming, 351 S.E.2d 58 (W. Va. 1986). Further, the West Virginia Supreme Court of Appeals has recently expanded the Dillon standard "to matters involving curricular programs and the qualifications and placement of personnel implementing those programs." Cowen v. Harrison County Bd. of Educ., 465 S.E.2d 648, 652 (W. Va. 1995). Here, MCBOE has decided to require junior high and middle school positions to be filled by teachers certified in the content area, if at all possible. It chose to retain teachers specifically trained in the subject they teach, instead of choosing the less specific Multi-subject certification, which is intended for a self-contained, elementary setting. This action cannot be seen as an arbitrary and capricious act and clearly falls within the discretion authorized by Dillon and Cowen.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. Grievants have the burden of proving their case by a preponderance of the evidence. Rupich v. Ohio County Bd. of Educ., Docket No. 89-35-719 (June 29, 1990).

2. "County boards of education have substantial discretion in matters relating to hiring, assignment, transfer and promotion of school personnel" as long as they exercise this discretion "reasonably, in the best interest of the school, and in a manner which is not arbitrary and capricious." Dillon v. Bd. of Educ. of the County of Wyoming, 351 S.E.2d 58 (W. Va. 1986).

3. County boards of education have substantial discretion in "matters involving curricular programs and the qualifications and placement of personnel implementing those programs." Cowen v. Harrison County Bd. of Educ., 465 S.E.2d 648, 652 (W. Va. 1995). 4. "At the time the RIF was initiated [Grievants] had a limited right under Code §18A-4-7a to displace or 'bump' less senior teachers then employed in [their] certification field." Lewis v. Mercer County Bd. of Educ., Docket No. 94-27-1053 (June 23, 1995).

5. County boards of education are required to place employees subject to a RIF into a position for which they are certified or licensed if they are more senior than another teacher. W. Va. Code §18A-4-7a.

6. Grievants failed to prove MCBOE violated of W. Va. Code §18A-4-7a with respect to their reduction-in-force.

7. Grievants, certified as Multi-subject, K-8 teachers, failed to demonstrate MCBOE acted in an arbitrary and capricious manner when it retained less senior but certified teachers in full-time teaching positions in middle schools instead of placing them in those particular teaching slots. Donofoe v. Hancock County Bd. of Educ., Docket No. 93-15-188 (Nov. 30, 1993).

8. Grievants did not have the required certification necessary to "bump" the less senior content-specific teachers. Gilkey v. Brooke County Bd. of Educ., Docket No. 91-05-489 (June 25, 1992).

9. Grievants failed to establish that they were more senior than any of the Multi-subject, K-8 certified teachers who were retained, thus, they could not "bump" any of these teachers.

Accordingly, this grievance is **DENIED**.

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

JANIS I.

REYNOLDS

Administrative Law Judge

Dated: June 28, 1996

[Footnote: 1](#)

Originally there were four Grievants, but only these three individuals proceeded to Level IV.

[Footnote: 2](#)

Hearsay testimony indicated two content certified teachers were RIF'd. A review of the retained Multi-subject teachers demonstrated one of them, Thomas Preece, was teaching 7th grade science at Lenore Middle School ("LMS") for the 1995-1996 school year. Mr. Preece, who had taught Social Science at LMS for three years prior to the 1995-1996 school year and has a specialization in social studies, has greater seniority than Grievants and Intervenors. It is unclear from the record when Mr. Preece was changed from his specialization area to science. Although Mr. Preece's placement in science may represent an inconsistency, it does not effect Grievants' case as Mr. Preece is more senior.