**SALLY DUNCAN,**

**Grievant,**

**v.** **Docket No. 96-33-231**

**MCDOWELL COUNTY BOARD OF EDUCATION,**

**Respondent.**

**DECISION**

This grievance was filed April 26, 1996, alleging as follows:
The McDowell County Board of Education acted arbitrarily and capriciously when they voted to eliminate Sally Duncan's MI teaching position and create a multi-categorical [sic] position. Ms. Duncan claims that the Board did not have a valid reason for such a change and she asks that she be allowed to keep her teaching position.

She was certified as an instructor in Elementary Education, one through six and M.I., K through twelve. (See footnote 1) Grievant was transferred for the 1996-1997 school year from her M.I. teaching position at Big Creek High School (BCHS) to Mount View High School. The Respondent alleges that this transfer was required by a reduction in force. TheM.I. instruction at BCHS was to be accomplished by multi-classified teachers who were certified as M.I./L.D. Grievant alleges that would result in the integration of M.I. students and L.D. students in the same classroom. Grievant feels that this would result in neither group receiving adequate attention. (Level II Tr. at 10, 11).

Grievant waived to Level II and a hearing was held May 9, 1996. The grievance was denied May, 24, 1996, and appealed to Level III. The McDowell County Board of Education, upon review, concurred with the Level II findings of fact and conclusions of law. Its decision of June 3, 1996 was appealed to Level IV. The grievance was assigned to ALJ Jerry A. Wright and then for administrative purposes to the undersigned ALJ. At Level IV, it was submitted upon the record and became mature for decision on February 18, 1997.

At the Level II hearing, the McDowell County Superintendent of Schools, Dr. J. Kenneth Roberts, testified as to the reasons for the transfer of Grievant. He stated that the decision was made some time ago to move to dual certifications. Decreasing school population over the years caused a

reduction in the number of teachers. The 1996-1997 school year required further reductions based upon statistics and calculations provided by the West Virginia Department of Education. The Department relies upon these statistics for determining funding to the various counties. ( Level II Tr. at 19, and Administration Ex. # 2, Level II hearing ). The reductions were made after receiving input from all school principals. A review of BCHS revealed a decrease in the number of special education students. The elimination of two special education teaching positions was necessary. With smaller teaching staffs, it was imperative to have teachers available who were certified in more than one area. Dr. Roberts further stated that this multi-area certification, ". . . allows us to provide services to low incidence exceptionalities . . ." And, "the caseloads are constantly changing; so, it's often difficult to know exactly how those caseloads may stay within a school year; so, therefore it helps us to handle shifting caseloads." (Level II Tr. at 20). In other words, Dr. Roberts believes that multi-certification gives the school boards more flexibility in meeting the diverse needs of students and is more efficient because these needs can be met with fewer teachers. Furthermore, multi-certification has been the trend since 1992 and is projected to continue. (Administration Ex.# 3, Level II hearing ).

To be decided is whether the action taken by Respondent was in the best interest of the schools, or whether it was arbitrary and capricious. Grievant testified that her transfer would be detrimental to the welfare of special education students, thus raising the issue as to whether her transfer is in the best interest of the schools. County boards of education have substantial discretion in matters relating to hiring, assignment, transfer, and promotion of school personnel, as well as matters involving curricular programs and qualification and placement of personnel implementing those programs. However, that discretion must be tempered in a manner that is reasonably exercised, in the best interest of the schools, and in a manner which is not arbitrary and capricious. Syllabus Pt.2, Cowen, et al. v. Harrison County Bd. of Educ., 195 W.Va. 377, 456 S.E.2d 648 (1995).

Grievant, testifying at the Level II hearing, stated that the needs of L.D. studentsand M.I. students are different. Her testimony at page 11 contains the essence of her contentions. Contrasting the two special education groups, she states, "Their modalities are different. Their curriculum that you have to teach them is totally different. There is no way possible that, with the number of students that we have, that you're going to service them with the amount of teachers that you left there, whether they be certified M.I./L.D. or L.D./M.I. or M.I. You're going to have eight students per M.I. teacher that has been left there, and it's just not feasible." Grievant continues her testimony alleging that

mainstreaming did not work. She admitted under cross- examination that she had only a few weeks' teaching experience in M.I./L.D. and that she based her opinions on her personal knowledge of L.D. students, including her son. No other testimony or other opinion evidence was submitted to support Grievant's contentions.

The testimony of Dr. Roberts explains the reasoning involved in the decisions to transfer Grievant and to employ multi-certified special education teachers. There was a well-thought plan designed to allow for the offering of a full spectrum of teaching services with fewer personnel. Grievant's testimony, intended to show that this would not be in the best interest of the special education students, was not persuasive. The burden of proof is on Grievant to prove her allegations by a preponderance of the evidence. Gwilliam v. Preston County Bd. Of Educ., Docket No. 95-39-255 (Dec.22, 1995). However, she has not proven that Respondent was arbitrary and capricious.

Consistent with the foregoing discussion, the following Findings of Fact and Conclusions of Law are appropriate.

## FINDINGS OF FACT

1. Grievant was employed by Respondent as a teacher certified to teach Elementary Education, 1 through 6, and M.I., K through 12.
2. In the 1995-1996 school year, Grievant taught special education classes for M.I. students at Big Creek High School.
3. For the 1996-1997 school year, decreasing student enrollment at Big Creek High School caused her to be transferred to Mount View High School, teaching special education.
4. Teachers, multi-certified in the various fields of special education assumed her M.I. teaching duties at Big Creek High School for the 1996-1997 school year.
5. Grievant is not multi-certified.
6. Since 1992, in the teaching field of Special Education, Respondent has decreased the number of teachers it employs who are certified in only one teaching classification, and has increased the number of teachers certified in more than one special education teaching classification.

## CONCLUSIONS OF LAW

1. In a nondisciplinary action, Grievant has the burden of proving her case by a preponderance of the evidence. Gwilliam v. Preston County Bd. Of Educ., Docket No. 95-39-255 (Dec. 22, 1995).

2. County boards of education have substantial discretion in matters relating to hiring, assignment, transfer, and promotion of school personnel, as well as matters involving curricular programs and qualification and placement of personnelimplementing those programs. However, that discretion must be tempered in a manner that is reasonably exercised, in the best interest of the schools, and in a manner which is not arbitrary and capricious. Cowen, et al. V. Harrison County Bd. of Educ., 195 W.Va. 377, 456 S.E.2d 648 (1995).

3. Respondent did not act in an arbitrary and capricious manner by transferring Grievant from Big Creek High School to Mount View High School.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to 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 appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

_____

**JAMES D. TERRY**

**Administrative Law Judge**

**DATE:** September 2, 1997

---

*Footnote: 1*

*The initials, M.I., were not defined, however, the unsigned believes them to mean, mentally impaired.*