DAVID T. BRAMMER,

Grievant,

v. **Docket No. 95-23-393**

LOGAN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

This is a grievance by David T. Brammer (Grievant) alleging that he was improperly released from employment by the Respondent Logan County Board of Education (LCBE) pursuant to a reduction-in force (RIF) action at the end of the 1994-95 school year. After his grievance was denied at Level II, Grievant waived Level III, as authorized by W. Va. Code § 18-29-4(c), appealing to Level IV on September 6, 1995. After the initial hearing date was continued for good cause shown, a Level IV evidentiary hearing was conducted in this Board's office in Charleston, West Virginia, on January 25, 1996. At the conclusion of that hearing, the parties agreed upon a schedule for submission of post-hearing written arguments. By agreement of the parties, the initial due date for submissions was extended to March 21, 1996.

Grievant submitted a timely written argument. However, the record was not yet complete as the parties had agreed to incorporate the transcript from Grievant's March 21, 1995, RIF hearing before LCBE in the Level II record. Initially, LCBE indicated that it wasunable to locate the record from that hearing, and the parties considered supplementing the record with stipulations. Ultimately, LCBE located the transcript from the earlier hearing, providing a copy to the undersigned on January 17, 1997, to complete the record in this matter.

The facts in this matter are essentially undisputed. Accordingly, the following findings of fact are made from the record established at Levels II and IV, as well as the RIF hearing.

FINDINGS OF FACT

1. Grievant was employed by Respondent Logan County Board of Education (LCBE) as a classroom teacher, teaching Mentally Impaired (MI) students at Logan East Junior High School (LEJHS) for the 1994-95 school year.

2. Grievant is certified by the West Virginia Department of Education to teach Mentally Impaired (MI) in grades K-12, and Social Studies in grades 7-12. RIF HT at 3. 3. At the beginning of the 1994-95 school year, LCBE posted a classroom teaching vacancy at Logan High School (LHS) in Basic Skills/Social Studies. G Ex A at L IV. Grievant applied for and was offered the position. However, Grievant declined to accept the position following a conversation with LHS Principal Wilma Zigmond wherein she was unable to assure him that the Basic Skills/Social Studies position would remain in its present form beyond the current school year. Thus, Grievant elected to remain in his MI teaching position at LEJHS for the 1994-95 school year.

4. Tim Murphy, who also holds an extracurricular contract with LCBE as a high school basketball coach, was the successful applicant for the LHS Basic Skills/Social Studies position described in Finding of Fact Number 3. 5. Grievant and Mr. Murphy are each properly certified to teach the Social Studies classes assigned to Mr. Murphy. No additional certifications are required to teach Basic Skills.

6. At the beginning of the second semester of the 1994-95 school year, LHS Principal Zigmond reassigned Mr. Murphy to teach a Physical Education class that was split off from another teacher's class. Grievant is not certified to teach Physical Education.

7. In order to reassign Mr. Murphy, he was relieved of teaching one class in Basic Skills, and the students in that class were redistributed to other Basic Skills classes. See G Ex C at L IV.

8. Ms. Zigmond determined that Mr. Murphy was better qualified to teach the Physical Education class in physical conditioning and weight-lifting than the previously assigned teacher. Ms. Zigmond was particularly concerned with disciplinary problems involving the student athletes attending that class.

9. LCBE eliminated an MI teaching position at Hugh Dingess Elementary School held by Lucille McDonald, effective at the beginning of the 1995-96 school year. Ms. McDonald was certified to teach multi-subjects, in grades K-8, and MI in grades K-12. Ms. McDonald had 979 days of seniority compared to Grievant's 920 days of seniority.

10. LCBE applied W. Va. Code § 18A-4-7a, determining that Ms. McDonald was eligible to transfer and "bump" Grievant from his assignment at LEJHS, based upon her greater seniority in MI. As Grievant was the least senior MI teacher, Grievant was placed on the preferred recall list as required by § 18A-4-7a. 11. Grievant had greater seniority in Social Studies than Mr. Murphy, but LCBE would not allow him to "bump" Mr. Murphy under W. Va. Code § 18A-4-7a, because Grievant is not certified to teach Physical Education.

DISCUSSION

W. Va. Code § 18A-4-7a provides, in pertinent part:

> 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 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 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.

The essence of this grievance is that LCBE improperly "transferred" Mr. Murphy to teach a Physical Education class, thereby preventing Grievant from "bumping" Mr. Murphy in accordance with the foregoing RIF provisions in W. Va. Code § 18A-4-7a. (See footnote 1) The first problem with Grievant's transfer argument is that Mr. Murphy's work location and hours of employment did not change. He remained in the same school building, teaching Physical Education, which he was properly certified to teach, while teaching one less class in BasicSkills. (See footnote 2) He continued to teach four classes in Basic Skills and one class in Social Studies, consistent with the original posting. See R Ex 1 at L IV.

In these circumstances, Mr. Murphy was not reassigned to a different position, a different location, or substantially different duties and responsibilities, so as to result in a "transfer." See Kiser v. Kanawha County Bd. of Educ., Docket No. 95-20-541 (Apr. 30, 1996); Matthews v. Preston County Bd. of Educ., Docket No. 39-88-239 (July 27, 1989). Moreover, assuming for the sake of argument

that assigning Mr. Murphy to teach Physical Education was a "transfer" covered by W. Va. Code § 18A-2-7, because he was being required to teach in an area of certification which was not previously being utilized, (See Blackburn v. Mingo County Bd. of Educ., Docket No. 95-29-489 (Mar. 27, 1996): Kidd v. Fayette County Bd. of Educ., Docket No. 89-10-452 (Dec. 14, 1989)), it is Mr. Murphy, not Grievant, who has standing to invoke the procedural safeguards provided by that statute. See, e.g., Stover v. Mason County Bd. of Educ., Docket No. 96-26-048 (Nov. 27, 1996); Crites v. Webster County Bd. of Educ., Docket No. 95-51-313 (Feb. 26, 1996); Khoury v. Public Service Comm'n, Docket No. 95-PSC-501 (Jan. 31, 1996).

Notwithstanding Grievant's inability to invoke W. Va. Code § 18A-2-7 for lack of standing, inasmuch as Grievant has demonstrated that he was adversely affected by LCBE's action in assigning Mr. Murphy to teach a Physical Education class, he may nonetheless claim that such an action was an abuse of LCBE's discretion. See Cremeans v. Bd. of Trustees, Docket No. 96-BOT-099 (Dec. 30, 1996). In support of this theory, itwas suggested that LCBE arranged Mr. Murphy's schedule to protect him from a RIF action, and that this special consideration arose in some part due to his extracurricular status as a basketball coach.

In response to the foregoing claim, LHS Principal Zigmond convincingly testified before the undersigned at Level IV that she directed this assignment for academic reasons relating to student discipline and the capabilities of the faculty personnel at her disposal. Further, there was no credible evidence that Ms. Zigmond had sufficient information at the time she reassigned Mr. Murphy to determine what impact, if any, such an assignment would have in regard to Mr. Murphy's ability to avoid being "bumped" by Grievant. In these circumstances, Grievant has not shown that LCBE, through Ms. Zigmond, abused its broad discretion in making such academic decisions. See W. Va. Code § 18A-2-9; Long v. Logan County Bd. of Educ., Docket No. 95-23-506 (Apr. 29, 1996); Piccirillo v. Brooke County Bd. of Educ., Docket No. 94-05-626 (Dec. 30, 1994). See also Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648 (1995); State ex. rel. Melchiori v. Bd. of Educ., 188 W. Va. 575, 425 S.E.2d 251 (1992); Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986); Hill v. Kanawha County Bd. of Educ., Docket No. 94-20-537 (Mar. 22, 1995), aff'd sub nom. Hill v. Raglin, Circuit Court of Kanawha County, No. 95-AA-106 (Jan. 8, 1997).

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

CONCLUSIONS OF LAW

1. As a RIF action does not involve a disciplinary matter, Grievant has the burden of proving the allegations in his complaint by a preponderance of the evidence. W. Va.Educ. & State Employees Grievance Bd. Procedural Rule 4.19, 156 C.S.R. 1 (1996); Jackson v. Monroe County Bd. of Educ., Docket No. 96-31-208 (Aug. 29, 1996); Rader v. Webster County Bd. of Educ., Docket No. 96-51-049 (July 31, 1996). See W. Va. Code § 18-29-6.

2. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986). See also Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648 (1995).

3. Grievant failed to demonstrate that LCBE violated, misapplied, or misinterpreted any statute, policy, rule, or regulation, by assigning another classroom teacher with less seniority in one of Grievant's areas of certification to teach a Physical Education class, resulting in Grievant's inability to displace the other teacher in the course of a reduction-in- force.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Logan 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 ofthe 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: January 31, 1997

Footnote: 1

Grievant is not contending that he should be allowed to "bump" Mr. Murphy and teach Physical Education, or that § 18A-4-7a obligates LCBE to revise Mr. Murphy's class assignments so that Grievant can replace him.

Footnote: 2

The evidence indicates that LCBE had fewer students requiring instruction in Basic Skills during the second semester, and the total number of classes being offered in Basic Skills was reduced accordingly.