**HARRY HILL and**

**GREG CYRUS,**

**Grievants,**

**v.** **Docket No. 96-20-362**

**KANAWHA COUNTY BOARD OF EDUCATION,**

**Respondent.**

## D E C I S I O N

Harry Hill and Greg Cyrus (Grievants) initiated this grievance under W. Va. Code §§ 18-29-1, et seq., on May 24, 1996, challenging a personnel action by the Kanawha County Board of Education (KCBE) which placed them on transfer for the 1996-97 school year, resulting from a decision to reduce the number of driver education classes being offered to students at Dupont and Nitro High Schools. The grievance was denied at Level I and Grievants appealed to Level II, where a hearing was conducted on July 31, 1996. On August 16, 1996, Michael Bell, the Superintendent's designee, denied the grievance at Level II. Grievants waived Level III as authorized by W. Va. Code § 18-29-4(c), and appealed to Level IV on August 19, 1996. After a hearing was set, the parties agreed to submit this grievance for decision on the basis of the record developed below, as supplemented by stipulation between the parties. On October 22, 1996, the undersignedissued an Order requiring all stipulations and written arguments be submitted not later than November 22, 1996. Following an agreed extension of that deadline, this matter became mature for decision upon receipt of Grievants' written submission on December 9, 1996. (See footnote 1)

The facts in this matter are essentially undisputed. Accordingly, the following findings of fact necessary to resolution of this grievance have been developed from the record.

## FINDINGS OF FACT

1. Grievants Harry Hill and Greg Cyrus are employed by Respondent Kanawha County Board of Education (KCBE) as classroom teachers.

2. During the 1995-96 school year, Grievant Cyrus was assigned to Nitro High School (NHS), and Grievant Hill was assigned to Dupont High School (DHS).

3. During both the first and second semesters of the 1995-96 school year, Grievants Hill and Cyrus taught driver's education at their respective schools. Moreover, they were the only teachers assigned to teach driver's education at those schools.

4. For the 1996-97 school year, the respective principals at DHS and NHS determined that driver's education would be taught during only one semester, or the equivalent of one academic semester. (See footnote 2)

5. As a result of the reduction in driver's education courses being offered, as described in Finding of Fact Number 4, KCBE placed Grievants on the transfer list.

6. Enrollment at NHS increased from 892 students for the 1995-96 school year to 896 students for the 1996-97 school year, a gain of 4.

7. Enrollment at DHS decreased from 649 students for the 1995-96 school year to 592 students for the 1996-97 school year, a loss of 57.

8. With only one semester of driver's education being taught at NHS and DHS, approximately 35 students per year will be able to sign up for this course at each school. This is equivalent to about 50 percent fewer students than in the previous year.

In addition to the foregoing facts, the following provisions in Chapter 18, Article 6 of the West Virginia Code, entitled "Driver Education" are pertinent to this grievance:

> The purpose of this article is to ensure that every secondary school pupil has the opportunity, at or about the time he reaches licensing age, to enroll in a course of driver education designed to train him to drive skillfully and safely under all traffic and roadway conditions and circumstances; to make the driver education course available to out-of-school youths and to adults; and to ensure that commercial driver education schools achieve and maintain a level of driver education equal to the minimum standards that are prescribed for secondary schools.

§ 18-6-1.

> No later than the first day of the public school term beginning in the year one thousand nine hundred seventy-three, there shall be offered in all public secondary schools within the State an approved, comprehensive course in driver education.

As the first priority, the driver education course shall be made available at no cost to all secondary school pupils at or about the time they reach licensing age.

* * *

In those counties where sufficient public secondary school education courses are not available to meet all requests for the course, county boards of education shall, as quickly as possible, make sufficient courses available to fill those requests.

§ 18-6-2.

Before any pupil is graduated from a secondary school after the first day of September, one thousand nine hundred seventy-five, he shall first be provided an opportunity and encouraged to successfully complete a driver education course approved by the state board in a public, private, parochial or denominational secondary school within the State. If a pupil has successfully completed a similar course in a secondary school of another state and the course is accepted by the state board as adequately meeting and complying with the course standards established by the state board, the aforementioned requirement shall be deemed fulfilled regarding that pupil.

§ 18-6-8.

County boards of education, subject to the rules and regulations of the state board, may expend school funds to maintain and repair vehicles used for instructional purposes, to purchase fuel, lubricants, parts and accessories therefor, to pay the compensation of teachers or instructors and to procure automobile insurance, where the expenditures are for the purpose of establishing or maintaining driver education courses in public secondary schools pursuant to this article. These expenditures, including compensation of teachers or instructors, may be made over a period of twelve months.

Each county board of education shall receive from funds specially appropriated for the driver education courses provided in public secondary schools a sum which shall be proportionate to the total amount available for distribution for that purpose to all county boards in the State in the ratio which the number of pupils who are enrolled in driver education courses in public secondary schools in the county bears to the total number of pupils who are enrolled in driver education courses in all public secondary schools within the State, but the payment shall not exceed the sum of thirty-five dollars for each such pupil per school year.

§ 18-6-6.

Other state statutes specify that certain courses of instruction are required in all schools. In that regard, W. Va. Code § 18-2-9 provides:

> (a) In all public, private, parochial and denominational schools located within this state there shall be given prior to the completion of the eighthgrade at least one year of instruction in the history of the state of West Virginia. Such schools shall require regular courses of instruction by the completion of the twelfth grade in the history of the United States in civics, in the constitution of the United States, and in the government of the state of West Virginia... The state board of education shall, with the advice of the state superintendent of schools, prescribe the courses of study covering these subjects for the public schools...
>
> (b) The state board of education shall cause to be taught in all of the public schools of this state the subject of health education, ...

## DISCUSSION

Because a transfer due to elimination of a position is not a disciplinary matter, Grievants must prove the allegations in their claim by a preponderance of the evidence. W. Va. Educ. & State Employees Grievance Bd. Procedural Rule 4.19, 156 C.S.R. 1 (1996); Williams v. Lincoln County Bd. of Educ., Docket No. 93-22-386 (Mar. 7, 1994); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). Grievants allege that KCBE's decision to decrease the number of driver education courses taught at Nitro and Dupont High Schools conflicts with the requirements of W. Va. Code §§ 18-6-1, et seq. Therefore, KCBE's decision allegedly constitutes an abuse of discretion and is arbitrary and capricious.

The outcome of this grievance is controlled by this Grievance Board's previous decision in a similar matter, Hill v. Kanawha County Board of Education, 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). Although fewer students at the affected schools will be able to take a course in driver's education than in previous years, the course will still be available for at least one semester each year. Thus, any difference between the facts in this case and those addressed previously in Hill involve a difference in degree, not in kind. Grievants ask that this Grievance Board reconsider our earlier ruling in Hill, supra. However, Grievants are still confusing W. Va. Code §§ 18-6-1, et seq., with legislation enacted for the benefit of teachers. It is apparent that the intended beneficiaries of this legislation are high school

students and their parents. Moreover, as clearly articulated by Judge MacQueen:

> This is also a situation in which the Court must defer to the Board of Education. The Board of Education is in the best position to determine how to meet the needs of its students with respect to driver's education. This Court has no expertise in determining how to administer driver's education classes at the various high schools throughout the county. The Court should defer to the Board of Education, which has employees with the expertise to make these sorts of determinations.

Hill v. Raglin, Circuit Court of Kanawha County, No. 95-AA-106 (Jan. 8, 1997).

As noted in this Grievance Board's Hill decision, adopting Grievants' position would mean that "notwithstanding a school board's authority under § 18A-4-7a to transfer employees when it is necessary to reduce the total number of professional personnel, driver education instructors may not be transferred unless a certain teacher-student ratio exists at the school undergoing the reduction in personnel." However, the statute does not contain such a clear provision and this Grievance Board remains reluctant to read such a requirement into the statute. See Hill, supra.

"County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Syllabus Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (W. Va. 1986). Here, KCBE determined that the requirements of W. Va. Code §§ 18-6-1, et seq., could be met by providing one driver's education classper year at each of the high schools to which Grievants were previously assigned. In reaching that decision, consideration was necessarily given to eliminating driver's education versus other academic courses, and KCBE's professional educators made an apparent good-faith determination that driver's education could be reduced.

As indicated in Hill, supra, this Grievance Board will not ordinarily overturn a board of education's decision to maintain certain courses in the curriculum while reducing the opportunities for students to partake of another course as an abuse of discretion. Clearly, such decisions fall within the discretion of the county board as noted in Dillon, supra, and, to prevail, a grievant must demonstrate that the decision was arbitrary and capricious. McCune v. Kanawha County Bd. of Educ., Docket No. 94-20-265 (Oct. 31, 1994). See Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648 (1995); Pockl v. Ohio County Bd. of Educ., 185 W. Va. 256, 406 S.E.2d 687 (1991).

In applying an "arbitrary and capricious" standard, a reviewing body applies a narrow scope of

review, limited to determining whether relevant factors were considered in reaching that decision and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, supra, at 286. In this situation, KCBE's decision on the number of driver education courses to be offered at DHS and NHS for the 1996-97 school year does not violate that standard. See Hill, supra.

The undersigned administrative law judge otherwise adopts the reasoning previously set forth in Hill, supra, as affirmed by the Circuit Court of Kanawha County. Inaddition to the foregoing discussion, the following conclusions of law are appropriate in this matter:

## CONCLUSIONS OF LAW

1. In a non-disciplinary matter, Grievants have the burden of proving each element of their grievance by a preponderance of the evidence. W. Va. Educ. & State Employees Grievance Bd. Procedural Rule 4.19, 156 C.S.R. 1 (1996); Williams v. Lincoln County Bd. of Educ., Docket No. 93-22-386 (Mar. 7, 1994); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. "W. Va. Code §§ 18-6-1, et seq., operates to make a course in driver education a 'required elective' in public secondary schools but does not compel a board of education to maintain a specific ratio of driver education teachers to the student population eligible to complete such a course of instruction." 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).

3. Grievants failed to establish that KCBE abused its discretion in determining that the number of driver's education courses being offered at DHS and NHS could be reduced to a single one-semester course each year at each school, or that such decision was arbitrary and capricious under the circumstances. See Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281 (1974); Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648 (1995); Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982); Hill, supra; McCune v. Kanawha County Bd. of Educ., Docket No. 94-20-265 (Oct. 31, 1994). Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to 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: January 30, 1997**

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*Footnote: 1*

*KCBE did not file a post-hearing submission, apparently relying upon the Level II decision in this matter.*

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*Footnote: 2*

*NHS employs a concept described as "block scheduling" which evidently involves longer class periods during shorter periods of time (nine weeks) that equate academically to a full semester. This arrangement is discussed briefly in the record. See L II HT at 10- 12.*