MARTHA BROWNING,

Grievant,

v. **DOCKET NO. 97-29-236**

MINGO COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

This grievance was filed by Grievant Martha Browning against the Mingo County Board of Education ("MBOE") on March 26, 1997, alleging she had been improperly transferred, in violation of W. Va. Code §§ 18A-4-7a and 18A-2-2. (See footnote 1) She requested as relief that her transfer be rescinded so that she would be restored to a teaching position at Gilbert High School.

The following facts pertinent to the resolution of this matter have been made from the evidence presented at Levels II and IV.

Findings of Fact

1. Grievant is employed by MBOE as a classroom teacher, and has been teaching 26 years.

2. Grievant's certification is in Elementary Education 1-8, Language Arts 1-9, and Multi- subject 1-9.

3. During the 1996-97 school year, Grievant, Truby Thompson (formerly Hatfield), Dixie Ingles, and James White taught English classes at Gilbert High School ("GHS"). Grievant was the most senior English teacher at GHS. Grievant also taught the only two Language Arts classes offered.

4. Students in grades nine through twelve attend GHS.

5. On or about February 10, 1997, Grievant received notification that the Mingo County Superintendent was recommending her transfer. The letter stated, "[t]he reason for the anticipated transfer is the consolidation of schools, a drop in student enrollment during the 1996-1997 school year, low projected enrollment for the 1997-1998 school year, and possible reorganization of the Federal, State, and County Programs." Grievant's Level IV Exhibit 1. After a hearing before MBOE,

Grievant was transferred to a teaching position at an elementary school. She subsequently asked to be assigned to Gilbert Middle School, and her request was granted by MBOE.

6. Language Arts was eliminated from the GHS curriculum for the 1997-98 school year, and one Library Science class was eliminated each semester at GHS. One English class was added in the fall semester, and one was eliminated in the spring semester. The net result was that two classes were eliminated in each semester. Grievant's Level II Exhibit 1, and Level IV Joint Exhibit 1. 7. GHS utilizes block scheduling. Under this system, each teacher is assigned to teach three classes each semester. Grievant's Level II Exhibit 1, and Level IV Joint Exhibit 1.

8. Ms. Thompson, Ms. Ingles, Mr. White, and Christa Lester will teach all the English courses at GHS for the 1997-98 school year. Their certifications are: Ms. Thompson, English 7-12 and German 7-12; Ms. Ingles, English 7-12, Secretarial Studies 7-12, and Elementary Education 1-6; Mr. White, Counselor 7-12, Social Studies 7-12, and English 7-12. Respondent's Level IV Exhibits 2, 3, and 4. Ms. Lester's certification was not placed into evidence. (See footnote 2) She taught only Library Science at GHS during the 1996-97 school year, and is scheduled to teach two Library Science classes and one English class each semester of the 1997-98 school year. Ms. Ingles is also scheduled to teach German, as she has done in the past. Grievant's Level II Exhibit 1, and Level IV Joint Exhibit 1.

Discussion

"County boards of education have broad discretion in personnel matters, including transfers, but must exercise that discretion in a manner which is not arbitrary or capricious." Dodson v. McDowell County Bd. of Educ., Docket No. 93-33-243 (Feb. 15, 1994). The Supreme Court of Appeals of West Virginia has "repeatedly held that the power to transfer teachers must be exercised in a reasonable manner and in the best interests of the school." Townshend v. Bd. of Educ. of County of Grant, 396 S.E.2d 185, 188 (W. Va. 1990). See Dillon v. Bd. of Educ. of County of Wyoming, 351 S.E.2d 58 (W. Va. 1986). The burden of proof in this case is upon Grievant to demonstrate by a preponderance of the evidence that MBOE's action was arbitrary and capriciousor an abuse of discretion. Tibbs v. Mercer County Bd. of Educ., Docket No. 96-27-074 (Oct. 31, 1996).

The evaluation of a personnel decision under the arbitrary and capricious standard entails close examination of the process used to make the decision. Considerable deference must be afforded the

professional judgment of those who made the decision. Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648 (1995). Baird v. Kanawha County Bd. of Educ., Docket No. 95-20-445 (Sept. 16, 1996). "In applying the `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." Hill and Cyrus v. Kanawha County Bd. of Educ., Docket No. 96-20-362 (Jan. 30, 1997). Although Grievant quibbled with the decision reached by MBOE, she did not meet her burden of proving its action was an abuse of discretion or arbitrary and capricious.

Grievant did not challenge MBOE's decision to reduce the number of courses offered at GHS. Once this decision was made, GHS had a staff overage, and it was reasonable to transfer someone. See Ellis v. Mingo County Bd. of Educ., Docket No. 94-29-213 (Oct. 28, 1994). Grievant's primary argument was that her seniority among the English teachers and in the school should have been a consideration in deciding who should be transferred. Grievant believed she was unjustly transferred, and MBOE could have transferred someone other than her. She also argued that the reasons given for her transfer were not valid. MBOE argued it has broad discretion in making transfer decisions,and that the arbitrary and capricious standard allows only a narrow scope of review. It also pointed out that Grievant's certification is only through ninth grade, that the transfer did not affect her salary, and she will not travel any further to arrive at Gilbert Middle School than she did to arrive at GHS.

Grievant's seniority argument is misplaced. Boards of education are not required by law to base transfer decisions on seniority, or to consider seniority as a factor in making transfer decisions. Transfer decisions "are based on the needs of the school, as decided in good faith by the superintendent and the board. Hawkins v. Tyler County Bd. of Educ., 166 W. Va. 363, 275 S.E.2d 592 (1979) and Post [v. Harrison County Bd. of Educ., Docket No. 89-17-355 (Feb. 20, 1990)]. See Jochum v. Ohio County Bd. of Educ., Docket No. 91-35-396 (Jan. 31, 1992)." Stewart, et al., v. Kanawha County Bd. of Educ., Docket No. 96-20-370 (Jan. 31, 1997). W. Va. Code § 18A-2-7 "grants broad discretion to a superintendent, and gives him the authority to transfer school personnel subject only to the approval of the board. Post [supra]." Stewart, supra. No evidence was presented

that seniority was a relevant factor in this case. (See footnote 3)

Grievant argued it made no sense to transfer her as she was the only teacher at GHS trained for the "skills bank language program," and MBOE would have to train someone else. She offered no explanation of this program or the training required. She has not proven this training should have been considered by MBOE in reaching its decision, or that it is so significant a consideration that it was arbitrary and capricious to transfer the only teacher with this training. As to Grievant's argument with the reasons given for her transfer, Grievant attempted to demonstrate that enrollment has not dropped at GHS, thus discounting one of the stated reasons for her transfer. However, she did not address whether enrollment had dropped for the 1996-97 school year (one of the reasons stated in the February 10 letter), and her comparison of ninth grade enrollment from 1996-97 to 1997-98 did not address whether enrollment in all grades at GHS had changed. (See footnote 4)

As to the remaining reasons given for Grievant's transfer, she argued in her post-hearing written submission that no schools were being consolidated in the GHS District. However, she presented no evidence on school consolidation from which the undersigned can accept Grievant's argument. Grievant stated she had not been able to get the Federal, State, and County Program plans, as the superintendent told her they were usually not ready until the beginning of school or after. Certainly, if MBOE determined, in good faith, that a reorganization might be necessary, it would be appropriate to place those who would have to be moved on transfer in the spring, because if it waited until the plans were ready in the fall, it could not then transfer anyone. Grievant was silent on what MBOE presented at the transfer hearing. The undersigned cannot find that MBOE did not act in good faith.

Grievant also pointed out that one teacher is scheduled to teach English 12 Advanced Placement and English 9 at the same time, which she asserted was not possible. If true, one class will have to be assigned to another teacher, eliminated, or perhaps contracted. MBOE eliminatedtwo of the three classes which make up a class load. Clearly, it was rational to transfer someone from GHS once the decision was made to reduce the number of courses offered, rather than retain someone full-time at GHS to teach just one course. Grievant really seems to admit that it was appropriate that someone be transferred. She just does not think it should have been her. While MBOE perhaps could have moved someone else, it could also move Grievant if it decided that was in the best interests of the schools. Although no evidence was presented regarding why MBOE selected Grievant as the teacher to be transferred, it is rational to transfer the teacher who is only licensed to teach through the ninth

grade, when students in grades ten through twelve also attend the school. (See footnote 5) See McQuaid v. Harrison County Bd. of Educ., Docket No. 96-17-293 (Dec. 31, 1996).

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The burden of proof is upon Grievant to demonstrate by a preponderance of the evidence that MBOE's action in transferring her was arbitrary and capricious or an abuse of discretion. Tibbs v. Mercer County Bd. of Educ., Docket No. 96-27-074 (Oct. 31, 1996).

2. "County boards of education have broad discretion in personnel matters, including transfers, but must exercise that discretion in a manner which is not arbitrary or capricious." Dodson v. McDowell County Bd. of Educ., Docket No. 93-33-243 (Feb. 15, 1994). Dillon v. Bd. of Educ. of County of Wyoming, 351 S.E.2d 58 (W. Va. 1986). 3. "There is no requirement in W. Va. Code §18A-2-7 that transfers be based on seniority or that the seniority requirements of W. Va. Code §18A-4-7a control transfers and subsequent assignments. Jochum v. Ohio County Bd. of Educ., Docket No. 91-35-396 (Jan. 31, 1992). See also Post v. Harrison County Bd. of Educ., Docket No. 89-17-355 (Feb. 20, 1990)." Stewart, et al., v. Kanawha County Bd. of Educ., Docket No. 96-20-370 (Jan. 31, 1997).

4. Grievant failed to prove that the Mingo County Board of Education abused its broad discretion or acted in an arbitrary and capricious manner when it chose to transfer her from Gilbert High School.

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.

BRENDA L. GOULD

Administrative Law Judge

Dated: September 19, 1997

Footnote: 1

Given the nature of the grievance, it is unlikely Grievant's supervisor made a decision, given his or her lack of authority in a transfer situation. A Level II hearing was held on April 24, 1997, and a decision denying the grievance at Level II was issued on May 1, 1997. Grievant waived Level III and appealed to Level IV on May 9, 1997. After several continuances, a Level IV hearing was held on July 24, 1997. This matter became mature for decision on August 18, 1997, with receipt of Grievant's Proposed Findings of Fact and Conclusions of Law. Respondent declined to submit written argument.

Footnote: 2

Grievant did not argue that Ms. Lester was not certified to teach English.

Footnote: 3

Some counties have adopted policies which require them to consider seniority in transfer situations. There is no indication in the record that MBOE has such a policy. If it had such a policy, MBOE would have to follow it in making transfer decisions. See Allen v. Harrison County Bd. of Educ., Docket No. 96-17-176 (July 31, 1996). See also, Dyer, et al., v. Lincoln County Bd. of Educ., Docket No. 95-22-494 (June 28, 1996).

Footnote: 4

MBOE pointed out on cross-examination that the projected enrollment figures are only rough guesses, and Grievant pointed out errors in the projections. However, this cuts both ways. If the figures are unreliable to demonstrate that enrollment will not drop, as MBOE attempted to show, then they are likewise unreliable for determining whether to transfer teachers. MBOE did not indicate it actually used more accurate figures.

Footnote: 5

Although Grievant pointed out she can also teach tenth grade (under Policy 5202, Section K-4), she may do so only if the superintendent assigns her to do so and she consents. MBOE is not required to allow her to teach outside her certification, and may prefer to employ persons to teach tenth grade who are properly certified.