GERALDINE GUNNELLS,

Grievant,

v v.

DOCKET NO. 97-29-398

MINGO COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant Geraldine Gunnells, a bus operator, filed a grievance alleging that she had been improperly "bumped" from her bus and her bus run, and requesting reassignment to the bus and bus run which she had during school year 1996-97. The grievance was denied at Levels I and II, and consideration at Level III was waived. A hearing was held at Level IV on October 15, 1997, and the matter became mature for decision on that date, as the parties declined to submit post-hearing written arguments. (See footnote 1) For reasons explained below, the grievance must be denied.

FINDINGS OF FACT

1 1.

Grievant has been employed by Respondent for over 27 years, in different capacities. She has been employed as a bus operator for the last 22 years.

2 2.

Jimmy Dean, also a bus operator for Respondent, has more seniority than Grievant.

3 3.

During school year 1996-97, Grievant drove an automatic transmission mini-bus, picking up and dropping off two children in the Gilbert area. She had this same assignment for the past eight years.

4 4.

During school year 1996-97, Mr. Dean drove a standard transmission, seventy-two

passenger bus serving numerous students of Gilbert Middle School. His bus run was shorter and took less time to complete than Grievant's run.

5 5.

Respondent's bus operators have received transfer notices in the spring of each year for at least the last five years. Grievant received a transfer notice in the spring of 1997.

6 6.

William Kirk, Grievant's supervisor and Respondent's Transportation Director, placed all bus operators on transfer in the spring of 1997, as he knew there would be changes in busroutes and numbers of passengers, due to declining enrollment, reassignment of fifth grade classes from elementary to middle schools, funding difficulties, and other circumstances. Five bus runs were “phased out” or eliminated, and numerous routes were changed. At least two bus operators, other than Grievant, who previously had mini-bus assignments no longer operate mini-buses this school year.

7 7.

For the 1997-98 school year, Grievant's and Mr. Dean's assignments were switched. Grievant was assigned to drive a standard transmission, seventy-two passenger bus, serving students of Gilbert Middle School, the bus and run assigned to Mr. Dean in school year 1996-97. Mr. Dean was assigned to drive the automatic transmission mini-bus and run that Grievant previously drove.

8 8.

The Superintendent of Mingo County Schools, Mr. Everett Conn, instructed Mr. Kirk to switch Grievant's and Mr. Dean's runs. Usually, when changes in bus operator assignments are necessary, Mr. Kirk discusses the changes and requests for changes among the bus operators, and then makes a decision on assignments for the school year. To the extent possible, Mr. Kirk reassigns the same route and bus to the same driver in successive years. The Superintendent has often instructed Mr. Kirk to make changes in bus routes and schedules.

9 9.

Mr. Dean was given the mini-bus assignment because he is the most senior bus operator, and had requested the assignment. He had filed a grievance demanding the assignment, as well.

10 10.

Grievant claims to have medical conditions, including arthritis, which cause her problems when driving a standard transmission bus. She has not submitted any medical records to Respondent verifying this, nor did she submit any in these grievance proceedings.

11 11.

Grievant has been driving a standard transmission bus since the start of the 1997-98

school year. She has pain when driving the bus.

DISCUSSION

As this case does not involve a disciplinary action, the burden of proof is on the grievant to prove all elements of her case by a preponderance of the evidence. Conley v. Logan County Bd. of Educ., Docket No. 23-86-102 (Nov. 21, 1986). Transfers of school service personnel are governed by W. Va. Code §18A-2-7, which provides, in pertinent part:

> The superintendent, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to the provisions of this chapter.

The cited language of W. Va. Code §18A-2-7 makes clear that Respondent may transfer any school personnel after proper notice and opportunity to be heard. Perry, et al. v. Fayette County Bd. of Educ., Docket No. 96-10-205 (July 25, 1996); Ellis v. Logan County Bd. of Educ., Docket No. 23-86-101 (Nov. 21, 1986); and Conley, supra. Of course, the power to transfer employees must be exercised reasonably and in the best interests of the school system, and may not be exercised arbitrarily or capriciously. State ex rel. Hawkins v. Tyler County Bd. of Educ., 166 W. Va. 363, 275 S.E.2d 908 (1980). Transfers of school personnel which are not disciplinary or the result of a reduction-in-force are reviewed against the “arbitrary and capricious” standard pronounced in Dillon v. Board of Educ., 351 S.E.2d 58 (W. Va. 1986). Conclusion of Law #1, Bailey v. Mercer County Bd. of Educ., Docket No 92-27-228 (Feb. 26, 1993). See also, Pockl v. Ohio County Bd. of Educ., 406 S.E.2d 687 (W. Va. 1991); Wellman v. Mercer County Bd. of Educ., Docket No. 95-27-327/300 (Nov. 30, 1995); Moses v. Mercer County Bd. of Educ., Docket No. 93-27-001 (Apr. 8, 1993).

It is uncontested that Respondent followed the procedural requirements for notice of transfer found in W. Va. Code §18A-2-7. Grievant contends that Respondent could not legally switch assignments between her and Mr. Dean, arguing that seniority was an improper consideration, as it is an issue only in actions involving reductions in force. She also alleges that her medical condition mandates that Respondent make an exception or accommodation, as it has done for others. Respondent asserts that there was no RIF-type “bumping” involved, only a transfer decision which was left to Respondent's discretion, and that seniority was a reasonable consideration and basis for making its transfer decision. Moreover, Respondent asserts that Grievant has failed to meet her burden of proof regarding accommodation of medical conditions, as she has failed to submit any

medical records for consideration.

The Code clearly does not mandate that transfers be based on seniority. Eckenrode v. Kanawha County Bd. of Educ., Docket No. 96-20-302 (Jan. 22, 1997). (See footnote 2) See also, Wellman, supra;Gonzales v. Harrison County Bd. of Educ., Docket No. 91-17-227 (Dec. 31, 1991). However, a county board of education may always adopt and be bound by formal written policy whereby seniority is the basis for such transfers. Wellman, supra; Norman v. Greenbrier County Bd. of Educ., Docket No. 90-13-345 (Nov. 30, 1990).

Here, Grievant failed to produce any evidence of a formal written policy specifying the basis for making transfers in Mingo County. She alleged that the past practice of Respondent had been to reassign a bus operator's prior run, and, to some extent, Mr. Kirk confirmed this. However, Mr. Kirk's testimony did not indicate that his usual method of reassigning bus runs had been utilized when buses and runs were being eliminated and reconfigured, as they were here. Indeed, his testimony was quite vague as to any methodical, objective process which has been consistently employed when transfers were either required or requested. He merely stated that all the bus operators discussed the situation, and he then made decisions. Thus, the most that can be said is that the Superintendent had not previously instructed Mr. Kirk to switch assignments between two bus operators in circumstances similar to the ones presented by this case. (See footnote 3)

While Mr. Kirk testified that he usually reassigned the same bus and run to the operator who previously had that assignment when possible, his statements fall short of creating a formal policy or other guarantee of reassignment. Absent further evidence of established practice and procedure, Grievant has simply failed to carry her burden of showing that Respondent departed from legal requirements in switching assignments between she and Mr. Dean.

Respondent was not bound by statute to allow more senior employees a voice in its transfer decisions. Respondent was also not prohibited by statute from considering seniority in making its assignments. Seniority is an important factor in filling service personnel vacancies. See Harrison County Bd. of Educ. v. Coffman, 189 W. Va. 273, 275, 430 S.E.2d 331 (1993). Moreover, a practice of using in-school seniority for administrative transfers of service personnel has been foundfair in a prior case. McClure v. Kanawha County Bd. of Educ., Docket No. 20-88-131 (Oct. 24, 1988), aff'd Cir. Ct. Kanawha County, Civil Action No. 88-AA-295 (Oct. 8, 1991). Respondent's offered reason for the reassignment, that Mr. Dean was the more senior employee and desired the run, cannot be

considered arbitrary and capricious given the evidence presented.

As to Grievant's argument that Respondent must make some exception or somehow accommodate her due to her medical condition, the short answer is that Grievant has failed to properly pursue this avenue. She has presented no information from her physician to document her claims, either to Respondent or to this Board. While Respondent may, indeed, have an obligation to extend the same treatment to Grievant as has been extended to other bus operators suffering from documented medical conditions, that obligation can only be created upon a proper showing and application for consideration. Grievant's argument on this point fails for lack of evidence at this time. However, nothing in this decision should be construed to prevent Grievant from submitting evidence of any medical condition affecting her ability to drive a standard transmission bus in the future, or from pursuing any exemption or accommodation otherwise available from Respondent.

CONCLUSIONS OF LAW

1 1.

County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer and promotion of school personnel so long as they act reasonably and not in an arbitrary and capricious manner. Dillon v. Board of Education of the County of Wyoming, 351 S.E.2d 58 (W. Va. 1986); Cawthon v. Lewis County Bd. of Educ., Docket No 21-87-244-2 (Feb. 16, 1988).

2 2.

An employee, including a bus operator, has no vested right to any particular assignment within the county school system. State ex rel. Hawkins v. Tyler County Bd. of Educ., 275 S.E.2d 908 (W. Va. 1980); Cawthon, supra.

3 3.

Grievant was transferred in compliance with W. Va. Code §18A-2-7.

4 4.

Grievant failed to prove that Respondent had an established policy or practice guaranteeing reassignment in subsequent years to an existing bus operating assignment, when bus assignments were being realigned; or that it departed from legal requirements in switching assignments between Grievant and Mr. Dean.

Accordingly, this grievance is **DENIED**.

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

Dated: December 10, 1997

_____

JENNIFER J. MEEKS **Administrative Law Judge**

Footnote: 1 *Respondent submitted a copy of the Level II decision, with a letter dated November 12, 1997, stating that it relied on that decision as its brief in this matter. As the Level II decision was already of record in this case, no ruling need be made on this late and unexpected submission.*

Footnote: 2 *Eckenrode overruled Strickland v. Kanawha County Bd. of Educ., Docket No. 95-20- 189 (Aug. 8, 1995), in part, in making this holding. Eckenrode involved a half-time Cook whose position was reduced according to staffing regulations. She was the only half-time Cook at theschool, but was not the least senior of the Cooks. Her grievance was denied, as the transfer was not arbitrary and capricious, since reduction of one half of a position at the school was required.*

Footnote: 3 *Mr. Kirk did not state that a more senior bus operator had ever previously requested to switch assignments, so any similarity between Grievant's situation and other service employees' is unclear, and any implied discrimination or favoritism argument must fail.*