CLAUDE BLANKENSHIP,

Grievant,

v.

DOCKET NO. 97-23-039

LOGAN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

This case arises from a prior Grievance Board decision, Blankenship v. Logan County Bd. of Educ., Docket No. 95-23-314 (Dec. 29, 1995), aff'd Circuit Court of Kanawha County, Civil Action No. 96-C-36-P (Nov. 4, 1996), in which Grievant protested his transfer from a 10th grade English/Language Arts position at Man High School in the Spring of 1995. The Administrative Law Judge held that the Logan County Board of Education's ("Board of Education") stated reason for transferring Grievant was arbitrary and capricious, and remanded the case to the Board of Education to determine, in its discretion, whether Grievant would have been transferred anyway for a non-arbitrary reason. The Board of Education appealed that decision, and upon receipt of the Circuit Court's Order affirming the Administrative Law Judge's decision, a hearing was held before the Board of Education to determine whether Grievant would have been transferred from his position at Man HighSchool in the Spring of 1995. The Board of Education voted at the end of that hearing to uphold Grievant's transfer, and Grievant appealed to level four on January 14, 1997. Hearing was held on March 10, 1997, and this case became mature for decision on April 15, 1997, the deadline for the parties' submission of proposed findings of fact and conclusions of law.

STATEMENT OF THE EVIDENCE

Exhibits

Jt. Ex. 1 - Logan County 94/95 Certification List

Jt. Ex. 2 - April 27, 1995 Logan County School Personnel Schedule

Jt. Ex. 3 - List of excess professional positions to be eliminated for the 1995-96 school year.

Testimony

Grievant testified in his own behalf and offered the testimony of John Myers and Brenda Skibo. The Board of Education offered the testimony of John Myers.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. Grievant is a professional educator employed by the Board of Education. Grievant is certified to teach Health and Physical Education 1-12, and English/Language Arts 7-9.

2. During the 1993-94 and 1994-95 school years, Grievant was employed as a 10th grade English/Language Arts instructor at Man High School.

3. Grievant bid for and was placed into the 10th grade position by Superintendent John Myers, pursuant to State Board of Education Policy 5202, Section 5, which provides:

> The county superintendent may assign an employee, with his/her consent, one grade higher or lower than the grade levels on the employee's certificate. The assignment shall be consistent with the specialization(s) indicated on the certificate. If no employee within the school consents to fill a specific assignment which must be filled, the county superintendent may assign an employee to the position.

4. Before Grievant accepted the position, he inquired of Superintendent Myers and Ms. Brenda Skibo, whether he would have to obtain certification to teach 10th grade in order to keep the position.

5. Grievant was informed that he would not have to obtain additional certification to remain in the 10th grade position.

6. Grievant was not interested in obtaining the necessary certification, and at no time during the two years he held this position, did he attempt to obtain the certification.

7. During the relevant time period, the Board of Education was under the control of the State Department of Education, and was under mandate to reorganize its existing system of operation.

8. As part of its plan of reorganization, in December or January of the 1994-95 school year, the

Board of Education began reviewing the needs of the schools to determine what positions could be eliminated in order to comply with the state aid formula, taking into account declining student enrollment.

9. The Board of Education met with the principals, identified positions, and went to the schools to evaluate if those positions could be reduced, while still maintaining necessary educational programs. 10. As a result of these meetings and conversations, a list was developed of all professional positions deemed excess which would be eliminated for the following 1995-96 school year. Jt. Ex. 3.

11. The Board of Education identified who held those positions, and who had the least seniority in those areas of certifications.

12. After the Board of Education identified the names of the individuals affected, it listed their seniority based on the most senior to the least senior, and decided to make all bumping, transfer and reduction decisions based on seniority.

13. One of the positions listed for elimination was the Logan East Junior High School In-School Suspension, held by Glen Adkins. He was the only In-School Suspension teacher at Logan East, so he was transferred out into the system.

14. Mr. Adkins “bumped” into the position held by Mr. Ronald Smith, who taught Basic Skills at Man High School. Applying the same principle to Mr. Smith, the Board of Education looked at his certification, which was Safety/English/Language Arts 5-12, and went down through all the people in Safety and in English/Language Arts to find if there was anybody less senior he could bump.

15. The person with the least amount of seniority in either of those fields was Ms. Rebecca Ball, who was teaching English at Man High School. Ms. Ball was certified in English/Language Arts 5-12.

16. The Board of Education does not bump or transfer personnel within schools, but county-wide by certification. It was coincidence that in this case the affected positions were all within Man High School. 17. The Superintendent initially recommended the Board of Education place Ms. Ball on reduction-in-force.

18. At Ms. Ball's reduction-in-force hearing in the Spring of 1995, she raised the issue of Grievant's certification. Based upon the Board of Education's interpretation of the pertinent provisions of Code § 18A-4-7a, it decided to rescind its decision to reduce Ms. Ball, and instead Grievant was

transferred to an English position at Logan East Junior High School.

19. It was the Board of Education's practice to transfer teachers who were not fully certified before transferring a fully certified teacher. If Ms. Ball had not brought up Grievant's certification, it would have been overlooked. But once it was brought to the Board of Education's attention, it transferred Grievant based on its understanding that a teacher without certification had to be reduced or transferred before a fully certified teacher.

DISCUSSION

The Board of Education originally transferred Grievant, relying on the provision of W. Va. Code § 18A-4-7a, which provides:

> 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 . . . [§ 18A-2-2] . . . 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 . . . (Emphasis added).

The Board of Education believed that, because Grievant did not hold certification to teach 10th grade English/Language Arts, he had to be “reduced”, or in this case, transferred,before a fully certified instructor, i.e., Ms. Ball. The Administrative Law Judge in Blankenship, supra, held that: “The highlighted portion of Code § 18A-4-7a is not applicable, because Grievant was not employed in 'a certification area to be reduced', and Grievant's position was not, in fact, reduced.” Thus, the Administrative Law Judge concluded that it was arbitrary and capricious for the Board of Education to rely upon that provision to justify Grievant's transfer in the Spring of 1995.

The Board of Education, on remand, decided that Grievant would have been transferred in the Spring of 1995 whether or not it was required under Code § 18A-4-7a, because it was in the best interests of the Board of Education to retain a teacher at Man High School who was qualified and certified to teach a broader range of subjects and grade levels than Grievant.

The Board of Education also maintains that the Administrative Law Judge in Blankenship, supra, and the Circuit Court are clearly wrong in their determination that Code § 18A-4-7a does not apply to the facts in this case. The Board of Education is, in essence, asking this Board to reconsider its

decision rendered December 29, 1995, in Docket No. 95-23-314. It has not been this Board's practice to reconsider its decisions, and this Board's procedural rules do not provide for reconsideration of its decisions. The law in West Virginia does not favor rehearing or reconsideration by administrative bodies absent explicit statutory language allowing for such, or at a minimum, agency regulations providing for such. See Atlantic Greyhound Corp. v. Public Service Commission, 132 W. Va. 650, 659-661, 54 S.E.2d 169 (1949); Hubbard v. SWCC, 295 S.E.2d 658, 666 (W. Va. 1981); Alfred S. Neely, IV, Administrative Law in West Virginia §§5.49, 5.5p (1982). This is especially true when no new evidence has been presented. See Mustard v. City ofBluefield, 130 W. Va. 763, 766-67, 45 S.E.2d 326 (1947). The Board of Education's remedy was to appeal this Board's decision to the circuit court, which it did, and thereafter to the West Virginia Supreme Court of Appeals. This matter is now out of this Board's hands. See Peters v. Raleigh County Bd. of Educ., Docket No. 95-41-035 (Mar. 15, 1995).

In a non-disciplinary matter, it is incumbent upon the Grievant to prove his case by a preponderance of the evidence. Vance v. Logan County Bd. of Educ., Docket No. 92-23- 045 (May 21, 1992). Grievant alleges the Board of Education's decision on remand is arbitrary and capricious, and violates the transfer provisions of W. Va. Code § 18A-2-7, which states:

> 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 provisions of this chapter. However, an employee shall be notified in writing by the superintendent on or before the first Monday in April if he is being considered for transfer or to be transferred, ... Any teacher or employee who desires to protest such proposed transfer may request in writing a statement of the reasons for the proposed transfer. Such statement of reasons shall be delivered to the teacher or employee within ten days of the receipt of the request. Within ten days of the receipt of the statement of the reasons, the teacher or employee may make written demand upon the superintendent for a hearing on the proposed transfer before the county board of education. The hearing on the proposed transfer shall be held on or before the first Monday in May, . . . At the hearing, the reasons for the proposed transfer must be shown. (See footnote 1)

Grievant contends that when Mr. Smith bumped into his position at Man High School, necessitating that another position at Man be eliminated, it should have been the least senior teacher in the Language Arts area of certification, and as Grievant was not the least senior, it was arbitrary and capricious to transfer him. When the Board of Education initially considered this situation at Man High School in the Spring of 1995, it was going to reduce Ms. Ball, who was the least senior teacher in the English/Language Arts area of certification. Only when Ms. Ball raised the issue of

Grievant's certification did the Board of Education change its decision and transfer Grievant instead. Superintendent Myers testified that it was the Board of Education's practice to transfer teachers who were not fully certified before transferring teachers who were fully certified. Thus, even if it had not relied on the provisions of Code § 18A-4-7a, the decision to transfer Grievant would have remained the same. Superintendent Myers admitted that the Board of Education had overlooked Grievant's lack of certification in initially deciding to reduce Ms. Ball. Once it realized its mistake, it rescinded her reduction-in-force and transferred Grievant, in accordance with its practice.

Grievant is asking this Board to hold the Board of Education bound by its original mistake in overlooking Grievant's lack of certification. Grievant argues that we must step into the shoes of the Board of Education in the Spring of 1995 to determine what it would have done. But Grievant wants time to stop at the Board of Education's initial decision to reduce Ms. Ball, and disregard the events which transpired at Ms. Ball's reduction-in-force hearing. I decline to halt time merely for Grievant's convenience. Determining what the Board of Education would have done requires a full review of the all of the events which transpired up until the point Grievant was transferred, which includes the facts known by the Board of Education at that time.

The Board of Education had found out, through Ms. Ball, that Grievant did not possess the requisite certification to teach 10th grade English/Language Arts, or any other secondary level courses at Man High School. A board of education has substantialdiscretion in matters relating to the assignment and transfer of school personnel. This discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Dillon v. Wyoming County Board of Educ., 351 S.E.2d 58 (W. Va. 1986). Reviewing the facts in this grievance, I do not find that it was arbitrary and capricious for the Board of Education to decide to transfer Grievant from Man High School, when he was not fully certified to teach secondary level courses, and it had a teacher available who could teach those classes. Clearly in light of the position the Board of Education was in when the State Board of Education took control, and the need to streamline its operations and reduce the number of personnel in its employ, it was in the best interests of the schools to retain Ms. Ball, who had certification to teach a full range of secondary level courses at Man High School, than to keep Grievant.

Grievant also argues that once he received the 10th grade teaching position, it was “permanently” his. However, as the Circuit Court Judge stated in his Order affirming Blankenship, supra, Grievant

was only afforded all rights to that position “as if selected for the position traditionally. . .”. Those “rights” did not guarantee him his position indefinitely; in this case, all Grievant could be certain of was that his position would be not be posted as long as he held it. It did not grant Grievant greater rights than regular, fully certified teachers. Specifically, it did not protect him from reductions-in-force and transfers which affect all teachers, so long as the Board of Education complied with the procedural requirements of the applicable statutes.

CONCLUSIONS OF LAW

1. In a non-disciplinary matter, it is incumbent upon the Grievant to prove his case by a preponderance of the evidence. Vance v. Logan County Bd. of Educ., Docket No. 92-23-045 (May 21, 1992).

2. A board of education has substantial discretion in matters relating to the assignment and transfer of school personnel. This discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Dillon v. Wyoming County Board of Educ., 351 S.E.2d 58 (W. Va. 1986).

3. Grievant has failed to prove by a preponderance of the evidence that the Board of Education's stated reason for his transfer from the 10th grade English/Language Arts position at Man High School in the Spring of 1995 was arbitrary and capricious.

4. Grievant has failed to prove by a preponderance of the evidence that the Board of Education violated the transfer provisions of W. Va. Code § 18A-2-7.

Accordingly, this grievance is **DENIED**.

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

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MARY JO SWARTZ

Administrative Law Judge

Dated: July 14, 1997

Footnote: 1

Grievant has not alleged any procedural violations with regard to the notice provisions of W. Va. Code § 18A-2-7.