LEFON ESTEP,

Grievant,

v. **DOCKET NO. 96-33-443**

McDOWELL COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Lefon Estep, grieves her assignment to teach first and second grade classes, (See footnote 1) alleging that it constitutes an illegal transfer, and requesting as relief instatement to her previous kindergarten teaching position and compensation. The grievance was denied at Levels I and II, and Level III was waived. The matter was appealed to Level IV, and was submitted for decision based upon the record developed at Level II. The case became mature on November 29, 1996, the deadline for proposed findings of fact and conclusions of law. It was reassigned for administrative reasons on January 30, 1997.

The following findings of fact are essentially undisputed, and are made based upon the record below: (See footnote 2)

FINDINGS OF FACT

1 1. Grievant is a teacher at Iaeger Elementary School (Iaeger), and is certified in elementary education 1-6 and multi-subjects K- 8. In School Year (SY) 1995-96, Grievant taught first grade, as did two other teachers. (Tr. p. 7.)

2 2. Changes in enrollment at Iaeger were projected to result in a lack of need for three first grade teachers, and a need for an additional kindergarten teacher for SY 1996-97. Iaeger Principal Claude Roberts asked Grievant to move from her first grade teaching position to a kindergarten teaching position for SY 1996-97, and she agreed, on March 11, 1996. (Admin. Ex. 5.) Grievant's first grade teaching position was eliminated for SY 1996-97. (Admin. Ex. 6.)

3 3. When students arrived at the beginning of SY 1996-97, it was apparent that kindergarten enrollment was less than projected, and second grade enrollment was greater than projected. Thus,

the additional kindergarten teaching position was not needed, and an additional second grade teacher was needed for SY 1996-97, in addition to other teaching reassignments.

4 4. McDowell County Board of Education (MCBOE) determined that realignment of teaching staff was necessary to reduce the number of teaching positions in kindergarten and to increase the number of teaching positions in second grade.

5 5. Grievant was asked to realign from kindergarten to a 1/2 position, with the understanding that the position would teach only second grade unless additional first grade students enrolled.

6 6. Grievant did not agree to the realignment described in Finding number 5, but taught in that position under protest. (See footnote 3) (Tr. p. 8.)

7 7. Grievant was not competitively selected to fill the 1/2 teaching position, as there was no posting of the position.

8 8. Grievant was not notified of a proposed transfer prior to the first Monday in April, 1996. (Tr. p. 7.)

9 9. There was no change in the number of teachers at Iaeger from SY 1995-96 to SY 1996-97. (Tr. p. 22.)

10 10. The financial condition of MCBOE reflects a deficit.

11 11. Grievant is not the least senior teacher at Iaeger, but was the least senior teacher in the kindergarten grade level. (Tr. pp. 8, 37-38.) The least senior teacher at Iaeger was willing to be reassigned to the 1/2 teaching position, but Grievant was not willing to take that teacher's position, (See footnote 4) so Respondent reassigned Grievant. (Tr. p. 24, pp. 38-39.)

DISCUSSION

To prevail in a non-disciplinary grievance, Grievant must prove the allegations in her case by a preponderance of the evidence. W. Va. Education and State Employees Grievance Board Procedural Rules, 156 C.S.R. 1, §4.19; Stout v. Harrison County Bd. of Educ., Docket No. 93-17-081 (Apr. 12, 1994). Grievant relies upon W. Va. Code §18A-2-7, which provides:

> 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...

Grievant asserts that a 1/2 split position requires a totally different level of teaching and a totally different method of preparation from those for kindergarten, and that this assignment therefore

constitutes a transfer. (See footnote 5) Grievant asserts she is not the least senior teacher, and she should not have been transferred without agreeing thereto, pursuant to the statute.

Respondent states that no transfer occurred. Rather, MCBOE argues it complied with the provisions of W. Va. Code §18A-4-7a, paragraph 11 in reassigning Grievant to a similar position within the same school, due to changes in student population. The pertinent part of W. Va. Code §18A-4-7a reads:

> Notwithstanding any other provision...where the total number of classroom teaching positions in an elementary school does not increase from one school year to the next, but there exists in that school a need to realign the number of teachers in one or more grade levels, kindergarten through six, teachers at the school may be reassigned to grade levels for which they are certified without that position being posted: Provided, That the employee and the county board of education mutually agree to the reassignment.

The case presented here is nearly identical to that presented in Agee v. Wayne County Bd. of Educ., Docket No. 96-50-475 (May 7, 1997). In Agee, Administrative Law Judge Swartz analyzed this Grievance Board's precedent and ruled that the grievant's reassignment to teaching kindergarten from teaching fifth grade in the same school did not constitute a transfer pursuant to W. Va. Code §18A-2-7. However, the provisions of the statute had been violated by reassigning teaching duties without obtaining the grievant's agreement. Judge Swartz ruled that the respondent violated the requirements of W. Va. Code §18A-4-7a, paragraph 11, and ordered it to instate the grievant into a fifth grade teaching position the next school year. Applying the principles discussed at length in Agee to the instant matter, it does not appear that MCBOE's action in relieving Grievant of kindergarten duties and assigning her 1/2 teaching duties constitutes a transfer within the meaning of W. Va. Code §18A-2-7. The site where Grievant works was not changed, Grievant still has a teaching position for which she is certified, and Grievant's assignment to teach a split class does not significantly change her elementary teaching duties. Blackburn v. Mingo County Bd. of Educ., Docket No. 95-29-489 (Mar. 27, 1996) (no transfer where a fifth grade teacher was assigned a 4/5 "split"). Moreover, MCBOE did not act arbitrarily or capriciously in determining that the number of kindergarten teaching positions had to be decreased, or that the number of second grade teaching positions had to be increased. See Kiser v. Kanawha County Bd. of Educ., Docket No. 95-20-541 (Apr. 30, 1996); State ex re. Melchiori v. Bd. of Educ., 188 W.Va. 575, 425 S.E.2d 251 (1992). Such a determination falls within MCBOE's sound discretion, under W. Va. Code §18A-2-9. See 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). Thus, as in Agee, Grievant here has failed to prove there was a transfer.

However, Grievant also argued that her consent was required before she could be reassigned under the provision cited by Respondent. Grievant is correct. As she did not agree to reassignment from kindergarten to the 1/2 teaching position, Respondent violated paragraph 11 of W. Va. Code §18A-4-7a. "Since Paragraph 11 is merely an exception to the posting requirements, if no mutual consent exists to the reassignment, the Board is required to either try to reassign another teacher to the position, or to post the position in accordance with Paragraph 10 of W. Va. Code §18A-4-7a." (See footnote 6) Agee at 7.

Respondent made some attempt to reassign another employee to the 1/2 position. When Grievant would not accept that other employee's sixth grade teaching assignment, Respondent abandoned its efforts to find another employee who would consent. Respondent's failed attempt does not obviate the statutory requirement to either obtain the employee's consent, or post the position. Respondent violated the statute by not obtaining consent to the reassignment, regardless of its attempts to accommodate employees, and regardless of the potential negative consequences to Grievant of following the statutory requirements for termination and posting.

As to the relief to be granted, reinstating Grievant to a kindergarten teaching position at this late date would unnecessarily disrupt both the kindergarten and second grade classrooms and students, while providing negligible, if any, benefit. Therefore, as Judge Swartz did in Agee, I decline to order reinstatement at this time. However, as Respondent did violate the applicable statutory provisions, Grievant is entitled to be instated to a kindergarten teaching position for SY 1997-98, unless she was notified of proposed transfer prior to the first Monday of April, 1997. (See footnote 7) As Grievant was employed as a teacher during the pendency of this grievance, she has suffered no monetary loss and is not entitled to any compensation.

CONCLUSIONS OF LAW

1 1. Realignment of Grievant from a kindergarten teaching assignment to a 1/2 teaching assignment during SY 1996-97 did not entail significantly different duties or responsibilities outside of Grievant's presently utilized area of certification, multi- subjects, and thus does not constitute a transfer under W. Va. Code §18A-2-7. Agee v. Wayne County Bd. of Educ., Docket No. 96-50-475 (May 7, 1997).

See also, Blackburn v. Mingo County Bd. of Educ., Docket No. 95-29-489 (Mar. 27, 1996).

2 2. W. Va. Code §18A-4-7a, paragraph 11, creates an exception to the posting requirements of paragraph 10 of that provision, which requires posting of any vacancy. Agee, supra. See Glover v. Pendleton County Bd. of Educ., Docket No. 95-36-408 (Oct. 19, 1995).

3 3. W. Va. Code §18A-4-7a, paragraph 11, requires a county board of education and an employee to mutually agree to a reassignment of teaching duties at an elementary school. Agee, supra.

4 4. As Grievant did not agree to accept the 1/2 teaching assignment at issue, she proved that the Board violated that provision of W. Va. Code §18A-4-7a.

Accordingly, this grievance is **GRANTED IN PART**, and MCBOE is hereby **ORDERED** to instate Grievant into a kindergarten teaching position at Iaeger Elementary School for the 1997-98 school year, unless she was notified of proposed transfer prior to April 7, 1997.

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

Dated: May 23, 1997 _____

JENNIFER J. MEEKS

Administrative Law Judge

Footnote: 1

This "split" teaching assignment is referred to as "1/2."

Footnote: 2

The transcript of the Level II hearing, with exhibits, was submitted at Level IV, and is referred to as "Tr. p. __" or "Admin. Ex. __," to refer to specific pages of the transcript or to specific exhibits. Grievant apparently submitted no exhibits below.

Footnote: 3 This was the proper procedure for Grievant to follow, and does not waive her right to grieve. See Blackburn v. Mingo County Board of Educ., Docket No. 95-29-489 (Mar. 27, 1996).

Footnote: 4 Apparently, this teacher taught sixth grade.

Footnote: 5 Grievant provided no evidence regarding what differences there were in teaching skills, methods or subject matter, if any. Therefore, her assertion is merely that. Moreover, Grievant originally taught first grade, which is only one grade from either the kindergarten or the second grade teaching position.

Footnote: 6 A third option is provided by W. Va. Code §18A-4-7a, paragraph 12, where the total number of teaching postions is reduced in an elementary school.

Footnote: 7 If Grievant was duly notified of proposed transfer, she could have been transferred from a kindergarten teaching position, had she held it, as legally as she could be transferred from her 1/2 teaching position. Thus, a transfer in accord with statutory procedures can occur even when Grievant is placed in the position she would have occupied absent Respondent's violation of law.