GARY McCOMIS,

Grievant,

v. DOCKET NO. 98-29-203

MINGO COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Gary McComis, alleges the Mingo County Board of Education ("MCBOE") violated W. Va. Code § 18A-4-7a when he was reduced-in-force from his Driver's Education position at Tug Valley High School ("TVHS"). He seeks as relief that his half- time position be restored, and he receive all back pay and benefits. This grievance was denied at Levels I and II, and Level III was bypassed pursuant to W. Va. Code § 18-29- 4(c). Grievant appealed to Level IV, and a Level IV hearing was held on August 19, 1998. This case became mature for decision on September 4, 1998, after receiving Grievant's proposed findings of fact and conclusions of law. (See footnote 1)

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. When he filed this grievance, Grievant was a regular, part-time employee with MCBOE with approximately six and one half years of experience. He is certified to teach Health Education, K-12, and Safety Education, 9-12. (See footnote 2)

2. When Grievant received his reduction-in-force ("RIF") notice he was employed in the morning as a half-time Driver's Education teacher at TVHS. Grievant was RIF'd for lack of need. Grievant frequently worked as a substitute teacher during the afternoons.

3. Grievant obtained this position by responding to a December 10, 1997 job posting for a regular, part-time or 17.5 hours a week position in Driver's Education. This position was posted as only for the second semester of the 1997-1998 school year.

4. TVHS has one full-time Driver's Education teacher, and another teacher currently employed full-time who is qualified to teach Driver's Education.

5. The current principal at TVHS does not see a need for an additional Driver's Education teacher for the 1998-1999 school year.

6. W. Va. Code § 18-6-2 requires an approved, comprehensive course in Driver's Education be offered in all secondary schools. Students are not required to take Driver's Education.

7. TVHS routinely limits its Driver's Education classes to senior students. If there is room in the class after the seniors sign up, then juniors are allowed to take the course. 8. No evidence was presented to demonstrate that senior students who wanted to take Driver's Education were refused for the 1998-1999 school year.

Issues and Arguments

Grievant argues his position is needed for the 1998-1999 school year, and therefore he should not be RIF'd. Grievant alleged it is possible that the requirements of W. Va. Code § 18-6-2, dealing with required Driver's Education, will be violated if he is not returned to his half-time position. MCBOE points out there is no evidence to demonstrate that W. Va. Code § 18-6-2 has been or will be violated. Further, MCBOE notes it has substantial discretion when it comes to the reduction of teachers for lack of need, and boards of education are responsible for deciding the content of the curriculum and the best way to use the resources available to them. Additionally, Respondent argues Grievant's contract was limited to the one semester of the posting only, and that he has no standing to protest MCBOE's decision to not repost the position. (See footnote 3)

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

In addition to the foregoing facts, the following provisions of W. Va. Code §§ 18-6-1, et seq., 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.**

W. Va. Code § 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.**

W. Va. Code § 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.**

W. Va. Code § 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 ofestablishing 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.**
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> **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.**

W. Va. Code § 18-6-6.

Other state statutes specify certain courses of instruction that all students are required to take. 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 eighth grade 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 . . . .**
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> **(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, ...**

It is well-settled that "[c]ounty boards of education have substantial discretion in matters relating to hiring, assignments, transferring and promotion of school personnel," as long as they exercise this discretion "reasonably, in the best interests of the school, and in a manner which is not arbitrary and capricious." Dillon v. Bd. of Educ. of Wyoming, 177 W. Va.145, 351 S.E.2d 57 (1986); Spaulding v. Mingo County Bd. of Educ., Docket No. 95- 29-357 (Jan. 31,

1996). Further, the West Virginia Supreme Court expanded the Dillonstandard "to matters involving curricular programs and the qualifications and placement of personnel implementing those programs." Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648 (1995).

The arbitrary and capricious standard of review of decisions requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may not substitute her judgment for that of the board of education. See generally, Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). Additionally, the reviewer's role is limited to determining whether relevant factors were considered in reaching the 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 at 283. 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. Generally, a board of education's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985).

Additionally, this Grievance Board, in two cases dealing with this same issue, has held it is not an abuse of discretion for a board of education to decrease the number of Driver's Education teachers. Hill v. Kanawha County Bd. of Educ., Docket No. 94-20-537 (Mar. 22, 1995), aff'd sub nom., Hill v. Raglin, No. 95-AA-106 (Circuit Court of Kanawha County, Jan. 8, 1997); Hill and Cyrus v. Kanawha County Bd. of Educ., Docket No. 96-20- 362 (Jan. 22, 1997). In fact, the Hill administrative law judge indicated it was theresponsibility of a board of education to decide when "to maintain certain courses in the curriculum while reducing the opportunities for students to partake of another course." Hill, supra.

To prevail Grievant needed to demonstrate that the decision to reduce the number of Driver's Education teachers at TVHS by a half-time position was arbitrary and capricious. He has not met this burden of proof. His belief, without proof, that Respondent might or could violate the provisions of W. Va. Code §§ 18-6-1, et seq., is insufficient to prove his case.

Vickers v. Bd. of Directors/W. Va. State College, Docket No. 97-BOD-112A (June 26, 1998); Baker v. Bd. of Directors/W. Va. Univ. at Parkersburg, Docket No. 97-BOT-359 (Apr. 30, 1998). See Harrison v. W. Va. Bd. of Directors/Bluefield State College, Docket No. 93-BOD-400 (Apr. 11, 1995). Further, MCBOE's decision to limit Driver's Education to seniors, especially with no showing that any students who wished to take the course were refused, falls within the above-identified parameters and cannot be found to be arbitrary and capricious. See Hill, supra; Hill and Cyrus, supra.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. "County boards of education have substantial discretion in matters relating to hiring, assignments, transferring and promotion of school personnel," as long as theyexercise this discretion "reasonably, in the best interests of the school, and in a manner which is not arbitrary and capricious." Dillon v. Bd. of Educ. of Wyoming, 177 W. Va.145, 351 S.E.2d 57 (1986); Spaulding v. Mingo County Bd. of Educ., Docket No. 95-29-357 (Jan. 31, 1996).

3. The West Virginia Supreme Court expanded the Dillon standard "to matters involving curricular programs and the qualifications and placement of personnel implementing those programs." Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648 (1995).

4. It is not an abuse of discretion, and is the responsibility of a board of education, to decide when "to maintain certain courses in the curriculum while reducing the opportunities for students to partake of another course." Hill v. Kanawha County Bd. of Educ., Docket No. 94-20-537 (Mar. 22, 1995), aff'd sub nom., Hill v. Raglin, No. 95-AA-106 (Circuit Court of Kanawha County, Jan. 8, 1997). See also Hill and Cyrus v. Kanawha County Bd. of Educ., Docket No. 96-20-362 (Jan. 22, 1997).

5. MCBOE's decision to decrease the number of Driver's Education teachers at TVHS by one half-time position was not arbitrary and capricious nor did it violate W. Va. Code §§ 18-6-

1, et seq. See Hill, supra; Hill and Cyrus, supra.

6. Grievant has not met his burden of proof and demonstrated that MCBOE's decision to RIF him for lack of need violated W. Va. Code § 18A-4-7a.

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.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: September 29, 1998

Footnote: 1

Grievant was represented by Mr. Sidney Fragale and Mr. Steve Angel of the West Virginia Federation of Teachers, and Respondent was represented by Superintendent John Mattern's Administrative Assistant, Mr. David Temple.

Footnote: 2

At the time of the Level IV hearing, Grievant was on the Preferred Recall List and was working as a Substitute.

Footnote: 3

Respondent's third approach to this grievance is a contractual one, and need not be addressed given the outcome of this Decision.