JULIA COLLINS, et al.,

Grievants,

v. **Docket No. 97-29-328**

MINGO COUNTY BOARD OF EDUCATION,

Respondent,

and

KATHY GROSSL,

Intervenor.

D E C I S I O N

Julia Collins, Esther Blair and Tina Grace (Grievants) allege that they were improperly released from employment by Respondent Mingo County Board of Education (MCBE) pursuant to a reduction-in force (RIF) action at the end of the 1996-97 school year. After their grievance was heard at Level II (See footnote 1) on May 15, 1997, Grievants appealed to Level IV on July 1, 1997, waiving Level III as authorized by W. Va. Code § 18-29-4(c). Thereafter, a Level IV evidentiary hearing was conducted in this Board's office in Charleston, West Virginia, on August 28, 1997. At the conclusion of that hearing, Grievantand Respondent agreed upon a schedule for submission of post-hearing written arguments. Subsequently, Kathy Grossl was granted Intervenor status in this matter in accordance with W. Va. Code § 19-29-3(u) by Order dated September 10, 1997. This matter became mature for decision on September 24, 1997, following submission of written arguments by all parties to this grievance.

The facts in this matter are essentially undisputed. Accordingly, the following findings of fact

are made from the testimony and evidence presented at Level IV.

FINDINGS OF FACT

1. Grievants were employed by Respondent Mingo County Board of Education (MCBE) as special education teachers.

2. Grievant Blair, whose seniority date is December 20, 1993, was employed as a special education teacher in a half-time position at Lenore Middle School and a half- time position at Kermit Grade School during the 1996-97 school year. Joint Exhibit A at Level IV (J Ex A).

3. Grievant Collins, whose seniority date is November 15, 1993, was employed as a full-time special education teacher at Lenore Middle School during the 1996-97 school year. J Ex A.

4. Grievant Grace, whose seniority date is July 1, 1996, was employed as a full- time special education teacher at Williamson High School during the 1996-97 school year. J Ex A.

5. In addition to holding a certification in at least one subject area as a classroom teacher, each Grievant holds special education certifications from the West Virginia Department of Education in Mild/Moderate Mentally Impaired (MMI), SpecificLearning Disabilities (SLD), and Behavior Disorders (BD). J Ex A. See State Bd . of Educ. Policy 5202, 126 C.S.R. 136 (1997).

6. Intervenor Grossl, whose seniority date is August 27, 1992, was employed by MCBE as a full-time special education teacher at Matewan Grade School during the 1996-97 school year. Intervenor Grossl is certified in MMI and SLD. J Ex A.

7. David Mollett, whose seniority date is August 25, 1986, was employed by MCBE as a full-time special education teacher at Kermit Middle School during the 1996-97 school year. Mr. Mollett is certified in MMI and SLD. J Ex A.

8. Larry Varney, whose seniority date is August 28, 1989, was employed by MCBE as a half-time special education teacher at Matewan Middle School during the 1996- 97 school year. Mr. Varney is certified in MMI and SLD. J Ex A.

9. Gordon Carter, whose seniority date is August 26, 1987, was employed by MCBE as a full-time special education teacher at Cline Grade School during the 1996-97 school year. Mr. Carter is certified in MMI and LD. J Ex A.

10. Based upon a decline in student enrollment, and a reorganization whereby certain middle schools were established, MCBE eliminated eight special education teaching positions at the end of the 1996-97 school year.

11. MCBE terminated the employment of Grievants Grace, Blair and Collins at the end of the 1996-97 school year through a reduction in force. Grievant Collins has since been reemployed by MCBE in a half-time position at Kermit Middle School. Grievant Blair is the most senior special education teacher on MCBE's preferred recall list.

12. Intervenor Grossl, Mr. Mollett, Mr. Varney, and Mr. Carter attended a meeting on April 25, 1997, with Karen Browning, MCBE's Director of Special Education. These fouremployees, and three other special education teachers, were the seven most senior special education teachers who were being displaced by the reduction in force. Accordingly, they were permitted to choose, by order of seniority, one of the seven special education positions MCBE had identified as available for the 1997-98 school year.

13. Intervenor Grossl was transferred to a full-time special education teaching position at Lenore Middle School for the 1997-98 school year.

14. Mr. Mollett was transferred to a full-time special education teaching position at Lenore Middle School for the 1997-98 school year.

15. During the 1996-97 school year there were no students at Lenore Middle School requiring instruction by a teacher holding BD certification. There were four employees assigned to special education teaching positions at Lenore Middle School during the 1996-97 school year, Grievants Blair and Collins, Ella Maynard and Stephanie Damron. Ms. Maynard holds certification in MMI, SLD and BD. Ms. Damron holds certification in MMI and SLD.

16. Although Ms. Blair was only assigned to a half-time position, MCBE had four full-time positions authorized at Lenore Middle School during the 1996-97 school year. Following the reductions in force and resultant transfers, the four special education teachers assigned to full-time positions at Lenore Middle School were Ms. Maynard, Ms. Damron, Mr. Mollett and Intervenor Grossl.

17. MCBE determined that only one special education teacher certified in BD (Ms. Maynard) would be required at Lenore Middle School, to accommodate any students requiring BD instruction who might transfer into or be identified from the student population. 18. There were no students at Lenore Middle School at the beginning of the 1997-98 school year whose primary disability was identified as BD. There were a number of students on "behavior management plans" whose primary disability was other than BD. Under state policy, those students may be taught by any special

education teacher; a BD certification is not required. At least one student requiring instruction by a teacher with BD certification transferred into Lenore Middle School after the beginning of the 1997-98 school year. That student is being taught by Ms. Maynard.

19. None of the transferred employees who lack BD certification are teaching students whose primary identified disability is BD.

20. Mr. Varney was transferred to a full-time itinerant special education teaching position at Matewan High School for the 1997-98 school year. There were a total of three full-time special education positions at Matewan High School during the 1996-97 and 1997- 98 school year.

21. Mr. Carter was transferred to a part-time special education teaching position at Cline Grade School for the 1997-98 school year. The position to which Mr. Carter was transferred had been a full-time special education position during the 1996-97 school year.

22. When posting vacant special education positions for the 1996-97 and 1997- 98 school years, it has been MCBE's policy to require certification in MMI, SLD and BD, in order to accommodate the changing needs of an itinerant student population. Likewise, MCBE has historically encouraged its special education teachers to obtain certification in MMI, SLD and BD.

DISCUSSION

As a RIF action does not involve a disciplinary matter, Grievants have the burden of proving the allegations in their complaint by a preponderance of the evidence. W. Va. Educ. & State Employees Grievance Bd. Procedural Rule 4.19, 156 C.S.R. 1 (1996); Jackson v. Monroe County Bd. of Educ., Docket No. 96-31-208 (Aug. 29, 1996); Rader v. Webster County Bd. of Educ., Docket No. 96-51-049 (July 31, 1996). See W. Va. Code § 18-29-6.

W. Va. Code § 18A-4-7a provides, in pertinent part:

> 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 section two [18A-2-2], article two 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: Provided, however, That an employee subject to release shall be employed in any other professional position where such employee is certified and was previously employed or to any lateral area for which such employee is certified and/or licensed, if such employee's seniority is greater than the seniority of any other employee in that area of certification and/or licensure: Provided further, That, if an employee subject to release holds certification and/or licensure in more than one lateral area and if such employee's seniority is greater than the seniority of any other employee in one or more of those areas of certification and/or licensure, the employee subject to release shall be employed in the professional position held by the employee with the least seniority in any of those areas of certification and/or licensure.

Grievants contend that, although they had less seniority than other special education teachers, MCBE should have retained them in their positions because they had superior certifications to the teachers who displaced them. However, § 18A-4-7a specifically requires that more senior teachers displace less senior teachers in the event of a RIF. While Grievants hold certifications that the teachers who displaced them do not, such certifications are not required to perform the duties of the positions in question. SeeRamey v. Mingo County Bd. of Educ., Docket No. 97-29-293 (Sept. 19, 1997). The record indicates that one special education teacher with BD certification is adequate to address the current and anticipated BD student population at Lenore Middle School where Grievants Blair and Collins had been assigned.

In any event, county school administrations and county boards of education must make decisions on which employees are to be retained or displaced based on the information available regarding requirements and vacancies as of the first Monday in April, and the first Monday in May, the statutory deadlines set forth in W. Va. Code § 18A-2-7. See State ex rel. Bd. of Educ. v. Casey, 176 W. Va. 733, 349 S.E.2d 436 (1986). See generally, Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979). At the time MCBE determined that BD certification would not be required of more senior special education teachers being transferred to Lenore Middle School, there were no students assigned to Lenore who required instruction by a teacher holding that certification.

Grievants correctly note that when special education teaching positions are created or become vacant, MCBE posts those positions as requiring certification in MMI, BD and LD. However, MCBE has substantial discretion when establishing the qualifications for a position at the time of posting. See Cowen v. Harrison County Bd. of Educ., 196 W. Va. 377, 465 S.E.2d 648 (1995); Mounts v. Mingo County Bd. of Educ., Docket No. 96-29-479 (June 27, 1997); Bailey v. Mingo County Bd. of Educ., Docket No. 95-29-346 (Feb. 21, 1996); Spaulding v. Mingo County Bd. of Educ., Docket No. 95-29-357 (Jan. 31, 1996). MCBE likewise has certain discretion in determining the certifications which employees must have in order to "bump" less senior employees during a RIF. Thus, MCBE might have determined that a BD certification was necessary to displace one of Grievants. However, Grievants failed to demonstrate that MCBE abused its discretion, or acted in an arbitrary and capricious manner, under the circumstances presented by this grievance. See Crum v. Mingo County Bd. of Educ., Docket No. 95-39-224 (Feb. 9, 1996).

It is understandable that Grievants believe they have been misled by MCBE inasmuch as they obtained additional certifications in special education as they were encouraged to do. Nonetheless, additional certifications do not necessarily translate into higher tenure status under W. Va. Code § 18A-4-7a. MCBE normally requires certification in three areas of special education, MMI, SLD, and BD, when setting the minimum qualifications for a teaching vacancy. Thus, as MCBE Superintendent Everett Conn testified at Level IV, when future special education positions are posted, Grievants will have an advantage because, in addition to holding preferred recall status, they hold all three certifications normally specified in MCBE's special education teacher postings.

Grievants also contend that the full-time position received by Mr. Varney and the half-time position received by Mr. Carter were "new positions" which should have been posted in accordance with W. Va. Code § 18A-4-7a. MCBE maintains that the full-time position existed, but had only been filled on a half-time basis. The other position was reduced from a full-time position to a half-time position as part of the RIF process. It is certainly anomalous that Mr. Varney moved from a half-time teaching position to a full-time teaching position in the course of a RIF. Nonetheless, MCBE established that all seven more senior employees, including Mr. Carter and Mr. Varney, were transferred to positions where they held appropriate certification to perform all essential duties. Moreover, each Grievant has less seniority than either Mr. Varney or Mr. Carter, and Grievants were properly reduced in force. Therefore, Grievants, who were not eligible to transfer to anyof the seven vacant positions, do not have standing to challenge the transfers of Mr. Varney and Mr. Carter.

In addition to the foregoing discussion, the following conclusions of law are appropriate in this matter:

CONCLUSIONS OF LAW

1. As a RIF action does not involve a disciplinary matter, Grievants have the burden of proving the allegations in their complaint by a preponderance of the evidence. W. Va. Educ. & State Employees Grievance Bd. Procedural Rule 4.19, 156 C.S.R. 1 (1996); Jackson v. Monroe County Bd. of Educ., Docket No. 96-31-208 (Aug. 29, 1996); Rader v. Webster County Bd. of Educ., Docket No. 96-51-049 (July 31, 1996). See W. Va. Code § 18-29-6.

2. County boards of education have substantial discretion in matters relating to the hiring,

assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986). See Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648 (1995).

4. County boards of education are required to place an employee subject to a RIF into a position for which he or she is certified, if he or she is more senior than the teacher then holding that position. W. Va. Code § 18A-4-7a. See Crum v. Mingo County Bd. of Educ., Docket No. 95-29-224 (Feb. 9, 1996).

5. Grievants, certified in special education including MMI, SLD, and BD, failed to demonstrate that MCBE acted in an arbitrary and capricious manner or abused its discretion when it transferred more senior special education teachers holding specialeducation certifications in MMI and SLD to positions that did not require certification in BD to perform the essential duties of the positions.

6. Grievants failed to establish that they were more senior than any of the MMI and SLD certified special education teachers who were retained by MCBE. Thus, they were not eligible to "bump" any such teachers when MCBE properly reduced the total number of special education teachers in its employ.

7. Grievants failed to prove a violation of W. Va. Code § 18A-4-7a with respect to their RIF.

Accordingly, the grievance is **DENIED**.

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

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: January 28, 1998

Footnote: 1

The Level II transcript does not contain any evidence or testimony, only a discussion of the parties' respective positions. Grievants and Respondent reached an understanding that, if no Level II decision was issued by June 30, 1997, Grievants were free to proceed to the next level of the grievance procedure. MCBE never issued a Level II decision.