ALVIN WATTS,

Grievant,

v. **Docket No. 98-22-348**

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Alvin Watts, states the Lincoln County Board of Education ("LCBOE") violated W. Va. Code § 18A-4-8b when it placed him in a position for which he did not apply. He seeks as relief to be returned to his former position. This grievance was denied at Level II and was appealed to Level IV on September 9, 1998. The case was submitted on the record developed below, and the parties' proposed Findings of Fact and Conclusions of Law were received by October 1, 1998, the date this case became mature for decision. (See footnote 1) LCBOE's attorney, Mr. Erwin Conrad, stated in his submissions that he became involved in the case after Level II, that LCBOE was not represented at Level II, and he would have requested a Level IV hearing if he had received the file from LCBOE's former attorney in a timely manner and before the response date. Nevertheless, he did not make a request for a Level IV hearing. (See footnote 2) The evidence in this case is sparse, and in their submissions both parties stated facts not in evidence from the lower level record. Additionally, Ms. Mitter attached a copy of an LCBOE policy to her submission that was not previously admitted below. In the interest of clarity, the substantially identical Findings of Fact proposed by both parties were treated as stipulations. In the interest of fairness, the Board Policy was not considered, as LCBOE did not have a chance to present additional evidence.

The following Findings of Fact are derived from the record below and the parties' submissions.

Findings of Fact

1. Grievant has been a bus operator with LCBOE for many years and has the most seniority in the county.

2. In the Spring of 1998, he received a timely notice that his position was being eliminated

because of decreased student enrollment and the need to reconfigure bus routes. Grievant was placed unassigned on the transfer list, as his seniority entitled him to a position.

3. Grievant drove approximately five special education students, and when the routes were reconfigured, these students were placed on the runs of other drivers.

4. Grievant asked for and received a transfer hearing, and after this hearing LCBOE voted to uphold the transfer.

5. The least senior bus operator, Jeff Dyer, was reduced in force ("RIF") from his position to ensure Grievant would have a position. 6. Sometime during the Summer, the position at issue was posted, and Grievant was sent a notice of the posting as well as a bid sheet.

7. Mr. Dyer's run was considered one of the worst runs in the county.

8. Grievant did not apply for this run because as he stated, "I took the position if they were going to do away with my run and assign me somewhere, they could assign me, I wasn't going to ask for something that I didn't want."

9. Mr. Dyer applied for the run.

10. At some time unclear from the record, LCBOE transferred Grievant into the vacant posted position, as there were no other vacant bus runs in the county, and Grievant's seniority entitled him to employment.

11. LCBOE does not have a policy which requires transfers be conducted according to seniority.

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.

Grievant argues he cannot be placed in a posted position for which he did not apply, and LCBOE is required to fill the position from the applicant pool. He relies on the case of Scott v. Mason County Bd. of Educ., Civil Action No. 93-C-195 (Sept. 17, 1993). This reliance is misplaced. Scott involved the posting of a position for professional educators and focused on the judge's interpretation of W.

Va. Code § 18A-4-7a. Although not cited by the parties as relevant, it would appear appropriate for clarity to distinguish this case from the case of Webster v. Johns, 191 W. Va. 664, 447 E.S.2d 599 (1994). Syllabus Point 2 of Johns states in pertinent part:

> [A] board of education clearly exceeds its discretion in assigning an individual to a newly-created service personnel position who did not apply for the position, but was otherwise qualified for the opening, when another individual, holding the necessary qualifications and superior seniority, applied for the position.

This present grievance differs from the directions given in Johns in three ways:

1) the position at issue was not a newly created position;

2) the assigned individual in Johns was not on transfer due to elimination of the position; and more importantly;

3) the assigned individual in this case was the most senior bus operator in Lincoln County and was entitled by this seniority to remain employed.

However, this case is somewhat analogous to Board of Education of Kanawha v. Casey and Gillespie, 176 W. Va. 733, 349 S.E.2d 432 (1986). In that case a secondary principal's school was closed and a position was eliminated. The West Virginia Supreme Court of Appeals directed the board of education to notify and release the least senior secondary principal and to place the more senior principal from the closed school in the position. The board of education was required to transfer the more senior employee into the position vacated by the RIF of the least senior employee. See Quinn v. W. Va. Northern Community College, 197 W. Va. 313, 475 S.E.2d 405 (1996).

The outcome of this case is also guided by W. Va. Code § 18A-2-7, relating to service personnel transfers, and subsequent placement, not by posting requirements. Transfers of school service personnel are governed by this Code Section, 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 provisions of this chapter. . . .

This power to transfer employees must be exercised reasonably and in the best interests of school systems 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).

As previously stated, W. Va. Code § 18A-2-7 grants broad discretion to a superintendent, and gives him the authority to transfer school personnel subject only to the approval of the board. Post v.

Harrison County Bd. of Educ., Docket No. 89-17-355 (Feb. 20, 1990). Further, employees have no right to be assigned to a particular position, and transfers are not based on seniority, but are based on the needs of the school system, as decided in good faith by the superintendent and the board. Hawkins, supra; Post, supra. See Jochum v. Ohio County Bd. of Educ., Docket No. 91-35-396 (Jan. 31, 1992). The standard of review in a transfer is stated in Dillon v. Board of Education of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (W. Va. 1986). 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 schools, and in a manner which is not arbitrary and capricious." Id. The West Virginia Supreme Court has stated that boards of education have "great discretion . . . to transfer and assign [personnel] to designated schools and [the West Virginia Supreme] Court will not interfere with the exercise of that discretion where such action is taken in good faith for the benefit of the school system andis not arbitrary." Hawkins supra. Thus, whether a transfer was properly conducted is judged by the arbitrary and capricious standard, in the absence of a county policy requiring seniority be considered. Lester v. McDowell County Bd. of Educ., Docket No. 93-33-256 (Jan. 31, 1994); See also Hawkins, supra; LeMastus v. Wyoming County Bd. of Educ., Docket No. 55-87-290-4 (Mar. 23, 1988); Tenny v. Barbour County Bd. of Educ., Docket No. 01-87-166-2 (Nov. 13, 1987).

"Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. See Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996). While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education. See generally, Harrison v. Ginsberg, 286 S.E.2d 476, 283 (W. Va. 1982)." Trimboli, et al. v. Dept. of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). The undersigned Administrative Law Judge does not find LCBOE's action to be arbitrary and capricious. Grievant's run was eliminated, the least senior bus operator was RIF'd from his position, and Grievant was placed in the vacant position.

Grievant also appears to argue he should not be placed in a less desirable run because of his

seniority. This Grievance Board has consistently rejected the notion that W. Va. Code § 18A-4-8b mandates that transfers necessitated by a reduction-in-force orlack of need be based on seniority. See, e.g., Wellman v. Mercer County Bd. of Educ., Docket No. 95-27-327/300 (Nov. 30, 1995); Gonzales v. Harrison County Bd. of Educ., 91- 17-227 (Dec. 31, 1991); Norman v. Greenbrier County Bd. of Educ., Docket No. 90-13-345 (Nov. 30, 1990); McClure v. Kanawha County Bd. of Educ., Docket No. 20-88-131 (Oct. 24, 1988). "While [W. Va. Code § 18A-4-8b] provides that '[a]ll decisions by county boards concerning reduction in work force of service personnel shall be made on the basis of seniority, as hereinafter provided,' the remaining language makes no mention of transfers. See, Wellman, supra." Eckenrode v. Kanawha County Bd. of Educ., Docket No. 96-20-302 (Jan. 22, 1997). Nothing in W. Va. Code § 18A-2-7, or any other portion of that chapter, speaks to the use of seniority as a basis in determining which employees shall be transferred, or allows a senior employee to select the position he wants when his position is eliminated and he is transferred. See Eckenrode, supra; Gillespie, supra.

Grievant also asserted his transfer was the result of age discrimination. This issue was not argued or discussed, nor was there any evidence presented to support this belief. Mere allegations alone without substantiating facts are insufficient to prove a grievance. Vickers v. Bd. of Directors/W. Va. State College, 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).

Additionally, it must be noted that the relief requested by Grievant could not be granted in any event. No evidence was presented to demonstrate Grievant's former run is still needed, and thus LCBOE's decision to eliminate the run must stand.

The above-discussion will be supplemented by the following Conclusions of Law.

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. Grievant has failed to demonstrate LCBOE violated any statute, rule, or regulation in his transfer and subsequent placement.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Lincoln 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: November 30, 1998

Footnote: 1

Grievant was represented by Anita Mitter from the West Virginia Education Association, and LCBOE was represented by Attorney Erwin Conrad.

Footnote: 2

Mr. Conrad consolidated his argument in this case with his proposed submissions for Dyer v. Lincoln County Board of Education, Docket No. 98-22-347, but neither party asked for the grievances to be consolidated. Since in his submissions Mr. Conradexpressed the opinion that consolidation would be against the best interest of Grievant, and since Ms. Mitter did not ask for consolidation, these cases were not joined.