**BARBARA FUGITT,**

**Grievant,**

**v. Docket No. 97-29-365**

**MINGO COUNTY BOARD OF EDUCATION,**

**Respondent,**

**and**

**MARCIA NEW,**

**Intervenor.**

## D E C I S I O N

**Grievant, Barbara Fugitt, alleges her "[i]n-building transfer is a violation of WV Code 18A-4-7a and 18A-2-7." She seeks as relief to have the transfer rescinded and to be placed either in a fourth grade position at Riverside Elementary or a fifth grade position at Williamson Middle School. This grievance was denied at Levels I and II and waived at Level III. This grievance was then filed at Level IV, and a Level IV hearing was held on October 15, 1997. This case became mature for decision on November 10, 1997, the deadline for the parties' proposed findings of fact and conclusions of law.**

**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. Grievant has been a teacher at Riverside Elementary ("RE") for a number of years. She has over twenty-nine years of seniority with the Mingo County Board of Education ("MCBOE").**

**2. Intervenor Marcia New has been a teacher a RE for several years, and has approximately 24 year of seniority with MCBOE.**

**3. During the 1996-1997 school year, Grievant taught the fifth grade, just as she had for many years.**

**4. In either February or March of 1997, Grievant was notified by her building principal, Ms. Deborah Harris, that the fifth grade would be moved to Williamson Middle School ("WMS").**

**5. Ms. Harris became the principal at RE before the start of the 1995-1996 school year. She instituted many changes at RE, and Grievant was not pleased with many of these new suggestions, directions, and methods.**

**6. Knowing this state of affairs existed for several of the teachers at RE, Principal Harris encouraged teachers who were uncomfortable with the direction in which she was taking the school to apply for these fifth-grade positions outside RE, as the changes she was instituting would continue.**

**7. Grievant did not apply for the fifth grade positions at WMS because she was "satisfied at RE," and she believed her seniority rights required Principal Harris to place her in a fourth grade position at RE. Because of her seniority, it was highly likely Grievant would have received one of the WMS fifth grade positions, if she had applied. 8. Grievant did not discuss her beliefs or thinking with Principal Harris, but did ask her Representative, Mr. Bob Morgenstern, to write a letter to Principal Harris. This May 1997 letter stated Grievant wished to exercise her seniority rights for placement into a fourth grade position at RE.**

**9. During the 1996-1997 school year, there were three, fourth grade teachers at RE. For the 1997-1998 school year, RE needed only two, fourth grade teachers.** (See footnote 1) **The least senior fourth grade teacher was made a floating teacher and was assigned to cover in various classrooms during planning periods.**

**10. The number of teachers at RE for the 1997-1998 school year was decreased, and the least senior teacher, who had taught in the second grade, was transferred to another school.** (See footnote 2)

**11. Principal Harris discussed the situation with Assistant Superintendent Johnny Fullen and asked if she was required to place Grievant in a fourth grade position. Principal Harris was pleased with the performance of the two fourth grade teachers, and the test scores received by their students. Mr. Fullen indicated Principal Harris was not required to place**

**Grievant in a certain position, and indicated the best interest of the studentsshould direct her decisions. He also directed Principal Harris to W. Va. Code § 18A-2-9 which states a principal is responsible for the administrative, instructional, and supervisory duties within her school. Principal Harris did not think it was in the best interest of the school and students to place Grievant in the fourth grade position**

**12. During the last week of the 1996-1997 school year, Principal Harris notified Grievant she would be teaching in a second grade position.**

**13. Grievant accepted the second grade position under protest.**

## Discussion

**Grievant first alleges her assignment to the second grade class was a transfer and such a transfer was a violation of W. Va. Code § 18A-2-7, specifically, the notification requirements of that Section, which provide:**

> **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. . . .**

**There is no dispute that Grievant was not notified or put on transfer in the preceding Spring of the 1996-1997 school year. The Board contends that Grievant's assignment was not a transfer under W. Va. Code § 18A-2-7.**

**In Matthews v. Preston County Bd. of Educ., Docket No. 39-88-239 (July 27, 1989), it was held that "a transfer may consist of the reassignment of an employee to a different position, a different location or significantly different duties or responsibilities. The addition of similar duties does not constitute a transfer." Id. at Conclusions of Law 1 & 2. In Dunleavy v. Kanawha County Bd. of Educ., Docket No. 20-89-008 (Feb. 23, 1989), it washeld that "schedule adjustments which do not include duties outside of an employee's presently utilized area of certification, discipline or department . . . [are generally not] assignments amounting to a transfer . . .." Id. at Conclusion of Law 1, citing VanGilder v. Mineral County Bd. of Educ.,**

**Docket No. 27-87-320-2 (June 16, 1988). In order for Grievant's assignment to be a transfer, she must be assigned significantly different duties or responsibilities outside her presently utilized area of certification, discipline, or department. Agee v. Wayne County Bd. of Educ., Docket No. 96-50-475 (May 7, 1997).**

**Additionally, the above-stated general principles must be applied to the particular facts of this case. See Kidd v. Fayette County Bd. of Educ., Docket No. 89-10-452 (Dec. 14, 1989). A professional employee is not entitled to a particular assignment or transfer, and transfers do not have to be based on seniority. State ex. rel. Hawkins v. Tyler County Bd. of Educ., 275 S.E.2d 908 (W. Va. 1980). Further, county boards of education are not required to post grade-specific elementary teaching positions, and an employee who is hired as an elementary school teacher is not entitled to any specific grade assignments within an elementary school. Pascoli v. Ohio County Bd. of Educ., Docket Nos. 91-35- 229/239 (Nov. 27, 1991). Elementary education teachers are certified and qualified to teach any elementary grade and are, therefore, interchangeable. These positions require no specific criteria or skills and elementary certification qualifies all holders to teach in all of the designated grade areas, usually 1-6, or K-8. Id.**

**Grievant is certified in elementary education. She has been employed by MCBOE for many years, and taught most of those years in the fifth grade. It is clear Grievant is certified to teach any level in the elementary school setting, and she did not claim herduties as an elementary education teacher have changed significantly as a result of her assignment to teach the second grade.**

**Grievant has not demonstrated that she has been assigned significantly different duties or responsibilities outside her presently utilized area of certification, discipline or department, i.e., elementary education. Thus, Grievant's reassignment to the second grade position in the same school does not constitute a transfer. See Blackburn v. Mingo County Bd. of Educ., Docket No. 95-29-489 (Mar. 27, 1996).**

**Grievant's second argument is she is entitled to the fourth grade position by her seniority. She assumed Principal Harris was legally required to place her in a fourth grade position because of this seniority. As previously stated, this contention is incorrect. Positions in elementary schools are not grade specific. Pascoli, supra. Further, professional educators are**

**not entitled to a specific assignment because of seniority. See Kidd, supra. Seniority entitles a teacher to retain employment in an area of certification, but does not restrict transfers and placements unless the county board of education has adopted a specific rule granting this benefit. No evidence was admitted that indicated MCBOE had created such a rule.**

**Grievant's third argument is that MCBOE violated W. Va. Code § 18A-4-7a because she did not agree to the second grade position and only accepted it under protest. Paragraphs 11 and 12 of W. Va. Code § 18A-4-7a provide the following information about RIF's and transfers in elementary schools.**

> **Notwithstanding any other provision of the code to the contrary, 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 gradelevels 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.**
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> **When the total number of classroom teaching positions in an elementary school needs to be reduced, such reduction shall be made on the basis of seniority with the least senior classroom teacher being recommended for transfer: Provided, That a specified grade level needs to be reduced and the least senior employee in the school is not in that grade level, the least senior classroom teacher in the grade level that needs to be reduced shall be reassigned to the position made vacant by the transfer of the least senior classroom teacher in the school without that position being posted: Provided, however, That the employee is certified and/or licensed and agrees to the reassignment.**

**This Code Section allows an elementary school to realign its teaching staff without posting and provides continuity to elementary students and the school. This Section is a posting exception, and as such, is a benefit to elementary school teachers.**

**The total number of classroom teaching positions at RE did not increase from the 1996-1997 school year to the 1997-1998 school year, it decreased. Additionally, there was also a need to realign the number of teachers in the fourth grade. Further, a situation occurred which appears not to be covered by this Code Section; the fifth grade was moved to another school, and Grievant, one of the fifth grade teachers, elected not to move.**

**The first two situations are spoken to in the statute and were resolved according to the statute's language. These changes did not involve Grievant, and were not contested by her.**

**Since the number of positions was decreased, the least senior teacher at RE was transferred to another school. This transfer left a vacancy in the second grade. Also, there was a need to realign the number of fourth grade teachers, so the third, fourth gradeteacher, who was least senior of the fourth grade teachers, was placed in a "floating teacher position."** **(See footnote 3)**

**Grievant was then placed in the second grade position left vacant by the transfer of the least senior teacher at RE. This should have worked out well. Grievant was allowed to remain where she was "satisfied", even though the fifth grade was no longer at that school, and she was placed in an elementary position for which she was certified and qualified. However, she argues MCBOE was required to place her in the fourth grade position.**

**The fact specific situation involving Grievant's placement is not covered by the above-cited Code Section, thus, it must be judged by the arbitrary and capricious standard. The arbitrary and capricious standard of review 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 decision-maker. See generally, Harrison v. Ginsberg, 286 S.E.2d 276 (W. Va. 1982). Generally, an action by a board of education is considered arbitrary and capricious if the decision-maker did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem or situation, 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). See Snodgrass v. Kanawha County Bd. of Educ., Docket No. 97-20-255 (Mar. 19, 1998). It was not arbitrary and capricious for Principal Harris to place Grievant in the vacant second grade position instead of requiring a teacher who had taught the fourth grade the year before to change, especially since an employee hired as an elementary school teacher is not entitled to any specific grade assignment within an elementary school. Pascoli v. Ohio County Bd. of Educ., Docket Nos. 91-35-229/239 (Nov. 27, 1991). Principal Harris' decision resulted in requiring Grievant to prepare for a new grade level, which is exactly what Grievant would have needed to do, even if she had received the fourth grade position. If Principal Harris had moved Ms. New to the second grade, Ms. New would have to prepare for a new grade level, and Grievant would also be required to prepare**

**for a new grade level. Additionally, Principal Harris would have had to move a teacher who was performing well in her current position. This decision was not arbitrary and capricious. Further, MCBOE's decision to support Principal Harris' decision was not arbitrary and capricious as it made sense in light of the specific facts of the case.**

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

**Conclusions of Law**

**1. As this is a non-disciplinary grievance, the grievant has the burden of proving her case 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. The realignment of Grievant from a fifth grade teaching assignment to a second grade teaching assignment during school year 1997-1998 did not entail significantly different duties or responsibilities outside of Grievant's presently utilized areaof certification, elementary education, and thus does not constitute a transfer under W. Va. Code § 18A-2-7. See Blackburn v. Mingo County Bd. of Educ., Docket No. 95-29-489 (Mar. 27, 1996); Kidd v. Fayette County Bd. of Educ., Docket No. 89-10-452 (Dec. 14, 1989); Matthews v. Preston County Bd. of Educ., Docket No. 39-88-239 (July 27, 1989); Dunleavy v. Kanawha County Bd. of Educ., Docket No. 29-89-008 (Feb. 23, 1989).**

**3. W. Va. Code § 18A-4-7a, ¶ ¶ 11 and 12 do not cover the facts specific to this case as they relate to Grievant.**

**4. Situations such as these, which are not covered by a specific section of the Code are judged by the arbitrary and capricious standard. The arbitrary and capricious standard of review 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 decision-maker. See generally, Harrison v. Ginsberg, 286 S.E.2d 276 (W. Va. 1982). Generally, an action by a board or employer is arbitrary and capricious if the decision-maker did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem or situation, 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). See Snodgrass v. Kanawha County Bd. of Educ., Docket No. 97-20-255 (Mar. 19, 1998).**

**5. MCBOE's decision to place Grievant in the second grade teaching position at RE, given the specific facts of this situation, is not arbitrary and capricious.**

**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: April 9, 1998**

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***Footnote: 1***

***The testimony was unclear whether there was also a three/four split class. This possibility was mentioned at the Level II hearing held during the Summer as the plan for the coming school year. The testimony at Level IV, did not indicate there was a three/four split at the time of the hearing, and Grievant testified there were only two fourth grade teachers.***

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***Footnote: 2***

***It is unclear what happened to the teachers who had previously taught the fifth grade at RE. Additionally, two other teachers received transfer notices, but these transfers were rescinded sometime in March before they were finally acted on by MCBOE. One of the teachers who received a rescinded transfer letter was Intervener New who had twenty- four years of seniority.***

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***Footnote: 3***

***Grievant could have argued that she should have been placed in this position, but she did not.***