

**THERESA GRANT,**

**Grievant,**

**v.**

**Docket No. 00-06-252**

**CABELL COUNTY BOARD OF EDUCATION,**

**Respondent.**

### **DECISION**

Theresa Grant (“Grievant”) initiated this proceeding on May 31, 2000, alleging her transfer from Huntington High School to Cabell-Midland High School violated provisions of W. Va. Code §§ 18A-2-7 and 18-29-2. She seeks reinstatement to her position. The grievance was denied at level one on June 9, 2000. A level two hearing was held on June 26, 2000, followed by a written decision, denying the grievance, dated July 24, 2000. Level three consideration was waived, and Grievant appealed to level four on July 31, 2000. The parties elected to submit this matter for a decision based upon the record developed below, supplemented by proposed findings of fact and conclusions of law. [\(See footnote 1\)](#) This grievance became mature for consideration upon receipt of Respondent's fact/law proposals on August 18, 2000. [\(See footnote 2\)](#)

The following findings of fact are made from a preponderance of the evidence of record.

### **Findings of Fact**

1. Grievant is employed as a classroom teacher by Respondent Cabell County Board of Education (“CCBOE”). During the 1999-2000 school year, Grievant was assigned to teach English and Yearbook at Huntington High School. She is certified in English 7-12 and Journalism 7-12. Grievant has 14 years of seniority.
2. Due to declining enrollment, CCBOE voted to implement a reduction in force (“RIF”) for the 2000-2001 school year. The RIF was to include 18 teaching positions at Huntington High School which would be eliminated.
3. Grievant's “English/Yearbook” position at Huntington High School required her to teach one block of English and two blocks of Yearbook.
4. Huntington High School Principal Jerry Lake recommended that Grievant's English class and one block of Yearbook be eliminated for the 2000-2001 school year. He also recommended that her remaining Yearbook class be assigned to Camelia Hale. Ms. Hale is more senior than Grievant, is

certified in Language Arts 7-12, and teaches English and Newspaper at Huntington High School.

[\(See footnote 3\)](#)

5. Mr. Lake recommended that Grievant's English and Yearbook classes be eliminated, because they had historically served a smaller number of students than most other classes at Huntington High School. Additionally, Yearbook is not a required course.

6. CCBOE voted to accept Mr. Lake's recommendation on May 1, 2000, and Grievant was notified of her RIF on May 3, 2000. 7. Becky Sturm was employed by CCBOE as an English teacher at Cabell Midland High School during the 1999-2000 school year. She is certified in Language Arts 7-12 and has eight years of seniority.

8. Ms. Sturm was identified by CCBOE officials as the least senior teacher in either of Grievant's areas of certification. Accordingly, she was "bumped," and Grievant was placed in her position for the 2000-2001 school year.

9. Also as part of the proposed RIF for 2000-2001, Mr. Lake recommended that another English teaching position, held by Mary Jane Mason, be eliminated. Ms. Mason has less seniority than Grievant and teaches only English classes.

10. Due to the retirement of another English teacher at Huntington High School, Ms. Mason's position was not eliminated.

### **Discussion**

Grievant bears the burden of proving the elements of her grievance by a preponderance of the evidence. Tibbs v. Mercer County Bd. of Educ., Docket No. 96-27-074 (Oct. 31, 1996). Grievant contends that her transfer was the result of reprisal and discrimination. She believes that Respondent should have proceeded with Ms. Mason's transfer, even after the retirement of a more senior English teacher, because this would have eliminated one English teaching position at Huntington High School. CCBOE contends that this would not have changed the decision to eliminate Grievant's position, because her Yearbook classes were identified as being easily reduced/eliminated, due to their lower enrollment. Thus, although CCBOE did need less English teaching positions, it also saw an opportunity to meet its goal of eliminating 18 positions at Huntington High School by condensing its Yearbook program, necessitating Grievant's transfer.

"County boards of education have broad discretion in personnel matters, including transfers, but

must exercise that discretion in a manner which is not arbitrary or capricious." Dodson v. McDowell County Bd. of Educ., Docket No. 93-33-243 (Feb. 15, 1994). The Supreme Court of Appeals of West Virginia has "repeatedly held that the power to transfer teachers must be exercised in a reasonable manner and in the best interests of the school." Townshend v. Bd. of Educ. of County of Grant, 183 W. Va. 418, 396 S.E.2d 185, 188 (1990). See Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986).

The evaluation of a personnel decision under the arbitrary and capricious standard entails close examination of the process used to make the decision. Considerable deference must be afforded the professional judgment of those who made the decision. Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648 (1995). Baird v. Kanawha County Bd. of Educ., Docket No. 95-20-445 (Sept. 16, 1996). "In applying the 'arbitrary and capricious' standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that 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, 169 W. Va. 162, 286 S.E.2d 276 (1982). 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." Hill and Cyrus v. Kanawha County Bd. of Educ., Docket No. 96-20-362 (Jan. 30, 1997).

Transfer decisions "are based on the needs of the school, as decided in good faith by the superintendent and the board. Hawkins v. Tyler County Bd. of Educ., 166 W. Va. 363, 275 S.E.2d 592 (1979) and Post [v. Harrison County Bd. of Educ.], Docket No. 89-17-355 (Feb. 20, 1990)]. See Jochum v. Ohio County Bd. of Educ., Docket No. 91-35-396 (Jan. 31, 1992)." Stewart, et al., v. Kanawha County Bd. of Educ., Docket No. 96-20-370 (Jan. 31, 1997). Classroom teachers have no vested right to be assigned to a particular school in the county. Hawkins, *supra*. 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 [supra]." Stewart, *supra*.

As stated above, Grievant believes her transfer was the result of reprisal, due to a grievance she filed in recent years. W. Va. Code § 18-29-2(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." A grievant claiming retaliation may establish a prima facie case of reprisal by establishing:

(1) that she engaged in protected activity, e.g., filing a grievance;

(2) that she was subsequently treated in an adverse manner by the employer or an agent;

(3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and

(4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Fareydoon-Nezhad v. W. Va. Bd. of Trustees/Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its actions. See Mace v. Pizza Hut, Inc., 377 S.E.2d 461 (W.Va. 1988); Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 309 S.E.2d 342 (W. Va. 1983); Webb, *supra*.

In the instant case, Grievant has failed to prove the required "causal connection" between her transfer and her previous grievance. While Grievant contends that an unidentified assistant principal had allegedly vowed to "get her" after she filed her prior grievance, she obtained this information only through rumors from other employees. At the level three hearing, she refused to identify the employees who told her about the assistant principal's alleged statements. Moreover, Principal Lake testified unequivocally that he alone was responsible for identifying which positions would be eliminated at Huntington High School, and no assistant principal was involved in making those decisions. Grievant introduced no evidence to controvert Mr. Lake's statements. Grievant has failed to establish that her transfer was due to reprisal.

\_\_\_ Grievant also contends that the transfer decisions made in this case were discriminatory.

Specifically, she alleges that discrimination occurred with regard to CCBOE's decision to allow Ms. Hale to "replace her as Yearbook sponsor." W. Va. Code § 18-29-2(m) defines "discrimination" to

mean "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." Under this Board's holding in Steele v. Wayne County Board of Education, Docket No. 89-50-260 (Oct. 19, 1989), in order to establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m), a grievant must demonstrate the following:

(a) that she is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and,

(c) that such differences were unrelated to actual responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

Steele, *supra*, at 15. Once a grievant establishes a prima facie case of discrimination under Code § 18-29-2(m), the employer is provided an opportunity to articulate legitimate, non-discriminatory reasons for its actions. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996); Conner, *supra*. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Prince v. Wayne County Bd. of Educ., Docket Nos. 90-50-281/295/296/311 (Jan. 28, 1990); Steele, *supra*. Thereafter, Grievant may demonstrate that the offered reasons for disparate treatment are merely pretextual. Dillon v. Cabell County Bd. of Educ., Docket No. 97-06-570 (May 29, 1998). See Tex. Dept. of Community Affairs, *supra*; Frank's Shoe Store, *supra*; Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991). Whether Grievant is comparing herself to Ms. Hale, who took one of Grievant's Yearbook classes, or to Ms. Mason, whose transfer was rescinded due to the retirement of another English teacher, Grievant has failed to establish a prima facie case of discrimination. Because Mr. Lake's objective was to eliminate the small Yearbook classes, which were taught only by Grievant, she simply was not similarly situated to either of the other teachers who taught English. Furthermore, CCBOE has justified the different treatment of Grievant, because she was the only teacher at Huntington High School who taught Yearbook.

Grievant has failed to establish that her transfer was motivated by reprisal or discrimination or

was arbitrary and capricious. CCBOE has provided ample explanation for its actions, which were properly within its broad discretion in such matters. Although it is unclear from the record whether Grievant challenges the decision to “bump” her into Ms. Sturm's position at Cabell Midland High School, this was also accomplished properly. W. Va. Code § 18A-4-7a provides that, when an employee is subject to release under the RIF provisions, that employee may be placed in the position of an employee with less seniority who is certified in any of the RIF'd employee's areas of certification. Accordingly, it was proper for Ms. Sturm, the least senior teacher certified in Language Arts 7-12, to be released and Grievant placed in her position.

Consistent with the foregoing, the following conclusions of law are appropriate.

### **Conclusions of Law**

1. Grievant bears the burden of proving the elements of her grievance by a preponderance of the evidence. Tibbs v. Mercer County Bd. of Educ., Docket No. 96-27-074 (Oct. 31, 1996).
2. County boards of education have broad discretion in personnel matters, including transfers, but must exercise that discretion in a manner which is not arbitrary or capricious. Dodson v. McDowell County Bd. of Educ., Docket No. 93-33-243 (Feb. 15, 1994).
3. In order to establish a prima facie case of discrimination under W. Va. Code § 18-29-2(m), a grievant must demonstrate the following:
  - (a) that she is similarly situated, in a pertinent way, to one or more other employee(s);
  - (b) that she has, to her detriment, been treated by her employer in a manner that the other employee(s) has/have not, in a significant particular; and,
  - (c) that such differences were unrelated to actual responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

Steele v. Wayne County Board of Education, Docket No. 89-50-260 (Oct. 19, 1989).

4. A grievant claiming retaliation under W. Va. Code § 18-29-2(p) may establish a prima facie case of reprisal by establishing:
  - (1) that she engaged in protected activity, e.g., filing a grievance;

(2) that she was subsequently treated in an adverse manner by the employer or an agent;

(3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and

(4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Fareydoon-Nezhad v. W. Va. Bd. of Trustees/Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989).

5. Grievant failed to prove by a preponderance of the evidence that the decision to transfer her from her English/Yearbook position at Huntington High School was arbitrary and capricious, an abuse of discretion, or the result of discrimination or reprisal.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Cabell 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

**Date: September 13, 2000** \_\_\_\_\_

**DENISE M. SPATAFORE**

**Administrative Law Judge**

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[Footnote: 1](#)

*Grievant was represented at all levels of this grievance by Susan Hubbard of the West Virginia Education Association, and Respondent was represented by counsel, Howard E. Seuffer, Jr.*

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[Footnote: 2](#)

*Grievant elected not to file a submission at level four.*

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[Footnote: 3](#)

*The parties agree that Ms. Hale's certification is sufficient to allow her to teach Yearbook under State Board of Education requirements.*