RETTA B. TAYLOR,

Grievant,

v. **Docket No. 01-01-476**

BARBOUR COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Retta Taylor, employed by the Barbour County Board of Education (BCBOE or Respondent) as a teacher, filed a level one grievance on June 4, 2001, in which she complained, “I have been notified by my Principal that I will be teaching a Social Studies class for the 2001-02 School Year. I did not use my Social Studies certification during the 2000-01 school year and have not been transferred under WV Code 18A-2-7.” For relief, Grievant requested that she not teach Social Studies during the 2001-02 school year. The grievance was denied at levels one and two, and appeal to level four was made on August 14, 2001. Grievant, represented by William White of WVEA, and BCBOE, represented by Superintendent John H. Hager, agreed to submit the grievance for decision based upon the record developed at level two. Both parties waived the opportunity to file additional proposed findings of fact and conclusions of law, and the matter was assigned to the undersigned for disposition on September 5, 2001.

The following facts are derived from the level two record.

Findings of Fact

1. Grievant, Retta Taylor, has been employed by BCBOE as a teacher for approximately thirty-six years, and has been assigned to Philip-Barbour High School (PBHS) at all times pertinent to this grievance.

2. Grievant is certified to teach both Business and Social Studies. She wasassigned to teach in both areas of her certification from 1988 through 1996, but has taught only Business classes beginning with the 1996-97 school year.

3. PBHS utilizes block scheduling with four classes of ninety minutes, and one forty-five minute class.

4. Grievant was assigned to teach three Business classes and one Social Studies class during

the 2001-02 school year.

5. Grievant was not provided the notice and other procedural protections mandated by W. Va. Code § 18A-2-7 prior to the change in her schedule.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); 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 alleges the assignment of the Social Studies class is a violation of the transfer provisions 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 prior to the schedule change effective the 2001-02 school year. Respondent alleges that no transfer has taken place, and that Grievant's schedule change was simply the discretionary exercise of the principal's authority to assign the faculty in a manner to provide a full and complete instructional program.

The Grievance Board has addressed the issue of what constitutes a transfer a number of times over the years. While certain general principles are applied consistently therein, the outcomes essentially depended upon the particular factual circumstances of each case. See Kidd v. Fayette County Bd. of Educ., Docket No. 89-10-452 (Dec. 14, 1989). The primary inquiry is necessarily whether or not changes in schedules are so substantial that a teacher has been essentially transferred from one position to another. In general, the relocation of a teacher from one school to another, or substantially altering a teacher's subject matter assignment constitutes a transfer as contemplated by W. Va. Code §18A-2-7. Reed v. Mason County Bd. of Educ., Docket No. 92-26-050 (Mar. 31, 1992); Pansmith v. Taylor County Bd. of Educ., Docket No. 46-86-057 (Aug. 4, 1986). However, while that general principle was upheld in Matthews v. Preston County Board of Education, Docket No. 39-88-239 (July 27, 1989), it was also determined that "the addition of similar duties does

not constitute a transfer." Id. Previously, in Dunleavy v. Kanawha County Board of Education, Docket No. 20-89-008 (Feb. 23, 1989), it was held 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 . . . ." Dunleavy, Conclusion of Law, No. 1, citing VanGilder v. Mineral County Bd. of Educ., Docket No. 27-87-320-2 (June 16, 1988). An adjustmentwhich included duties outside the employee's currently utilized area of certification, discipline or department was held to be a transfer in Carroll v. Wayne County Board of Education, Docket No. 91-50-428 (May 27, 1992)(rev'd, Circuit Court of Wayne County, Civil Action No. 92-C-274 (Dec. 9, 1992). In general, however, such adjustments must constitute a “substantial change” in the employee's schedule. Schafstall v. Brooke County Bd. of Educ., Docket No. 05-86-347-3 (Mar. 30, 1987).

The ongoing review of this issue in an attempt to delineate exactly what constitutes a transfer arises from the fact that there is no statutory or case law definition of the term. Although the term “transfer” has been held to include a change in assignment from one certification to another, there is judicial authority that such an interpretation is too narrow. On appeal, the Circuit Court of Wayne County ruled that the board of education could assign Howard Carroll to teach a Health class instead of a “coverage” period. Mr. Carroll taught Physical Education, but was also certified to teach Health. The Court concluded that the change in assignment did not constitute a transfer within the meaning of W. Va. Code § 18A-2-7.

Additionally, an Interpretation of the State Superintendent of Schools, dated April 19, 1999, advises that a principal has the authority to assign a full-time librarian to teach one class of physical education, a second area of certification held by the employee. Citing W. Va. Code § 18A-2-9, which grants a principal administrative and instructional supervision and responsibility for the school, the Superintendent concluded that “teaching assignments proposed by the superintendent and approved by the board should be general enough to allow the principal some scheduling flexibility.” While not legal authority, the opinion of the Superintendent is entitled to great weight unless clearly erroneous. Smith v. Bd. of Educ., 176 W. Va. 65, 341 S.E.2d 685 (1985). These rulings do not interpret the term “transfer” so narrowly to disallow at least one subject assignment change to a teacher's schedule.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); 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. W. Va. Code § 18A-2-7provides that “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, ... “

3. Adjustments must constitute a “substantial change” in the employee's schedule to constitute a transfer as contemplated by W. Va. Code § 18A-2-7. Schafstall v. Brooke County Bd. of Educ., Docket No. 05-86-347-3 (Mar. 30, 1987).

4. Grievant has failed to prove that altering her assignment to include one subject matter class for which she held certification constitutes a transfer within the meaning of W. Va. Code § 18A-2-7.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Barbour 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 24, 2001 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE