CATHERINE H. NESTOR,

Grievant,

v. **Docket No. 00-30-292**

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent,

LISA SOLLARS,

Intervenor.

D E C I S I O N

Grievant, Catherine H. Nestor, employed by the Monongalia County Board of Education (MCBOE) as a teacher, filed a level one grievance on or about August 14, 2000, in which she alleged a violation of W. Va. Code §18A-4-7a, when a position at Mason- Dixon Elementary School (MDES) was filled without posting. For relief, Grievant requested that the position of first grade teacher at MDES be posted so that she may have the opportunity to apply and be considered. Grievant's immediate supervisor lacked authority to resolve the complaint, and forwarded it to level two. Following an evidentiary hearing, the grievance was denied at level two, and Grievant proceeded to level three. MCBOE waived the right to review the matter, as is permitted by W. Va. Code §18-29-4(c), and the matter was advanced to level four on September 11, 2000.

An evidentiary hearing was conducted on November 17, 2000, at which time Grievant was represented by William C. Brewer, Esq., MCBOE was represented by Kelly J. Kimble, Esq., and Intervenor was represented by Don Craft of WVEA. The matter became mature for decision with the submission of proposed findings of fact and conclusions of law by all three parties by December 29, 2000.

The facts of this matter are undisputed and may be set forth as follows.

Findings of Fact

1. Grievant began employment with MCBOE in 1992 as a substitute teacher. She became regularly employed in 1994, and has been assigned as a first grade teacher at Cass Elementary School at all times pertinent to this grievance.

2. Intervenor has been employed by MCBOE for five years. During the 1999- 2000 school year she held a position at MDES created by a federal grant to provide additional teachers to schools with enrollment exceeding recommended levels. MCBOE was allowed flexibility to assign her where the greatest need existed in grades one through three. During the 1999-2000 school year Intervenor was assigned to teach third grade.

3. Because funding for the position held by Intervenor was not guaranteed for the 2000-2001 school year, MCBOE placed Intervenor, the least senior faculty member at MDES, on the transfer list in March 2000. In June 2000, MCBOE learned that the funding would not be available to continue the position for the 2000-2001 school year, therefore, MDES would lose one position.

4. On or about August 8, 2000, MCBOE approved the transfer of MDES first grade teacher Susan Seitz to Riverside Elementary School.

5. Following its customary practice to rescind transfers if the reason for the action has ceased to exist, MCBOE rescinded Intervenor's transfer, and realigned her assignment to the first grade teaching position vacated by Ms. Seitz.

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. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991), Leichliter v. W. Va. Dept. of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

Grievant argues that MCBOE exceeded its broad discretionary powers in this instance because the realignment was contrary to the statutory requirement that the most qualified applicant be placed into a vacancy. She asserts that realignment of the MDES staff was improperly based upon the transfer of Ms. Seitz, which created a true vacancy, requiring posting and filling, without exception. MCBOE responds that when Ms. Seitz transferred to another school the reason for Intervenor's

transfer no longer existed, because the number of teaching positions and teachers at MDES was no longer incongruent. Therefore, the transfer was rescinded, and the assignment of Intervenor to the first grade position was the result of a realignment, an exception to the general posting requirements permitted by W. Va. Code §18A-4-7a.

Realignment of faculty members is clearly permissible. W. Va. Code §18A-4-7a provides in pertinent part:

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 grade levels for which they are certified withoutthat position being posted: Provided, That the employee and the county board of education mutually agree to the reassignment.

MCBOE also applied the holdings of numerous Grievance Board decisions which state that "[w]hen a service or professional employee's transfer or reduction-in-force, otherwise valid, loses its stated justification, absent some extraordinary circumstance, the employee is entitled to instatement into the position she would have held but for the transfer or reduction-in-force." Bailey v. Mingo County Bd. of Educ., Docket No. 97-29- 392R (Sept. 26, 2000); Ramey v. Lincoln County Bd. of Educ., Docket No. 96-22-298 (Oct. 30, 1996); Berry v. Logan County Bd. of Educ., Docket No. 95-23-421 (Mar. 29, 1996); Hollins v. Wyoming County Bd. of Educ., Docket No. 92-55-263 (Mar. 18, 1993); Brown v. Logan County Bd. of Educ., Docket No.90-23-177 (Oct. 31, 1990).

Unfortunately, MCBOE erred in the present case because Intervenor's transfer was based on a loss of funding. Since the funding had not been restored, the action to place her on the transfer list had not lost its stated justification. Had Intervenor not been on the transfer list when Ms. Seitz accepted another position, MCBOE could have properly realigned her position to that of first grade; however, because the vacancy occurred after the transfer, posting and filling the position pursuant to W. Va. Code §18A-4-7a was required.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal 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. "When a service or professional employee's transfer or reduction-in-force, otherwise valid, loses its stated justification, absent some extraordinary circumstance, the employee is entitled to instatement into the position she would have held but for the transfer or reduction-in-force." Bailey v. Mingo County Bd. of Educ., Docket No. 97-29- 392R (Sept. 26, 2000); Ramey v. Lincoln County Bd. of Educ., Docket No. 96-22-298 (Oct. 30, 1996); Berry v. Logan County Bd. of Educ., Docket No. 95-23-421 (Mar. 29, 1996); Hollins v. Wyoming County Bd. of Educ., Docket No. 92-55-263 (Mar. 18, 1993); Brown v. Logan County Bd. of Educ., Docket No.90-23-177 (Oct. 31, 1990).

3. MCBOE erred in rescinding Intervenor's transfer because the stated justification for the action had not changed.

4. MCBOE must post and fill the first grade position at MDES pursuant to W. Va. Code §18A-4-7a. See Marion County Bd. of Educ. v. Bonfantino, 179 W. Va. 204, 366 S.E.2d 650 (1998).

Accordingly, the grievance is **GRANTED** and MCBOE is Ordered to post and fill the first grade position at MDES pursuant to appropriate statutory guidelines. Posting may be delayed until the end of the current school year to avoid disruption in multiple classrooms during the Spring semester.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia County and such appeal must be filed within thirty (30) daysof 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: February 9, 2001 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE