BRENDA BRUM and VIRGINIA LAW,

Grievants,

v.

DOCKET NO. 02-54-225

WOOD COUNTY BOARD OF EDUCATION,

Respondent,

and

CHERYL COTTRILL,

Intervenor.

D E C I S I O N

Grievants, Brenda Brum and Virginia Law, filed identical grievances against their employer, the Wood County Board of Education ("Board"), on April 15 and 24, 2002, respectively, as follows:

> The grievant's rights to an unbiased hearing before the Board votes upon placing them on the transfer list as guaranteed by West Virginia Code 18A-2-7 and the West Virginia Constitution were denied when the Board voted to transfer the Grievants prior to their hearings.
>
> Relief sought: Declare the transfer vote void and place grievants in the same position held during the 2001-2002 school year. (See footnote 1)

Grievants' principals responded at level one that they were without authority to grant the grievances, which were appealed to level two. The grievances were consolidated atlevel two, and Cheryl Cottrill was permitted to intervene pursuant to W. Va. Code § 18-29- 3(u). The level two hearing was held on June 14, 2002, and the level two decision denying the grievance was rendered by the Superintendent's designee, George B. Summers, on July 18, 2002. Grievants appealed to

level four on July 25, 2002, and a level four hearing was held in the Grievance Board's Charleston, West Virginia, office on September 12, 2002. This matter became mature for decision on October 14, 2002, the deadline for the parties' proposed findings of fact and conclusions of law. Grievants were represented by Bruce W. Boston, WVEA UniServ Consultant, the Board was represented by Dean Furner, Esq., Spilman, Thomas & Battle, and Intervenor represented herself.

SUMMARY OF EVIDENCE

Level Two General Exhibits

Ex. 1 -

Brum grievance statement and attachments.

Ex. 2 -

April 30, 2002 letter from Daniel D. Curry to George B. Summers.

Ex. 3 -

Law grievance statement and attachments.

Ex. 4 -

April 29, 2002 letter from Daniel D. Curry to George B. Summers.

Ex. 5 -

Preston grievance statement and attachments.

Ex. 6 -

April 29, 2002 letter from Daniel D. Curry to George B. Summers.

Ex. 7 -

April 29, 2002 letter from Bruce W. Boston to Daniel Curry.

Ex. 8 -

May 2, 2002 letter from George B. Summers to William B. McGinley, with attachments.

Ex. 9 -

May 17, 2002 letters from George B. Summers to Brenda Brum, Louise Law, and

Benjamin Preston.

Ex. 10 -

June 30, 2002 letter from Bruce Boston to George Summers.

Ex. 11 -

June 4, 2002 letter from George Summers to Benjamin Preston.

Ex. 12 -

May 31, 2002 letter from Bruce Boston to George Summers.

Ex. 13 -

June 4, 2002 letter from George Summers to Bruce Boston.

Level Two Agreed Exhibits

Ex. 1 -

March 26, 2002 Board Minutes.

Ex. 2 -

April 16, 2002 Board Minutes.

Ex. 3 -

March 6, 2002 letter from Daniel Curry to Louise Law.

Ex. 4 -

March 11, 2002 letter from V. Louise Law to Daniel Curry.

Ex. 5 -

March 13, 2002 Professional Transfer Request of Louise Law.

Ex. 6 -

March 14, 2002 letter from Daniel Curry to V. Louise Law.

Ex. 7 -

March 18, 2002 letter from V. Louise Law to Daniel Curry.

Ex. 8 -

March 27, 2002 letter from Daniel Curry to V. Louise Law.

Ex. 9 -

April 9, 2002 Board Minutes.

Ex. 10 -

Undated document entitled Reasons for Placing Louise Law on the Transfer List.

Ex. 11 -

July 23, 2002 memorandum from Frank Bono to Terri Hammond re: Response to Critique of Title I Plans for FY'02.

Ex. 12 -

May 23, 1996 memorandum from Bill Luff to County Superintendents, Personnel Directors, and Title I Directors re: Reading Certification Update.

Ex. 13 -

June 14, 2001 memorandum from Terri Hammond to Frank Bono re: FY 2002 Title Plan.

Ex. 14 -

Waverly School Quartile Report 2001-2002.

Ex. 15 -

Summary of Reading and Mathematics SAT9 Quartile Distributions for Title I schools 1997-2001.

Ex. 16 -

June 6, 2002 memorandum from Terri Hammond to Frank Bono re: FY 2003 Title Plan.

Ex. 17 -

Transcript from April 16, 2002 transfer hearings before the Board.

Ex. 18 -

Transcript from April 9, 2002 transfer hearings before the Board.

Ex. 19 -

Wood County Board of Education Policy 4119 - Realignment by Administrative Transfer Policy - Non-Administrative Professional Employees.

Level Four Grievants' Exhibit

Ex. 1 -

Annual Financial Statements of the Board as of and for the Fiscal Year Ended June 30, 2002; Notes to the Financial Statements.

Level Four Board Exhibits

Ex. 1 -

Final Computation Public School Support Program Professional Educators Data for the 2002-03 Year.

Ex. 2 -

Final Computation Public School Support Program Professional Educators Data for the 2001-02 Year.

Ex. 3 -

Portion of January 8, 2002 Board Minutes.

Testimony

Grievants testified in their own behalf, and presented the testimony of Thomas Little.

Based upon a review of the evidence and testimony of record, I find the following facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant Brum was employed during the 2001-02 school year by the Board as a Librarian at

Parkersburg South High School.

2. Grievant Law was employed during the 2001-02 school year by the Board as a Title I teacher at Waverly Elementary School.

3. Intervenor Cottrill was employed during the 2001-02 school year by the Board as an English teacher at Parkersburg South High School.

Grievant Brenda Brum

4. By letter dated March 6, 2002, Grievant Brum was notified she was being considered for transfer for the 2002-03 school year.

5. On March 12, 2002, Grievant Brum signed and filed with the Board a voluntary Professional Transfer Request form requesting a transfer from the position of Librarian to an English position at Parkersburg South High School. The Transfer Request form indicates Grievant Brum was bumping Intervenor Cottrill from an English teaching position.

6. By letter dated March 13, 2002, Grievant Brum, by counsel, requested a list of reasons for the proposed transfer, and was provided a list on March 14, 2002, by Superintendent Daniel Curry. 7. By letter dated March 18, 2002, Grievant Brum, by counsel, requested a transfer hearing before the Board.

8. On March 26, 2002, the Board approved Grievant Brum's voluntary transfer request to the English position at Parkersburg South High School, which had been held by Intervenor Cottrill.

9. The only judgment made by the Board at the March 26, 2002 meeting was the approval of Grievant Brum's voluntary request for a transfer to the English position. No determination was made of the propriety of reducing the librarian position at Parkersburg South or placing Grievant Brum on the transfer list.

10. On March 27, 2002, Superintendent Curry notified Grievant Brum her transfer hearing was scheduled before the Board on April 16, 2002.

Grievant Louise Law

10. By letter dated March 6, 2002, Grievant Law was notified she was being considered for transfer for the 2002-03 school year.

11. By letter dated March 11, 2002, Grievant Law requested a list of reasons for the proposed transfer.

12. On March 13, 2002, Grievant Law signed and filed with the Board a voluntary Professional

Transfer Request form, requesting to be transferred from the Title I position at Waverly Elementary School to a position at VanDevender Junior High School, which was held by Kelly Boggess during the 2001-02 school year.

13. On March 14, 2002, Superintendent Curry supplied Grievant with a list of reasons for her proposed transfer. Among those reasons is the fact that a comprehensive needs assessment, based upon student performance at Waverly, indicated reading shouldbe the primary focus of the Title I program at that school. Grievant Law was reminded that she was not certified as a reading specialist, and the administration believed the Title I teacher at Waverly should be so certified.

14. By letter dated March 18, 2002, Grievant Law requested a transfer hearing before the Board. Grievant Law was notified on March 27, 2002, that her transfer hearing was scheduled on April 9, 2002.

15. On March 26, 2002, the Board approved Grievant Law's voluntary transfer request to VanDevender Junior High School.

16. On that date there was no consideration by the Board regarding the propriety of eliminating Grievant Law's position at Waverly Elementary School, but rather only considered her voluntary request for transfer to VanDevender.

17. Grievant Law's transfer hearing was held on April 9, 2002.

Intervenor Cottrill

15. On the same day that Grievant Brum signed and filed her Professional Transfer Request form requesting to be transferred to Intervenor Cottrill's English teaching position, the Board sent notice to Intervenor Cottrill that she was being considered for transfer for the 2002-03 school year.

16. By letter dated March 15, 2002, Intervenor Cottrill requested a list of reasons for the proposed transfer.

17. By letter dated March 18, 2002, Superintendent Curry supplied her with a list of reasons which stated, in a nutshell, that the reduction of one staff member at Parkersburg South High School resulted in an overage of one teacher who had the choice of being placed on the transfer list or transferring to another position within the school. Intervenor Cottrill was informed that, because she was the least senior person at Parkersburg South within the overage person's fields of certification, she was subject to being bumped by that teacher pursuant to Policy 4119.

18. Intervenor Cottrill was informed that a hearing regarding her proposed transfer would be

held on April 16, 2002, the same day as Grievant Brum's hearing.

19. Intervenor Cottrill and Grievant Brum agreed the evidence on their proposed transfers could be heard together and applied to both cases.

20. By Board action on April 16, 2002, Intervenor Cottrill was approved to be placed on the transfer list.

21. As Grievant Brum had already requested a voluntary transfer which had been approved by the Board on March 26, 2002, Grievant Brum was not placed on the transfer list.

DISCUSSION

Grievants have the burden of proving each element of their 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. Grievants allege the Board prejudged them and thus denied them due process when it approved their transfers prior to their respective transfer hearings. The Board maintains it approved Grievants' voluntary transfer requests, which action does not mandate the due process procedures set forth in the transfer statute, W. Va. Code § 18A-2-7, and to the extent it followed those procedures,it did so in accordance with the statute, and finally, the reasons given for Grievants' transfers were not arbitrary and capricious.

W. Va. Code § 18A-2-7 provides:

> (a) 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. Only those employees whose consideration for transfer or intended transfer is based upon known or expected circumstances which will require the transfer of employees shall be considered for transfer or intended for transfer and the notification shall be limited to those employees. Any teacher or employee who desires to protest such proposed transfer may request in writing a statement of the reasons for the proposed transfer. Such statement of reasons shall be delivered to the teacher or employee within ten days of the receipt of the request. Within ten days of the receipt of the statement of the reasons, the teacher or employee may make written demand upon the superintendent for a hearing on the proposed transfer before the county board of education. The hearing on the proposed transfer shall be held on or before the first Monday in May. At the hearing, the reasons for the proposed transfer must be shown.

In addition, W. Va. Code § 18-9A-4, Foundation allowance for professional educators, provides as follows relating to reductions-in-force:

> Every county shall utilize methods other than reductions in force, such as attrition and early retirement, before implementing their reductions in force policy to comply with the limitations of this section.

The Wood County Board of Education developed Policy 4119, Realignment by Administrative Transfer Policy-Non-Administrative Professional Employees, in response to Code § 18-9A-4. Policy 4119 provides, in pertinent part:

> The superintendent shall recommend to the board of education the staffing goal for the school system. Upon the approval of the staffing goal by the board of education, the superintendent and administrative staff, in coordination with principals, shall review countywide programs, curricular offerings and pupil teacher ratios and shall establish staff allocations for such programs and schools.
>
> Having determined the county school system non-administrative professional employee staffing goals and allocations to county programs and schools, the superintendent and administrative staff shall supervise the manner in which school and county program staffs are reduced, increased, realigned or reassigned in order to assure equitable or justifiable staffing of grade levels and program areas. To this end, commonly accepted formulas and factors shall be applied in making decisions and judgments related to staffing. For example, the class size law and other ratios and factors established by state regulations and North Central standards shall be used to help determine staff allocations for programs. If curricular areas must be reduced, required instruction shall have the highest priority.

Once it is determined there is a need for a reduction-in-force, the Policy sets forth the procedure to be followed in accordance with Code § 18A-2-7, but also provides a “supplemental” benefit:

> If applicable, the overage personnel shall have the choice of being placed on the transfer work list or being rescheduled to another position within the school of his/her present assignment. In order to remain assigned to his/her present school, the overage person must accept the position, if any, held at the school by the person with the least seniority in all of the overage person's fields of certification. If it can be clearly demonstrated that such least senior teacher has teaching responsibilities in another curricular area for which he/she is licensed and which may not be absorbed by the remaining staff, the classroom teacher within the area to be reduced will be reviewed under the above criteria in order of reverse seniority.

The Board followed its Policy when it offered Grievants Brum and Law the option of being placed on the transfer work list or being rescheduled to other positions. Grievants chose to be placed in other positions, and completed the voluntary transfer forms to accomplish the reassignment, which

the Board approved on March 26, 2002.

Grievants maintain, however, that exercising the option for reassignment does not waive their right under Code § 18A-2-7 for a transfer hearing before the Board on their original positions, and that by accepting their voluntary transfers before their transferhearings, the Board "prejudged" them. Grievants also allege the reasons given for their transfers are not proven by the facts, and were arbitrary and capricious.

Frankly, the undersigned does not understand Grievants' position, and fails to see how they were denied due process. They were notified they were being recommended for placement on the transfer list. They were given the option of going forward on the proposed transfer, or accepting reassignment within their schools, according to Board Policy 4119, a benefit many county employees do not have. They chose reassignment and completed voluntary transfer forms, which were accepted by the Board. Then, notwithstanding the Board's acceptance of their voluntary requests for transfer, the Board still afforded them a transfer hearing under Code § 18A-2-7. That is all the due process to which Grievants are entitled.

As for the reasons stated for the transfers, county boards of education have broad discretion in personnel matters, including making job assignments and transfers, but must exercise that discretion in a manner which is not arbitrary or capricious. Dillon v. Wyoming County Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986); Conrad v. Nicholas County Bd. of Educ., Docket No. 97-34-388 (Jan. 12, 1998); Mullins v. Logan County Bd. of Educ., Docket No. 94-23-283 (Sept. 25, 1995); Dodson v. McDowell County Bd. of Educ., Docket No. 93-33-243 (Feb. 15, 1994).

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.2d1017 (4th Cir. 1985); Yokum v. W. Va. Schools for theDeaf 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 is arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of the board of education. See generally Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982).

Regarding Grievant Brum, the evidence shows the decision to reduce one librarian position at

Parkersburg South High School was reasonable due to declining enrollment. The administration was required to ascertain which professional positions could be eliminated in order to achieve the new staffing goals for the 2002-03 school year. These staffing goals were discussed among administrators and principals of the high schools in the County. Director of Secondary Education Mike Boyd and Parkersburg South Principal Tom Eschbacher took several factors into consideration, including concerns with keeping the student/teacher ratio as consistent as possible, and the desire to have the least amount of negative impact on the required areas of instruction. With those factors in mind, Mr. Eschbacher and Mr. Boyd concluded the most reasonable position to eliminate was one of the two librarian positions. Superintendent Curry, and ultimately the Board, agreed with that decision.

With regard to Grievant Law, the evidence shows that she was a Title I teacher without a reading certification, and was the only Title I teacher assigned to Waverly Elementary School. Based upon an evaluation of the needs of the school and the students, it was determined that Waverly needed a Title I teacher with reading certification, and placing Grievant on the transfer list was the best way to effectuate that staffing need. Finally, with respect to Intervenor Cottrill, she simply was the least senior teacher at Parkersburg South High School within Grievant Brum's area of certification, and thus was bumped in accordance with Policy 4119. Intervenor Cottrill, then being identified as the "overage person" at Parkersburg South, was given the same choice as Grievants Brum and Law. Intervenor Cottrill was afforded a transfer hearing and subsequently approved to the transfer list.

The above discussion is supplemented by the following conclusions of law.

CONCLUSIONS OF LAW

1. Grievants have the burden of proving each element of their 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-2-7 provides, in pertinent part:

> (a) 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. Only those employees whose consideration for transfer or intended transfer is based upon known or expected

> circumstances which will require the transfer of employees shall be considered for transfer or intended for transfer and the notification shall be limited to those employees. Any teacher or employee who desires to protest such proposed transfer may request in writing a statement of the reasons for the proposed transfer. Such statement of reasons shall be delivered to the teacher or employee within ten days of the receipt of the request. Within ten days of the receipt of the statement of the reasons, the teacher or employee may make written demand upon the superintendent for a hearing on the proposed transfer before the county board of education. The hearing on theproposed transfer shall be held on or before the first Monday in May. At the hearing, the reasons for the proposed transfer must be shown.

3. County boards of education have broad discretion in personnel matters, including making job assignments and transfers, but must exercise that discretion in a manner which is not arbitrary or capricious. Dillon v. Wyoming County Bd. of Educ., 351 S.E.2d 58 (W. Va. 1986); Conrad v. Nicholas County Bd. of Educ., Docket No. 97-34-388 (Jan. 12, 1998); Mullins v. Logan County Bd. of Educ., Docket No. 94-23-283 (Sept. 25, 1995); Dodson v. McDowell County Bd. of Educ., Docket No. 93-33-243 (Feb. 15, 1994).

4. An agency must abide by the procedures it properly establishes to conduct its affairs. Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977); Morris v. Kanawha County Bd. of Educ., Docket No. 99-20-200 (July 27, 1999).

5. Wood County Board of Education Policy 4119, II.B. states in pertinent part:

> The superintendent shall recommend to the board of education the staffing goal for the school system. Upon the approval of the staffing goal by the board of education, the superintendent and administrative staff, in coordination with principals, shall review countywide programs, curricular offerings and pupil teacher ratios and shall establish staff allocations for such programs and schools.

> Having determined the county school system non-administrative professional employee staffing goals and allocations to county programs and schools, the superintendent and administrative staff shall supervise the manner in which school and county program staffs are reduced, increased, realigned or reassigned in order to assure equitable or justifiable staffing of grade levels and program areas. To this end, commonly accepted formulas and factors shall be applied in making decisions and judgments related to staffing. For example, the class size law and other ratios and factors established by state regulations and North Central standards shall be used to help determine staff allocations for programs. If curricular areas must be reduced, required instruction shall have the highest priority.

6. Grievants have failed to establish by a preponderance of the evidence any violation of statute, rule, law, or policy regarding their proposed transfers for the 2002-03 school year.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wood County. Any 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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: November 18, 2002

Footnote: 1

Benjamin Preston filed an identical grievance on April 25, 2002, but withdrew from the grievance on June 3, 2002.