SUSAN NELSEN,

Grievant,

v. **Docket No. 02-20-158**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Susan Nelsen, employed by the Kanawha County Board of Education (KCBOE) as a teacher, filed a level one grievance on April 4, 2002, following her transfer from Richmond Elementary School. Grievant requests reinstatement to Richmond Elementary. Grievant's immediate supervisor lacked authority to grant the requested relief, and the matter was denied following a hearing at level two. Grievant elected to bypass consideration at level three, and advanced the grievance to level four on May 28, 2002. Grievant's representative, Anita Mitter of WVEA, and Respondent's counsel, James W. Withrow, agreed to submit the matter for decision based upon stipulated facts and proposed conclusions of law. The grievance became mature for decision upon receipt of the proposals on July 16, 2002.

The facts stipulated to by the parties are set forth as the following findings of fact.

Findings of Fact

1. Grievant has been employed by KCBOE as a classroom teacher since October 25, 1979, and is certified in Elementary Education 1 - 8, and Early Childhood K - 3. Grievant was assigned to teach third grade at Richmond Elementary School (RES) during the 2001-2002 school year. 2. Due to a projected decrease in enrollment, the professional staff at RES was slated to be reduced by one regular classroom teacher for the 2002-2003 school year. RES will additionally lose a federally-funded teacher.

3. The teacher with the least seniority at RES was assigned to teach Kindergarten. That teacher was placed on transfer, and Grievant, the only other teacher on staff with Kindergarten certification, refused to accept reassignment to Kindergarten. 4. Following a hearing, KCBOE

approved a recommendation that Grievant be placed on transfer.

5. KCBOE anticipates that the loss of two teachers may require grades two, three, four, and five be realigned for the 2002-2003 school year.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving 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 agrees that because the Kindergarten teacher was the least senior staff member, she was the proper teacher for transfer, but suggests that KCBOE should look at the teachers assigned to the grade levels affected by the reduction. The least senior teacher in grades three, four, and five is assigned to fourth grade. Grievant asserts that the fourth grade teacher should have been transferred, or in the alternative, both the Kindergarten and fourth grade teacher should be transferred, and the Kindergarten position posted.

Grievant argues that she was transferred simply because she did not accept a reassignment to Kindergarten, but explained that her decision was in the best interests of the children since she had not taught at that level in West Virginia, and had not taught Kindergarten for twenty years. KCBOE asserts that the recommendation to transfer Grievant was proper since it more closely followed the Administrative Regulation than any other scenario.

Although Grievant alleged violations of W. Va. Code §§ 18A-4-7a and 18A-2-7, she only generally relies on these provisions to support her claim that seniority was the only factor to be considered when making the staff reduction. KCBOE relies upon its Administrative Regulation 43.04, which provides, in part:

If a principal determines that it will be necessary to realign the assignment of classroom teachers for

the next ensuing year and the total number of classroom teachers assigned to the school is scheduled to be reduced, the least senior classroom teacher assigned to the school (excluding special program teachers, See Section 43.05) shall be recommended for transfer by the Superintendent. If the least senior classroom teacher is not assigned to a grade level scheduled to be reduced, the classroom teachers in the grade level scheduled to be reduced, in order of seniority starting with the most senior classroom teacher, shall be requested to agree toreassignment to the position to be vacated by the least senior classroom teacher. If no agreement is forthcoming, the least senior classroom teacher who withheld agreement shall be recommended for transfer by the Superintendent. If such recommended transfers are approved by the Board, all newly created assignments shall be promptly posted.

West Virginia Code § 18A-2-7a(p) addresses realignment of elementary teachers as follows:

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 without that position being posted: *Provided,* That the employee and the county board of education mutually agree to the reassignment.

Since Grievant did not agree to the reassignment, she was transferred in compliance with W. Va. Code § 18A-4-7, which 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 only 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 thesuperintendent 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.

"County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary or capricious." Syllabus Pt. 1, Hyre v. Upshur County Bd. of Educ., 186 W. Va. 267, 412 S.E.2d 265 (1991), quoting Syllabus Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

In the present matter, the Board acted reasonably by transferring the least senior staff member when one position was eliminated at RES. Because the least senior employee taught Kindergarten, and Grievant was the only other teacher on staff who was certified to teach Kindergarten, the request that she accept that assignment was consistent with policy and was also reasonable. While Respondent could have elected to transfer another teacher, it was not required to do so. Teachers have no vested right to be assigned to any particular school, and there is no requirement in W. Va. Code § 18A-2-7 that transfers be based on seniority. State ex rel.Hawkins v. Tyler County Bd. of Educ., 166 W. Va. 363, 275 S.E.2d 908 (1980); Dewhurst v. Mason County Bd. of Educ., Docket No. 02-26-052 (May 9, 2002); Howard v. Mingo County Bd. of Educ., Docket No. 99-29-241 (Sept. 16, 1999); Tracewell v. Wood County Bd. of Educ., Docket No. 90-54-365 (Aug. 2, 1991). In addition to the foregoing findings of fact and discussion, it is appropriate to make the following conclusions of law.

Conclusions of Law 1. Grievant has the burden of proving 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. "County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary or

capricious." Syllabus Pt. 1, Hyre v. Upshur County Bd. of Educ., 186 W. Va. 267, 412 S.E.2d 265 (1991), quoting Syllabus Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

3. There is no requirement in W. Va. Code § 18A-2-7 that transfers be based on seniority. Dewhurst v. Mason County Bd. of Educ., Docket No. 02-26-052 (May 9, 2002); Howard v. Mingo County Bd. of Educ., Docket No. 99-29-241 (Sept. 16, 1999); Tracewell v. Wood County Bd. of Educ., Docket No. 90-54-365 (Aug. 2, 1991).

4. The record does not establish that the Board exercised its transfer power arbitrarily or not in good faith for the benefit of the school system. The Board did not abuse its discretion by transferring Grievant in compliance with its Administrative Regulation which provides that the least senior classroom teacher who withholds agreement to a reassignment shall be recommended for transfer.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha 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: August 20, 2002 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE