CARMELLA RUSSELL,

Grievant,

v.

DOCKET NO. 02-40-232

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Carmella Russell, filed this grievance against her employer, the Putnam County Board of Education ("Board") on May 30, 2002, alleging:

> The grievant, a Spanish teacher, has recently been informed by her principal, Mr. Victor Donalson, that her teaching assignment for 2002-03 school year will be changed to an area of certification that is outside of her presently utilized area of certification. The new assignment, Introduction to the Majors, is a position with significantly different duties and responsibilities outside of her current teaching assignment.
>
> Relief sought: The grievant is asking to remain in her current teaching assignment which is Spanish.

The grievance was denied at level one by her Principal, Vic Donalson, and a level two hearing was conducted on June 13, 2002. Grievance Evaluator Barbara Brazeau denied the grievance by decision dated July 18, 2002. Grievant appealed to level four on July 26, 2002, and the parties' agreed the matter could be decided based on the lower level record, with written submissions due by August 22, 2002. Grievant was representedby Chris Barr, West Virginia Federation of Teachers, and the Board was represented by Gregory W. Bailey, Esq., Bowles, Rice, McDavid, Graff & Love.

SUMMARY OF EVIDENCE

LII Joint Exhibits

Ex. 1 -

Statement of grievance and level one response.

Ex. 2 -

May 28, 2002 memorandum from Vic Donalson.

LII Grievant's Exhibits

Ex. 1 -

West Virginia Department of Education Introduction to IGOs (Instructional Goals and Objectives).

Ex. 2 -

Course Request List.

LII Board Exhibits

None.

Testimony

Grievant testified in her own behalf, and presented the testimony of Jack Dailey, Vic Donalson, and Wanda Dailey. The Board presented the testimony of Vic Donalson and Harold Hatfield.

Based upon a review of the record in its entirety, I find the following material facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant has been employed by the Board as a teacher four years. She is certified to teach Spanish 5-12, and at all times has been assigned to Poca High School.

2. In the Spring of 2002, the Board determined it needed to cut two professional positions due to declining enrollment. One of the positions to be eliminated was a Business teacher who taught Introduction to Majors during the 2001-2002 school year. 3. Introduction to Majors is a high school level course offered in Putnam County to meet the West Virginia Department of Education's mandate that career clusters and majors be made available to students.

4. Introduction to Majors is a Putnam County graduation requirement, and all students at Poca High School take Introduction to Majors during the first semester of their sophomore, or tenth grade, year.

5. No subject-specific certification is necessary to teach Introduction to Majors, however, the Board requires two weeks of training for teachers assigned to teach that subject.

6. In the Spring of 2002, four teachers were trained to teach Introduction to Majors: Jack Dailey, Business, Patty Igo, Business, Melissa Schamp, Business, Allen Osborne, Physical Education. Mr. Dailey taught three sections of Introduction to Majors, Ms. Igo taught one section, Ms. Schamp taught two sections, and Mr. Osborne taught two sections. Another teacher, Pam Martin, also taught Introduction to Majors, but apparently did not have training.

7. Ms. Schamp held the Business position targeted for elimination, and will not be at Poca High School for the 2002-2003 school year.

8. Poca High School Principal Vic Donalson approached Grievant in March 2002, and asked if she would be willing to teach one section of Introduction to Majors for the upcoming school year.

9. Grievant told Principal Donalson she was not interested in that assignment because she already had a significant amount of preparation to do for the upcoming school year.

10. Principal Donalson called Harold Hatfield, Assistant Superintendent of Personnel, to inform him of the situation, and Mr. Hatfield instructed Principal Donalson to explain to Grievant that if she refused the Introduction to Majors assignment, she would be placed on administrative transfer, in order that a teacher willing to take the assignment could be placed at Poca High School.

11. Principal Donalson immediately met with Grievant to convey this information, and told her he needed to have her response in writing. Grievant told Principal Donalson she had not refused the assignment, but she just did not want to teach it. Grievant refused to put her response in writing.

12. Principal Donalson called Mr. Hatfield back immediately and told him what Grievant had said.

13. Principal Donalson interpreted Grievant's statement to mean she was not refusing to teach Introduction to Majors.

14. As a result of these conversations, Mr. Hatfield also understood that Grievant was not refusing to teach the course, and therefore, it would not be necessary to place her on administrative transfer.

15. At the time Principal Donalson asked Grievant to put it in writing if she was refusing to teach the course, Grievant called her union representative for advice. She wastold by her representative not to put anything in writing, and to “lay low” to see what happened with Ms. Schamp's transfer hearing, as the whole issue could become moot.

16. Grievant was assigned to teach Introduction to Majors for the 2002-2003 school year, in addition to her Spanish classes.

DISCUSSION

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 Introduction to Majors 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 2002-03 school year. The Board alleges 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, supra, Conclusion of Law No. 1, *citing* VanGilder v. Mineral County Bd. of Educ., Docket No. 27-87-320-2 (June 16, 1988). An adjustment which 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 mustconstitute 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 by 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 State 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 assignmentchange to a teacher's schedule. Taylor v. Barbour County Bd. of Educ., Docket No. 01-01- 476 (Sept. 24, 2001).

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-2-7 provides 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. A transfer is not to be interpreted so narrowly as to disallow at least one subject assignment change to a teacher's schedule. Taylor v. Barbour County Bd. of Educ., Docket No. 01-01-476 (Sept. 24, 2001). 5. Grievant has failed to prove that altering her assignment to include Introduction to Majors 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 Putnam 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: September 19, 2002