CAROL LEARMONTH,

Grievant,

v. **Docket No. 03-10-200**

FAYETTE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Carol Learmonth, filed this grievance when the Fayette County Board of Education ("FBOE") decided to transfer her from her teaching position at Fayetteville Middle School. She alleged the transfer violated W. Va. Code § 18A-2-7, stating, “[t]ransfer of Grievant was based on false and misleading information.” She requested as relief that she be allowed to remain at Fayetteville Middle School. (See footnote 1)

The following Findings of Fact are made from the evidence presented at Level II.

FINDINGS OF FACT

1. During the 2002-2003 school year, Grievant was employed by FBOE as a special education teacher at Fayetteville Middle School. She has been employed as a teacher by FBOE for 11 years, and was a substitute teacher for 3 years prior to that. Her certification is in Special Education, Learning Disorders, Mentally Impaired, and Behavior Disorders. She is not certified in Autism. She has a Bachelor of Science Degree in physical education and health education K through 12, and a Master's Degree in specific learning disorders.

2. During the 2002-2003 school year, Gary Bailey was also employed by FBOE as a special education teacher at Fayetteville Middle School. Mr. Bailey is certified in Behavior Disorders (“BD”) and Autism.

3. During the 2002-2003 school year there were 13 BD students at Fayetteville Middle School. During the 2003-2004 school year there will be 4 BD students at Fayetteville Middle School.

4. During the 2002-2003 school year there was one autistic student at Fayetteville Middle School. During the 2003-2004 school year there will be two autistic students at Fayetteville Middle School.

5. FBOE decided only one special education teacher would be needed at Fayetteville Middle School for the 2003-2004 school year, and that teacher should be certified to teach autistic students in order to serve the special education needs of the students, and so FBOE would receive federal funding for the students.

6. Grievant received notice that she would be transferred from Fayetteville Middle School. She was told by Nancy Price, FBOE's Special Education Director, that she was the person transferred because she did not hold certification in Autism. Ms. Price stated at Grievant's transfer hearing that she was expecting that a student would be starting at Fayetteville Middle School in the fall of 2003 who was autistic.

7. Mr. Bailey was allowed to remain at Fayetteville Middle School because of his Autism certification.

DISCUSSION

Grievant bears the burden of proving the elements of her grievance by a preponderance of the evidence. Tibbs v. Mercer County Bd. of Educ., Docket No. 96-27- 074 (Oct. 31, 1996). Grievant alleged that the reasons given for her transfer at the transfer hearing before the board of education were “false reasons and the situation presented at the Board for her transfer had not occurred yet.” Specifically, Grievant alleged that when Ms. Price stated at Grievant's transfer hearing that “an autistic child from Fayetteville Elementary School had been identified to attend [Fayetteville Middle School] for the 223- 2004 [sic] school year,” this was a false statement, as this student's parents had not yet decided whether to send the child to Fayetteville Middle School as of the date of the transfer hearing, and were considering their options. Grievant concluded that it was arbitrary and capricious to base her transfer on false reasons, and resulted in a less senior employee being retained at Fayetteville Middle School. Respondent pointed out that seniority is not an issue in transfers, absent a county policy to the contrary. No county policy was presented into evidence, nor does the record reflect the seniority of Mr. Bailey.

"County boards of education have broad discretion in personnel matters, including transfers, but

must exercise that discretion in a manner which is not arbitrary or capricious." Dodson v. McDowell County Bd. of Educ., Docket No. 93-33-243 (Feb. 15, 1994). The Supreme Court of Appeals of West Virginia has "repeatedly held that the power to transfer teachers must be exercised in a reasonable manner and in the best interests of the school." Townshend v. Bd. of Educ. of County of Grant, 183 W. Va. 418, 396 S.E.2d 185, 188 (1990). See Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986).

The evaluation of a personnel decision under the arbitrary and capricious standard entails close examination of the process used to make the decision. Considerable deference must be afforded the professional judgment of those who made the decision. Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648 (1995). Baird v. Kanawha County Bd. of Educ., Docket No. 95-20-445 (Sept. 16, 1996). "In applying the 'arbitrary and capricious' standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that decision and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, supra, at 286." Hill and Cyrus v. Kanawha County Bd. of Educ., Docket No. 96-20-362 (Jan. 30, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." Eads, supra (citing Arlington Hosp. v. Schweiker, 547 F. Supp. 670 (E.D. Va. 1982)).

Boards of education are not required by law to base transfer decisions on seniority, or to consider seniority as a factor in making transfer decisions. (See footnote 2) Transfer decisions "are based on the needs of the school, as decided in good faith by the superintendent and the board. Hawkins v. Tyler County Bd. of Educ., 166 W. Va. 363, 275 S.E.2d 592 (1979) and Post [v. Harrison County Bd. of Educ., Docket No. 89-17-355 (Feb. 20, 1990)]. See Jochum v. Ohio County Bd. of Educ., Docket No. 91-35-396 (Jan. 31, 1992)." Stewart, et al., v. Kanawha County Bd. of Educ., Docket No. 96-20-370 (Jan. 31, 1997). Classroom teachers have no vested right to be assigned to a particular school in the county. Hawkins, supra. W. Va. Code § 18A-2-7 "grants broad discretion to a superintendent, and gives him the authority to transfer school personnel subject only to the approval of the board.

Post [supra]." Stewart, supra.

Grievant's argument that Ms. Price gave a false statement as to why Grievant was to be transferred is specious. County boards of education are required by law to make personnel decisions during the spring of the year based upon anticipated enrollments for the next school year. They certainly cannot know what will occur in the fall. They have to make a judgement based upon what they project will occur. Grievant admitted at the Level II hearing that Ms. Price did not ever state that the autistic student would definitely be attending Fayetteville Middle School in the fall of 2003, stating “we didn't know for sure.” In fact, this student will be attending Fayetteville Middle School in the fall of 2003, as Ms. Price anticipated. Certainly, FBOE acted in good faith in this instance, and that is all that is required.

This Grievance Board has previously found that it is not arbitrary and capricious for a county board of education to retain a teacher with BD certification to serve the needs of any BD student who might enroll at a future point in time, even though there were no BD students enrolled at the school in question at the time this decision was made. Belladonna v. Logan County Bd. of Educ., Docket No. 97-23-321 (Oct. 16, 1997). Likewise, it is reasonable to retain the teacher with Autism certification at a school where it is anticipated that there will be two autistic students. To do otherwise would be to disregard the facts and circumstances, and to disregard the interests of the autistic students.

The following Conclusions of Law support the Decision reached.

CONCLUSIONS OF LAW

1. The burden of proof is upon Grievant to prove the elements of her grievance by a preponderance of the evidence. Tibbs v. Mercer County Bd. of Educ., Docket No. 96- 27-074 (Oct. 31, 1996).

2. "County boards of education have broad discretion in personnel matters, including transfers, but must exercise that discretion in a manner which is not arbitrary or capricious." Dodson v. McDowell County Bd. of Educ., Docket No. 93-33-243 (Feb. 15, 1994). Dillon v. Bd. of Educ. of County of Wyoming, 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 or that the seniority requirements of W. Va. Code §18A-4-7a control transfers and subsequent assignments. Jochum v. Ohio County Bd. of Educ., Docket No. 91-35-396 (Jan. 31, 1992). See also

Post v. Harrison County Bd. of Educ., Docket No. 89-17-355 (Feb. 20, 1990)." Stewart, et al., v. Kanawha County Bd. of Educ., Docket No. 96-20-370 (Jan. 31, 1997).

4. Classroom teachers have no vested right to be assigned to a particular school in the county. Hawkins v. Tyler County Bd. of Educ., 166 W. Va. 363, 275 S.E.2d 592 (1979).

5. Grievant was not given false reasons for her transfer at her transfer hearing.

6. The Fayette County Board of Education did not abuse its broad discretion or act in an arbitrary and capricious manner when it chose to transfer Grievant from Fayetteville Middle School in order to staff that school with a teacher certified in Autism to serve the needs of the two autistic students who will be enrolled at that school. Belladonna v. Logan County Bd. of Educ., Docket No. 97-23-321 (Oct. 16, 1997).

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Fayette 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: August 20, 2003

Footnote: 1

This grievance was filed on or about April 25, 2003. Grievant's supervisor responded on May 1, 2003, that he was without authority to grant the grievance. Grievant appealed to Level II, where a hearing was held on May 29, 2003, and a decision denying the grievance was issued on July 1, 2003. Grievant waived Level III, appealing to Level IV on July 7, 2003. The parties agreed to submit this grievance for decision at Level IV based upon the record developed at Level II. Grievant was represented by Anita L. Mitter, and Respondent was represented by Erwin L. Conrad, Esquire. This matter became mature for decision on August 6, 2003, upon receipt of the last of the parties' written arguments.

Footnote: 2

Some counties have adopted policies which require them to consider seniority in transfer situations. See Allen v. Harrison County Bd. of Educ., Docket No. 96-17-176 (July 31, 1996). See also, Dyer, et al., v. Lincoln County Bd. of Educ., Docket No. 95-22-494 (June 28, 1996).