BELVIA FULLER and

MARSHA LOCKHART,

Grievants,

v. Docket No. 03-33-252

McDOWELL COUNTY

BOARD OF EDUCATION,

Respondent.

DECISION

The grievants, Belvia Fuller and Marsha Lockhart (jointly "Grievants"), are teachers employed by the respondent, the McDowell County Board of Education ("BOE"). Grievants challenge their transfers for the 2003-2004 school year. As relief they ask that the transfers be rescinded until "a proper merger or consolidation has occurred between Iaeger and Panther Elementary [Schools]."

The underlying grievance was filed on April 28, 2003. It was denied at Level I on May 12, 2003, because the principal was without authority to grant the relief requested. Grievants waived the time requirements and a Level II hearing was conducted on July 8,2003. The undated Level II decision denied the grievance. A Level IV appeal was brought on August 20, 2003, after BOE waived Level III consideration.

Initially, Grievants asserted that there had been a default at Level II. However, by correspondence dated September 8, 2003, Grievants notified the West Virginia Education and State Employees Grievance Board that the default claim was withdrawn.

The record was supplemented by the submission of documents at Level IV and, by agreement of the parties, this grievance was submitted for decision on the supplemented record. It became mature

for decision upon receipt, on or before April 12, 2004, of the parties' proposed findings of fact and conclusions of law.

Grievants are represented by Ben Barkey, WVEA Region VII UniServ Consultant. BOE is represented by attorney Kathryn Reed Bayless.

Discussion

Panther Elementary School ("Panther Elementary") was damaged by flooding in May 2002 causing school to be cancelled for the remainder of that school year. As a result of the flood, the students and faculty from Panther Elementary were sent to Iaeger Elementary School ("Iaeger Elementary") for the 2002-2003 school year. With the possible exception of two teachers, who voluntarily went elsewhere, the entire Panther Elementary faculty was able to teach at Iaeger Elementary. Grievant Fuller was one of the teachers who went to Iaeger Elementary as a result of the flood damage to the Panther Elementary building.

Prior to April 28, 2003, Grievants were advised that they had been recommended for transfer. There is no evidence in the record to establish more specifically whenGrievants were notified of their transfer status. (See footnote 1) The Level II decision contains a finding of fact that Grievants were notified of their transfer status in March 2003 but there is no evidence in the record upon which to predicate such finding.

Grievants claim that, pursuant to West Virginia Code section 18A-4-8f, the McDowell County faculty senates were required to vote regarding priority placement for teachers who would be displaced as a result of the planned closure of Panther Elementary. They take the position that such votes had to be taken before they were placed on the transfer list. BOE responds that the State Board did not vote to approve the plan to close Panther Elementary until April 17, 2003, and that, prior to the State Board's action, faculty senate votes regarding preferential treatment for teachers displaced by the Panther Elementary closure would have been premature.

Further, BOE argues that the decision to transfer Grievants was part of a county- wide reduction in force based on a declining school population and was not tied to the decision to close Panther Elementary. Grievants' representative responds to this assertion by claiming that, in determining the needs of its students in connection with a reduction in force, BOE should have looked at the needs of the student population for Panther Elementary in isolation from the Iaeger Elementary population. This was not done because, at the time the reduction in force was being planned, both groups of

students were attending classes in the Iaeger Elementary building where the populations were blended. The decision to implement a county-wide reduction in force was a reasonable response to the decline in student population in McDowell County. The fact that the student populations of Panther Elementary and Iaeger Elementary were blended for purposes of assessing the staffing needs in that geographical region does not impugn the reasonableness or the propriety of BOE's decisions about the reduction in force or the manner in which the reduction would be implemented. To the contrary, this was a reasonable approach given the geographical proximity of the student populations and the fact that emergency circumstances prematurely forced them together. To compel BOE to maintain an artificial distinction between the two student populations would not be in the best interests of the students who, under any scenario, were going to have to share physical space and limited educational resources for an indeterminate period of time.

Grievants are correct in asserting that, pursuant to West Virginia Code section 18A- 4-8f, faculty senates may vote to create priority status for teachers who will be displaced by a school closure caused by a consolidation or a merger. Grievants' transfers are not predicated upon a closure or consolidation. Therefore, the requirements of West Virginia Code section 18A-4-8f do not come into play with respect to Grievants' transfer status.

In light of the fact that their transfers pre-date the official decision to close Panther Elementary, Grievants do not have standing to insist that their transfers be held in abeyance until Panther Elementary and Iaeger Elementary are properly merged or consolidated and faculty senate votes pursuant to West Virginia Code section 18A-4-8f can be held.

After careful review of the entire record, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

Findings of Fact

1 1. Grievants are employed as teachers by BOE.

2 2. Dr. Mark A. Manchin (“Dr. Manchin”) is the Superintendent of the McDowell County Schools.

3 3. At all times pertinent to this grievance, the McDowell County school system was operating under the intervention of the State Board of Education (“State Board”).

4 4. Grievant Fuller was assigned to Panther Elementary School when a flood in May 2002

made the building uninhabitable.

5 5. By correspondence dated August 2, 2002, Dr. Manchin advised Grievant Fuller that she was being assigned to Iaeger Elementary for the 2002-2003 school year, pursuant to “the statutory authority given the superintendent in an emergency to reassign personnel.”

6 6. Throughout the 2002-2003 school year the former Panther Elementary students attended school at Iaeger Elementary in classes that were a blend of students from both schools.

7 7. As of the date of the Level II hearing, Grievant Lockhart had been teaching at Iaeger Elementary School for three years.

8 8. At some unspecified date before the grievance was filed on April 28, 2003, each Grievant was advised that she was being placed on transfer status for the 2003-2004 school year.

9 9. Grievants were placed on transfer as part of a county-wide reduction in force that flowed from a decline in the student population in McDowell County.

10 10. After school administrators assessed staffing needs, based on projected student populations, the administrators looked to seniority and certification for purposes of determining which individual teachers would be affected by the reduction.

11 11. There is no dispute that their seniority was properly calculated in selecting Grievants for transfer

12 12. On April 17, 2003, the State Board approved changes to the McDowell County school system that will include closure of Panther Elementary School and its consolidation with Iaeger Elementary.

Based upon the foregoing, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

Conclusions of Law

1 1. This is not a disciplinary grievance. Therefore, Grievants bear the burden of proof. 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).

2 2. Grievants' allegations must be proven by a preponderance of the evidence. 156 W. Va. C.S.R. 1 § 4.21. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't*

of Health and Human Resources, Docket No. 92-HHR- 486 (May 17, 1993).

3 3. "'County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, thisdiscretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious.' Syl. pt. 3, *Dillon v. Wyoming County Board of Education*, 177 W. Va. 145, 351 S.E.2d 58 (1986)." Syl. pt. 2, *Hancock County Bd. of Educ. v. Hawken*, 209 W. Va. 259, 260, 546 S.E.2d 258, 259 (1999)(*per curiam*).

4 4. An action is recognized as "arbitrary and capricious when it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 614, 474 S.E.2d 534, 544 (1996) (citing *Arlington Hosp. v. Schneider*, 547 F. Supp. 670 (E.D. Va. 1982)).

5 5. The selection process for the reduction in force was not arbitrary and capricious. Rather, it was based on the needs of the school system with due consideration to seniority and certification being given during the process of selecting the individual teachers who would be affected by the reduction.

6 6. Pursuant to West Virginia Code section 18-4-10(10), Dr. Manchin was empowered to "[a]ct in case of emergency as the best interests of the school demand[.]"

7 7. The May 2002 flood was an emergency, which is defined in West Virginia Code section 18-4-10(10) as "limited to an unforeseeable, catastrophic event including natural disaster or act of war."

8 8. West Virginia Code section 18-4-10(10) also contains an express limitation to the effect that the superintendent cannot, without express statutory authorization, "override any statutory or constitutional provision in the exercise of said emergency power[.]" This limitation, as applied to the circumstances of this case, means that Dr. Manchin did not have the power to merge Panther Elementary with Iaeger Elementaryexcept on an emergency basis. He could not ignore or override the statutorily-prescribed procedures, set forth in West Virginia Code sections 18-5-13 and 18-5-13a, that must be followed in order to lawfully close one school and merge it with another.

9 9. Solely for purposes of West Virginia Code section 18-4-8f, a merger occurs "when one or more schools are closed or one or more grade levels are removed from one or more schools and the students who previously attended the closed schools or grade levels are assigned to another existing

school." Although there was a *de facto* merger of Panther Elementary with Iaeger Elementary as a result of the May 2002 flood, it occurred under emergency conditions and did not trigger the need for faculty senate voting as provided for in West Virginia Code section 18A-4-8f. *Beavers v. McDowell County Bd. of Educ*., Docket No. 03-33-321 (Sept. 30, 2003).

10 10. West Virginia Code section 18A-4-8f provides, in pertinent part, that "[e]ach year a consolidation or merger is proposed, prior to the implementation of that plan, the superintendent shall cause to be prepared and distributed to all faculty senates a ballot on which teachers may indicate whether or not they desire those affected by the school closings to be given priority status in filling new positions." Although a plan to merge Panther and Iaeger Elementary schools was approved on April 17, 2003, the requisite faculty senate voting need only occur before a merger plan is implemented.

11 11. By statute, BOE is required to advise employees, in writing, of their transfer status on or before the first Monday in April, which would have been Monday, April 7, 2003. Grievants have neither alleged nor offered any evidence to suggest that they did not receive the transfer notice by this deadline. Therefore, Grievants have failed to establish that the implementation of the merger plan was imminent at the time they were placed ontransfer status. Consequently, they have failed to establish entitlement to a faculty senate vote on preferred recall status.

12 12. Grievants have failed to prove that their transfers were improper or that BOE was required to call for a faculty senate vote pursuant to West Virginia Code section 18A- 4-8f before their transfers could take effect.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of McDowell 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 West Virginia Code section 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: June 18, 2004

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JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

To the extent that BOE's proposed findings of fact contain dates not established by substantive evidence of record, they are rejected.