DEBORAH BAISDEN,

Grievant,

v. **Docket No. 03-29-286**

MINGO COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Deborah Baisden, an employee of the Mingo County Board of Education ("MCBOE"), filed this grievance on May 7, 2003. Grievant's Statement of Grievance reads:

> Grievant is a regularly employed cook. Grievant was the most senior applicant for a posted position. The position was awarded to an employee who did not apply for the position. Grievant alleges that the action of the Respondent violated W. Va. Code §§ 18A-4-8b & 18A-4-8g.
>
> Relief sought: Grievant seeks instatement to the position. She seeks compensation for travel expenses if she is not instated into the position by the beginning of the 2003 - 2004 school year.

This grievance was denied at all lower levels, and Grievant appealed to Level IV on September 18, 2003. A Level IV hearing was held November 5, 2003, at the Grievance Board's Charleston Office. (See footnote 1) The parties agreed to submit their proposed findings of fact and conclusions of law by December 8, 2003, whereupon the matter became mature for decision.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. During the 2002 - 2003 school year, Grievant was employed as a Cook II by MCBOE at Lenore Elementary.

2. In the Spring of 2003, Grievant and several other cooks were placed on the assigned transfer list, meaning they had enough seniority to retain a position, but their placement for the next school year was not yet known. Other cooks were reduced-in-force ("RIF'd").

3. Grievant did not grieve her transfer.

4. Grievant applied for multiple posted vacancies, but when she turned in her bid sheets she was told it was not necessary for her to apply, as she was on the transfer list. Her first choice was to return to Lenore Elementary, and her second choice was Varney Grade.

5. Freda Hensley was a half-time Cook II at Lenore Elementary. She was also placed on the transfer list.

6. Ms. Hensley has approximately four more years of seniority than Grievant.

7. Ms. Hensley did not complete an application for any of the posted cook positions. (See footnote 2)

8. Nell Hatfield, Personnel Coordinator of MCBOE, created a list of the cooks on the unassigned transfer list, their seniority dates, and the available cook positions. 9. The practice of considering employees on the unassigned transfer list as automatic applicants has been in place for at least ten years. (See footnote 3) Ms. Hatfield also testified she used this method in order to comply with a Level IV Grievance Board Decision from Lincoln County issued several years ago.

10. If employees on the unassigned transfer list are not placed in positions, they are still on the payroll, whether they work or not.

11. Following past practice, Ms. Hatfield called these employees in seniority order and asked them their placement preference.

12. Two more senior cooks were placed, and then Ms. Hatfield called Ms. Hensley, the third most senior employee on the unassigned transfer list.

13. Ms. Hensley selected the full-time position at Lenore Elementary.

14. Grievant was the fourth most senior cook on the transfer list, and she received her second choice, a full-time position at Varney Grade.

Issues and Arguments

Grievant asserts an employee on transfer must apply for a position pursuant to W. Va. Code § 18A-4-b(b), and a prior Grievance Board Decision. Respondent asserts it followed a newer Grievance Board Decision, and the prior Decision was inherently overruled. (See footnote 4)

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. "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). Where the evidence equally supports both sides, the employer has not met its burden. Id.

Grievant maintains Ms. Hensley cannot be placed in a posted position for which she did not apply, and relies on the case of Compton v. Mercer County Board of Education, Docket No. 27-87-281-4 (Feb. 29, 1988). In Compton, an employee on administrative transfer was given a position she did not apply for over an employee with less seniority who did apply for the position. Confusingly, the administrative law judge in Compton held the language of W. Va. Code § 18A-4-8b discussing RIF's was controlling. This RIF reasoning does not apply to a transfer situation, and it does not control the current grievance. The outcome of this case is guided by W. Va. Code § 18A-2-7, relating to service personnel transfers and subsequent placement, not by posting requirements and applications. See Watts v. Lincoln County Bd. of Educ., Docket No. 98-22-348 (Nov. 30, 1998). Transfers of school service personnel are governed by this Code Section, which provides, in pertinent part:

> 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. . . .

This power to transfer employees must be exercised reasonably and in the best interests of school systems and may not be exercised arbitrarily or capriciously. State ex rel. Hawkins v. Tyler County Bd. of Educ., 166 W. Va. 363, 275 S.E.2d 908 (1980).

As previously stated, 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 v. Harrison County Bd. of Educ., Docket No. 89-17-355 (Feb. 20, 1990). Further, employees have no right to be assigned to a particular position, and transfers are not based on seniority, but are based on the needs of the school system, as decided in good faith by the superintendent and the board.

Hawkins, supra; Post, supra. See Jochum v. Ohio County Bd. of Educ., Docket No. 91-35-396 (Jan. 31, 1992). The standard of review in a transfer is stated in Dillon v. Board of Education of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986). It is well-settled that "[c]ounty boards of education have substantial discretion in matters relating to hiring, assignments, transferring and promotion of school personnel," as long as they exercise this discretion "reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Id. The West Virginia Supreme Court has stated that boards of educationhave "great discretion . . . to transfer and assign [personnel] to designated schools and [the West Virginia Supreme] Court will not interfere with the exercise of that discretion where such action is taken in good faith for the benefit of the school system and is not arbitrary." Hawkins supra. Thus, whether a transfer was properly conducted is judged by the arbitrary and capricious standard, in the absence of a county policy requiring seniority be considered. Lester v. McDowell County Bd. of Educ., Docket No. 93-33-256 (Jan. 31, 1994); See also Hawkins, supra; LeMastus v. Wyoming County Bd. of Educ., Docket No. 55-87-290-4 (Mar. 23, 1988); Tenny v. Barbour County Bd. of Educ., Docket No. 01-87- 166-2 (Nov. 13, 1987).

"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.2d 1017 (4th Cir. 1985); Yokum v. W. Va. Schools for the Deaf and the Blind, Docket No. 96-DOE-081 (Oct. 16, 1996)." Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. State ex rel. Eads v. Duncil, 196 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)). The arbitrary and capricious standard is a high one, requiring willful and unreasonable action and disregard of known facts. Respondent cites to Dyer v. Lincoln County Board of Education, Docket No. 98-22- 347 (Nov. 30, 1998), which presented a set of facts similar to this grievance. In Dyer, a RIF'd employee alleged another employee, on unassigned transfer, could not receive a position unless he applied for it. The administrative law judge in Dyer held no statutory violations occurred, and the employee on transfer was entitled to a position with the board. While

Dyer did not specifically overrule Compton within the Decision, the effect of the holding was to do so.

MCBOE has decided employees on the unassigned transfer list do not have to apply for positions because they are already entitled to a position. This decision is not arbitrary and capricious. Additionally, while employees have no right to be assigned to a particular position, and transfers do not have to be based on seniority, but are based on the needs of the school system, as long as they are decided in good faith by the superintendent and the board, MCBOE has decided to give their senior employees this benefit. Hawkins, supra; Post, supra. See Jochum, supra. Again, this action cannot be seen as arbitrary and capricious.

It should be noted Grievant cites Syllabus Point 1 of Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1992) as support for this grievance. Morgan stands for the proposition that "[s]chool personnel regulations and laws are to be strictly construed in favor of the employee." That assertion would be inapplicable here, as this grievance actually pits employee against employee.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. 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. "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). Where the evidence equally supports both sides, the employer has not met its burden. Id.

2. Grievant has failed to demonstrate MCBOE's decisions in her transfer and subsequent placement were arbitrary and capricious.

3. The case of Compton v. Mercer County Board of Education, Docket No. 27- 87-281-4 (Feb. 29, 1988), is specifically overruled.

Accordingly, this grievance is **DENIED**.

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

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: January 23, 2004

Footnote: 1

Grievant was represented John Roush, Esq., from the West Virginia School Service Personnel Association, and Respondent was represented by Harry Rubenstein, Esq. of Kay Casto and Chaney.

Footnote: 2

Grievant testified Ms. Hensley told her she did not want a full-time position, and that is why she did not apply. Grievant did not call Ms. Hensley to testify, and this testimony was placed in doubt, as Ms. Hensley took the full-time Lenore position when it was offered, and a part-time position was available in another school. Accordingly, it is unknown why Ms. Hensley did not complete bid sheets. It is just as possible that Ms. Hensley knew she did not have to complete them because she was on transfer.

Footnote: 3

It is noted that some counties do not assign employees on the unassigned transfer list by seniority.

Footnote: 4

Although not cited by the parties as relevant, it would appear appropriate for clarity to distinguish this case from Webster v. Johns, 191 W. Va. 664, 447 S.E.2d 599 (1994). Syllabus Point 2 of Johns states in pertinent part, "A board of education clearly exceeds its discretion in assigning an individual to a newly-created service personnel position who did not apply for the position, but was otherwise qualified for the opening, when anotherindividual, holding the necessary qualifications and superior seniority, applied for the position."

This present grievance differs from the directions given in Johns in three ways: 1) the position at issue was not a newly created; 2) the assigned individual in Johns was not on transfer due to elimination of the position; and more

importantly; 3) the assigned individual in this case was more senior than Grievant.