WALLIS CONN,

Grievant,

v. **Docket No. 04-29-314**

MINGO COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Wallis Conn, is employed by the Mingo County Board of Education ("MCBOE") as a counselor. On May 5, 2004, she filed this grievance. Her Statement of Grievance states:

> **I received a letter dated April 30, 2004 from Superintendent Brenda Skibo stating that I have been placed on transfer, unassigned, from my currently held position as counselor 3/5 at Williamson Middle School and 2/5 at Riverside Elementary School. Under 1 8A-2-7 [sic] and Hawkins v. Tyler County Board of Education, power of board of educations "to transfer teachers must be exercised in a reasonable manner and in the best interests of school and must not be exercised arbitrarily and capriciously." 18A-1-1 and Beine v. Board of Education "by contract and by statute, school counselor was a teacher entitled to all the contractual and legal rights to which a teacher is entitled in West Virginia." I believe that my transfer is in violation of the three findings of Hawkins v. Tyler County Board of Education, and is therefore, an improper transfer.**

Grievant's Relief Sought stated: "I ask that my transfer be found null and void and I be allowed to continue my current assignment at Williamson Middle School and Riverside Elementary."

This grievance was denied at Levels I and II, and waived at Level III. Grievant appealed to Level IV on August 16, 2004. A Level IV hearing was held on October 14,2004, and this case became mature for decision on that date, as the parties elected to stand on their lower level proposals. **(See footnote 1)**

Issues and Arguments

Grievant asserts her transfer was arbitrary and capricious as "the best interest of the

school" was not considered. She also disagrees with the reorganization of the counseling positions within the Mingo County school system. Grievant further argues the reasons listed in her transfer letter did not apply, and thus, her transfer was incorrect. **(See footnote 2)**

MCBOE notes boards of education have broad discretion relating to personnel matters within the school system, including transfers. MCBOE asserts Grievant did not meet her burden of proof and demonstrate MCBOE violated any statute, policy, rule, or regulation, and/or its action was arbitrary and capricious or an abuse of discretion.

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

Findings of Fact

1. Grievant has been employed by MCBOE for thirty years and is the most senior counselor employed by MCBOE. During the 2003 - 2004 school year, Grievant was assigned to Riverside Elementary School two days a week and Williamson Middle School three days a week. 2. During school year 2003 - 2004, there was a need to review and reorganize the counselor positions within the Mingo County school system. The counselors were allowed to meet and draw up their own assignments. The end result of this reorganization was "a mess." Test. Keathley, Level IV Hearing. For example, one school, while receiving three days of counseling service, obtained this service from three different counselors, thus, there was no continuity of service for these students. Additionally, one counselor was traveling from one end of the county to another, one counselor covered four schools, and only one counselor remained at her school for the entire time. Further, schools of similar size and student population were not receiving a similar amount of services. For example, Matewan Middle School had two days of counseling services a week, and Williamson Middle School had three days of counseling services a week. The number of students at these two schools is almost the same.

3. Two Counselors retired at the end of the 2003 - 2004 school year, and several schools were closed and/or had their grade levels reconfigured.

4. For the 2004 - 2005 school year, a half-time counselor position was posted for the Vocational School. The funds for this position were provided through a grant, not by county

funds. Otherwise, the number of counselors remained the same for the 2003 - 2004 and 2004 - 2005 school years.

5. Superintendent Skibo asked Assistant Superintendent Randy Keathley to reconfigure the counseling services for the 2004 - 2005 school year to insure all MCBOE students received as many services as possible on an equal basis. (See footnote 3) **Additionally, MCBOEwanted to insure as much continuity at each school as possible and to decrease the travel time of the counselors to increase the time on task.**

6. Assistant Superintendent Keathley, Personnel Director Nell Hatfield, and Karen Canterbury, a counselor who spends a portion of her time at the Central Office, worked on this reconfiguration. This group agreed the focus for counselor positions should be in the high schools because of the undertakings needed to ready these students for graduation and further education and training. This plan resulted in Grievant's transfer.

7. In late March or early April of 2004, Superintendent Brenda Skibo informed Grievant she was placed on transfer, unassigned. One of the reasons given for Grievant's transfer was the decrease in student population and the resulting reconfiguration of schools. Grievant requested a hearing before MCBOE, and this request was granted on April 28, 2004.

8. By letter dated April 30, 2004, Superintendent Skibo informed Grievant her transfer was approved by MCBOE.

9. The newly created positions were posted, and Grievant applied for and received the counselor position at Williamson Middle School (two days) and Williamson High School (three days). Thus, she remained as the counselor for Williamson Middle School, and the new portion of her position was at Williamson High School. These two schools are on the same campus, share a variety of positions, and Grievant's placement would provide continuity and assistance in the transition period from middle school to high school. Additionally, Grievant would be able to provide coverage for each school, if there were an emergency. 10. Grievant's transfer in no way was meant as a disciplinary measure, and there is no indication her work was ever less than satisfactory.

11. Grievant's transfer was due to a decrease in enrollment over time, the resulting closing and reconfiguration of schools, and the need to improve counseling services county-wide, in the best interests of all Mingo County students. These goals could not have been

achieved without Grievant's transfer.

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 & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

Grievant asserts she has been improperly transferred. It has been repeatedly ruled that the Code Section which applies to transferred employees is W. Va. Code § 18A-2-7. Stewart v. Kanawha County Bd. of Educ., Docket No. 96-20-370 (Jan. 31, 1997). See also, Hawkins v. Tyler County Bd. of Educ, 166 W. Va. 363, 275 S.E.2d 908 (1980); Eckenrode v. Kanawha County Bd. of Educ., Docket No. 96-20-302 (Jan. 22, 1997); Morgan v. Wood County Bd. of Educ., Docket No. 89-54-470 (Nov. 29, 1989).

W. Va. Code § 18A-2-7 states 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. 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,**
>
> **. . .**
>
> **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 the superintendent 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, except that for the school year one thousand nine hundred eighty-nine_ninety only, the hearing shall be held on or before the fourth Monday in May, one thousand nine hundred ninety. At the hearing, the reasons for the proposed transfer must be shown.**
>
> **The superintendent at a meeting of the board on or before the first Monday in**

> **May shall furnish in writing to the board a list of teachers and other employees to be considered for transfer and subsequent assignment for the next ensuing school year,**
>
> **. . .**
>
> **All other teachers and employees not so listed shall be considered as reassigned to the positions or jobs held at the time of this meeting. The list of those recommended for transfer shall be included in the minute record of such meeting and all those so listed shall be notified in writing, by certified mail, return receipt requested, to such persons' last known addresses within ten days following said board meeting, of their having been so recommended for transfer and subsequent assignment and the reasons therefor.**

This Code Section applies to Grievant's transfer.

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, teachers have no right to be assigned to a particular school, and transfers are not based onseniority, but are based on the needs of the school, 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). Thus, whether a transfer was properly conducted is judged by the arbitrary and capricious standard, in the absence of a county policy requiring seniority to 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). No evidence was presented that MCBOE has such a policy.

"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 Res., 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. MCBOE's transfer of Grievant from the Williamson Middle School and Riverside Elementary School position to the Williamson Middle School and Williamson High School position was not arbitrary and capricious. While it is understandable that Grievant did not want to be transferred and wished to remain in her prior position, this does not make her transfer incorrect. Grievant was placed in a position with like responsibilities and duties and with the same compensation. The fact that she was not allowed to remain in a position of her own choosing is not violative of any Code Section.

Further, Grievant's interpretation of the phrase "the best interest of the school" is too narrow in that it focuses only on Riverside Elementary School. It is true that Riverside Elementary School's number of days with a counselor have changed from two days in five days to two days in six days, but other schools are now receiving more services, and these services are now more equally dispersed in the county. Additionally, other schools have the same counselor assigned for their services and continuity has increased, and travel time has decreased.

MCBOE did not abuse its substantial discretion in transferring Grievant. The goal to improve and equalize the counseling services to students county-wide was achieved. While it is true the services offered to Riverside Elementary School were slightly decreased by this change, is it also clear Riverside Elementary School was receiving more services than other schools of comparable size.

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 Rulesof 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 & Human Res., Docket No. 92-HHR-486 (May 17, 1993).

2. W. Va. Code § 18A-2-7, gives the Superintendent the right to transfer employees subject to the approval of the board. See Watts v. Lincoln County Bd. of Educ., Docket No. 98-22-348 (Nov. 30, 1998); Post v. Harrison County Bd. of Educ., Docket No. 89-17-355 (Feb. 20, 1990).

3. The 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). See Hyre v. Upshur County Bd. of Educ., 412 S.E.2d 265 (W. Va. 1991).

4. 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; Dingess v. Lincoln County Bd. of Educ., Docket No. 98-22--52 (May 29, 1998); Post, supra. See Jochum v. Ohio County Bd. of Educ., Docket No. 91-35-396 (Jan. 31, 1992).

5. 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 education have "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.

6. 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).

7. "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 Res., 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, andin 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.

8. MCBOE's transfer of Grievant from Riverside Elementary School and Williamson Middle School to Williamson Middle School and Williamson High School was not arbitrary and capricious nor an abuse of discretion. Hawkins, supra; Dingess, supra; Lester, supra.

9. Grievant did not meet her burden of proof and demonstrate her transfer was arbitrary and capricious, an abuse of discretion, nor did she establish a violation of any statute.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha or 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: December 16, 2004

Footnote: 1

Grievant represented herself, and MCBOE was represented by Howard Seufer, Esq. of Bowles Rice McDavid Graff and Love.

Footnote: 2

Grievant also asserted one of the counselor assignments had too large a caseload. Since this was not Grievant's caseload, this issue will not be addressed.

Footnote: 3

It was clear all witnesses at the hearing wish they had more money for more counselors.