WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

CAROLYN SHARP,

Grievant,

v.

Docket No. 07-18-361

JACKSON COUNTY

BOARD OF EDUCATION,

Respondent.

DECISION

Carolyn Sharp ("Grievant") initiated this proceeding at level two on an unspecified date in mid-2007, challenging the elimination of her position and subsequent transfer. A level two hearing was held on June 7, 2007, followed by a decision, denying the grievance, dated July 11, 2007. Level three consideration was bypassed, and Grievant appealed to level four on July 16, 2007, requesting that this matter be decided based upon the record developed at level two. The parties' fact/law proposals were submitted by September 10, 2007. In order to expedite the decision in this matter, this grievance was reassigned to the undersigned administrative law judge on January 18, 2008. (See footnote 1)

Synopsis

Grievant challenges the elimination of her position and transfer in the spring of 2007 for the upcoming school year. Due to a reduced number of special education students in the county's elementary schools, the Board proposed that the two itinerant special education teaching positions (one of which was held by Grievant) be combined into oneposition. Because the new, combined position required certifications that Grievant did not hold, and she had the least seniority of the employees with her certifications, she was returned to a position which she had previously held, in accordance with W. Va. Code § 18A-4-7a(j). Grievant failed to prove that the she was entitled to retain her position, or that the Board's actions were improper or unnecessary.

Based upon a detailed review of the record in its entirety, the undersigned makes the following findings of fact:

Findings of Fact

1. Grievant has been employed by Respondent as a special education teacher for approximately four years.

2. During the 2006-2007 school year, Grievant served as an itinerant special education teacher assigned to Cottageville Elementary and Evans Elementary Schools. The posting for this position required certification in Learning Disabilities (“LD”) and Mentally Impaired (“MI”), “certified or willing to complete certification” in Behavior Disorders (“BD”), and stated “Elementary Education [certification] preferred.”

3. Grievant holds a masters degree in Special Education and is certified in LD and MI. She is not certified in Elementary Education.

4. When she was placed in her itinerant position, Grievant was enrolled in courses necessary to obtain BD certification, making her qualified pursuant to the provisions of that particular posting. At all times relevant to this grievance, she continued to take such courses, but had not yet acquired certification in BD.

5. There was one other itinerant special education position during the 2006- 2007 school year, which was assigned to Gilmore Elementary School and RavenswoodMiddle School. This position required certification in LD, MI and BD, along with Elementary Education.

6. The Gilmore Elementary/Ravenswood position required the additional certification in

Elementary Education, due to the fact that at least one of the special education students at Gilmore Elementary received virtually all of his/her instruction from the special education teacher. Most other special education students receive their core instruction, in subjects such as reading and math, from a regular classroom teacher and are removed to receive instruction from the special education teacher for only a portion of the school day.

7. In the spring of 2007, Board officials concluded that the number of elementary special education students for the upcoming school year would be less than it had been in the past. Therefore, it was decided that one special education teaching position could be eliminated by combining the two itinerant positions into one.

8. By letter dated February 26, 2007, Grievant was informed by Superintendent Blaine Hess that, due to decreased enrollment in the special education area, the two itinerant positions were being eliminated, and the students at the three elementary schools would be served by one itinerant teacher. (See footnote 2) Grievant was also advised that she would be allowed to displace a less senior employee in an area where she had previously been employed. (See footnote 3)

9. Following a hearing before the Board on April 5, 2007, in which Grievant contested her proposed reduction in force, the Superintendent's proposal was approved, and Grievant was assigned to a teaching position at the Alternative School and Safe and Drug Free Resource Center for the 2007-2008 school year. Grievant had served in this position prior to receiving her special education position.

10. In April of 2007, the special education teacher position at Cottageville/Evans/Gilmore Elementary Schools was posted, requiring certification in LD, BD, MI, and Elementary Education. At that time, several students at Evans and Cottageville were being screened and evaluated for BD, due to behavior issues noted in their referrals for special education services.

11. The successful applicant for the newly posted itinerant position was Michelle Cox, who is certified in all areas required by the posting. The record does not reflect whether Grievant applied for the position.

12. Since 2006, Respondent has posted all special education teaching positions as requiring Elementary Education certification, in order to ensure that all students, regardless of the amount of special services they receive, will receive the required amount of instruction in core subjects from a qualified individual. This is, in part, due to requirements of the No Child Left Behind Act, which

mandates that special education students obtain the same levels in core subjects on the WESTEST as regular students.

Discussion

In non-disciplinary matters, a grievant bears the burden of proving her allegations by a preponderance of the evidence. W. Va. Code § 18-29-6. (See footnote 4) "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 Res.*, Docket No. 92-HHR-486 (May 17, 1993).

When the number of teaching positions in a county must be reduced, the provisions of W. Va. Code § 18A-4-7a(j) govern. That section provides, in pertinent part:

Whenever a county board is required to reduce the number of professional personnel in its employment, the employee with the least seniority shall be properly notified and released from employment pursuant to the provisions of ... [18A-2-2] ... of this chapter .... Provided, however, That an employee subject to release shall be employed in any other professional position where such employee is certified and was previously employed or to any lateral area for which such employee is certified and/or licensed, if such employee's seniority is greater than the seniority of any other employees in that area of certification and/or licensure: Provided further, That if an employee subject to release holds certification and/or licensure in more than one lateral area and if such employee's seniority is greater than the seniority of any other employee in one or more of those areas of certification and/or licensure, the employee subject to release shall be employed in the professional position held by the employee with the least seniority in any of these areas of certification and/or licensure.

In turn, W. Va. Code § 18A-2-2 provides that a teacher's continuing contract can only be terminated upon proper written notice, stated cause and an opportunity for a hearing before the Board. That statute further provides that a teacher's dismissal for lack of need must be “based upon known or expected circumstances which will require dismissal for lack of need.”

It is well-recognized that county boards of education have substantial discretion in matters related to hiring, assignment, transfer, and promotion of school personnel. However, that discretion must be tempered in a manner that is reasonably exercised, in the best interest of the schools, and in a

manner which is not arbitrary and capricious. *Syl. Pt. 3, Dillon v. Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986). Consistent with this principle, a county board of education has substantial discretion when establishing the qualifications for a position at the time of posting. *See Cowen v. Harrison County Bd. of Educ.*, 196 W. Va. 377, 465 S.E.2d 648 (1995); *Mounts v. Mingo County Bd. of Educ.*, Docket No. 96-29-479 (June 27, 1997); *Bailey v. Mingo County Bd. of Educ.*, Docket No. 95-29-346 (Feb. 21, 1996).

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.2d1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16., 1996). While a searching inquiry into the facts is required to determine if an action is arbitrary and capricious, the scope ofreview is narrow, and an administrative law judge may not simply substitute her judgment for that of the board of education. *See generally Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

Grievant contends that, because she was already an itinerant special education teacher, she should have been allowed to remain as the one itinerant teacher for the three elementary schools, merely absorbing the additional school. She believes that the certifications required by the posting for that position were not necessary and that she was fully qualified to provide the necessary services to all of the students, despite her lack of Elementary Education certification. In addition, in her level four proposals, she notes that she completed the requirements for BD certification in August of 2007, (See footnote 5) and that Respondent should have placed her in the position with the understanding that she was working toward attaining full certification. Grievant argues that her experience and training as a special education teacher are more than sufficient to equip her to teach the students in question.

Although discussing teacher transfers as opposed to reduction in force, the Grievance Board has previously held 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)." *Learmonth v. Fayette County Bd. of Educ.*, Docket No. 03-10-200 (Aug. 20, 2003). The reasoning in both of these casesis pertinent to the issue at hand, in that it is well established that a board of education has ample discretion in assessing how to best serve the needs of its special needs students. In *Learmonth*, the board of education's decision to require certification in autism, based upon a good faith belief that autistic students would be enrolled for the upcoming school year, was upheld.

In the instant case, it was not unreasonable for Respondent to require the combined itinerant teacher to have completed BD certification, as had previously been required for the Gilmore Elementary position. Moreover, several students had been referred for BD screening at the time the pertinent decisions here were being made, justifying Respondent's decision to continue to require that certification and ensure that all students' needs would be met by the successful applicant. As to Grievant being enrolled in the courses for BD certification, which she was not expected to complete prior to the fall of 2007, the Grievance Board has recognized that "it cannot be found to be an abuse of discretion to ignore an applicant who was without certification at the time of the posting and would still be without certification by the time the position must be filled." *Hurd v. Fayette County Bd. of Educ.*, Docket No. 04-10-283 (June 13, 2005).

Similarly, it was reasonable for Respondent to require Elementary Education certification for the newly combined position. The previous two teachers who had served in the position assigned to that particular school were so certified, based upon the requirements of the position as posted and the needs of the particular students to be served. Moreover, it is within a school board's authority to determine that such a certification is necessary and desirable for all special education teachers, in view of theWESTEST requirements and the need to teach special needs students the same core curriculum as other students.

Accordingly, the undersigned finds that Grievant's reduction in force was based upon "known or expected circumstances," as required by statute, and Respondent acted in accordance with the provisions of W. Va. Code § 18A-4-7a(j) by returning her to a position she had previously held. The following conclusions of law are appropriate.

Conclusions of Law

1. In non-disciplinary matters, a grievant bears the burden of proving her allegations by a

preponderance of the evidence. W. Va. Code § 18-29-6.

2. A teacher's reduction in force must be “based upon known or expected circumstances which will require dismissal for lack of need.” W. Va. Code § 18A-2-2.

3. When an employee is reduced in force, he or she is entitled to placement "in any other professional position where such employee is certified and was previously employed or to any lateral area for which such employee is certified" if the employee has more seniority than the person holding the position. W. Va. Code § 18A-4-7a.

4. County boards of education have substantial discretion in matters related to hiring, assignment, transfer, and promotion of school personnel. However, that discretion must be tempered in a manner that is reasonably exercised, in the best interest of the schools, and in a manner which is not arbitrary and capricious. *Syl. Pt. 3, Dillon v. Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986).

5. The evidence of record establishes by a preponderance of the evidence that Grievant's reduction in force was based upon known or expected circumstances and wasnot arbitrary and capricous or an abuse of the board of education's discretion in such matters.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Jackson County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7 (repealed, *See Footnote 4, supra)*. Neither the West Virginia Public 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.

Date: February 26, 2008

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant was represented by Bruce W. Boston of the West Virginia Education Association, and Respondent was represented by counsel, Howard E. Seufer.

Footnote: 2

It was determined that the students at Ravenswood Middle School could be served by other special education teachers already assigned to that school.

Footnote: 3

The other itinerant teacher received a similar reduction in force notification, and, because of her low seniority, was placed on the preferred recall list.

Footnote: 4

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.

Footnote: 5

However, it remains unclear whether Grievant has actually received her certification from the State Department of Education and, if so, when.