

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

RACHELLE LYNN COLE,
Grievant,

v.

Docket No. 2015-1554-WooED

WOOD COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Rachelle L. Cole, is employed by Respondent, Wood County Board of Education, ("Board") as a classroom teacher assigned to Williamstown High School. Ms. Cole filed a level one grievance form dated June 11, 2015, alleging:

Principal at Williamstown High School has transferred Ms. Cole from a High School Social Studies teacher to a Middle School West Virginia Studies teacher. Ms. Cole is not in agreement of the transfer. Grievant believes the transfer was done in violation of 18A-2-7 and 18A-2-9, since this is a substantial change in subject matter.

As relief Grievant seeks ". . . to be reinstated back to her position of High School Teacher for the next school year 2015-2016, and retain the grade level and subject matter at which she taught the previous school year."

A level one conference was held on July 8, 2015, and a decision denying the grievance was issued on July 27, 2015. Grievant appealed to level two on August 2, 2015. A level two mediation was held on September 9, 2015, and Grievant filed a timely appeal to level three.¹

¹ The form was dated September 9, 2015, and postmarked September 15, 2015.

A level three hearing was held in the Charleston office of the West Virginia Public Employees Grievance Board on December 9, 2015. Grievant appeared personally and was represented by Joseph M. Britton, ODS, West Virginia Education Association. Respondent was represented by Richard S. Boothby, Esquire, Bowles Rice LLP. This matter became mature for decision on February 1, 2016, upon receipt of the Proposed Findings of Fact and Conclusions of Law from all of the parties.

Synopsis

Grievant alleges that the change in her schedule was so significant that she was entitled by statute to notice and a hearing before the Board of Education prior to it being implemented. She also alleges that the principal's action was arbitrary and capricious. While Grievant's displeasure with her schedule change is understandable, under the specific facts of this case, it was not the type of change that requires the implementation of rights set out in W. VA. CODE § 18A-2-7. Additionally, Principal Peters relied upon appropriate factors in making his decision to change Grievant's schedule and did not act arbitrarily or capriciously.

The following facts are found to be proven by a preponderance of the evidence based upon an examination of the entire record developed in this matter.

1. Grievant, Rachelle Cole, is a professional educator employed by the Wood County Board of Education and assigned to Williamstown High School.
2. Williamstown High School is unusual in that it contains grades seven through twelve. The grades are all part of one school with one administration. There is no Williamstown Middle School or Junior High School. As a result of this configuration, it is not unusual for classroom teachers to have classes which are typically taught in middle

school as well as traditional high school classes.² William Patrick “Pat” Peters has been the principal of Williamstown High School for the last seven years.

3. Respondent posted a vacant classroom teaching position on February 25, 2011. The position was described as: Williamstown High; Social Studies with AP History preferred; Social Studies 7-12. (Respondent’s Exhibit 1).

4. Grievant applied for the position by completing a Professional Transfer Supplement Form CT-1 (Respondent’s Exhibit 2). Grievant noted that she had 1.5 years of teaching experience at that time and held a certification in Social Studies, Grades 5-12.

5. Grievant was hired for the position with the understanding that she would obtain an AP History certification in the summer prior to commencing her duties. Grievant completed all requirements and earned the AP³ History certification. (Respondent’s Exhibit 3).

6. Grievant is the only Social Studies teacher at the school who is certified to teach AP courses and she has taught those courses since she was initially assigned to Williamstown High School.

² (Respondent Exhibits 4, 5, & 6.) Class schedules for the school’s faculty members. Apparently the school has had this configuration since 1959. (Level three testimony of Williamstown High School Principal Peters.)

³ Advanced Placement (AP) is a program created by the College Board which offers college-level curricula and examinations to high school students. American colleges and universities often grant placement and course credit to students who obtain specified scores on the examinations. The AP curriculum for each of the various subjects is created for the College Board by a panel of experts and college-level educators in that field of study. For a high school course to have the AP designation, the course must be audited by the College Board to ascertain that it satisfies the AP curriculum. If the course is approved, the school may use the AP designation and the course will be publicly listed on the AP Course Ledger. *“AP Course Ledger.” AP Course Audit. University of Oregon.*

7. During the 2013-2014 school year Grievant's schedule included four periods teaching Civics, one period of AP World History, one period of AP United States History, and one period of AP Government.⁴ Additionally, she had one planning period and a period for lunch. (Respondent Exhibit 4, *2013-2014 Williamstown High School Schedule*).

8. During the 2014-2015 school year, Grievant's schedule included, two periods teaching Civics, one period of AP World History, two periods of AP United States History, and one period of AP Government. Additionally, she had one planning period, a period designated "Homebase," and a period for lunch. (Respondent Exhibit 5, *2014-2015 Williamstown High School Schedule*). This schedule required Grievant to have four "preparations", meaning that she had to prepare four different lesson plans for each day of class.

9. Grievant's schedule for the 2015-2016 school year only contained one class that she had taught during all of her previous years of employment at Williamstown High School; AP Government. In addition to that period, Grievant taught five periods of West Virginia Studies.⁵ This class is offered at the eighth grade level and typically taught at a middle school or junior high school. The same teaching certification is required for the classes to which Grievant was newly assigned as was required for the classes she previously taught.

10. This schedule reduced Grievant's preparations from four to two. However, she had never taught the West Virginia Studies class before so she had to create new

⁴ As a general rule, AP World History was taken by sophomores, AP United States History was taken by juniors, and AP Government was taken by seniors.

⁵ West Virginia Studies is also referred to as West Virginia History.

lesson plans rather than simply making adjustments to her existing plans as she could with the previously taught AP courses.

11. Each High School is required to offer at least one AP class in each discipline. Williamstown High School met that requirement for the 2015-2016 school year by assigning Grievant to teach one period of AP Government. The remaining two AP classes were no longer offered and Grievant continues to be the only social studies educator teaching (or qualified to teach) an AP class at the school.

12. Grievant did not agree to the change of her schedule or classes, did not receive a written notice of the change stating the reasons therefore, nor an opportunity to be heard before the board of education before the assignment became effective.

13. The teacher assigned to teach the West Virginia Studies classes the previous year, agreed to teach Theater, Civics, as well as 20th and 21st Century History.⁶

14. Grievant had a discussion with Principal Peters during the 2014-2015 school year about feeling overwhelmed by her AP classes. Principal Peters interpreted the conversation to mean that Grievant had too many different classes to adequately prepare for. Grievant states that she was concerned that there were as many as thirty students in each of her AP classes and many were not prepared to handle the difficult curriculum.

15. Grievant gave students assignments, such as vocabulary exercises and reflections on readings, which allowed them to bring their grades up but kept the content

⁶ Principal Peters testified that he obtained the teacher's agreement to the move because it would require the teacher to teach a theater class. Theater requires a different certification than social studies, which was the only certification the teacher was utilizing the previous year.

of the course rigorous.⁷ In one year, Grievant had seventy-eight students enrolled in her AP courses but only around thirty of those students attempted to take the AP test for college credit.⁸ Principal Peters was not dissatisfied with the number of students successfully taking the AP College Board tests or the scores made on those tests.

16. In an annual survey, taken by all students at the high school, approximately twelve students out of 275 surveys complained about Grievant's AP courses or teaching style. Most of the complaints centered on the use of videos, vocabulary and work sheets in the teaching." Respondents Exhibits 8, 9, 10. The surveys are anonymous and there is no way to know whether the individual responders had more nefarious reasons for their comments or relevant pedagogical training.

17. Grievant's course outlines were approved by the college boards and all of her lesson plans were submitted to the principal and assistant principal for approval. Additionally, her classes were occasionally monitored by an administrator as part of the evaluation process. Grievant did not receive any criticism for course content or teaching style from any of these professional sources.

18. In preparing the 2015-2016 course schedule, Principal Peters decided to reduce the number of AP classes offered in the area of social studies from three to one, which is the minimum requirement. He changed Grievant's schedule to adjust to the elimination of two AP classes. One reason given for the change was that Principal Peters felt that Grievant would benefit from having only two classes to prepare for as opposed to

⁷ Grievant began this practice when told by Principal Peters to make the course less difficult if necessary so that the students could get better grades.

⁸ It is difficult to know why so many students would enroll in the AP courses with no intention of taking the AP test for college credit at the end.

four. The change in Grievant's schedule was not disciplinary. Principal Peters believed that the new schedule alignment would strengthen the high school's social studies offerings as a whole.

19. Grievant feels that she was demoted because she is now mostly teaching ninth grade students specific facts, rather than preparing older students for success in college.

Discussion

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE R §156-1-3. *Burden of Proof*. "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). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

Grievant feels that the change of her schedule constitutes a demotion because she is teaching lower level students less challenging material. She feels that the move was motivated by invalid criticism of her job performance. While it is easy to understand Grievant's concerns, Principal Peters specifically stated that the change of schedule was not a disciplinary move. Grievant's evaluations do not reflect criticism of her teaching style, preparation, or performance. While comments by student's and OPEA interviewers were cited in the hearing, the main reason stated by Principal Peters for the change of schedule was the concern that Grievant had too many preparations, especially in light of

the fact that three of the courses were AP classes, and he felt that Grievant and the students would benefit from giving Grievant a less challenging schedule.

Grievant did not suffer a loss of salary or benefits, continues to teach in the same certification area and is assigned to the same school. The only loss Grievant may have suffered is perceived prestige of teaching the more challenging social studies classes at the school. This is clearly insufficient to qualify as a demotion.⁹

Grievant's main argument is that the change in her schedule from the 2014-2015 school year to the 2015-2016 school year was so significant that it constituted a transfer triggering the notice and hearing requirements of WEST VIRGINIA CODE § 18A-2-7 which states:

- (a) ... [A]n employee shall be notified in writing by the superintendent on or before March 1 if he or she is being considered for transfer or to be transferred. . . . Any teacher or employee who desires to protest the proposed transfer may request in writing a statement of the reasons for the proposed transfer. The 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. The hearing on the proposed transfer shall be held on or before April 15. At the hearing, the reasons for the proposed transfer must be shown.

Id.

Grievance Board decisions have generally held that "A teaching schedule adjustment not including duties or responsibilities outside of a teacher's presently utilized area of certification, discipline, department or grade level is not a change in assignment

⁹ Generally a "demotion" is defined as a lowering in "rank, position, or pay." *Blacks Law Dictionary*, 8th Edition, Thomson West © 1999.

amounting to a transfer as contemplated by W. VA. CODE § 18A-2-7.” *Gerstner v. Gilmer County Bd. of Educ.*, Docket No. 11-87-303-3 (Feb. 17, 1988); *Pansmith v. Taylor County Bd. of Educ.*, Docket No. 46-86-057 (Aug. 4, 1986); *Burge and Worrell v. Mercer County Bd. of Educ.*, Docket No. 27-86-113 (Feb, 6, 1987); *Dotson v. Greenbrier County Bd. of Educ.*, Docket No. 13-87-321-4 (Mar. 7, 1988); *Callahan v. Raleigh County Board of Education*, Docket No. 41-87-026-4 (June 2, 1987).

A review of prior Grievance Board decisions reveals that the outcomes essentially depended upon the particular factual circumstances of each case, but certain general principles apply. The primary inquiry is necessarily whether or not changes in schedules are so substantial that a teacher has been essentially transferred from one position to another. In *Pansmith*, it was held that full-time special education teachers whose duties as such were reduced by one-half when they were assigned kindergarten and regular elementary classes were transferred. This change required them to utilize regular education certifications which they were not utilizing in their schedules consisting solely of special education classes. In *Bumgardner v. Ritchie County Bd. of Educ.*, Docket No. 43-88-119 (Feb. 28, 1989), change of a full-time librarian's assignment to a one-half time librarian and one-half time vocational home economics position was deemed such a substantial change as to require notice and an opportunity to be heard. Once again the schedule change required the librarian to utilize a certification area which she was not using in her full library schedule. Conversely, in *Dotson v. Greenbrier County Board of Education*, Docket No. 13-87-321-4 (March 7, 1988), it was concluded that a requirement that a full-time librarian teach one class of library science was not a transfer even though the employee had not previously done so. The deciding factor was that the new

assignment of teaching a library science class was within the teacher's "presently utilized area of certification." The same general rule was controlling in *Schafstall v. Brooke County Bd. of Educ.*, Docket No. 05-86-347-3 (Mar. 30, 1987) concerning the deletion of an English II class from a language arts teacher's schedule, and in *Kidd v. Fayette County Bd. Of Educ.*, Docket No. 89-10-452 (Dec. 14, 1989), where a teacher who had been teaching four English classes and one Social Studies class was given a new schedule where those numbers were reversed. Additionally, the same rule was followed in *Hutchinson v. Nicholas County Bd. of Educ.*, Docket No. 99-34-290 (Sept. 13, 1999) where, due to financial constraints, driver education courses were no longer going to be offered at the high school causing a teacher's schedule to be changed from two driver education class and one health classes, to three health classes.

The schedule change in the present case did not include duties or responsibilities outside of Grievant's presently utilized area of certification, discipline, department, i.e., Social Studies. Therefore, the prior cases indicate that it would not be a transfer triggering the provisions of W. VA. CODE § 18A-2-7.

However, changes in grade assignments have also been held to be sufficiently substantial to require the statutory notice and hearings. *Burge and Worrell v. Mercer County Bd. of Educ.*, Docket No. 27-86-113 (Feb. 6, 1987); *Gallaher v. Taylor County Board of Education*, Docket No. 44-87-233-2 (May 19, 1988). However, these cases have all concerned elementary school teachers and the rule has generally not been applied at the secondary level.

If Grievant had been moved to a different school there is no doubt that her schedule change would constitute a transfer. Under many school configurations that would have

been the case since Grievant's new schedule is predominately teaching West Virginia History to eighth graders. This is a course typically taught in a middle school. However, in this unique situation, Williamstown High School is a small school which incorporates grades seven through twelve. Moreover, it is not unusual for teachers in that school to teach classes which are traditionally high school classes and traditionally middle or junior high school classes. Their certifications are generally subject matter related for grades seven through twelve. For example: Language Arts, seven through twelve or as in Grievant's case, Social Studies, seven through twelve. Consequently, even though Grievant's new schedule requires teaching courses which are traditionally taught in middle school, the change did not result in her being transferred to a different school nor different certification, discipline or department. Under this particular set of facts the schedule change did not trigger the requirements of the transfer statute.

Finally, Grievant argues that Principal Peters' actions regarding her schedule were arbitrary and capricious. The West Virginia Supreme Court of Appeals noted in *syllabus point 3 of Dillon v. Board of Educ. of Wyoming County*, 177 W.Va. 145, 351 S.E.2d 58 (1986) that "county boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." *Keatley v. Mercer County Bd. of Educ.*, 200 W. Va. 487, 492, 490 S.E. 2d 306 (1997). The arbitrary and capricious standard of review of county board of education decisions requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the administrative law judge may not substitute his judgment for that of the board of education. *See generally, Harrison v.*

Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). Generally, a board of education's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). See *Berry v. Boone County Bd. of Educ.*, Docket No.2014-0450-BooED (Sept. 29, 2014).

As Principal of Williamstown High School, Mr. Peters is charged by statute with assuming the “administrative and instructional supervisory responsibility for the planning, management, operation and evaluation of the total educational program of the school...” W. VA. CODE § 18A-2-9. The main reason Mr. Peters gave for changing Grievant’s schedule was that the four preparations she had while teaching three AP courses was becoming too much for her to maintain. He eliminated two of the AP courses which required Grievant’s schedule to be changed. In support of this position, Respondent noted that Grievant had mentioned that she was feeling overwhelmed, OPEA auditors noted the the AP classes at the school were not as challenging as they should be, and some students made negative comments regarding Grievant’s teaching on a school-wide survey.

Grievant counters that she was overwhelmed by the inordinate number of unprepared students in her AP courses, not the number of preparations. She noted that the OPEA committee’s general comments were related to all of the school’s AP courses, not hers specifically, and the negative student comments represented only a small

percentage of the total number surveyed.¹⁰ All of Grievant's lesson plans were reviewed by the principals, her course outline was approved by the College Board and she received no negative evaluations regarding her teaching style or course content.

Student survey comments have limited use in judging teacher performance. In determining who is legally qualified to pass on the professional competency of teachers, the West Virginia Supreme Court stated:

The law does not contemplate that the members of a board of education shall supervise the professional work of teachers, principals and superintendents. They are not teachers, and ordinarily not qualified to be such. Generally they do not possess qualifications to pass upon methods of instruction and discipline. The law clearly contemplates that professionally trained teachers, principals and superintendents shall have exclusive control of these matters." *Rogers v. Board of Education*, 125 W.Va. 579, 588, 25 S.E.2d 537 (1943); cf. *Green v. Board of Education*, 133 W.Va. 356, 56 S.E.2d 100 (1949).

Mason County Bd. of Educ. v. State Superintendent of Sch., 165 W. Va. 732, 738, 274 S.E.2d 435, 438-439 (1980).¹¹ Like board of education members, students are ordinarily not qualified to make such determinations.

While Grievant argues that she was not overwhelmed with the preparations for three AP courses, it is ultimately the principal's determination as to the number of such courses to be offered at the school. Principal Peters felt that the elimination of two AP courses was a reasonable response to the concerns of the OPEA committee, as well as reducing Grievant's preparations. While reasonable people might differ regarding whether this was the best strategy to follow, it is clear that these are appropriate factors

¹⁰ Grievant also pointed out that many students had praised her courses, but those survey results were not introduced at the hearing, or made a part of the record for consideration.

¹¹ The Court cited State Board of Education Policy 5300 which has since been codified as W. VA. CODE § 18A-2-12a.

for Principal Peters to consider in making his decision. Consequently, his actions were not arbitrary or capricious.

Grievant's dissatisfaction with being assigned to teach required eighth grade classes as compared to the AP courses for college-bound upper classmen is understandable. Since there is very little opportunity for advancement for teachers without going into administration, they often feel that teaching the most difficult classes to the most advanced students, raises their status among their peers. This is unfortunate since younger students struggling to get a basic educational foundation often benefit most from experienced and motivated educators. Nevertheless, the change of Grievant's schedule was not a transfer which would trigger the statutory notice and hearing requirements and was not arbitrary and capricious. Accordingly, the grievance is DENIED.

Conclusions of Law

1. Grievant bears the burden of proof in this non-disciplinary matter. Grievant's allegations must be proven by a preponderance of the evidence. See W. VA. CODE R §156-1-3. *Burden of Proof*. "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). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

2. W. VA. CODE § 18A-2-7 requires that public school employees who are being considered for transfer be provided with written reasons for the transfer and a hearing before the county board of education before the transfer is approved.

3. A teaching schedule adjustment within an assigned school which does not include duties or responsibilities outside of a teacher's presently utilized area of certification, discipline, department or grade level is not a change in assignment amounting to a transfer as contemplated by W. VA. CODE § 18A-2-7." *Gerstner v. Gilmer County Bd. of Educ.*, Docket No. 11-87-303-3 (Feb. 17, 1988); *Pansmith v. Taylor County Bd. of Educ.*, Docket No. 46-86-057 (Aug. 4, 1986); *Burge and Worrell v. Mercer County Bd. of Educ.*, Docket No. 27-86-113 (Feb. 6, 1987); *Dotson v. Greenbrier County Bd. of Educ.*, Docket No. 13-87-321-4 (Mar. 7, 1988); *Callahan v. Raleigh County Board of Education*, Docket No. 41-87-026-4 (June 2, 1987).

4. Under the unique circumstances of this case, the change made to Grievant's schedule does not constitute a transfer which would trigger the notice and hearing requirements of W. VA. CODE § 18A-2-7.

5. "[C]ounty boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. *Dillon v. Board of Educ. of Wyoming County*, 177 W.Va. 145, 351 S.E.2d 58 (1986) " *Keatley v. Mercer County Bd. of Educ.*, 200 W. Va. 487, 492, 490 S.E. 2d 306 (1997).

6. The arbitrary and capricious standard of review of county board of education decisions requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the administrative law judge may not substitute his judgment for that of the board of education. *See generally, Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276 (1982). Generally, a board of education's action is arbitrary and capricious if

it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. *Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985). See *Berry v Boone County Bd. of Educ.*, Docket No. 2014-0450-BooED (Sept. 29, 2014).

7. Grievant did not prove by a preponderance of the evidence that the principal's decision to change her schedule was arbitrary or capricious.

Accordingly, the grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. See also 156 C.S.R. 1 § 6.20 (2008).

DATE: March 18, 2016.

WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE