MARY BLACKBURN,

Grievant,

v. **DOCKET NO. 95-29-489**

MINGO COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Mary Blackburn, filed this grievance on October 17, 1995, alleging:

> Class size for grievants exceeds legal limits as per West Virginia Code 18A-5-18a. In add[it]ion), split grad(e) assignment violates West Virginia Code 18A-2-7.

As relief, Grievant seeks "[r]estoration of assignments and class size as per October 15, 1995." Mary Hale and Deborah Young were parties to the original grievance relating to the class size, but withdrew their grievance at Level IV. Ms. Blackburn withdrew that portion of the grievance relating to class size at Level IV, leaving only the alleged violation of W. Va. Code § 18A-2-7 regarding the split grade assignment.

Following adverse decisions at the lower levels, Grievant appealed to Level IV on November 7, 1995, and following several continuances for good cause, hearing was held on March 11, 1996, at which time this case became mature for decision. The material facts are not in dispute and are set forth as follows.

Findings of Fact

1. At the beginning of the 1995-96 school year, Respondent became aware, due to increased enrollment, of the need for another Kindergarten teacher at Delbarton Grade School.

2. Respondent posted a position requiring K-8 certification on September 8,

1995. A fourth grade teacher at Delbarton Grade School applied for and received the Kindergarten teaching position, thus creating the need for a fourth grade teacher.

3. Respondent posted a position for "Elementary Teacher (For the 1995-96 school term only)" on September 22, 1995. G Ex. 1.

4. Respondent is currently operating under a $4 million deficit and has been ordered by the State Board of Education to correct its budgetary problems. Respondent was ordered to cut 80 positions at the end of the 1994-95 school year. Respondent cut 95 positions in compliance with that order.

5. Upon review of the enrollment and staffing at Delbarton Grade School, Superintendent Everett Conn determined Respondent was currently over-staffed with fifth grade teachers at that school and suggested the fourth grade teaching position be offered to one of the fifth grade teachers. Conn, Level IV testimony.

6. Don Roberson, Principal at Delbarton Grade School, offered the fourth grade teaching assignment to the existing three fifth grade teachers, including Grievant, all of whom refused. Mr. Roberson then offered to the assignment tovarious in-school transfer employees, who had already received assignments for that school year, all of whom also refused.

7. In the meantime, Mr. Roberson and a physical education teacher were providing instruction to the fourth grade students who were left without a teacher.

8. Finally, a decision was made to create a fourth/fifth split grade, and the assignment was given to Grievant, who had the least amount of students in her fifth grade class. Grievant had 16 fifth grade students as of October 15, 1995. The addition of the fourth grade students raised her enrollment to 28, three above the maximum allowed by statute, for which Grievant has been adequately compensated.

9. Grievant told Mr. Roberson she would "reluctantly" accept the assignment, but would file a grievance over the matter, which she did in a timely manner. (See footnote 1)

Discussion

Grievant alleges the assignment of the fourth/fifth split grade is a violation of the

transfer provisions of W. Va. Code § 18A-2-7, specifically, the notification requirements of that Section, which provide:

> 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 thesuperintendent on or before the first Monday in April if he is being considered for transfer or to be transferred, ...

There is no dispute that Grievant was not notified or put on transfer in the preceding Spring of the 1995-96 school year. Respondent alleges it has not violated the above Code section.

The only issue raised by Grievant is whether such a reassignment is a transfer under W. Va. Code § 18A-2-7. In Matthews v. Preston County Bd. of Educ., Docket No. 39-88-239 (July 27, 1989), it was held that "a transfer may consist of the reassignment of an employee to a different position, a different location or significantly different duties or responsibilities. The addition of similar duties does not constitute a transfer." Id., Conclusions of Law, nos. 1, 2. In Dunleavy v. Kanawha County Bd. of Educ., Docket No. 20-89-008 (Feb. 23, 1989), it was held that "schedule adjustments which do not include duties outside of an employee's presently utilized area of certification, discipline or department . . . [are generally not] assignments amounting to a transfer . . ." Dunleavy, Conclusion of Law, no. 1, citing, VanGilder v. Mineral County Bd. of Educ., Docket No. 27-87-320-2 (June 16, 1988). The inquiry is whether Grievant has been assigned significantly different duties or responsibilities outside her presently utilized area of certification, discipline or department.

While the above general principles apply, the outcome depends upon the particular facts of this case. See Kidd v. Fayette County Bd. of Educ., 89-10-452(Dec. 14, 1989). Grievant is certified in elementary education and was hired as an elementary school teacher. It has been held that a professional employee is not entitled to an assignment in any particular school. State ex. rel. Hawkins v. Tyler Co. Board of Educ., 275 S.E.2d 908 (W. Va. 1980). Further, boards are not required to post grade-specific elementary teaching positions, and an employee who is hired as an elementary school teacher is

not entitled to any specific grade assignment within an elementary school. Pascoli v. Ohio County Bd. of Educ., Docket Nos. 91-35- 229/239 (Nov. 27, 1991). Elementary education teachers are certified and qualified to teach any elementary grade and are, therefore, interchangeable. These positions require no specific criteria or skills and elementary certification qualifies all holders to teach in all of the designated grade areas, usually 1-6, K-6, or 1-8. Pascoli, supra. Grievant testified that the fourth/fifth split grade is a "lot of work" because she has 28 students and must follow the fourth and fifth grade curriculum. She feels this situation is not good for the children because the fourth graders need their own teacher. However, Grievant also testified that she is confident the students are receiving a good education under her tutelage, and Respondent agrees. Other than having to teach the fourth grade curriculum as well as the fifth, Grievant's duties as an elementary education teacher have not changed.

Grievant has not demonstrated that she has been assigned significantly different duties or responsibilities outside her presently utilized area of certification,discipline or department, i.e., elementary education. Thus, Grievant's reassignment to the fourth/fifth split grade does not constitute a transfer. (See footnote 2)

Conclusions of Law

1. In a non-disciplinary matter, it is incumbent upon the Grievant to prove her case by a preponderance of the evidence.

2. The realignment of Grievant from a fifth grade teaching assignment to a fourth/fifth split grade teaching assignment during school year 1995-96 did not entail significantly different duties or responsibilities outside of Grievant's presently utilized area of certification, elementary education, and thus does not constitute a transfer. See Matthews V. Preston County Bd. of Educ., Docket No. 39-88-239 (July 27, 1989); Dunleavy v. Kanawha County Bd. of Educ., Docket No. 20-89-008 (Feb. 23, 1989); Kidd v. Fayette County Bd. of Educ., Docket No. 89-10-452 (Dec. 14, 1989).

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 and 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: March 27, 1996

Footnote: 1

Respondent argued that because Grievant "voluntarily" accepted the assignment, she waived her right to grieve the matter. This argument must fail. Grievant was merely doing as all personnel are usually instructed to do: work, then grieve. This acquiesence does not waive an employee's right to grieve the action of the employer.

Footnote: 2

Grievant did not raise, and thus the undersigned will not address, the issue of whether the fourth/fifth split grade position was a newly-created position requiring posting under W. Va. Code § 18A-4-7a, and, additionally, whether ¶ 10 of that Code section would provide Respondent with an exception to the posting requirements in any event. Crawford v. Mercer County Bd. of Educ., Docket No. 94-27-958 (Apr. 13, 1995). See also, Glover v. Pendleton County Bd. of Educ., Docket No. 95-36-408 (Oct. 19, 1995); Thomas v. Kanawha County Bd. of Educ., Docket No. 91-20-287 (Nov. 14, 1991), citing Lloyd v. Kanawha County Bd. of Educ., Docket No. 91-20-327 (Oct. 29, 1991), aff'd, Circuit Court of Kanawha County, Civil Action No. 91-AA-251 (Dec. 6, 1993).