DEBORAH LANE

v. Docket No. 94-27-231

MERCER COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant, employed as a teacher for Respondent Mercer County Board of Education (MCBE), was terminated effective the end of the 1993-94 school year due to a reduction in force (RIF). In June 1994, Grievant advanced a grievance to level four alleging a violation of W.Va. Code 18A-4-7a:

Due to RIF I was released without opportunity for employment in a lateral position for which I am qualified. I want to be instated into this position for which I am more senior [than] that employee currently holding this position.

Grievant requested that a decision be based on the record adduced below, and MCBE filed no objections.1

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1The record contains the adverse lower-level decisions, rendered April 13, May 24, and June 3, 1994, respectively, and a copy of the transcript and exhibits of the May 4 and May 7, 1994 level two evidentiary hearing. Apparently, Grievant and MCBE waived their right to file level four fact/law proposals by the designated date of July 11, 1994. On October 25, 1994 the case was transferred to the undersigned for administrative reasons.

Some background information is necessary. Grievant was initially hired by MCBE as a teacher in 1984. She is certified to teach social studies and art, grades seven through twelve. During at least the 1993-94 school year, she was assigned to

Princeton Junior High School (PJH).2
On September 7, 1993, MCBE advertised two Alternative Education Facilitator (AEF) positions, with one AEF to be based at PJH and the other at another junior high school.3 Listed minimum qualifications were
A valid West Virginia teaching certificate with proper secondary certification required. Experience working with students who are considered likely to discontinue school attendance. Experience in working with stu dents experiencing discipline problems; experience in improving students in the areas of self-esteem, and desire for self-improvement.

Exhibit 1. The successful applicant for the job at PJH was Richard Roberts. His initial hire date at MCBE was 1986. In any event, MCBE approved Mr. Roberts' employment for the AEF position at PJH on October 19, 1993.
Thereafter, on November 23, 1993, MCBE adopted Policy GCPB, titled "Reduction in Force - Professional Personnel." Exhibit 2. Said policy sets forth the criteria for effecting a RIF of professional personnel pursuant to W.Va. Code 18A-4-7a and, if applicable, the seniority-based reassignment of an affected

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2Grievant did not indicate what subjects she taught at PJH during the 1993-94 school year.

3The actual job posting listed the AEF slots as well as at least eighteen other open positions for professional and service personnel.
employee to "[a]ny area for which he/she is currently certified

and that is lateral to his/her current position." The policy defines MCBE's lateral professional positions as follows:

Position	Lateral Positions
Principal	Principals
PT Principal/PT Teacher	PT Principals/PT Teachers
Director (Prof. Employee)	Directors (Prof. Employee)
PT Asst. Principal(PT Teacher)	PT Asst. Principals/PT Teach.
Supervisor	Supervisors
Coordinator	Coordinators
Asst. Principal (full-time)	Asst. Principal (full-time)
Facilitator	Facilitators
Asst. Director	Asst. Directors
Specialist	Specialists
Attendance Director	Attendance Directors
Speech Therapist	Speech Therapists
Audiologist	Audiologist

Grievant appeared on her own behalf at the level two hearing and testified that Mr. Roberts' job as AEF at PJH was to monitor a classroom of students who were serving an "in-house suspension."4 She said that, throughout the school year, she sent only one student to Mr. Roberts' class for "cooling off," but during one class period only. She further elaborated that when students are sent to the in-house suspension classroom for the entire day, they must take all of their textbooks and assignments with them. She also explained that these students are escorted to lunch and the rest room throughout the day. She maintained that Mr. Roberts did not supervise other teachers,

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4The record is silent about Mr. Robert's actual

certification area(s) and prior teaching assignments for MCBE.
but spent the entire school day at PJH with the students in his
class in an instructional or counseling capacity.5
Apparently in an effort to establish that she could handle
the AEF classroom and duties, Grievant testified that, in the
past, she as well as all of the other teachers at PJH had been
in charge of a thirty-five to forty minute after-school deten
tion hall on a rotating basis for at least ten days each during
the school year. She said students had to sign an attendance
list and sit down and complete homework assignments from their
teachers. She suggested that her past duties in detention hall
were similar or equivalent to those of Mr. Roberts' in the
in-school suspension class.
Grievant also directly questioned MCBE's Administrative
Assistant/Director of Human Resources. Mr. Daniels admitted
that the AEF position required no special training or certifica
tion. When later questioned by MCBE's counsel and asked to
distinguish between a classroom teacher and an AEF, Daniels
responded6
The intent for these duties would be someone to work
with the administration at the school level and the
teachers in identifying and working with students as
an at-risk program, helping those students in trying
to be more proactive than reactive in the situation.

5Although MCBE's counsel suggested during cross-examination
of Grievant that Grievant had no way of knowing the precise
nature and scope of Mr. Roberts' duties at PJH, MCBE presented
no rebuttal evidence on the subject of just exactly what Mr.

Roberts did in the AEF classroom on an ongoing, day-to-day basis.

6MCBE's counsel did not call on any witnesses on behalf of MCBE during the level two hearing, although she did introduce two exhibits.

MCBE's counsel then queried, "and this position of [AEF] does not fall within such a narrow description as that of classroom teacher," and Mr. Daniels agreed that it did not. T.27.
Mr. Daniels also opined during cross-examination that the AEF position was not that of principal, supervisor or any other position listed in Code 18A-1-1(c), except for "professional educator," as that term is used to distinguish professional employees from "service personnel." T.29-30. Mr. Daniels reluctantly agreed that an AEF was not a professional adminis trative position. T.33.
In support of her contention that she is entitled to bump Mr. Roberts from the AEF position, Grievant cites W.Va. Code 18A-1-1(c)(1)'s definition of classroom teacher: "A profes sional who has a direct instructional or counselor relationship with pupils, spending the majority of his time in this capaci ty." She argues that the AEF is a classroom position since the incumbent maintains a full-time and ongoing "direct instruc tional or counselor relationship with pupils." Grievant con cludes that, because all classroom teaching positions are lateral positions pursuant to Code 18A-4-7a, and because the AEF position requires only a secondary education certification such as she currently holds and not a specific subject-area certification, she has a right to assume Mr. Roberts' AEF position at PJH.

On the other hand, MCBE maintains that, according to Policy GCPB, facilitators are lateral only to facilitators. Therefore, it argues, Grievant was properly RIFed because she was the least senior teacher in her area of certification and "was not lateral to any other position." See T.3.

Unfortunately for Grievant, the evidence and the law do not support her in this dispute. First of all, contrary to what Grievant seems to believe, the outcome of this case does not necessarily turn on whether the AEF position must be considered a classroom teaching position. Arguably, the AEF position might be a classroom teaching position.

In order to determine this, several relevant definitions contained in Code 18A-1-1 must be assessed. Section 1(b) defines professional personnel as persons "who meet the certifi cation and/or licensing requirements of the State, and shall include the professional educator and other professional employ ees." Section 1(c) continues that the term professional educa tor "shall be synonymous with and have the same meaning" as the term teacher and that the professional educator "shall be" classified as either classroom teacher, principal, supervisor or some other type of central office administrator. While class room teachers have "direct" instructional or counseling rela tionships with students, principals, supervisors and central office administrators do not instruct or counsel students, rather, they manage schools or programs. See subsections (1), (2), (3) and (4).

Conversely, under Section 1(d), professional personnel who are deemed "other" professional employees are persons "from another profession who [are] properly licensed and employed to serve the public schools. . . ." The statute identifies the

position of nurse, but this group of employees would surely also include other support personnel such as psychologists, audiologists and speech therapists.

Thus, it appears that the AEF position must be classified as either a classroom teaching position, administrative position or "other" professional position under Code 18A-1-1, as Grievant correctly maintains. MCBE admits the job is not an administrative position. While MCBE claims the position belongs to the group of "other" professional positions, this cannot be true since the job requires the incumbent to hold a secondary teaching certificate and does not require some "other" non-teaching professional licensure. Seemingly, the AEF position is none other than a classroom teaching position whether it re quires some specific subject-area certification or not.7

However, the determination that the AEF might be a classroom teaching position does not establish that Grievant is entitled to displace Mr. Roberts under any "bumping" theory.

In order to reach that conclusion, the RIF provisions of Code 18A-4-7a must be examined in detail. The statute sets forth a seniority-based criteria for RIF in that "the employee with the least amount of seniority shall be . . . released" and that, under certain circumstances, personnel "subject to re lease" shall be retained. Relevant provisos include:

7That is not to say that the AEF job could not be deemed some type of hybrid teacher-administrator position since it appears that the school's subject-area teachers assign particu lar lessons to the students in the class and because program management is also a component of the job.

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 employee 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 those areas of certification and/or licensure.
For the purpose of this article, all positions which meet the definition of classroom teacher as defined in . . . [18A-1-1], shall be lateral positions. For all other professional positions the county board of education shall adopt a policy by . . . [October 31, 1993], . . . which defines which positions shall be lateral positions. . . . . In adopting such a policy, the board shall give consideration to the rank of each position in terms of title, nature of respon sibilities, salary level, certification and/or licensure, and days in the period of employment.

In addition, the statute provides certain seniority-based recall rights for RIFed employees as follows:
All professional personnel whose seniority with the

county board is insufficient to allow their retention by the county board during a reduction in work force shall be placed upon a preferred recall list. As to any professional position opening within the area where they had previously been employed or to any lateral area for which they have certification and/or licensure, such employee shall be recalled on the basis of seniority if no regular, full-time profes sional personnel, or those returning from leaves of absence with greater seniority, are qualified, apply for and accept such position.

It is evident that Code 18A-4-7a provides seniority-based job security both for non-teaching education personnel and for classroom teachers holding particular subject-area certifica tions. Because certain employees attain administrative seniority under the statute, boards of education have been directed to identify and define those administrative positions which are lateral to one another. The bottom line here is that the professional educators who are administrators usually have a teaching degree and may hold one or more subject-area certifica tion(s). Therefore, these workers can return to the classroom if they lose their non-teaching job via a RIF and no lateral administrative positions exist for which they can bump a less-senior non-teaching employee.8

Notwithstanding this discussion about the intent of the RIF and recall provisions, the determination in this case that the AEF job is more like a classroom teaching position than any other kind of professional education position does not establish that Grievant is entitled to displace Mr. Roberts, as was noted above. It is true that the question of what constitutes lateral

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8It is noted that the adjective "lateral" is defined in The American Heritage Dictionary (Second College Edition) as, "of, relating to, or situated at or on the side." A reasonable person could conclude that, when the word lateral is used in the context of "lateral position," it would mean an alternative position to the primary position. However, the definitions contained in MCBE's Policy GCPB of purported lateral positions appear to have little meaning. Every position listed as lateral to another is exactly the same as the other. Under MCBE's policy, no positions are lateral.

Just as a board of education might define lateral too narrowly prior to fashioning its formal, written definitions of lateral, see Goodwin v. Kanawha County Bd. of Educ., Docket No. 93-20-161 (Mar. 14, 1994), a board of education might formally establish lateral positions so narrowly that no lateral posi tions even exist for which to protect the interests and jobs of affected employees. Arguably, MCBE's Policy completely defeats the letter and spirit of Code 18A-4-7a's seeming intent that relevant "lateral" positions be available to at least some non-teaching professional personnel subject to RIF. However, the validity of the policy is not at issue here.

jobs for classroom teachers subject to RIF has not been specifi cally addressed by the Grievance Board. However, in Woodson v. Monroe County Bd. of Educ., Docket No. 92-31-282 (Feb. 10, 1993), the Grievance Board determined that a RIFed teacher on a preferred recall list was not entitled to any seniority-based priority for a vacant (posted) teaching job per 18A-4-7a's recall provisions because the position did not require subject-

specific certification. Rather, Woodson established that recall rights to a formerly-held job or to a lateral job are confined to subject-specific areas in which the proper and required certifications are held.9

This reasoning must also be applied for RIF purposes, for "lateral" cannot mean one thing in one portion of the statute and mean something different in another portion of the statute. Therefore, classroom teaching positions which must be considered lateral for RIF purposes are only those classroom teaching positions requiring subject-specific certification. In short, the RIF portion of 18A-4-7a at issue, "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

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9For further discussion on the subject of certification-based recall requirements and rights under Code 18A-4-7a, see Stewart v. Tyler County Bd. of Educ., Docket No. 93-48-163 (Aug. 20, 1993); Bailey v. Wyoming County Bd. of Educ., Docket No. 92-55-478 (July 19, 1993); Argabright v. Wyoming County Bd. of Educ., Docket No. 93-55-053 (Apr. 6, 1993); Adams v. Mercer County Bd. of Educ., Docket No. 92-27-455 (Mar. 31, 1993).

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 those areas of certification and/or licensure," must be read literally and also consistently with the recall portion of the statute.

It is clear that, under the statute, teachers who complete

additional educational requirements and attain multiple sub ject-area certifications are in a better position to obtain alternative work in a lateral teaching area than those teachers who do not broaden their teaching areas. Here, Grievant pre sented no evidence that any of MCBE's classroom teachers who taught in any of her certification areas and who held less seniority than her were retained in conjunction with her RIF. Thus no legal basis exists for which to grant Grievant any relief in this case.

In addition to the foregoing findings and conclusions, the following determinations are made.

Findings of Fact

1. Grievant was initially hired by MCBE in 1984; during the 1993-94 school year she was assigned to a junior high school as a classroom teacher.

2. In the spring of 1994 Grievant was RIFed, effective the end of the 1993-94 school term.

3. Another staff member at the junior high school, with an initial hire date of 1986, held a position in some type of special needs classroom and/or program which did not require subject-specific certification and was retained by MCBE.

4. Grievant filed a grievance on the basis that the retained staff member's job is a lateral classroom teaching position which she is entitled to have.

5. Grievant does not allege and the record does not establish that any less-senior classroom teachers who taught in any of Grievant's certification areas were retained at the time of her RIF, either county-wide or at her school.

Conclusions of Law

1. It is incumbent upon a grievant to prove all the

allegations constituting the grievance by a preponderance of the evidence. Rupich v. Ohio County Bd. of Educ., Docket No. 89-35-719 (June 29, 1990); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. According to the current provisions of W.Va. Code 18A-4-7a, lateral classroom teaching positions for the purpose of alternate placement during a reduction in force or for recall priority are only those positions which require subject-area certification; alternate placement and recall rights to a lateral area under the statute are available only to those who hold the required certification in the specified teaching area. See Woodson v. Monroe County Bd. of Educ., Docket No. 92-31-282 (Feb. 10, 1993), aff'd, Kanawha Co. Cir. Ct., C.A. No. 93-AA-64 (June 10, 1994).

3. Grievant did not establish that she was terminated via a reduction in force while a less-senior classroom teacher then employed as an instructor in any certification area she also held was retained; therefore, she did not demonstrate that she was improperly released pursuant to the RIF provisions of Code 18A-4-7a.

4. Grievant is not entitled to the Alternative Education Facilitator position, be it a classroom teaching position or otherwise, on the basis of the definitions for professional personnel contained in W.Va. Code 18A-1-1 or on the basis of the lateral placement (RIF) provisions of Code 18A-4-7a.

Accordingly, the grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mercer 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 appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

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NEDRA KOVAL

Administrative Law Judge

Date: December 16, 1994