STEVEN PARKS,

Grievant,

v v.

DOCKET NO. 01-24-375

MARION COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Steven Parks, filed this grievance against his employer, the Marion County Board of Education ("Board") on March 29, 2001:

> My teaching contract was terminated in a reduction-in-force procedure in Marion County. The Marion County School System determined I was the least senior in my certification and/or licensure area and, therefore, could not displace any other teacher in the county. There are two individuals employed by Marion County Schools with whom I am tied according to seniority, and they are teaching in assignments I am certified and/or licensed to teach.
>
> The remedy I seek is for Marion County Schools to follow the procedures of WV Code § 18A-4-7a for determining the seniority if two or more employees have identical seniority, and if I am determined to be more senior for either position, place me in the position with any back pay, interest and benefits due me.

By agreement of the parties, the grievance was filed at level two, and a level two hearing was held on May 15, 2001, before Roger Perdue, Grievance Evaluator. Mr. Perdue denied the grievance by decision dated May 24, 2001, and the Board waived participation at level three. Grievant advanced his appeal to level four on June 1, 2001, and the parties agreedto submit the matter on the record developed at level two. The grievance became mature for decision on July 2, 2001, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant was represented by Don Craft, West Virginia Education Association, and the Board was represented by Stephen R.

Brooks, Esq., Flaherty, Sensabaugh & Bonasso, P.L.L.C.

SUMMARY OF EVIDENCE

Grievant's Exhibits

Ex. 1 -

June 13, 2000 Vacancy Notice for Two (2) Skills Improvement Instructors - East Fairmont High.

Ex. 2 -

Professional Teaching Certificates for William W. Haddox.

Ex. 3 -

Professional Teaching Certificate for Mary A. Mlinarcik.

Ex. 4 -

Professional Teaching Certificate for Steven D. Parks.

Ex. 5 -

February 21, 2001 letter from Thomas E. Long to Steve Parks.

Ex. 6 -

March 23, 2001 letter from Thomas E. Long to Steve Parks.

Board Exhibits

None.

Testimony

Grievant testified in his own behalf, and presented the testimony of Dennis Edge. The Board presented no additional witnesses.

FINDINGS OF FACT

The material facts are not in dispute, and are set forth in the following findings.

1. Grievant was employed during the 2000-2001 school year by the Board as a regular, full-time Mathematics teacher assigned to Barrackville Middle School. 2. Grievant holds a valid West Virginia Teaching Certificate in Mathematics 5-12 with a licensure in secondary education. Grievant is the least senior Math teacher in the county.

3. Grievant was notified by letter dated February 21, 2001, that Superintendent Thomas Long would recommend to the Board that Grievant's contract be terminated due to a reduction-in-force.

4. Grievant requested and received a hearing before the Board concerning the Superintendent's recommendation.

5. The Board voted to terminate Grievant's contract and notified him of such by letter dated March 23, 2001.

6. At East Fairmont High School there are two professional teaching positions for Skills Improvement Instructors. These two positions were posted June 13, 2000, and required only a West Virginia certification appropriate to grade level. These positions are non-subject specific teaching positions.

7. William Haddox and Mary Mlinarcik were hired for the two Skills Improvement positions. Mr. Haddox holds a certificate in Physical Education 7-12 and Health Education 7-12. Ms. Mlinarcik holds a certificate in Health Education K-12.

8. Mr. Haddox, Ms. Mlinarcik, and Grievant are tied in seniority with a hire date of August 21, 2000.

9. The Board utilizes a random drawing whenever it is necessary to determine seniority for purposes of a reduction-in-force.

DISCUSSION

As a RIF action does not involve a disciplinary matter, Grievant has the burden of proving the allegations in his complaint by a preponderance of the evidence. W. Va. Educ. & State Employees Grievance Bd. Procedural Rule 4.21, 156 CSR 1 (2000); Jackson v. Monroe County Bd. of Educ., Docket No. 96-31-208 (Aug. 29, 1996); Rader v. Webster County Bd. of Educ., Docket No. 96-51-049 (July 31, 1996). See W. Va. Code § 18-29-6.

W. Va. Code § 18A-4-7a 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 an/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.

> For the purpose of this article, all positions which meet the definition of classroom teacher as defined in section one, article one of this chapter, shall be lateral positions. For all other professional positions the county board of education shall adopt a policy by the thirty-first day of October, one thousand nine hundred ninety-three, and may modify said policy thereafter as necessary, 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 responsibilities, salary level, certification and/or licensure, and days in the period of employment.

The Board contends this issue has specifically been decided by this Grievance Board in Whitt v. Lincoln County Board of Education, Docket No. 97-22-342 (Feb. 3, 1988),and its progeny. The Board argues that this Grievance Board is bound by these prior decisions by the doctrine of stare decisis, and that the Board could not transfer Grievant, thereby displacing a less senior employee, because the teaching position in question does not require subject-specific certification in Math 5-12, the certification which Grievant holds. The Board relied upon this Grievance Board's interpretation of W. Va. Code § 18A-4-7a in Angus v. Cabell County Board of Education, Docket No. 00-06-273 (Dec. 8, 2000), (See footnote 1) in its decision to RIF Grievant as opposed to the Skills Improvement teachers, which held:

> Under W. Va. Code § 18A-4-7a, lateral classroom teaching positions for the purpose of alternate placement during a reduction-in-force are only those positions which require subject-specific certification. Whitt v. Lincoln County Bd. of Educ., Docket No. 97-22-342 (Feb. 3, 1988) citing Lane v. Mercer County Bd. of Educ., Docket No. 96-29-164 (June 28, 1996); Bailey v. Wyoming County Bd. of Educ., Docket No. 92-55-478 (July 19, 1993); Woodson v. Monroe County Bd. of Educ., Docket No. 92-31-194 (Feb. 10, 1993), aff'd Circuit Court of Kanawha County, No. 93-AA-64 (June 10, 1994). See also Board of Education v. Bowels, 183 W. Va. 399, 396 S.E.2d 166 (1990).

The Whitt decision was based, in part, on the Supreme Court of Appeals of West Virginia holding

in Board of Education v. Bowers, 183 W. Va. 399, 396 S.E.2d 166 (1990), that determined administrative positions which do not require specific certification or licensure are not available for "bumping" when the position of a more senior central office administrator is eliminated. See Lambert v. Pocahontas County Bd. of Educ., Docket No. 89-38-342 (Sept. 28, 1990). See also Evans v. Mason County Bd. of Educ., Docket No. 97-26-400 (Jan. 23, 1997). The Whitt administrative law judge noted Bowers was decidedunder W. Va. Code § 18A-4-8b (1988), the predecessor to W. Va. Code § 18A-4-7a (1990), and found it applicable to a RIF in a teaching situation. The administrative law judge acknowledged "the language regarding certification and licensure in relation to rights of employees encountering a reduction in force situation is essentially the same", and that Bowers addressed administrative positions, not classroom teaching positions, and should be viewed as instructive, but not as controlling precedent. Whitt, supra.

Grievant argues Whitt and its progeny were incorrectly decided, and ignored the language of the statute which provides in pertinent part:

> That an employee subject to release shall be employed in any 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....

W. Va. Code § 18A-4-7a. (Emphasis added).

Grievant argues the statute clearly provides for a more senior employee holding a certain licensure to displace a less senior employee holding the same licensure. Thus, Grievant, licensed to teach secondary schools, should have been eligible to displace Mr. Haddox or Ms. Mlinarcik, who were also licensed to teach secondary schools.

This Grievance Board attempts to follow the well-recognized legal doctrine of stare decisis in ruling upon grievances. Accordingly, the undersigned administrative law judge is persuaded that Grievant's situation is governed by this Board's decisions in Angus, Whitt, Lane, and Woodson, and while his argument is well-taken, he has presented no additional evidence or case law which would cause the undersigned to conclude thisGrievance Board's prior decisions on this issue were clearly wrong. Moreover, although the West Virginia Supreme Court of Appeals has not previously spoken to this specific issue, the Court's holding in Bowers, limiting lateral transfer rights, generally supports

this interpretation of W. Va. Code § 18A-4-7a.

CONCLUSIONS OF LAW

1. As a RIF action does not involve a disciplinary matter, Grievant has the burden of proving the allegations in his complaint by a preponderance of the evidence. W. Va. Educ. & State Employees Grievance Bd. Procedural Rule 4.21, 156 CSR 1 (2000); Jackson v. Monroe County Bd. of Educ., Docket No. 96-31-208 (Aug. 29, 1996); Rader v. Webster County Bd. of Educ., Docket No. 96-51-049 (July 31, 1996). See W. Va. Code § 18-29-6.

2. "Under W. Va. Code § 18A-4-7a, lateral classroom teaching positions for the purpose of alternate placement during a reduction-in-force are only those positions which require subject-specific certification." Whitt v. Lincoln County Board of Education, Docket No. 97-22-342 (Feb. 3, 1998)(citing Lane v. Mercer County Bd. of Educ., Docket No. 94- 27-231 (Dec. 16, 1994)). See Lester-Ellis v. Mingo County Bd. of Educ., Docket No. 96-29- 164 (June 28, 1996); Bailey v. Wyoming County Bd. of Educ., Docket No. 92-55-478 (July 19, 1993); Woodson v. Monroe County Bd. of Educ., Docket No. 92-31-194 (Feb. 10, 1993), aff'd, Cir. Ct. of Kanawha County, No. 93-AA-64 (June 10, 1994). See also Bd. of Educ. v. Bowers, 183 W. Va. 399, 396 S.E.2d 166 (1990).

3. County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986). See also Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648 (1995).

4. Grievant failed to demonstrate that the Board violated, misapplied, or misinterpreted W. Va. Code § 18A-4-7a, or any other statute, policy, rule, or regulation, by failing to find him eligible to displace one of the Skills Improvement teachers for the 2001- 2002 school year. Angus, supra; Whitt, supra. See Lane, supra.

Accordingly, this grievance is **DENIED** .

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court

of Marion 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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: July 20, 2001

Footnote: 1 *The Angus decision was issued with a date of December 8, 1998, however, that date was a typographical error, and the correct issuance date is December 8, 2000.*