PRISCILLA SUAN,

Grievant,

v. **Docket No. 96-21-269**

LEWIS COUNTY BOARD OF EDUCATION,

Respondent,

and

CATHERINE WHITE, REBECCA HALL AND

REBECCA STANSBERRY,

Intervenors.

DECISION

Grievant, Priscilla Suan, a teacher, alleges her reduction-in-force ("RIF") was improper for multiple reasons. She also alleges the Lewis County Board of Education ("LCBOE") improperly reduced her seniority as well as identifying numerous other issues. Although no relief was stated on the initial Level IV grievance form, Grievant seeks instatement into her former position, and 200 days added to her seniority. This grievance was denied at Levels I and II and waived at Level III. Grievant appealed to Level IV, and hearings were held at this Grievance Board's Elkins office on September 9 and 23, 1996. After much delay, this case became mature for decision on December 9, 1996.

Issues

The issues in this case have changed over the course of the grievance. Initially, Grievant stated she was "[d]enied due process of law and other legal rights guaranteed by state and federal law" and further stated "I was inappropriately removed from my position. I was inappropriately denied an opportunity to displace a less senior employee. (See footnote 1) [LCBOE] [e]ngaged in discrimination/favoritism. Retaliation from previous grievance." Level I Grievance Form, 3/29/96.

At the Level II hearing, Grievant also argued: 1) LCBOE intentionally arranged the 1996-97 RIF

process to ensure Grievant would lose her teaching position to punish her for filing and winning a grievance in October 1992; 2) LCBOE was required to “bump”/transfer teachers in another way; 3) the homebound teacher's special education permit was improperly issued and thus, cannot be used to protect her in the “bumping” process; 4) Ms. Elizabeth Nichols' seniority was adjusted incorrectly, and thus she should be required to have a tie-breaking drawing with Ms. Rebecca Hall; 5) Ms. Hall must “bump” a middle school teacher, Mr. Chris Derico; (See footnote 2) 6) Ms. Rebecca Stansberry must bump Mr. Derico; 7) Grievant's seniority was intentionally and maliciously changed to retaliate against her for filing a prior grievance; and 8) Grievant was required to have a ten day written notice of her RIF hearing prior to her RIF hearing, and she did not. In appealing to Level IV, Grievant alleged she “was improperly subjected to a reduction-in- force (18A-4-7a). Grievant was the victim of retaliation for a previous grievance, discrimination and favoritism (18-29-2). Lewis County Board of Education has acted in an arbitrary and capricious fashion against Grievant.” Level IV Grievance Form, 6/26/96.

Most of these arguments were continued to Level IV and further clarified and amplified. In essence, Grievant argued the whole transfer/RIF process of multiple teachers was intentionally manipulated to ensure she would be terminated.

LCBOE argued the transfer/RIF process was properly conducted, there was no intent, malicious or otherwise, to remove Grievant for previously filing a grievance, and the fact Grievant lost her position was the logical result of following the mandates of W. Va. Code § 18A-4-7a. LCBOE also stated the 200 days were removed from her seniority to correct a previous clerical error, as Grievant had received two years of seniority for one year.

Background

Toward the end of the 1995-96 school year, LCBOE knew it would have to reduce professional and service staff because of decreased student enrollment and fiscal problems. LCBOE's Superintendent, Dr. Joseph Mace, asked the schools' principals to meet and decide which positions could be cut with the least amount of harm to the students. The principals chose to eliminate the elementary, itinerant physical education (“P.E.”) position held by Ms. Hall, who was certified P.E., K-12. Because Ms. Hall had approximately eleven years of seniority, she was placed on the transfer list. Ms. Hall was the least senior P.E. teacher (teaching P.E.), but was also certified in Math, 7-9;

Ms. Hall “bumped” the least senior math teacher, Ms. Stansberry. Ms. Stansberry also had dual certification, in Math 7-9 and Business Education 7-12 and nine years of seniority. As Ms.Stansberry was more senior than Grievant, who was the least senior Business Education teacher, Ms. Stansberry was transferred and “bumped” Grievant. Grievant had one certification area and six years of seniority, and did not have the certification or seniority to “bump” anyone, thus she was RIF'd.

Grievant argues Ms. Hall must bump Ms. Cathy White. Ms. White is LCBOE's only homebound teacher. The homebound teacher position requires a programmatic level of K-12. Any combination of certifications may be used to obtain this programmatic level. (See footnote 3) Ms. White's programmatic certification was P.E., K-12, and the 1995-96 school year was her first year of teaching. She was also certified in Language Arts, 7-9.

During the 1995-96 school year, Ms. White taught a variety of students with special education needs. Some of these students were placed on out-of-school environment and some were homebound. (See footnote 4) In Individual Education Plan (“IEP”) meetings, several of the special educators told Ms. White it would be helpful if she had a special education permit so she could instruct the out-of- school environment students. (See footnote 5) Because she had 21 undergraduate hours in special education, Ms. White knew she was “permitable” and checked into receiving a special education permit, eventhough it was not required by the posting. Neither Superintendent Mace nor the Director of Special Education, Mr. Denton King, suggested or encouraged Ms. White to obtain this permit.

Ms. White started the application process sometime in November 1995, and after some confusion over her transcripts, she received her permit in learning disabilities on February 28, 1996. The evidence of record shows Ms. White's position did not require a permit, and that Ms. White believed she would receive a general special education permit, which would allow her to teach in all special education areas.

Although somewhat unclear, it appears Ms. White was not considered in the RIF'ing process even though she was P.E., K-12, because she was a homebound teacher. Additionally, it appears LCBOE thought the permit Ms. White acquired, although it was not required, prevented Ms. Hall from replacing her, as their current certification areas did not “match.”.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. W. Va. Code § 18-29-6; Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

Because Grievant has advanced multiple theories and arguments, and because these theories and arguments are inextricably intertwined, the following discussion will necessarily contain some overlap of data. However, since the standard of review for these arguments and theories differs, they cannot be dealt with concurrently and will be discussed consecutively.

The first issue to resolve is whether Grievant was properly RIF'd. W. Va. Code § 18A-4-7a discusses the RIF process and states in pertinent part:

> Whenever a county board is required to reduce the number of professional personnel in its employment, the employee with the least amount of seniority shall be properly notified and released from employment pursuant to the provisions of section two [§ 18A-2-2], article two 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 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.

This is the Code Section which applies to Grievant.

"It has been repeatedly ruled by this Grievance Board that this Code Section does not apply to transferred employees, as they are not 'subject to release', and the Code Section which does apply to transferred employees is W. Va. Code § 18A-2-7." Stewart v. Kanawha County Bd. of Educ., Docket No. 96-20-370 (Jan. 31, 1997). See also, Hawkins v. Tyler County Bd. of Educ, 166 W. Va. 363, 275 S.E.2d 908 (1980); Eckenrode v. Kanawha County Bd. of Educ., Docket No. 96-20-302 (Jan. 22, 1997); Morgan v. Wood County Bd. of Educ., Docket No. 89-54-470 (Nov. 29, 1989).

The other Code Section involved in this grievance is W. Va. Code § 18A-2-7, which speaks to transfers and states in pertinent part:

> 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 the superintendent on or before the first Monday in April if he is

being considered for transfer or to be transferred,

. . .

Any teacher or employee who desires to protest such proposed transfer may request in writing a statement of the reasons for the proposed transfer. Such 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, theteacher or employee may make written demand upon the superintendent for a hearing on the proposed transfer before the county board of education. The hearing on the proposed transfer shall be held on or before the first Monday in May, except that for the school year one thousand nine hundred eighty-nine_ninety only, the hearing shall be held on or before the fourth Monday in May, one thousand nine hundred ninety. At the hearing, the reasons for the proposed transfer must be shown.

The superintendent at a meeting of the board on or before the first Monday in May shall furnish in writing to the board a list of teachers and other employees to be considered for transfer and subsequent assignment for the next ensuing school year,

. . .

All other teachers and employees not so listed shall be considered as reassigned to the positions or jobs held at the time of this meeting. The list of those recommended for transfer shall be included in the minute record of such meeting and all those so listed shall be notified in writing, by certified mail, return receipt requested, to such persons' last known addresses within ten days following said board meeting, of their having been so recommended for transfer and subsequent assignment and the reasons therefor.

This is the Code Section that applies to Ms. Hall and Ms. Stansberry.

W. Va. Code § 18A-2-7 grants broad discretion to a superintendent, and gives him the authority to transfer school personnel subject only to the approval of the board. Post v. Harrison County Bd. of Educ., Docket No. 89-17-355 (Feb. 20, 1990). Further, teachers have no right to be assigned to a particular school, and transfers are not based on seniority, but are based on the needs of the school, as decided in good faith by the superintendent and the board. Hawkins, supra; Post, supra. See Jochum v. Ohio County Bd. of Educ., Docket No. 91-35-396 (Jan. 31, 1992). Thus, whether a transfer was properly conducted is judged by the arbitrary and capricious standard, in the absence of a county policy requiring seniority be considered. Lester v. McDowell County Bd. of Educ., Docket No. 93-33-256 (Jan. 31, 1994); See also Hawkins, supra; LeMastus v. Wyoming County Bd. of

Educ., Docket No. 55-87-290-4 (Mar. 23, 1988); Tenny v. Barbour County Bd. of Educ., Docket No. 01-87-166-2 (Nov. 13, 1987). Ms. Hall's position was eliminated, and because of her seniority and dual certification she was not “subject to release”. She was transferred to a math position. Ms. Stansberry was also transferred. She was “bumped” from her position by Ms. Hall, but because of her seniority and dual certification, she was transferred to Grievant's position. She was not “subject to release” either.

Grievant, however, was “subject to release” and did not have either enough seniority or another certification which could prevent her from being RIF'd.

What Grievant wishes to do is to alter the method by which Ms. Hall and Ms. Stansberry were transferred, and either require Ms. Hall to replace Ms. White or require Ms. Stansberry to bump Mr. Derico. Although LCBOE could have placed Ms. Hall in Ms. White's position, it is not required to do so. The standard of review in a transfer is stated in Dillon v. Board of Education of County of Wyoming, 351 S.E.2d 58 (W. Va. 1986). It is well-settled that “[c]ounty boards of education have substantial discretion in matters relating to hiring, assignments, transferring and promotion of school personnel,” as long as they exercise this discretion “reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious.” Dillon, supra. The West Virginia Supreme Court has stated that boards of education have “great discretion . . . to transfer and assign teachers to designated schools and [the West Virginia Supreme] Court will not interfere with the exercise of that discretion where such action is taken in good faith for the benefit of the school system and is not arbitrary.” Hawkins supra. The West Virginia Supreme Court expanded this discretion “to matters involving curricular programs and the qualifications and placement of personnel implementing those programs.” Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648, 652 (1995). Thus, unless Grievant can demonstrate LCBOE's decision to place a teacher with eleven years ofseniority, eleven years of experience, and dual certification in Ms. Stansberry's position was arbitrary and capricious, this grievance must fail.

“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.2d 1017 (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 was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education. See generally, Harrison v. Ginsberg, 286 S.E.2d 476, 283 (W. Va. 1982)." Trimboli, et al. v. Dept. of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997).

After a review of all evidence of record, the undersigned Administrative Law Judge determines LCBOE's actions were not arbitrary and capricious. While LCBOE could have transferred Ms. Hall to Ms. White's homebound teacher position, it was not required by statute to do so. See Ramey v. Mingo County Bd. of Educ., Docket No. 97-29-293 (Sept. 19, 1997). It cannot be seen as arbitrary and capricious to place a teacher with eleven years of experience, much of it with K-8 children, in a middle school setting, where she could again use her content-specific certification (See footnote 6), instead of placing her in a homebound position teaching multiple-subjects to all ages. Additionally, since the homebound teacher frequently worked with a variety of special education students in a variety of placements, it would not be arbitrary and capricious to keep a "permitable"teacher with twenty-one undergraduate hours in special education in the position instead of replacing her with a teacher who had no special education courses.

The West Virginia Supreme Court has recognized "it takes a special individual to accept and handle the demands and even, at times, the dangers posed by and inherent to homebound instruction." State ex rel. Boner v. Kanawha County Bd. of Educ., 475 S.E.2d 176 at n.n. 23 (W. Va. 1996). Additionally, the West Virginia Supreme Court has stated, "[t]he quality and efficiency of [homebound] instruction may more properly be a matter left to the discretion and expertise of the Board." State v. Kanawha, supra at 186.

Next, Grievant alleges LCBOE intentionally and maliciously structured the transfers and RIF's to ensure Grievant lost her position as retribution and retaliation for a prior selection grievance she filed in 1990 and won in 1992. (See footnote 7) Grievant also alleges favoritism was demonstrated by allowing Ms. White to obtain a permit not required in the posting, and then using this permit to protect Ms. White from a RIF. Reprisal is defined by W. Va. Code § 18-29-2(p) as "retaliation of an employer or agent toward a Grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to address it." A grievant claiming retaliation may establish a prima facie case of reprisal by presenting evidence as follows:

(1) that he/she engaged in protected activity, e.g., filing a grievance;

(2) that he/she was subsequently treated in an adverse manner by the employer or an agent;

(3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and

(4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Conner v. Barbour County Bd. of Educ., Docket No. 93-01-543/544 (Jan. 31, 1995). See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Fareydoon-Nezhad v. W. Va. Bd. of Trustees at Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). Of course, if a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. See Mace v. Pizza Hut, Inc., 377 S.E.2d 461 (W. Va. 1988); Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 309 S.E.2d 342 (W. Va. 1983); Webb, supra.

W. Va. Code § 18-29-2(o) defines favoritism as “unfair treatment of an employee as demonstrated by preference, exceptional or advantageous treatment of another or other employee.” To prove favoritism a grievant must establish a prima facie case which consists of demonstrating:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated [to] actual job responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

If a grievant establishes a prima facie case, a presumption of favoritism exists, which the respondent

can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, a grievant may still prevail if he can demonstrate the reason given by the respondent was pretextual. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Although Grievant clearly believes this sequence of events was maliciously and intentionally structured to her detriment and demonstrates retaliation and favoritism, the undersigned Administrative Law Judge finds little to no evidence to support this contention. Grievant's beliefs are just that, and without evidentiary support cannot be acted upon. Both Dr. Mace, and Mr. Gabe Devono, Assistant Superintendent and Director of Personnel, testified Grievant was a good to excellent teacher, and they were sorry the transfer/RIF process worked the way it did. Dr. Mace was not the superintendent during the prior grievance, and Mr. Devono was the outside, impartial administrator who was brought in to handle the selection process when the grievance was remanded to LCBOE. Mr. Devono was, in essence, the individual who chose Grievant to fill the position. Grievant also stated she thought Mr. Devono had been fair in the prior grievance. Grievant was placed into the contested position and was granted back pay, seniority, and $1,000 in attorney fees within three months of this placement.

Although the parties agree there continued to be an issue of additional attorney fees from the prior grievance, and that Dr. Mace initially recommended to LCBOE that the remaining attorney fees not be paid until a related grievance was resolved (the ousted teacher filed a grievance about the position), these facts do not demonstrate prejudice and malice, and certainly cannot be tied to a transfer/RIF situation two to three years later. Thus, although Grievant showed she participated in a protected activity, she did not demonstrate a causal connection. Additionally, Respondent offeredlegitimate, non-retaliatory reasons for its actions. “[T]he critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity was a 'significant,' 'substantial' or 'motivating' factor in the adverse personnel action.” Conner v. Barbour County Bd. of Educ., Docket No. 93-01-154 (Apr. 8, 1994). Grievant has not proven the filing and winning of her prior grievance was a “significant”, “substantial”, or “motivating” factor in her RIF.

Although the definition and test of favoritism cited above cannot be applied in a direct comparison situation between Ms. White and Grievant, the issue of favoritism in general will be examined. As for

the issue of Ms. White's permit, Ms. White testified she obtained the permit at the suggestion of special educators, so she could be of more benefit to the students she taught. Although a permit was not required by the posting, it certainly was a positive step for Ms. White to take and was in the best interest of her students. However, a non-required permit could not have been used to protect Ms. White from being “bumped”, if LCBOE had decided it wished to transfer Ms. Hall into Ms. White's position.

In a non-disciplinary hearing the burden of proof is on the Grievant. LCBOE could have transferred Ms. Hall into Ms. White's position, but it was not arbitrary and capricious not to do so nor was it a violation of the statute. LCBOE's decision is not so implausible that it could not be ascribed to a difference of opinion. Bedford County Memorial Hosp., supra. Further, Grievant must either demonstrate the RIF process was improperly applied to her, i.e., Ms. Stansberry was improperly transferred and placed in her position, or prove the entire transfer/RIF process was manipulated, with malice aforethought, to ensure she was RIF'd. Otherwise, Grievant has nostanding to question LCBOE's placement of Ms. Hall into Ms. Stansberry's position. The individual who would have standing to question this transfer decision is Ms. Stansberry and/or Ms. Hall. Grievant has not proven her RIF was incorrect, or that LCBOE maliciously manipulated the transfer/RIF process to retaliate against her or to give favoritism to Ms. White.

Seniority Issue

Grievant originally stated LCBOE miscalculated her seniority, and that she should have received a year's credit for her substitute teaching in 1989-90. Later, she argued she had been given an additional year's seniority by Mr. Paul Derico, the Business Manager, to resolve her Equal Employment Opportunity (“EEO”) complaints. (See footnote 8) Grievant also complained the recalculation of her seniority was malicious and intentionally done as retaliation for her prior grievance.

The facts in evidence about Grievant's seniority are as follows: 1) She began as a substitute in 1989; it is unclear how many days she worked and in what capacity. She did not file a grievance about these calculations. 2) In December 1992 or January 1993, Grievant received 200 days of seniority as one part of her prior grievance, Suan I, for the time she should have held the position she was subsequently awarded. 3) During the 1992-93 school year, Grievant was given 400 days,

instead of 200 days for that school year. 4) After the RIF letters were sent, but before the RIF hearings, Mr. Devono and Ms. Brenda Rogers, his assistant, checked and recalculated the seniority of all the employees who had been RIF'd. They found a clerical error in Grievant's seniority and corrected it. Mr. Devono has the authority to make these types of corrections. The change in seniority did not affect Grievant's RIF. 5) Grievant presented no evidence other than her testimony to support hercontention that she was given 200 days to resolve her EEO complaint. She provided no written settlement agreement, no notation approving this settlement from LCBOE members, no minutes from Board meetings approving a settlement, and no concurrence from Mr. Derico, (See footnote 9) who was to have given this settlement to Grievant. Additionally, Grievant indicated her EEO complaint had not been closed.

LCBOE states there was no such agreement, there was a clerical, mathematical error in the seniority calculations, and the individual responsible for making such corrections, Mr. Devono, corrected the error.

Given there is no data to support Grievant's argument, and no record of any board or administrative action to approve such a settlement, Grievant's argument must fail. Such a settlement or agreement, granting a year of seniority, affecting the seniority of other employees, and affecting Grievant's pay scale would need the approval of LCBOE; further, the individual who supposedly made the settlement offer to Grievant and approved it, did not confirm Grievant's story. (See footnote 10)

As for Grievant's argument that the additional 200 days granted during the 1992-93 school year was for her substitute teaching in the 1989-90 school year, this argument does not make sense. Why would LCBOE suddenly grant 200 days to Grievant without some inquiry or grievance on herpart? Additionally, Grievant did not prove she had worked 133 days as a substitute in the 1989-90 school year. Further, substitute days do not count toward regular seniority. (See footnote 11)

Other Issues

1) Notice of RIF Hearing

___Grievant argued LCBOE is required by statute to give her a ten day notice before her RIF hearing. Grievant also argued the cause for her termination was not clearly specified in her RIF letter. There is no such statutory ten-day requirement. W. Va. Code § 18A-2-2 requires a teacher to receive written

notice, served on the teacher by return receipt requested, stating the cause or causes of the termination, and a reasonable opportunity to be heard before the termination is effective. See Farley v. Bd. of Educ., 179 W. Va. 152, 365 S.E.2d (1988); Bates v. Bd. of Educ., 133 W. Va. 225, 55 S.E.2d 777 (1949). The vote of the school board must take place before April first of the current year. W. Va. Code § 18A-2-2; Farley, supra.

Grievant was notified in person the first week of February 1996, and by certified mail dated February 9, 1996, that she was to be RIF'd. On February 17, 1996, she requested a RIF hearing, and by letter dated March 5, 1996, received notice that the RIF hearing was scheduled for March 14, 1996. Grievant attended this hearing with a representative and made no request for a continuance. Grievant was terminated in March 1995, before the April first date. As for the cause of her termination, it was stated on her letter dated February 9, 1995, as “the need to reduce our number of employees based upon the closing of positions within the Lewis County School System andfinancial constraints.” This indeed was the cause for her termination. The fact she may not have been aware of the step-by-step RIF process is of no moment. She received the information she was entitled to receive. Further, as stated above, Grievant had representation at this hearing, and did not ask for a continuance. See Lavender v. Kanawha County Bd. of Educ., Docket No. 96-20-241 (Oct. 31, 1996).

LCBOE is not required by statute to give Grievant ten days notice of her RIF hearing. Grievant received all the procedural due process to which she was entitled.

2) Seniority of Ms. Elizabeth Nichols

___Grievant argues Ms. Nichols received additional seniority to which she was not entitled, and that made her more senior than Ms. Hall. If Ms. Nichols' seniority had not been adjusted, Ms. Hall's and Ms. Nichols' seniority would have been tied, a coin toss would have been required, Ms. Nichols may have lost the coin toss, and, thus, Ms. Nichols would have been the RIF'd P.E. teacher, and Grievant would not have been RIF'd. Ms. Nichols, Ms. Hall, and Mr. Devono all testified Ms. Nichols' additional seniority was appropriate as she earned it working during the regular school year. (See footnote 12)

3) Ms. White's Special Education Permit

___As previously discussed, a permit not required in the posting cannot be used to protect a teacher from being RIF'd. The undersigned Administrative Law Judge agrees that not all theprocedural i's were dotted and t's were crossed in the granting of Ms. White's permit. However, no intentional or malicious behavior was evidenced by this process. Ms. White obtained her permit so she could

legally instruct more homebound students. However, it is clear Ms. White cannot serve the out-of-school environment special education students in areas in which she is not permitted. Further, Grievant has no standing to challenge Ms. White's permit as she was not qualified or certified to fill her position.

The above discussion will be supplemented by the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. Before her RIF in the Spring of 1996, Grievant was employed by LCBOE as a Business Education teacher with six years of seniority.

2. In February of 1996, LCBOE knew it would need to decrease the number of professional and service positions. One position to be decreased was the itinerant, elementary P.E. position held by Ms. Rebecca Hall. Because of her seniority and dual certification, Ms. Hall was transferred and “bumped” Ms. Rebecca Stansberry and assumed her middle school math position. Because of her dual certification and seniority, Ms. Stansberry was transferred and “bumped” into Grievant's position in Business Education. Because of her seniority and single certification, Grievant was RIF'd.

3. Grievant was properly notified of her termination and her RIF hearing.

4. Ms. Elizabeth Nichols was properly granted additional seniority during the 1995-96 school year, for previous uncounted JTP teaching during a regular school year. 5. Mr. Chris Derico's middle school position was eliminated, and his duties were absorbed by various members of his team and the faculty at his middle school.

6. The recalculation and decrease of Grievant's seniority by Mr. Gabe Devono, Assistant Superintendent, was correct and properly reflects the seniority to which Grievant is entitled.

7. Grievant filed a prior grievance in 1991, over LCBOE's failure to select her for a business teaching position. At Level IV, the Administrative Law Judge remanded the case for further consideration, as the proper set of factors under W. Va. Code § 18A-4-7a were not utilized in the selection process. Grievant appealed this decision and it was affirmed by the Kanawha County Circuit Court. Suan v. Lewis County Bd. of Educ., Civil Action No. 91-AA-190 (Kanawha County Cir. Ct.) (Oct. 13, 1992). Subsequently, an independent selection committee, headed by Mr. Devono, selected Grievant for the position. Shortly thereafter, Grievant was placed in the position in January 1993,

awarded back pay, seniority for the time she should have held the position, and some of the requested attorney fees. After further negotiations in 1994, LCBOE paid Grievant additional attorney fees.

8. Grievant also filed an EEO complaint and the exact status and outcome of that action is unclear.

Conclusions of Law

1. In a non-disciplinary grievance, the grievant has the burden of proving each element of her grievance by a preponderance of the evidence. See W. Va. Code § 18-29-6. Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). 2. "County boards of education have substantial discretion in matters relating to hiring, assignment, transferring and promotion of school personnel," as long as they exercise this discretion "reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Dillon v. Board of Education of County of Wyoming, 351 S.E.2d 58 (W. Va. 1986). The West Virginia Supreme Court has stated that boards of education have "great discretion . . . to transfer and assign teachers to designated schools and [the West Virginia Supreme] Court will not interfere with the exercise of that discretion where such action is taken in good faith for the benefit of the school system and is not arbitrary." State ex rel. Hawkins v. Tyler County Bd. of Educ., 275 S.E.2d 908, 911 (W. Va. 1981). The West Virginia Supreme Court has expanded this discretion "to matters involving curricular programs and the qualifications and placement of personnel implementing the programs." Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648, 652 (1995).

3. Absent any evidence that a board abused its discretion or acted in an arbitrary and capricious manner, an administrative transfer of an employee must be upheld. Lester v. McDowell County Bd. of Educ., Docket No. 93-33-256 (Jan. 31, 1994); See also Hawkins v. Kanawha County Bd. of Educ., Docket No. 96-20-370 (Jan. 31, 1997); LeMastus v. Wyoming County Bd. of Educ., Docket No. 55-87-290-4 (Mar. 23, 1988); Tenny v. Barbour County Bd. of Educ., Docket No. 01-87-166-2 (Nov. 13, 1987).

4. An action is arbitrary and capricious if the agency making the decision 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 is 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). An action may also be arbitrary and capricious if it is willful and unreasonable without consideration of facts. Black's Law Dictionary, at 55 (3d Ed. 1985). Arbitrary is further defined as being “synonymous with bad faith or failure to exercise honest judgment.” Id. While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of DOP. See generally, Harrison v. Ginsberg, 286 S.E.2d 476, 283 (W. Va. 1982); Trimboli v. W. Va. Dept. of Health and Human Resources, Docket No. 93-HHR-322 (June 26, 1997).

5. County boards of education are required to place an employee subject to a RIF into a position for which she is certified or licensed if she is more senior than another teacher. W. Va. Code § 18A-4-7a.

6. To prove favoritism, a grievant must establish a prima facie case which consists of demonstrating:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated [to] actual job responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

If a grievant establishes a prima facie case, a presumption of discrimination or favoritism exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, a Grievant may still prevail if he can demonstrate the reason given by the respondent was pretextual. Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

7. Reprisal is defined as “retaliation of an employer or agent toward a Grievant or any other

participant in the grievance procedure either for an alleged injury itself or any lawful attempt to address it." W. Va. Code § 18-29-2(p). A grievant claiming retaliation may establish a prima facie case of reprisal by presenting evidence as follows:

(1) that he/she engaged in protected activity, e.g., filing a grievance;

(2) that he/she was subsequently treated in an adverse manner by the employer or an agent;

(3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and

(4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Conner v. Barbour County Bd. of Educ., Docket No. 93-01-543/544 (Jan. 31, 1995). See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Fareydoon-Nezhad v. W. Va. Bd. of Trustees at Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989).

8. If a grievant makes out a prima facie case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, non-retaliatory reasons for its action. Conner, supra. See Mace v. Pizza Hut, Inc., 377 S.E.2d 461 (W. Va. 1988); Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 309 S.E.2d 342 (W. Va. 1983); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989).

9. "[T]he critical question is whether the grievant has established by a preponderance of the evidence that his protected activity was a factor in the personnel decision. The general rule is that an employee must prove by a preponderance of the evidence that his protected activity wasa 'significant,' 'substantial' or 'motivating' factor in the adverse personnel action." Conner v. Barbour County Bd. of Educ., Docket No. 93-01-154 (Apr. 8, 1994).

10. LCBOE did not abuse its substantial discretion or act in an arbitrary and capricious manner in the transfer and subsequent placement of its professional educators. "[T]he quality and efficiency

of [homebound] instruction may more properly be a matter left to the discretion and expertise of the Board." State of W. Va. v. Kanawha County Bd. of Educ., 475 S.E.2d 176 at n.n. 23 (W. Va. 1996).

11. The West Virginia Supreme Court has recognized "it takes a special individual to accept and handle the demands and even, at times, the dangers posed by and inherent to homebound instruction." State v. Kanawha, supra.

12. Grievant failed to prove a violation of W. Va. Code § 18A-4-7a with respect to her reduction-in-force.

13. Grievant failed to establish a prima facie case of either reprisal or favoritism.

14. A settlement of an EEO complaint by adding 200 days of seniority requires the approval of a county board of education. See Parker v. Summers County Bd. of Educ., 406 S.E.2d 744 (W. Va. 1991).

15. Grievant received all the procedural due process rights due her throughout the RIF process. W. Va. Code § 18A-2-2.

16. Ms. White's special education permit was not required in the posting for the homebound teaching position; thus, it cannot be used to prevent her from being RIF'd, but her special education permit may be used as a rationale to keep Ms. White in the homebound teaching position in regard to the board's exercise of its discretion to transfer employees.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Lewis 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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JANIS I. REYNOLDS

Administrative Law Judge

Dated: September 30, 1997

Footnote: 1

At the Level IV hearing, Grievant's attorney indicated this argument was no longer a part of the grievance.

Footnote: 2

The evidence of record is clear, Mr. Derico's position was eliminated; thus, it would not be possible for anyone to be transferred into a position which no longer existed. It is not therefore necessary to discuss the problem with certifications presented by Respondent. It is also not necessary to discuss, as Grievant wishes, whether Mr. Derico's RIF was proper, and whether his duties were currently being properly carried out at his former middle school.

Footnote: 3

For example, a teacher certified in multi-subjects, K-8 and English 7-12, would have the necessary programmatic level.

Footnote: 4

Out-of-school environment students receive all their instruction from a teacher who comes to their home. Homebound students are students who are usually taught in the school setting, but for some reason, such as illness, presently receive instruction at home. The homebound teacher receives this student's assignments from his in-school teacher and assists the student with them.

Footnote: 5

Grievant's attorney repeatedly requested that these students' IEP's be obtained and submitted into the record. Due to the extreme confidentiality of these documents and parental concerns, the undersigned requested the parties resolve this issue through affidavits. Although there was still some discrepancy with the number and types of students served, this factor would not affect the outcome of this decision.

Footnote: 6

Ms. Hall had previously taught 6th grade Math.

Footnote: 7

See Suan v. Lewis County Bd. of Educ., Docket No. 91-21-074 (Aug. 28, 1991) ("Suan I"). Suan I was a selection case. At Level IV, the Administrative Law Judge found LCBOE had used the wrong set of factors in selecting the successful applicant and remanded the case. Ms. Suan appealed the case to circuit court, and on October 13, 1992, the Kanawha County Circuit Court remanded the case to LCBOE to reevaluate the candidates using the correct set of factors. Mr. Gabe Devono chaired the selection committee, and in approximately December of 1992, Grievant was chosen to fill the position. She began her regular teaching duties in January 1993.

Footnote: 8

The EEO complaint was concerning the same subject matter as the 1991 grievance; Grievant argued she had been the victim of sexual discrimination.

Footnote: 9

Grievant called Mr. Derico as a witness, but did not ask him about the alleged settlement.

Footnote: 10

If Mr. Derico had made such a commitment with Grievant without the approval of Dr. Mace or LCBOE, this act would be considered ultra vires and without force and effect. See Parker v. Summers County Bd. of Educ., 406 S.E.2d 744 (W. Va. 1991); See also Guthrie v. Dept. of Health and Human Resources, Docket No. 95-HHR-277 (Jan. 31, 1996).

Footnote: 11

W. Va. Code § 18-4-7a states "upon the completion of one hundred and thirty-three days of employment in any one school year, substitute teachers shall accrue seniority exclusively for the purpose of applying for employment as a permanent, full-time professional employee." (emphasis added.)

Footnote: 12

During the 1995-96 school year, Ms. Nichols informed Mr. Devono that she believed she had not received credit for her regular school year teaching with the Job Training Partnership Program ("JTP"). Ms. Nichols' seniority was reviewed and, upon the advice of counsel, Ms. Nichols received additional seniority. Although much confusion was generated by Grievant's counsel on this issue, teachers who work in the JTP program during the summer, do not and should not receive regular school seniority, but teachers who work in the JTP program during the regular school year do.