RODNEY B. WHITT,

Grievant,

v. **Docket No. 97-22-243**

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Rodney B. Whitt (Grievant) submitted this grievance under W. Va. Code §§ 18-29-1, et seq., alleging that he was improperly released from employment by Respondent Lincoln County Board of Education (LCBE) pursuant to a reduction-in-force (RIF) action at the end of the 1996-97 school year. Following a Level II hearing on April 23, 1997, this grievance was denied by the Superintendent's designee, Charles S. McCann, on April 30, 1997. Grievant appealed to Level III where LCBE waived participation, as authorized by W. Va. Code § 18-29-4(c), on May 12, 1997. Grievant then appealed to Level IV on May 16, 1997. After the initial hearing date was continued for good cause shown, a Level IV evidentiary hearing was conducted in this Board's office in Charleston, West Virginia, on August 15, 1997. At the conclusion of that hearing, the parties agreed upon a schedule for submissionof post-hearing written arguments. Thereafter, this matter became mature for decision upon receipt of Grievant's post-hearing brief on September 12, 1997. (See footnote 1)

The facts in this matter are essentially undisputed. Accordingly, the following findings of fact are made from the record established at Level IV.

FINDINGS OF FACT

1. Grievant was employed by Respondent Lincoln County Board of Education (LCBE) as a classroom teacher.

2. Grievant is certified by the West Virginia Department of Education to teach Business

Principles/Business Math 7-12, and Business Education/Business Math 9-12. G Ex A-1. Grievant's seniority date with LCBE is August 25, 1983. G Ex A-4.

3. Sherelene Dailey is certified by the West Virginia Department of Education to teach Business Education 7-12. G Ex A-4. Ms. Daily's seniority date with LCBE is August 28, 1989. G Ex A-4.

4. Grievant began teaching business classes at LCBE's Harts High School in 1983. After six years at Harts High School, Grievant successfully bid into a Job Training Partnership Act (JTPA) teaching position at LCBE's Yeager Career Center. At the end of the 1990-91 school year, Grievant "bumped" Ms. Dailey in an earlier reduction-in-force, returning to teach business classes at Harts High School. 5. On March 4, 1997, LCBE Interim Superintendent Donna Martin notified Grievant in writing that his contract with LCBE would be terminated at the end of the 1996- 97 school year as a result of a county-wide reduction-in-force (RIF). G Ex A-2.

6. Grievant requested a hearing on his proposed termination.

7. A hearing on Grievant's proposed termination was conducted before LCBE on or about March 17, 1997. The hearing was recorded, but LCBE has failed to provide Grievant or this Grievance Board with a transcript of those proceedings. LCBE has likewise failed to provide a transcript from the Level II hearing in this grievance held on April 23, 1997.

8. During the 1996-97 school year, Ms. Dailey taught one-half day of Adult Basic Education, and another one-half day of remedial classes in the Instructional Resource Curriculum Center, at LCBE's Yeager Career Center. Ms. Dailey's duties were projected to remain the same for the 1997-98 school year.

9. No subject-specific certification is required to teach Adult Basic Education or to teach in the Instructional Resource Center. The West Virginia Department of Education will issue an Adult License to teach Adult Basic Education to anyone with a Bachelor's Degree from an accredited college with an overall "C" average. J Ex A. See State Bd. of Educ. Policy 5202, 126 C.S.R. 136 (1997).

10. LCBE approved the Superintendent's recommendation to terminate Grievant's employment at the end of the 1996-97 school year.

DISCUSSION

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 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, That all persons employed in a certification area to be reduced who are employed under a temporary permit shall be properly notified and released before a fully certified employee in such a position is subject to release: 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.

> 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.

Grievant asserts that LCBE terminated Grievant's employment contrary to the foregoing RIF provisions in W. Va. Code § 18A-4-7a. In particular, Grievant contends that LCBE was required by statute to allow him to laterally "bump" a less senior classroom teacher in his area of certification and/or licensure.

W. Va. Code § 18A-1-1 defines "classroom teacher" as "[t]he professional educator who has direct instructional or counseling relationship with pupils, spending the majority of his time in this capacity." A preponderance of the limited evidence available in this record indicates that Ms. Dailey's position teaching Adult Basic Education and remedialsubjects falls under the foregoing definition of classroom teacher. See 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). Therefore, Ms. Dailey's position is considered to be a "lateral position" as contemplated by W. Va. Code § 18A-4-7a. Id.

LCBE argues that it was not obligated to transfer Grievant, thereby displacing a less senior employee, because the teaching position in question does not require subject- specific certification in Business Education or Business Principles/Business Math, the certifications which Grievant holds. LCBE claims to have relied upon this Grievance Board's interpretation of W. Va. Code § 18A-4-7a in

Lane v. Mercer County Board of Education, Docket No. 94-27-231 (Dec. 16, 1994), in reaching this conclusion.

As noted by LCBE, this Grievance Board has previously determined that "lateral classroom teaching positions for the purpose of alternate placement during a reduction in force ... are only those positions which require subject-area certification." Lane, supra. See Woodson, supra. This same interpretation of W. Va. Code § 18A-4-7a has been adopted in grievances involving an employee's right to preferred recall to a position that does not require subject-specific certification. 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, supra.

Grievant submits that McCarthy v. Mason County Board of Education, Docket No. 93-26-292 (May 31, 1994), supports his contention that he should have been permitted to "bump" the least senior teacher holding his certification in Business Education. However, in McCarthy, the "bumped" teacher was teaching in a position that required the same subject-specific certification obtained by a more senior teacher. McCarthy determined thatthe more senior employee properly used her newly-acquired subject-specific certification to bump a less senior teacher whose position required that certification. Accordingly, McCarthy does not support Grievant's position.

Grievant also relies upon Radcliff v. Marion County Board of Education, Docket No. 93-24-194 (Feb. 25, 1994), appeal pending, Cir. Ct. of Kanawha County No. 94-AA-45, to support his contention. In Radcliff, this Grievance Board determined that a teacher at the Marion County Technical Center with certification in Business Education properly "bumped" Ms. Radcliff, the least senior teacher in the county holding a Business Education certification, from her teaching position at Fairmont Senior High School. The positions at issue were "Business Education" positions, and subject-specific certifications were required to hold both jobs.

Thereafter, Ms. Radcliff "bumped" a less senior teacher at the employer's White Alternative Learning Center (WALC) holding a position which did not require subject- specific certification. Radcliff affirmed the propriety of the grievant's being "bumped" by a more senior teacher in the same area of certification, and rejected Grievant's contention that § 18A-4-7a required the more senior Business Education teacher to "bump" directly into the WALC position which does not require subject-specific certification. However, Radcliff does not address whether the less senior teacher at WALC was properly displaced by Ms. Radcliff. (See footnote 2) The Supreme Court of Appeals of

West Virginia has determined that 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. Bd. of Educ. v. Bowers, 183 W. Va. 399, 396 S.E.2d 166 (1990). 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). Bowers was decided under W. Va. Code § 18A-4-8b (1988), the predecessor to W. Va. Code § 18A-4-7a (1990) applicable here. However, the language regarding certification and licensure in relation to rights of employees encountering a reduction in force situation is essentially the same. In any event, Bowers addresses administrative positions, not classroom teaching positions. Thus, Bowers may be viewed as instructive, but not as controlling precedent.

This Grievance Board attempts to follow the well-recognized legal doctrine of stare decisis (See footnote 3) in ruling upon grievances. Accordingly, the undersigned administrative law judge is persuaded that Grievant's situation is governed by this Board's decisions in Lane, McCarthy, and Woodson. 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 LCBE's interpretation of § 18A-4-7a.

Although LCBE was not obligated by W. Va. Code § 18A-4-7a to transfer Grievant to a position not requiring subject-specific certification held by a less senior employee, the board nonetheless had the option, as apparently exercised by the school board in Radcliff,to transfer Grievant and displace an employee with less seniority at the Yeager Career Center. See Pockl v. Ohio County Bd. of Educ., 185. W. Va. 256, 406 S.E.2d 687 (1991). In this regard it is recognized that "[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." Syl Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986).

In examining LCBE's decision to retain a less senior employee teaching in its adult education and remedial education programs, the arbitrary and capricious standard of review does not permit an administrative law judge to simply substitute his judgment for that of the school board. Bradley v. Bd. of Directors, Docket No. 96-BOD-030 (Jan. 28, 1997). See Harper v. Mingo County Bd. of Educ., Docket No. 93-29-064 (Sept. 27, 1993). See generally, Bedford County Memorial Hosp. v. Health &

Human Serv., 769 F.2d 1017 (4th Cir. 1985); Staton v. Wyoming County Bd. of Educ., 184 W. Va. 369, 400 S.E.2d 613 (1990). Grievant established that he had experience teaching similar subjects while working in JTPA for two years and that he could, with minimal training, perform the duties presently assigned to Ms. Dailey. Nonetheless, Grievant failed to establish that LCBE's decision to retain Ms. Dailey, rather than displace her by transferring him into her position, was founded upon impermissible factors, or constituted an abuse of the discretion extended school boards when making such determinations.

Grievant also complains that LCBE failed to provide him with a transcript of his RIF hearing or a transcript of his Level II hearing, depriving him of due process of law, andentitling him to reinstatement. (See footnote 4) Grievant requested these transcripts after he initiated this grievance complaining that LCBE had violated W. Va. Code § 18A-4-7a by not permitting him to "bump" a less senior employee.

W. Va. Code § 18-29-3(j) provides as follows:

> Once a grievance has been filed, supportive or corroborative evidence may be presented at any conference or hearing conducted pursuant to the provisions of this article. Whether evidence substantially alters the original grievance and renders it a different grievance is within the discretion of the grievance evaluator at the level wherein the new evidence is presented. If the grievance evaluator rules that the evidence renders it a different grievance, the party offering the evidence may withdraw same; the parties may consent to such evidence, or the grievance evaluator may decide to hear the evidence or rule that the grievant must file a new grievance. The time limitations for filing the new grievance shall be measured from the date of such ruling.

Grievant's complaint regarding the lack of transcripts was not raised until Level IV. To the extent this complaint relates to the underlying grievance, it is without merit as Grievant had the opportunity to present all relevant evidence pertaining to his RIF at a de novo Level IV hearing. (See footnote 5) See W. Va. Code § 18-29-6. Otherwise, Grievant's complaint regarding LCBE's failure to provide transcripts represents a new and separate grievance which LCBE has not consented to include in this matter. Accordingly, the undersigned administrative law judge will not address this new grievance. See Smith v. Mingo County Bd. of Educ., Docket No. 96-29-492 (May 29, 1997); Roush v. Jackson County Bd. of Educ., Docket No. 95-18-020 (May 25, 1995); Crawford v. Mercer County Bd. of Educ.,Docket No. 94-27-958 (Apr. 13, 1995). See generally, W. Va. Dept. of Health & Human Resources v. Hess, 189 W. Va. 357, 432 S.E.2d 775 (1993).

In addition to the foregoing discussion, the following conclusions of law are appropriate in this

matter:

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 4.19, 156 C.S.R. 1 (1996); 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." 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.2d58 (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 LCBE violated, misapplied, or misinterpreted W. Va. Code § 18A-4-7a, or any other statute, policy, rule, or regulation, by failing to transfer him to a position teaching Adult Basic Education and remedial subjects in LCBE's Instructional Resource Curriculum Center for the 1997-98 school year. See Lane, supra.

5. An administrative law judge at Level IV will not rule upon a legal claim in a grievance that was not properly presented for consideration at the lower levels of the grievance procedure. Smith v. Mingo County Bd. of Educ., Docket No. 96-29-492 (May 29, 1997); Roush v. Jackson County Bd. of Educ., Docket No. 95-18-020 (May 25, 1995). See W. Va. Code § 18-29-3(j); Wells v. Bd. of Directors, Docket No. 94-MBOD-334 (Aug. 22, 1996); Crawford v. Mercer County Bd. of Educ.,

Docket No. 94-27-958 (Apr. 13, 1995). See generally W. Va. Dept. of Health & Human Resources v. Hess, 189 W. Va. 357, 432 S.E.2d 775 (1993).

Accordingly, this grievance is **DENIED**.

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

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: February 3, 1998

Footnote: 1

Counsel for LCBE indicated at the Level IV hearing that a transcript of the Level II hearing and Grievant's earlier RIF hearing would be provided. However, neither transcript was ever received by this Grievance Board.

Footnote: 2

The Radcliff decision does not indicate whether the school board "bumped" the teacher without subject-specific certification based upon its lateral transfer policy, or its inherent discretion to make appropriate personnel decisions where W. Va. Code § 18A-4- 7a does not mandate a particular result.

Footnote: 3

Literally, "to stand by things decided." This is the doctrine that when a court has laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases, where the facts are substantially the same. Black's Law Dictionary 1577 (Rev. 4th Ed. 1968).

Footnote: 4

Grievant's post-hearing brief specifically indicates that he is not seeking a remand of this matter, relief which the undersigned has authority to provide in the circumstances presented. See W. Va. Code § 18-29-6.

Footnote: 5

It is noted that Grievant reintroduced all of the documents previously admitted at Level II in the course of the Level IV hearing. See also F.N. 4, supra.