LINDA L. ASHBY,

Grievant,

v. **Docket No. 98-07-186**

CALHOUN COUNTY BOARD OF EDUCATION,

Respondent,

and

KAREN KIRBY,

Intervenor.

D E C I S I O N

Grievant, Linda Ashby, filed this grievance against the Calhoun County Board of Education ("CCBOE") stating:

> **I have taught Computer Technology for the past 4 years at Calhoun County High School. A new school is being built to replace the present building in which teachers are currently housed. Our Board of Education voted to post all jobs in grades 9-12 (See footnote 1) and the teachers voted to give priority status for teacher placement for the '98-'99 school year. Due to this I was displaced by another teacher.**
>
> **I feel this was a violation of WV State Code 18A-4-8f, and ask to be reinstated into the computer position at the new high school.**
>
> **I also ask for any lost wages and/or benefits [to be] restored to me.**

This grievance was filed April 2, 1998, and denied at Level I on April 8, 1998. Level II was by-passed without objection, and after a hearing before CCBOE, this grievance was deniedby CCBOE in June 1998. (See footnote 2) Grievant appealed to Level IV, and after a hearing was scheduled the parties agreed to submit the case on the record developed below. This case became mature for decision on September 4, 1998, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 3)

After a detailed review of the record in its entirety, the undersigned Administrative Law

Judge makes the following Findings of Fact.

Findings of Fact

1. During the 1997-1998 school year, Grievant taught Computer Literacy at Calhoun County High School ("CCHS"). Her schedule consisted of teaching Microsoft Word the first semester and Microsoft Works the second semester.

2. Although Grievant has taught many years, her seniority date with CCBOE is only from August 24, 1994.

3. Grievant's certifications are: Secretarial Studies, 7-12; Health and Physical Education, 7-9; and Pre-vocational Business, 7-12.

4. During the 1997-1998 school year, CCBOE operated four elementary schools, grades K-7, and one high school, CCHS, grades 8-12. During that school year CCBOE finalized plans for the opening of its newly reconfigured school system. By the start of the 1998-1999 school year, there were two elementary schools, grades K-4, and a middle/high school under one roof, consisting of grades 5-12. The middle/high schoolis actually two separate school administrations with the Middle School comprising grades 5-8, and the High School comprising grades 9-12.

5. As part of its planning for the new building and reconfiguration of grade levels, CCBOE was unclear if it should post any or all of the positions within the county. It sought advice on this issue and received the following recommendations:

State Superintendent of Schools - Post all positions, K-12

West Virginia Education Association - Post only grades 5-8

West Virginia School Boards Association - Post all positions grades 5-12

6. After receiving these varied recommendations, CCBOE voted to post all positions for grades 5-12.

7. Prior to posting these positions, the Superintendent conducted the voting and election required by W. Va. Code § 18A-4-8f regarding priority status. A majority of the teacher voting chose to give priority status to the teachers in the schools to be closed and reconfigured.

8. Teachers, including Grievant, were informed of the decisions to post and to select on

a priority status.

9. Some new positions were created by the reconfiguration, some positions were eliminated, and some courses were changed or shifted to the Middle School.

10. All positions at the Middle/High School were posted, and in February 1998, all applicants with priority status met with the Superintendent. Teachers with priority status and proper certification in the Middle School were allowed to select what they wanted to teach from the posted Middle School positions on the basis on seniority. This same process was followed with the High School positions. 11. Given her certifications, Grievant was only certified to teach one course at the new CCHS, Computer Applications. Grievant only had priority status at the High School because this is where she taught the majority of her classes. Grievant was not certified to teach the Middle School computer or keyboarding classes, nor was she interested in doing so.

12. The one position at CCHS that Grievant was qualified for was selected by Intervenor Karen Kirby, who is properly certified for the position and met the standards set forth in the job posting. Intervenor Kirby's seniority date is September 4, 1984. During the 1997-1998 school year, Intervenor had taught special education.

13. When Grievant applied for the Computer position four years previously, Intervenor Kirby was one of the applicants for the position. Under the factors outlined in W. Va. Code § 18A-4-7a, Grievant was selected as the most qualified applicant for the position. **(See footnote 4)**

14. The course Grievant taught at the prior High School, Computer Literacy, although similar, is not the same as the new course to be taught by Intervenor Kirby, Computer Applications. Computer Applications is seen as a more advanced course than Computer Literacy.

15. Because there was no position for Grievant, she was reduced-in-force pursuant to W. Va. Code § 18A-4-7a.

Issues and Arguments

Grievant asserts that W. Va. Code § 18A-4-8f does not apply to this situation as there was no consolidation or merger, and there was no influx of students from another school. Thus,

the positions should not have been posted, and the teachers should merely have moved from one building to the other in their same positions. Additionally, Grievant argues it was incorrect to allow teachers to select on a priority basis using seniority, as this process ignores the mandate of W. Va. Code § 18A-4-7a to select the most qualified teacher for positions. Although Grievant argues that W. Va. Code § 18A-4-8f does not apply, she also argues that the purpose of this Code Section is to maintain the status quo; thus, she should have remained in her position.

CCBOE and Intervenor argue that W. Va. Code § 18A-4-8f does apply and the transition of teachers was properly conducted. The parties note CCBOE has substantial discretion in the hiring, assigning, and transferring of school personnel. Additionally, these parties do not believe that W. Va. Code § 18A-4-7a was violated by the process used to fill positions, as all positions were filled by certified teachers.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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). See W. Va. Code § 18-29-6. The first issue to examine is whether W. Va. Code § 18A-4-8f applies to the reconfiguration of schools conducted by CCBOE. This Code Section provides, in pertinent part:

> **Notwithstanding any provision of this article to the contrary, when a majority of the classroom teachers, as defined in section one [§ 18A-1-1], article one of this chapter, who vote to do so, in accordance with procedures established herein, and who are employed by a county board of education, the board shall give priority to classroom teachers in any school or schools to be closed as a result of a consolidation or merger when filling positions in the new school created by the consolidation or newly created positions in existing schools as a result of the merger . . . . The teachers in the school or schools to be closed shall have priority in filling new positions in the new or merged schools for which the teachers are certified and meet the standards set forth in the job posting on the basis of seniority within the county: Provided, That a teacher shall only receive priority for filling a position at a school impacted by a merger, or consolidation with the position being created by the influx of students from a consolidated or merged school into the school receiving students from their closed school or grade level. The most senior teacher in the closed school or schools shall be placed first, the second most senior shall be placed next and**

> **so on until all the newly created positions are filled, or until all the teachers in the closed school or schools who wish to transfer into the newly created positions are placed: Provided, however, That if there are fewer new positions in the newly created school or merged school than there are classroom teachers in the school or schools to be closed, the teachers who were not placed in the new positions shall retain the same rights as all other teachers with regard to seniority, transfer and reduction in force: Provided further, That nothing herein shall be construed to grant any employee additional rights or protection with regard to reduction in force.**
>
> **For the purposes of this section only, a consolidation shall mean when one or more schools are closed, or one or more grade levels are removed from one or more schools and the students who previously attended the closed schools or grade levels are assigned to a new school. For purposes of this section only, a merger shall mean when one or more schools are closed or one or more grade levels are removed from one or more schools and the students who previously attended the closed schools or grade levels are assigned to another existing school.**

(emphasis added).

CCBOE took all the schools in Calhoun County and reconfigured them. Two elementary schools were closed and two remained open. All students in grades 5-7 were moved to the new Middle/High School complex. The old High School was closed. Within this complex, the Middle School was considered to be grades 5-8, while High School was now considered to be grades 9-12. It is clear from these facts that CCBOE merged and consolidated all the schools within the county. Thus, W. Va. Code § 18A-4-8f applies to the positions at the Middle/High School complex.

Although some classes stayed the same, a few new positions were created, and some previous High School classes were now taught at the Middle School level. Additionally, some previous High School classes, such as Grievant's Computer Literacy course, were increased in difficulty, complexity, or length. Consequently, even though the computer position at the new High School was similar, it was not the same. Because of this fact, Grievant's argument that she should have been allowed just to change schools because the position was the same, must fail.

Grievant's last argument is that allowing teachers to select positions for which they are certified on a seniority basis is a violation of W. Va. Code § 18A-4-7a. Grievant cites Hoyes v. Tyler County Board of Education, Docket No. 93-48-026 (May 28,1993) as supportive of her argument. Hoyes deals with a consolidation in which a Junior High School teacher was placed in a High School position which caused the High School teacher to be placed in the Junior

High School position. The Administrative Law Judge in Hoyes noted the words "closed school or grade level" were significant in interpreting the meaning of the statute, and then found that in essence high school teachers should have priority in high school settings, and junior high or middle school teachers should havepriority in those settings. This directive was followed by CCBOE during the priority selection process.

What is unclear is why the Hoyes Administrative Law Judge stated later in her Conclusion of Law 3 that "[u]nder Code §18A-4-8f, when several jobs are available for displaced teachers with like certifications, a board of education must determine whether the students who will create each such teaching slot are from the displaced applicants' former school and current grade level teaching area in its placement decisions." (emphasis added). The words "teaching area" are not included in W. Va. Code § 18A-4-8f, and this language was not needed to reach the final decision in Hoyes. Additionally, counties have utilized this method of prioritizing teachers based on grade levels and seniority and have not been found to have misinterpreted or misapplied the Code Section. (See footnote 5) **Chapman v. Calhoun County Bd. of Educ., Docket No. 98-07-159 (Aug. 23, 1998). See Crawford v. Randolph County Bd. of Educ., Docket No. 93-24-108 (July 27, 1993); Vance v. Hardy County Bd. of Educ., Docket No. 92-16-162 (Aug. 31, 1992).**

It is well settled that county boards of education have substantial discretion in matters relating to the hiring of school personnel as long as their decisions are in the best interest of the schools and are not arbitrary and capricious. See Hyre v. Upshur County Bd. of Educ., 186 W. Va. 267, 412 S.E.2d 265 (1991); Syl. Pt 3, Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va 145, 351 S.E.2d 58 (1986).

The arbitrary and capricious standard of review requires a searching and careful inquiry into the facts; however, the scope of review is narrow, and the undersigned may notsubstitute her judgment for that of the decision-maker. See generally, Harrison v. Ginsberg, 169 W. Va 162, 286 S.E.2d 276 (1982). "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 Servs., 769 F.2d 1071 (4th Cir. 1985); Snodgrass v. Kanawha County Bd. of

Educ., Docket No. 97-20-255 (Mar. 19, 1998). An action may also be arbitrary and capricious if it is willful and unreasonable without consideration of facts. Black's Law Dictionary, 55 (abr. 5th ed. 1985). Arbitrary is further defined as being "synonymous with bad faith or failure to exercise honest judgment." See Trimboli v. W. Va. Dept. of Health and Human Servs./ Div. of Personnel, Docket No. 93-HHR-322 (June 27, 1997).

Given this review of the statute and this Grievance Board's cases, other than Hoyes, CCBOE's decision to allow teachers to select positions based on seniority and certification cannot be seen as arbitrary and capricious and does not violate W. Va. Code § 18A-4-8f.

This Grievance Board adheres to the doctrine of stare decisis in adjudicating the grievances that come before it. Belcher v. W. Va. Dept. of Transp., Docket No. 94-DOH- 345 (Apr. 27, 1995). See Ramey v. Lincoln County Bd. of Educ., Docket No. 96-22-298 (Oct. 30, 1996); Chafin v. W. Va. Dept. of Health and Human Resources, Docket No. 92- HHR-132 (July 24, 1992) (citing Dailey v. Bechtel Corp., 157 W. Va. 1023, 207 S.E.2d 160 (1974)). This adherence is founded upon a determination that the employees and employers need a system that provides for predictability, while retaining the discretion necessary to effectuate the purpose of the statutes applied. Consistent with this approach,this Grievance Board follows precedents established by the Supreme Court of Appeals of West Virginia as the law of this jurisdiction. Likewise, prior decisions of this Grievance Board are followed unless a reasoned determination is made that the prior decisions are clearly in error.

It is obvious from a review of the Grievance Board case law that there is a small conflict in the statements of this Board. Thus, it is important to reexamine our prior rulings, as done above, to assure the above-stated Code Sections are followed, and that our case law does not deviate from the statutory law. After this review it appears that the Administrative Law Judge in Hoyes incorrectly added the words "teaching area" to her third Conclusion of Law. Given that this requirement is not found in the statute that addition was in error. To the extent this Decision is inconsistent with the prior ruling in Hoyes, that portion of Hoyes is hereby overruled.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of

proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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). See W. Va. Code § 18-29-6. 2. W. Va. Code § 18A-4-8f applies to the total reconfiguration of all schools in the Calhoun County School system as multiple schools were closed, merged, consolidated, and moved as part of a comprehensive plan.

3. The courses the Computer Applications teacher is teaching at the new High School, although similar to the ones Grievant taught before, are not the same.

4. CCBOE's decision to allow priority teachers to select posted positions by seniority and certification is not arbitrary and capricious.

5. The addition of the phrase "teaching area" to Conclusion of Law 3 In Hoyes v. Tyler County Board of Education, Docket No. 93-48-026 (May 28,1993), was in error and does not comport with the statutory language of W. Va. Code § 18A-4-8f. Accordingly, to the extent that the Hoyes language is inconsistent with the statute and the holding in this case, it is overruled.

Accordingly, this grievance is DENIED.

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

JANIS I. REYNOLDS

Administrative Law Judge

Dated: September 29, 1998

Footnote: 1

See Finding of Fact 6, infra.

Footnote: 2

The Level III decision was undated.

Footnote: 3

Grievant was represented by Mr. Steve Angel, of the West Virginia Federation of Teachers, Intervenor was represented by Mr. Ed Stephenson of the West Virginia Education Association, and Respondent was represented by Attorney Howard Seufer.

Footnote: 4

Although not entirely clear from the record it appears that Intervenor Kirby may not possess any teaching experience in this certification area. However, the material in the record was insufficient to allow the undersigned Administrative Law Judge to make this a Finding of Fact.

Footnote: 5

It is noted that Hoyes did not recommend or suggest an alternative to the process currently utilized.