

**TONDA ANGUS,**  
**Grievant,**

**v. Docket No. 00-06-273**

**CABELL COUNTY BOARD OF EDUCATION,**  
**Respondent.**

## **DECISION**

Tonda Angus, Grievant, submitted this grievance under W. Va. Code §§ 18-29-1, et seq., alleging she was improperly released from employment by Respondent Cabell County Board of Education (CCBE) pursuant to a reduction-in-force (RIF) action at the end of the 1999-2000 school year. Her Statement of Grievance reads:

Violations of WV Code 18A-4-7a with regard to grievant's reduction-in-force for the 2000 - 2001 school year. Less senior employee in Grievant's certified area not reduced.

Relief Sought: relief sought is to be placed in less senior computer literacy position.

Following a Level II hearing on June 26, 2000, this grievance was denied July 24, 2000. Grievant appealed to Level III where CCBE waived participation, as authorized by W. Va. Code § 18-29-4(c), on August 19, 2000. Grievant then appealed to Level IV on August 17, 2000. A Level IV hearing was conducted in this Board's office in Charleston, West Virginia, on October 3, 2000. At the Level IV hearing, Grievant wanted to expand her grievance, and argue her position should not have been RIF's at all, and to change her relief sought to reinstatement to her former position. Respondent objected to Grievant's desire to amend her grievance. This case became mature for decision on October 20, 2000, after receipt of the parties' proposed findings of fact and conclusions of law. ([See footnote 1\)](#))

## **Issues and Arguments**

Grievant makes two arguments. First, W. Va. Code § 18A-4-7a was violated when Grievant was RIF'd and a less senior teacher with the same certification was allowed to remain in the CCBE system. Two, Grievant was incorrectly RIF'd as there was a need for her position. Respondent maintains it followed the directions given in previous Grievance Board cases, most notably, Whitt v. Lincoln County Board of Education, Docket No. 97-22- 342 (Feb. 3, 1998). Respondent also objects to Grievant introducing a new grievance at Level IV.

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. Grievant was employed by CCBE as a classroom teacher at Cabell Midland High School ("CMHS").
2. Grievant is certified to teach Business Education/Business Math 9-12. She has two years and 1999 days of seniority.
3. The principal at CMHS was directed to select fourteen positions that could be RIF'd. He examined the school's schedule, the requests for classes, and past utilization of various courses. He decided two Business Education teachers could be RIF'd without causing scheduling and credit difficulty at CMHS. Grievant's position was among the positions he recommended for elimination.
4. Grievant and another teacher were the two least senior CCBE teachers certified in this area, currently teaching in the Business Education area.
5. Two probationary teachers with less seniority than Grievant and with Grievant's certification are currently teaching Computer Literacy in middle schools. [\(See footnote 2\)](#)
6. There is no particular required certification for teaching Computer Literacy. Applicants must have a teaching certificate, and the ability to perform the duties of the position. Many CCBE Computer Literacy teachers are certified in Business areas, but others hold a variety of certifications. Because of her certification, Grievant would be qualified to teach Computer Literacy in the middle schools.
7. Prior to receiving a regular teaching position, Grievant substituted in a Computer Literacy position.
8. The concepts taught in Computer Literacy in the middle schools are similar to the concepts

taught in beginning computer courses in high schools, but the depth, focus, and length of the courses are different.

9. Sometime in March 2000, CCBE Superintendent David Roach notified Grievant in writing that her contract with CCBE would be terminated at the end of the 1999 - 2000 school year as a result of a county-wide reduction-in-force. [\(See footnote 3\)](#) 10. Grievant requested and received a hearing on her proposed termination.

11. CCBE approved the Superintendent's recommendation to terminate Grievant's employment at the end of the 1999-2000 school year.

### **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 CSR 1 § 4.19 (1996); [Toney v. Lincoln County Bd. of Educ.](#), Docket No. 99-22-046 (Apr. 23, 1999); [Bowen v. Kanawha County Bd. of Educ.](#), Docket No. 99-20-039 (Mar. 30, 1999); [Holly v. Logan County Bd. of Educ.](#), Docket No. 96-23-174 (Apr. 30, 1997). [See W. Va. Code § 18-29-6.](#)

A preponderance of the evidence is evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. [Petry v. Kanawha County Bd. of Educ.](#), Docket No. 96-20-380 (Mar. 18, 1997). It may not be determined by the number of witnesses, but by the greater weight of all evidence, the witnesses' opportunity for knowledge, information the witnesses possess, and the witnesses' manner of testifying; these factors determine the weight of the testimony. [Black's Law Dictionary](#), 5th Ed., p. 1064. "If the evidence is evenly balanced between the parties, there can be no recovery" by the party bearing the burden of proof. [Adkins v. Smith](#), 142 W. Va. 772, 98 S. E. 2d 712 (1957).

The first issue to address is whether Grievant can raise a new grievance at Level IV over the objection of Respondent. This question has been answered in the negative by prior Grievance Board decisions, with directions from the West Virginia Supreme Court of Appeals. As stated in [Whitt](#), [supra](#), a complaint raised by a grievant at Level IV for the first time and not consented to by the respondent cannot be addressed. [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. Dep't of Health & Human Resources v. Hess, 189 W. Va. 357, 432 S.E.2d 775 (1993).

The second issue is Grievant's assertion that CCBE terminated her employment contrary to the RIF provisions in W. Va. Code § 18A-4-7a. In particular, Grievant contends that CCBE was required by statute to allow her to "bump" laterally a less senior classroom teacher in her area of certification and/or licensure.

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.

CCBE argues Whitt, supra, is directly on point, and it could not transfer Grievant, thereby displacing a less senior employee, because the teaching position in question does not require subject-specific certification in Business Principles/Business Math, 9 - 12, the certification which Grievant holds. CCBE relied upon this Grievance Board's interpretation of W. Va. Code § 18A-4-7a in, Whitt, supra, in its decision to RIF Grievant as opposed to the other teachers with Business certifications.

As noted by CCBE, this Grievance Board previously determined "lateral classroom teaching positions for the purpose of alternate placement during a reduction in force ... are only those

positions which require subject-area certification." Whitt, supra (citing Lane v. Mercer County Board of Education, Docket No. 94-27-231 (Dec. 16, 1994)). See Woodson v. Monroe County Bd. of Educ., Docket No. 92-31-194 (Feb. 10, 1993). 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. 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 decided under 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.

The Whitt administrative law judge also 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). This Grievance Board attempts to follow the well-recognized legal doctrine of stare decisis ([See footnote 4](#)) in ruling upon grievances. Accordingly, the undersigned administrative law judge is persuaded that Grievant's situation is governed by this Board's decisions in Whitt, Lane, 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 this interpretation of W. Va. Code § 18A-4-7a.

In Whitt, as here, the undersigned Administrative Law Judge cannot find CCBE's decision to retain a less senior employee teaching Computer Literacy in the middle schools as arbitrary and

capricious, and the undersigned Administrative Law Judge is not permitted to simply substitute her judgment for that of the school board, especially since CCBE's decision relied upon the recent Whitt Decision. See Bradley v. Bd. of Directors, Docket No. 96-BOD-030 (Jan. 28, 1997); 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 has failed to establish that CCBE's decision to retain the other teachers, rather than displacing them and transferring Grievant into one of their positions, was founded upon impermissible factors, or constituted an abuse of the discretion extended school boards when making such determinations.

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 her complaint by a preponderance of the evidence. W. Va. Educ. & State Employees Grievance Bd. Procedural Rule 4.19, 156 CSR 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." 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 CCBE violated, misapplied, or misinterpreted W. Va. Code § 18A-4-7a, or any other statute, policy, rule, or regulation, by failing to transfer her to a Computer Literacy teaching position for the 2000 - 20001 school year. Whitt, supra; 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. Whitt, supra; 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. Dep't 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 Cabell 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 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: December 8, 2000**

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[Footnote: 1](#)

*Grievant was represented by Susan Hubbard from the West Virginia Education Association, and Respondent was represented by attorney Howard Seuffer.*

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[Footnote: 2](#)

*The other Computer Literacy teachers have greater seniority than Grievant.*

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[Footnote: 3](#)

*Grievant had also been RIF'd the year before, but had received a regular teaching position prior to the start of the school year.*

[Footnote: 4](#)

*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).*