RICK LANE,

Grievant,

v v.

DOCKET NO. 02-41-176

RALEIGH COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Rick Lane, filed this grievance against his employer, the Raleigh County Board of Education ("Board") on April 15, 2002, alleging a "[v]iolation of WV Code § 18A-4- 7a, § 18A-2-7 & § 18A-2-2." He seeks as relief the "Business position at Marsh Fork or Liberty High School." The grievance was waived to level two, and a level two hearing was held on May 16, 2002, after which a decision was rendered by Grievance Evaluator Kathryn R. Bayless, denying the grievance. Grievant bypassed level three, and appealed to level four on June 19, 2002. The parties agreed to submit the grievance on the record developed at level two, and this matter became mature for decision on July 23, 2002, the deadline for the parties' proposed findings of fact and conclusions of law. Grievant was represented by Ben Barkey, West Virginia Education Association, and the Board was represented at level two by Emily Meadows, Director of Personnel, and at level four by Erwin L. Conrad, Esq., Conrad Law Offices.

SUMMARY OF EVIDENCE

Level Two Joint Exhibits

Ex. 1 -

Waiver of Level I Grievance.

Ex. 2 -

April 15, 2002 memorandum from Rick Lane to Dr. Charlotte Hutchens; April 22, 2002 letter from Charlotte Hutchens to Richard Lane; April 24, 2002 letter from Charlotte Hutchens to Richard Lane.

Ex. 3 -

Personnel hearing transcript, March 18, 2002, with exhibits. (See footnote 1)

PT AEx. 1 -

March 13, 2002 memorandum from Emily C. Meadows to Marsh Fork Staff Addressed; Conference Check-off; March 5, 2002 letter from Charlotte Hutchens to Rick Lane; Certified Mail Receipt.

PT AEx. 1 -

Professional Teaching Certificate for Richard W. Lane.

PT AEx. 3 -

Business Education Seniority List - Raleigh County, January 8, 2002.

Ex. 4 -

Personnel hearing transcript, March 26, 2002, with exhibits.

PT AEx. 4 -

Emails to and from Violet Collins and Emily Hundley re: course code/certifications.

PT AEx. 5 -

Certificate Endorsement Codes Listing, March 21, 2002.

PT AEx. 6 -

March 26, 2002 email from Linda Heatherman to Emily Meadows.

PT AEx. 7 -

Endorsement codes for teaching Marketing Education.

PT AEx. 8 -

June 7, 1994 letter from Dwight D. Dials to Linda Struyk.

PT AEx. 9 -

Rural Entrepreneurship Through Action Learning (REAL) website; March 25, 2002 emails to and from Emily Meadows and Bill Richardson.

PT AEx. 10 -

Core Content Exams for Vocational Completers; Business Educator's Back-to-School Update.

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PT AEx. 11 -
Grievance Board Decision, Angus v. Cabell County Board of Education, Docket No. 00-06-273 (Dec. 8, 2000). (See footnote 2)

PT AEx. 12 -

October 6, 1997 Vacancy List.

PT AEx. 13 -

Endorsement codes for teaching Technical and Industrial Education Courses.

PT AEx. 14 -

Computer Systems Technology.

PT AEx. 15 -

Endorsement codes for teaching Technical and Industrial Education. PT AEx. 16 -
March 19, 2002 emails to and from Emily Meadows and Howard Seufer, Esq.

PT GEx. 1 -

Real Entrepreneurship Curriculum License Agreement.

PT GEx. 2 -

June 7, 1994 letter from Gary Rumberg to Linda Struyk.

PT GEx. 3 -

March 9, 1995 letter from Richard S. Larson To Whom It May Concern.

PT GEx. 4 -

The REAL Story, Winter 1995, Vol. VI, Chap. 1.

PT GEx. 5 -

Appalachia, Vol. 29, No. 1.

Level Two Grievant's Exhibits

Ex. 1 -

March 20, 2002 Proposed Teacher Master Schedule for Richard Lane.

Ex. 2 -

Staff Development Personalized Plan, 1997-98.

Ex. 3 -

Marsh Fork High School Schedule.

Ex. 4 -

REAL Enterprises Certificate of Completion for Rick Lane, 1994; REAL Enterprises commendation for Rick Lane, 1995.

Ex. 5 -

March 9, 1995 letter from Richard S. Larson To Whom It May Concern.

Ex. 6 -

REAL Enterprises Professional Development Policy.

Ex. 7 -

REAL Entrepreneurship Curriculum License Agreement.

Ex. 8 -

Policy 5310 Teacher Evaluation, 1995-96.

Ex. 9 -

Policy 5310 Teacher Evaluation, 1996-97.

Ex. 10 -

March 20, 2002 Proposed Teacher Master Schedule for Richard Lane.

Ex. 11 -

Endorsement codes for teaching Marketing Education.

Ex. 12 -

West Virginia REAL Enterprises non-financial school requirements, Spring 1994.

Ex. 12a -

June 7, 1994 letter from Dwight D. Dials to Linda Struyk.

Ex. 13 -

June 7, 1994 letter from Gary Rumberg to Linda Struyk.

Ex. 14 -

May 19, 1995 letter from Linda Struyk To Whom It May Concern.

Ex. 15 -

October 18, 1995 email from Linda Struyk to Rick Lane.

Ex. 16 -

August 23, 1996 letter from Gene Coulson to Rick Lane.

Ex. 17 -

April 3-4, 2002 emails to and from Rick Lane and Emily Hundley.

Ex. 18 -

March 19, 2002 emails to and from Violet Collins and Emily Hundley.

Level Four Grievant's Exhibit

Ex. 1 -

June 7, 2002 memorandum from Doris White to Rick Lane; May 21, 2002 memorandum from Clyde Stepp To Whom It May Concern. (See footnote 3)

Level Two Board Exhibits

Ex. 1 -

May 3, 2002 letter from Gregory W. Bailey to Barry L. Bruce.

Ex. 2 -

Certificate Status Information for Richard Lane.

Ex. 3 -

Teachers Assigned to Teach Computers, Tech Ed or Business, Raleigh County, May 13, 2002.

Ex. 4a -

Endorsement codes for teaching Technology Education.

Ex. 4b -

Endorsement codes for teaching Vocational Education: Technology Education.

Testimony

Grievant testified in his own behalf. The Board presented the testimony of Emily Meadows.

After a careful review of all the testimony and exhibits presented, I find the following facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant is employed by the Board as a teacher assigned to Marsh Fork High School. Grievant is certified in Business Principles 5-12.

2. In the Spring of 2002, Grievant received a timely Notice that the position he held would be reduced in force on the recommendation of the Superintendent.

3. A hearing on the Superintendent's recommendation was conducted before the Board in a timely fashion.

4. There were no procedural irregularities with respect to the Notice of Hearing, the conduct of the Hearing, or the action taken by the Board to approve the Superintendent's recommendation that

his contract be terminated.

5. At the time of the grievance filing, the Board and the West Virginia State Board of Education had approved the closing of Marsh Fork High School for the comingschool year with the movement of some students to Liberty High School, and some students to Trap Hill Middle School. (See footnote 4)

6. Under the Board's plan for personnel for school year 2002-2003, the closure of Marsh Fork High School and the movement of students to Liberty would result in the creation of an additional Business position at Liberty. However, due to a reduction in force of a position at the Academy of Careers and Technology ("ACT") for the coming year, a more senior teacher having certification for the Business position at Liberty would "bump" into the Liberty position. Likewise, if Marsh Fork remains open for the 2002-2003 school year, the more senior teacher who has lost a position at ACT would bump to the Marsh Fork opening created by Grievant's reduction in force. (See footnote 5)

7. Grievant teaches two courses, Travel West Virginia, and REAL, which required specialized training. Grievant received a Certificate of Completion for his training in REAL.

8. The only requirement of the West Virginia State Board of Education for teaching Travel West Virginia is that the individual hold a professional teaching certificate. In other words, Travel West Virginia is not a subject-specific course. 9. Neither REAL nor Travel West Virginia are considered "core" courses by the Board or the State Board of Education; rather, they are "electives" which are not required for students to complete their curriculum.

10. Grievant has less seniority than the teacher who is to bump from the Business position reduced in force at ACT. Furthermore, Grievant is not certified to teach in the assignments held by any person with less seniority whose name appears on the "Business Education Seniority" list maintained by the Board. (See footnote 6)

11. The teacher who is displacing Grievant, Diana Cottle, has not completed the specialized training for REAL Enterprises or Travel West Virginia.

DISCUSSION

In non-disciplinary grievances, the grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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.

W. Va. Code § 18A-4-7a provides, in pertinent part:

> (f) The seniority of classroom teachers . . . shall be determined on the basis of the length of time the employee has been employed as a regular full-time certified and/or licensed professional educator by the county board of education and shall be granted in all areas that the employee is certified and/or licensed.
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> . . .
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> (j) 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 . . . § 18A-2-2 . . .. The provisions of this subsection are subject to the following:
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> . . .
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> (2) 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;

Grievant maintains that his reduction in force violates the above Code Section, and is arbitrary and capricious, because the teacher who is displacing him is not certified to teach REAL Enterprises and Travel West Virginia. Grievant asserts it is inconsistent for the Board to allow Ms. Cottle to displace him when she has no specialized training or certification to teach the REAL and Travel courses, while at the same time argue that he is not permitted to bump any less senior teachers who teach courses that are not subject specific.

County boards of education have broad discretion in personnel matters, including making job assignments and transfers, but must exercise that discretion in a manner which is not arbitrary or capricious. Dillon v. Wyoming County Bd. of Educ., 351 S.E.2d 58 (W. Va. 1986); Conrad v. Nicholas County Bd. of Educ., Docket No. 97-34-388 (Jan. 12, 1998);Mullins v. Logan County Bd. of Educ., Docket No. 94-23-283 (Sept. 25, 1995); Dodson v. McDowell County Bd. of Educ., Docket No. 93-33-243 (Feb. 15, 1994).

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.2d1017 (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 is arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of the board of education. See generally Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

The “clearly wrong” and the “arbitrary and capricious” standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis. Adkins v. W. Va. Dept. of Educ., No. 29066 (W. Va. 2001)(citing In re Queen, 196 W. Va. 442, 473 S.E.2d 483 (1996).

While it is true that specialized training is required for REAL, the evidence presented shows that the West Virginia State Department of Education does not recognize REAL as a “core” course necessary for a student's advancement. REAL and Travel West Virginia are both considered “electives,” and as such, are not required to be offered by the schools. Clearly, Grievant is concerned about the future of the courses that he personally developed and which have received acclaim both locally and nationally. If Ms. Cottle does not have the required training to teach the courses, it is entirely possible that Liberty High Schoolmay drop them from its curriculum offerings. However, Grievant has not produced sufficient evidence to show that these courses are required, or that dropping them from the curriculum is arbitrary or capricious.

Grievant's second argument is that it is inconsistent, and therefore arbitrary and capricious, for the Board to permit Ms. Cottle to bump him and teach courses which do not require content-specific certification, while he is not permitted to do the same. Grievant presented a list of less-senior employees who are teaching courses which do not require subject-specific certification, and maintains that he should be able to bump into one of those positions.

Grievant's argument has been raised before and rejected by the Grievance Board, as stated in Angus v. Cabell County Board of Education, Docket No. 00-06-273 (Dec. 8, 2000):

> "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. 92-31-282 (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.

However, as noted in footnote 2, supra, the Circuit Court of Kanawha County has recently overruled Angus in Civil Action No. 01-AA-9 (Aug. 2, 2002), warranting further discussion. As a general rule, this Grievance Board adheres to the doctrine of stare decisis in adjudicating grievances that come before it. Chafin v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-132 (July 24, 1992), citing Dailey v. Bechtel Corp.,157 W. Va. 1023, 207 S.E.2d 169 (1974). This adherence is founded upon a determination that the employees and employers whose relationships are regulated by this agency are best guided in their actions by a system that provides for predictability, while retaining the discretion necessary to effectuate the purposes 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 decision was clearly in error. Shaffer v. Kanawha County Bd. of Educ., Docket No. 00-20-085 (June 12, 2000); Belcher v. W. Va. Dep't of Transp., Docket No. 94- DOH-341 (Apr. 27, 1995). A decision from a circuit court reversing a Grievance Board Decision, while instructive, does not mandate that the circuit court's reasoning be followed by the Grievance Board in future cases dealing with the same issue.

A review of Angus, and the cases relied upon in reaching that Decision, convinces the undersigned that the logic and rationale behind Angus and its progeny was not clearly wrong, based upon the clear wording of the applicable statutes. Therefore, the undersigned does not find the Circuit Court's reversal presents a reasoned determination sufficient to overrule the Grievance Board's long line of cases, none of which have been disturbed until now.

CONCLUSIONS OF LAW

1. Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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-4-7a provides *inter alia* that a county board of education must release the least senior teacher in the *certification area* to be reduced. That teacher may "bump" into another position requiring the *same certification* only if he or she has greater seniority than the current holder of the position.

3. Grievant has failed to prove, by a preponderance of the evidence, that the Board wrongfully terminated his contract when it considered only his certification and seniority. The training for the REAL and Travel West Virginia courses which he taught is not training required by the West Virginia Department of Education for certification or endorsement purposes. While training may result in issuance of a certificate from the entity providing the training which certifies that an enrollee has completed the training, such is not equivalent to "certification" as that term is used in W. Va. Code § 18A-4-7a.

4. W. Va. Code § 18A-4-7a also permits lateral movement by a teacher having greater seniority than another in a subject-specific certification. Angus v. Cabell County Board of Education, Docket No. 00-06-273 (Dec. 8, 2000).

5. Grievant is not entitled to a lateral move to a position which does not require that a teacher hold subject-specific endorsement but simply requires that the teacher holda West Virginia Teaching Certificate. Angus; supra; Whitt v. Lincoln County Board of Education, Docket No. 97-22-342 (Feb. 3, 1998).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Raleigh County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: August 29, 2002

Footnote: 1

References to the Personnel Hearing exhibits will be "PT AEx. __," for Administration Exhibits, and "PT GEx. __," for Grievant's Exhibits.

Footnote: 2

Angus was recently overruled by the Hon. Judge Louis H. Bloom of the Circuit Court of Kanawha County in Civil Action No. 01-AA-9 (Aug. 2, 2002), and will be addressed in the Discussion, infra.

Footnote: 3

These documents were submitted after the close of the level two hearing for admission at level four. No objection was received from the Board, and these documents are hereby admitted as Level Four Grievant's Exhibit 1.

Footnote: 4

The closure was challenged by litigation and an injunction was awarded by the Circuit Court of Raleigh County which is now on appeal to the West Virginia Supreme Court of Appeals. However, the outcome of this grievance would not be affected by the school closure litigation.

Footnote: 5

Grievant argued as a collateral issue that all of the positions at Liberty High School should be posted because the movement of Marsh Fork students to Liberty constitutes a consolidation under W. Va. Code § 18A-4-8(f). That issue has recently been decided by the Grievance Board in Roberts and Workman v. Raleigh County Board of Education, Docket No. 02-41-163 (July 18, 2002), holding that movement of students from Marsh Fork to Liberty is a merger, and therefore, only the newly created positions resulting from the influx should be posted.

Footnote: 6

Grievant claimed he should be permitted to bump into one of several computer courses taught by less senior teachers, because teaching computers requires no subject- specific certification or license.