PAULINE BIRMINGHAM,

Grievant,

v. **Docket No. 02-MCVTC-134**

JAMES RUMSEY TECHNICAL INSTITUTE,

Respondent.

DECISION

Pauline Birmingham ("Grievant") initiated this proceeding in April of 2002, challenging her reduction in force as the director of finance for the James Rumsey Technical Institute ("James Rumsey"). (See footnote 1) A level two hearing was held on May 8, 2002, followed by a written decision, denying the grievance (undated). Level three consideration was bypassed, and Grievant appealed to level four on May 15, 2002. A level four hearing was held on August 28, 2002, at James Rumsey in Martinsburg, West Virginia. Grievant was represented by counsel, Lawrence Schultz, and Harvey Bane of WVEA, and Respondent was represented by counsel, David Joel. This matter became mature for consideration upon receipt of the parties' final written arguments on November 15, 2002.

The following findings of fact are made based upon a preponderance of the credible evidence of record.

Findings of Fact

1. Grievant began employment at James Rumsey in October of 1987 as a classroom teacher. (See footnote 2)

2. On April 1, 1988, Grievant was selected to fill the position of director of finance for James Rumsey. Grievant has never held an administrative certification.

3. Grievant is certified as a home economics teacher, with an endorsement in early childhood education.

4. In the spring of 2002, due to inability to fund the position, James Rumsey notified Grievant

that her position as director of finance was being eliminated.

5. After a hearing before the James Rumsey Administrative Council, Grievant was placed on the preferred recall list, effective at the conclusion of the 2001-2002 school year.

6. James Rumsey does not have a policy which describes which positions are lateral to professional positions, such as Grievant's, for purposes of reductions in force.

7. Although she has had no classroom instruction duties since she was selected as director of finance, Grievant's position has been listed on James Rumsey's certification list as “teacher,” so that the state would fund the position.

Discussion

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

Grievant contends that, pursuant to statutory provisions regarding reductions in force, she was entitled to placement in another position at James Rumsey for which she was qualified. She further argues that, because James Rumsey has listed her position as teacher for the past fourteen years, she should be considered a teacher for purposes of placing her in a lateral position under the provisions of the reduction in force statute. Respondent counters that, despite how Grievant's position has been listed for funding purposes, she has been an administrator for the past fourteen years and is not eligible for placement into any of the positions she has identified as “lateral.” Grievant claims that, by placing her on preferred recall, rather than in another position, James Rumsey violated the provisions of W. Va. Code § 18A-4-7a, which 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 seniority shall be properly notified and released from employment pursuant to the provisions of ... [18A-2-2] ... 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 employees 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 these 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 countyboard 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 has identified five positions for which she believes she is qualified and should have been allowed to “bump” into, due to her superior seniority. Indeed, Respondent does not dispute that, pursuant to another provision of W. Va. Code § 18A-4- 7a, Grievant has accrued seniority as a classroom teacher while working in her administrative position, and does have more teaching seniority than the persons in the targeted positions. Of the five positions Grievant has identified, four are teaching positions and the other, Work-Based Learning Coordinator, is an administrative position.

As Respondent has correctly noted, Grievant's position was clearly administrative, because, despite how her position was listed for funding purposes, she was not a “professional educator [with a] direct instructional or counseling relationship with pupils” as defined by W. Va. Code § 18A-1-1. Accordingly, the teaching positions Grievant claims she could have been placed in were not lateral to her administrative position, pursuant to the "bumping" provisions of W. Va. Code § 18A-4-7a. She was not entitled to bump into any of the teaching positions identified.

The only remaining issue is whether or not Grievant should have been allowed to displace a less senior employee who held the position of Work-Based Learning Coordinator. This option would only be available if the position is deemed to be lateral to Grievant's director of finance position. James Rumsey's failure to comply with the statutory requirement of promulgating a policy defining positions which are lateral to professionalpositions presents a difficult situation. If such a policy existed, it would be clear whether or not Grievant could be placed in the coordinator position. Since no such policy has been enacted, it would be purely conjecture on the undersigned's part to determine whether the two

positions should be considered lateral. Respondent has noted the Grievance Board's line of cases finding that teaching positions are only lateral to one another if they require subject-specific certification. Lane v. Raleigh County Bd. of Educ., Docket No. 02-41-176 (Aug. 29, 2002); Parks v. Marion County Bd. of Educ., Docket No. 01-24-375 (July 20, 2001); Lane v. Mercer County Bd. of Educ., Docket No. 96-29-164 (June 28, 1996). These decisions are based, in part, upon the Supreme Court's reasoning in Board of Education v. Bowers, 183 W. Va. 399, 396 S.E.2d 166 (1990), where it was held 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." However, it must be noted that this decision was based upon an interpretation of a different statute, W. Va. Code § 18A-4-7a not being in existence at that time. In fact, it is likely that the portion of the statute requiring boards of education to define lateral positions may have been a reaction to the Bowers ruling, but that is unknown.

Under the facts presented, the undersigned cannot make a finding that Grievant's position is lateral to the coordinator position. Bowers, supra, has not been specifically overruled, and it states that administrative positions are not lateral if they do not require specific certification, as do the cases cited above regarding teaching positions. Accordingly, in the absence of a lateral position, Grievant's only option for "bumping" under W. Va. Code § 18A-4-7a would be placement in a position which she had already held, andher prior teaching position has not been identified as one which she seeks. See Roncella v. McDowell County Bd. of Educ., Docket No. 01-33-395 (Dec. 27, 2001).

The following conclusions of law support the decision reached.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving her claims 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. When an employee is reduced in force, he or she is entitled to placement "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" if the employee has more seniority than the person holding

the position. W. Va. Code § 18A-4-7a.

3. Positions which do not require subject-specific certification are not lateral to one another for bumping purposes. Lane v. Raleigh County Bd. of Educ., Docket No. 02- 41-176 (Aug. 29, 2002); Parks v. Marion County Bd. of Educ., Docket No. 01-24-375 (July 20, 2001); Lane v. Mercer County Bd. of Educ., Docket No. 96-29-164 (June 28, 1996). See Bd. of Educ. v. Bowers, 183 W. Va. 399, 396 S.E.2d 166 (1990).

4. Grievant has failed to prove by a preponderance of the evidence that, upon being reduced in force, she was entitled to placement in another position with the James Rumsey Technical Institute.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Berkeley 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. 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.

Date: November 25, 2002 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant had initially filed directly at level four, claiming she had been terminated. By order dated April 19, 2002, the undersigned remanded this grievance to level two, because Grievant was not terminated for cause and, accordingly, not eligible to "skip" the lower levels as allowed by W. Va. Code § 18A-2-8.

Footnote: 2

The record does not reflect what class Grievant taught when initially employed at James Rumsey.