



**Legal Personnel Issues:
Advice on School Employee RIFs, Transfers, and
Related Actions for "Personnel Season" 2015**

RESA 7

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Clarksburg



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§18A-2-2. Employment of teachers; contracts; continuing contract status; how terminated; dismissal for lack of need; released time; failure of teacher to perform contract or violation thereof; written notice bonus for teachers and professional personnel.

(a) Before entering upon their duties, all teachers shall execute a contract with their county boards, which shall state the salary to be paid and shall be in the form prescribed by the state superintendent. Each contract shall be signed by the teacher and by the president and secretary of the county board and shall be filed, together with the certificate of the teacher, by the secretary of the office of the county board: *Provided*, That when necessary to facilitate the employment of employable professional personnel and prospective and recent graduates of teacher education programs who have not yet attained certification, the contract may be signed upon the condition that the certificate is issued to the employee prior to the beginning of the employment term in which the employee enters upon his or her duties.

(b) Each teacher's contract, under this section, shall be designated as a probationary or continuing contract. A probationary teacher's contract shall be for a term of not less than one nor more than three years, one of which shall be for completion of a beginning teacher internship pursuant to the provisions of section two-b, article three of this chapter, if applicable. If, after three years of such employment, the teacher who holds a professional certificate, based on at least a bachelor's degree, has met the qualifications for a bachelor's degree and the county board enter into a new contract of employment, it shall be a continuing contract, subject to the following:

(1) Any teacher holding a valid certificate with less than a bachelor's degree who is employed in a county beyond the three-year probationary period shall upon qualifying for the professional certificate based upon a bachelor's degree, if reemployed, be granted continuing contract status; and

(2) A teacher holding continuing contract status with one county shall be granted continuing contract status with any other county upon completion of one year of acceptable employment if the employment is during the next succeeding school year or immediately following an approved leave of absence extending no more than one year.

(c) The continuing contract of any teacher shall remain in full force and effect except as modified by mutual consent of the school board and the teacher, unless and until terminated, subject to the following:

(1) A continuing contract may not be terminated except:



33 (A) By a majority vote of the full membership of the county board on or before
34 March 1 of the then current year, after written notice, served upon the teacher, return receipt
35 requested, stating cause or causes and an opportunity to be heard at a meeting of the board prior
36 to the board's action on the termination issue; or

37 (B) By written resignation of the teacher on or before March 1 to initiate
38 termination of a continuing contract;

39 (2) The termination shall take effect at the close of the school year in which the
40 contract is terminated;

41 (3) The contract may be terminated at any time by mutual consent of the school
42 board and the teacher;

43 (4) This section does not affect the powers of the school board to suspend or
44 dismiss a principal or teacher pursuant to section eight of this article;

45 (5) A continuing contract for any teacher holding a certificate valid for more than
46 one year and in full force and effect during the school year 1984-1985 shall remain in full force
47 and effect;

48 (6) A continuing contract does not operate to prevent a teacher's dismissal based
49 upon the lack of need for the teacher's services pursuant to the provisions of law relating to the
50 allocation to teachers and pupil-teacher ratios. The written notification of teachers being
51 considered for dismissal for lack of need shall be limited to only those teachers whose
52 consideration for dismissal is based upon known or expected circumstances which will require
53 dismissal for lack of need. An employee who was not provided notice and an opportunity for a
54 hearing pursuant to this subsection may not be included on the list. In case of dismissal for lack
55 of need, a dismissed teacher shall be placed upon a preferred list in the order of their length of
56 service with that board. No teacher may be employed by the board until each qualified teacher
57 upon the preferred list, in order, has been offered the opportunity for reemployment in a position
58 for which he or she is qualified, not including a teacher who has accepted a teaching position
59 elsewhere. The reemployment shall be upon a teacher's preexisting continuing contract and has
60 the same effect as though the contract had been suspended during the time the teacher was not
61 employed.

62 (d) In the assignment of position or duties of a teacher under a continuing
63 contract, the board may provide for released time of a teacher for any special professional or
64 governmental assignment without jeopardizing the contractual rights of the teacher or any other
65 rights, privileges or benefits under the provisions of this chapter. Released time shall be provided
66 for any professional educator while serving as a member of the Legislature during any duly



constituted session of that body and its interim and statutory committees and commissions without jeopardizing his or her contractual rights or any other rights, privileges, benefits or accrual of experience for placement on the state minimum salary schedule in the following school year under the provisions of this chapter, board policy and law.

(e) Any teacher who fails to fulfill his or her contract with the board, unless prevented from doing so by personal illness or other just cause or unless released from his or her contract by the board, or who violates any lawful provision of the contract, is disqualified to teach in any other public school in the state for a period of the next ensuing school year and the State Department of Education or board may hold all papers and credentials of the teacher on file for a period of one year for the violation: *Provided*, That marriage of a teacher is not considered a failure to fulfill, or violation of, the contract.

(f) Any classroom teacher, as defined in section one, article one of this chapter, who desires to resign employment with a county board or request a leave of absence, the resignation or leave of absence to become effective on or before July 15 of the same year and after completion of the employment term, may do so at any time during the school year by written notification of the resignation or leave of absence and any notification received by a county board shall automatically extend the teacher's public employee insurance coverage until August 31 of the same year.

(g) (1) A classroom teacher who gives written notice to the county board on or before January 15 of the school year of his or her retirement from employment with the board at the conclusion of the school year shall be paid \$500 from the Early Notification of Retirement line item established for the Department of Education for this purpose, subject to appropriation by the Legislature. If the appropriations to the Department of *Education* for this purpose are insufficient to compensate all applicable teachers, the Department of Education shall request a supplemental appropriation in an amount sufficient to compensate all such teachers. Additionally, if funds are still insufficient to compensate all applicable teachers, the priority of payment is for teachers who give written notice the earliest. This payment shall not be counted as part of the final average salary for the purpose of calculating retirement.

(2) The position of a classroom teacher providing written notice of retirement pursuant to this subsection may be considered vacant and the county board may immediately post the position as an opening to be filled at the conclusion of the school year. If a teacher has been hired to fill the position of a retiring classroom teacher prior to the start of the next school year, the retiring classroom teacher is disqualified from continuing his or her employment in that position. However, the retiring classroom teacher may be permitted to continue his or her employment in that position and forfeit the early retirement notification payment if, after giving notice of retirement in accordance with this subsection, he or she becomes subject to a significant unforeseen financial hardship, including a hardship caused by the death or illness of an



104 immediate family member or loss of employment of a spouse. Other significant unforeseen
105 financial hardships shall be determined by the county superintendent on a case-by-case basis.
106 This subsection does not prohibit a county school board from eliminating the position of a
107 retiring classroom teacher.



1 **§ 18A-2-6. Continuing contract status for service personnel; termination.**

2 After three years of acceptable employment, each service personnel employee
3 who enters into a new contract of employment with the board shall be granted continuing
4 contract status: *Provided*, That a service personnel employee holding continuing contract status
5 with one county shall be granted continuing contract status with any other county upon
6 completion of one year of acceptable employment if such employment is during the next
7 succeeding school year or immediately following an approved leave of absence extending no
8 more than one year. The continuing contract of any such employee shall remain in full force and
9 effect except as modified by mutual consent of the school board and the employee, unless and
10 until terminated with written notice, stating cause or causes, to the employee, by a majority vote
11 of the full membership of the board before March 1 of the then current year, or by written
12 resignation of the employee on or before that date. The affected employee has the right of a
13 hearing before the board, if requested, before final action is taken by the board upon the
14 termination of such employment.

15 Those employees who have completed three years of acceptable employment as
16 of the effective date of this legislation shall be granted continuing contract status.

§18A-2-7. Assignment, transfer, promotion, demotion, suspension and recommendation of dismissal of school personnel by superintendent; preliminary notice of transfer; hearing on the transfer; proof required.

(a) The superintendent, subject only to approval of the board, may assign, transfer, promote, demote or suspend school personnel and recommend their dismissal pursuant to provisions of this chapter. However, an employee shall be notified in writing by the superintendent on or before March 1 if he or she is being considered for transfer or to be transferred. Only those employees whose consideration for transfer or intended transfer is based upon known or expected circumstances which will require the transfer of employees shall be considered for transfer or intended for transfer and the notification shall be limited to only those employees. Any teacher or employee who desires to protest the proposed transfer may request in writing a statement of the reasons for the proposed transfer. The statement of reasons shall be delivered to the teacher or employee within ten days of the receipt of the request. Within ten days of the receipt of the statement of the reasons, the teacher or employee may make written demand upon the superintendent for a hearing on the proposed transfer before the county board. The hearing on the proposed transfer shall be held on or before April 15. At the hearing, the reasons for the proposed transfer must be shown.

(b) The superintendent at a meeting of the board on or before April 15 shall furnish in writing to the board a list of teachers and other employees to be considered for transfer and subsequent assignment for the next ensuing school year. An employee who was not provided notice and an opportunity for a hearing pursuant to subsection (a) of this section may not be included on the list. All other teachers and employees not so listed shall be considered as reassigned to the positions or jobs held at the time of this meeting. The list of those recommended for transfer shall be included in the minute record of the meeting and all those so listed shall be notified in writing, which notice shall be delivered in writing, by certified mail, return receipt requested, to the persons' last known addresses within ten days following the board meeting, of their having been so recommended for transfer and subsequent assignment and the reasons therefor.

(c) The superintendent's authority to suspend school personnel shall be temporary only pending a hearing upon charges filed by the superintendent with the county board and the period of suspension may not exceed thirty days unless extended by order of the board.

(d) The provisions of this section respecting hearing upon notice of transfer is not applicable in emergency situations where the school building becomes damaged or destroyed through an unforeseeable act and which act necessitates a transfer of the school personnel because of the aforementioned condition of the building.

(e) Notwithstanding this section or any provision of this code, when actual student enrollment in a grade level or program, unforeseen before March 1 of the preceding school year, permits the assignment of fewer teachers or service personnel to or within a school under any pupil-teacher ratio, class size or caseload standard established in section eighteen-a, article five,



chapter eighteen of this code or any policy of the state board, the superintendent, with board approval, may reassign the surplus personnel to another school or to another grade level or program within the school if needed there to comply with any such pupil-teacher ratio, class size or caseload standard.

(1) Before any reassignment may occur pursuant to this subsection, notice shall be provided to the employee and the employee shall be provided an opportunity to appear before the county board to state the reasons for his or her objections, if any, prior to the board voting on the reassignment.

(2) Except as otherwise provided in subdivision (1) of this subsection, the reassignment may be made without following the notice and hearing provisions of this section, and at any time during the school year when the conditions of this subsection are met: Provided, That the reassignment may not occur after the last day of the second school month.

(3) A professional employee reassigned under this subsection shall be the least senior of the surplus professional personnel who holds certification or licensure to perform the duties at the other school or at the grade level or program within the school.

(4) A service employee reassigned under this subsection shall be the least senior of the surplus personnel who holds the same classification or multiclassification needed to perform the duties at the other school or at the grade level or program within the same school.

(5) No school employee's annual contract term, compensation or benefits shall be changed as a result of a reassignment under this subsection.



1 **§18A-2-8a. Notice to probationary personnel of rehiring or nonrehiring; hearing.**

2 The superintendent at a meeting of the board on or before April 15 of each year
3 shall provide in writing to the board a list of all probationary teachers that he or she recommends
4 to be rehired for the next ensuing school year. The board shall act upon the superintendent's
5 recommendations at that meeting in accordance with section one of this article. The board at this
6 same meeting shall also act upon the retention of other probationary employees as provided in
7 sections two and five of this article. Any such probationary teacher or other probationary
8 employee who is not rehired by the board at that meeting shall be notified in writing, by certified
9 mail, return receipt requested, to such persons' last known addresses within ten days following
10 said board meeting, of their not having been rehired or not having been recommended for
11 rehiring.

12 Any probationary teacher who receives notice that he or she has not been
13 recommended for rehiring or other probationary employee who has not been reemployed may
14 within ten days after receiving the written notice request a statement of the reasons for not
15 having been rehired and may request a hearing before the board. The hearing shall be held at the
16 next regularly scheduled board of education meeting or a special meeting of the board called
17 within thirty days of the request for hearing. At the hearing, the reasons for the nonrehiring must
18 be shown.

§18A-4-7a. Employment, promotion and transfer of professional personnel; seniority.

(a) A county board of education shall make decisions affecting the filling of vacancies in professional positions of employment on the basis of the applicant with the highest qualifications: *Provided*, That the county superintendent shall be hired under separate criteria pursuant to section two, article four, chapter eighteen of this code.

(b) In judging qualifications for the filling of vacancies of professional positions of employment, consideration shall be given to each of the following:

(1) Appropriate certification, licensure or both;

(2) Amount of experience relevant to the position or, in the case of a classroom teaching position, the amount of teaching experience in the required certification area;

(3) The amount of course work, degree level or both in the relevant field and degree level generally;

(4) Academic achievement;

(5) In the case of a classroom teaching position or the position of principal, certification by the National Board for Professional Teaching Standards;

(6) Specialized training relevant to the performance of the duties of the job;

(7) Past performance evaluations conducted pursuant to section twelve, article two of this chapter and section two, article three-c of this chapter or, in the case of a classroom teacher, past evaluations of the applicant's performance in the teaching profession;

(8) Seniority;

(9) Other measures or indicators upon which the relative qualifications of the applicant may fairly be judged;

(10) In the case of a classroom teaching position, the recommendation of the principal of the school at which the applicant will be performing a majority of his or her duties; and

(11) In the case of a classroom teaching position, the recommendation, if any, resulting from the process established pursuant to the provisions of section five, article five-a, chapter eighteen of this code by the faculty senate of the school at which the employee will be performing a majority of his or her duties.

(c) In considering the filling of a vacancy pursuant to this section, a county board is entitled to determine the appropriate weight to apply to each of the criterion when assessing an



33 applicant's qualifications: *Provided*, That if one or more permanently employed instructional
34 personnel apply for a classroom teaching position and meet the standards set forth in the job
35 posting, each criterion under subsection (b) of this section shall be given equal weight except that
36 the criterion in subdivisions (10) and (11) shall each be double weighted.

37 (d) For a classroom teaching position, if the recommendations resulting from the
38 operations of subdivisions (10) and (11), subsection (b) of this section are for the same applicant,
39 and the superintendent concurs with that recommendation, then the other provisions of
40 subsections (b) and (c) of this section do not apply and the county board shall appoint that
41 applicant notwithstanding any other provision of this code to the contrary.

42 (e) The state board shall promulgate a rule, including an emergency rule if
43 necessary, in accordance with the provisions of article three-b, chapter twenty-nine-a of this code
44 to implement and interpret the provisions of this section, including provisions that may provide
45 for the compensation based on the appropriate daily rate of a classroom teacher who directly
46 participates in making recommendations pursuant to this section for periods beyond his or her
47 individual contract.

48 (f) Recommendations made pursuant to subdivisions (10) and (11), subsection (b)
49 of this section shall be made based on a determination as to which of the applicants is the highest
50 qualified for the position: *Provided*, That nothing in this subsection shall require principals or
51 faculty senates to assign any amount of weight to any factor in making a recommendation.

52 (g) With the exception of guidance counselors, the seniority of classroom
53 teachers, as defined in section one, article one of this chapter, shall be determined on the basis of
54 the length of time the employee has been employed as a regular full-time certified and/or
55 licensed professional educator by the county board of education and shall be granted in all areas
56 that the employee is certified, licensed or both.

57 (h) Upon completion of one hundred thirty-three days of employment in any one
58 school year, substitute teachers, except retired teachers and other retired professional educators
59 employed as substitutes, shall accrue seniority exclusively for the purpose of applying for
60 employment as a permanent, full-time professional employee. One hundred thirty-three days or
61 more of said employment shall be prorated and shall vest as a fraction of the school year worked
62 by the permanent, full-time teacher.

63 (i) Guidance counselors and all other professional employees, as defined in
64 section one, article one of this chapter, except classroom teachers, shall gain seniority in their
65 nonteaching area of professional employment on the basis of the length of time the employee has
66 been employed by the county board of education in that area: *Provided*, That if an employee is
67 certified as a classroom teacher, the employee accrues classroom teaching seniority for the time
68 that that employee is employed in another professional area. For the purposes of accruing



seniority under this paragraph, employment as principal, supervisor or central office administrator, as defined in section one, article one of this chapter, shall be considered one area of employment.

(j) Employment for a full employment term shall equal one year of seniority, but no employee may accrue more than one year of seniority during any given fiscal year. Employment for less than the full employment term shall be prorated. A random selection system established by the employees and approved by the board shall be used to determine the priority if two or more employees accumulate identical seniority: *Provided*, That when two or more principals have accumulated identical seniority, decisions on reductions in force shall be based on qualifications.

(k) 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, article two of this chapter. The provisions of this subsection are subject to the following:

(1) 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;

(2) Notwithstanding any provision of this code to the contrary, all employees subject to release shall be considered applicants for any vacancy in an established, existing or newly created position that, on or before February 15, is known to exist for the ensuing school year, and for which they are qualified, and, upon recommendation of the superintendent, the board shall appoint the successful applicant from among them before posting such vacancies for application by other persons;

(3) An employee subject to release shall be employed in any other professional position where the employee is certified and was previously employed or to any lateral area for which the employee is certified, licensed or both, if the employee's seniority is greater than the seniority of any other employee in that area of certification, licensure or both;

(4) If an employee subject to release holds certification, licensure or both in more than one lateral area and if the employee's seniority is greater than the seniority of any other employee in one or more of those areas of certification, licensure or both, 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, licensure or both; and

(5) If, prior to August 1 of the year a reduction in force is approved, the reason for any particular reduction in force no longer exists as determined by the county board in its sole and exclusive judgment, the board shall rescind the reduction in force or transfer and shall notify



the released employee in writing of his or her right to be restored to his or her position of employment. Within five days of being so notified, the released employee shall notify the board, in writing, of his or her intent to resume his or her position of employment or the right to be restored shall terminate. Notwithstanding any other provision of this subdivision, if there is another employee on the preferred recall list with proper certification and higher seniority, that person shall be placed in the position restored as a result of the reduction in force being rescinded.

(l) 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 October 31, 1993, and may modify the policy thereafter as necessary, which defines which positions shall be lateral positions. The board shall submit a copy of its policy to the state board within thirty days of adoption or any modification, and the state board shall compile a report and submit the report to the Legislative Oversight Commission on Education Accountability by December 31, 1993, and by that date in any succeeding year in which any county board submits a modification of its policy relating to lateral positions. In adopting the policy, the board shall give consideration to the rank of each position in terms of title; nature of responsibilities; salary level; certification, licensure or both; and days in the period of employment.

(m) After the twentieth day prior to the beginning of the instructional term, no person employed and assigned to a professional position may transfer to another professional position in the county during that instructional term unless the person holding that position does not have valid certification. The provisions of this subsection are subject to the following:

(1) The person may apply for any posted, vacant positions with the successful applicant assuming the position at the beginning of the next instructional term;

(2) Professional personnel who have been on an approved leave of absence may fill these vacancies upon their return from the approved leave of absence;

(3) The county board, upon recommendation of the superintendent may fill a position before the next instructional term when it is determined to be in the best interest of the students. The county superintendent shall notify the state board of each transfer of a person employed in a professional position to another professional position after the twentieth day prior to the beginning of the instructional term;

(4) The provisions of this subsection do not apply to the filling of a position vacated because of resignation or retirement that became effective on or before the twentieth day prior to the beginning of the instructional term, but not posted until after that date; and



(5) The Legislature finds that it is not in the best interest of the students particularly in the elementary grades to have multiple teachers for any one grade level or course during the instructional term. It is the intent of the Legislature that the filling of positions through transfers of personnel from one professional position to another after the twentieth day prior to the beginning of the instructional term should be kept to a minimum.

(n) All professional personnel whose seniority with the county board is insufficient to allow their retention by the county board during a reduction in work force shall be placed upon a preferred recall list. As to any professional position opening within the area where they had previously been employed or to any lateral area for which they have certification, licensure or both, the employee shall be recalled on the basis of seniority if no regular, full-time professional personnel, or those returning from leaves of absence with greater seniority, are qualified, apply for and accept the position.

(o) Before position openings that are known or expected to extend for twenty consecutive employment days or longer for professional personnel may be filled by the board, the board shall be required to notify all qualified professional personnel on the preferred list and give them an opportunity to apply, but failure to apply shall not cause the employee to forfeit any right to recall. The notice shall be sent by certified mail to the last known address of the employee, and it shall be the duty of each professional personnel to notify the board of continued availability annually, of any change in address or of any change in certification, licensure or both.

(p) Openings in established, existing or newly created positions shall be processed as follows:

(1) Boards shall be required to post and date notices of each opening at least once. At their discretion, boards may post an opening for a position other than classroom teacher more than once in order to attract more qualified applicants. At their discretion, boards may post an opening for a classroom teacher one additional time after the first posting in order to attract more qualified applicants only if fewer than three individuals apply during the first posting subject to the following:

(A) Each notice shall be posted in conspicuous working places for all professional personnel to observe for at least five working days;

(B) At least one notice shall be posted within twenty working days of the position openings and shall include the job description;

(C) Any special criteria or skills that are required by the position shall be specifically stated in the job description and directly related to the performance of the job;



(D) Postings for vacancies made pursuant to this section shall be written so as to ensure that the largest possible pool of qualified applicants may apply; and

(E) Job postings may not require criteria which are not necessary for the successful performance of the job and may not be written with the intent to favor a specific applicant;

(2) No vacancy shall be filled until after the five-day minimum posting period of the most recent posted notice of the vacancy;

(3) If one or more applicants under all the postings for a vacancy meets the qualifications listed in the job posting, the successful applicant to fill the vacancy shall be selected by the board within thirty working days of the end of the first posting period;

(4) A position held by a teacher who is certified, licensed or both, who has been issued a permit for full-time employment and is working toward certification in the permit area shall not be subject to posting if the certificate is awarded within five years; and

(5) Nothing provided herein shall prevent the county board of education from eliminating a position due to lack of need.

(q) Notwithstanding any other provision of the code to the contrary, where the total number of classroom teaching positions in an elementary school does not increase from one school year to the next, but there exists in that school a need to realign the number of teachers in one or more grade levels, kindergarten through six, teachers at the school may be reassigned to grade levels for which they are certified without that position being posted: *Provided*, That the employee and the county board mutually agree to the reassignment.

(r) Reductions in classroom teaching positions in elementary schools shall be processed as follows:

(1) When the total number of classroom teaching positions in an elementary school needs to be reduced, the reduction shall be made on the basis of seniority with the least senior classroom teacher being recommended for transfer; and

(2) When a specified grade level needs to be reduced and the least senior employee in the school is not in that grade level, the least senior classroom teacher in the grade level that needs to be reduced shall be reassigned to the position made vacant by the transfer of the least senior classroom teacher in the school without that position being posted: *Provided*, That the employee is certified, licensed or both and agrees to the reassignment.



(s) Any board failing to comply with the provisions of this article may be compelled to do so by mandamus and shall be liable to any party prevailing against the board for court costs and reasonable attorney fees as determined and established by the court. Further, employees denied promotion or employment in violation of this section shall be awarded the job, pay and any applicable benefits retroactive to the date of the violation and payable entirely from local funds. Further, the board shall be liable to any party prevailing against the board for any court reporter costs including copies of transcripts.

(t) The county board shall compile, update annually on July 1 and make available by electronic or other means to all employees a list of all professional personnel employed by the county, their areas of certification and their seniority.

(u) Notwithstanding any other provision of this code to the contrary, upon recommendation of the principal and approval by the classroom teacher and county board, a classroom teacher assigned to the school may at any time be assigned to a new or existing classroom teacher position at the school without the position being posted.

(v) The amendments to this section during the 2013 regular session of the Legislature shall be effective for school years beginning on or after July 1, 2013, and the provisions of this section immediately prior to those amendments remain in effect until July 1, 2013.

1 **§ 18A-4-7b. Calculation of seniority for professional personnel.**

2 Notwithstanding any other provision of this code to the contrary, seniority for
3 professional personnel as defined in section one, article one, chapter eighteen-a of this code shall
4 be calculated pursuant to the provisions of section seven-a of this article as well as the following:
5 Provided, That any recalculation of seniority of a professional personnel employee that may be
6 required in order to remain consistent with the provisions contained herein shall be calculated
7 retroactively, but shall not be utilized for the purposes of reversing any decision that has been
8 made or grievance that has been filed prior to the effective date of this section:

9 (a) A professional employee shall begin to accrue seniority upon commencement
10 of the employee's duties.

11 (b) An employee shall receive seniority credit for each day the employee is
12 professionally employed regardless of whether the employee receives pay for that day: Provided,
13 That no employee shall receive seniority credit for any day the employee is suspended without
14 pay pursuant to section eight, article two of this chapter: Provided, however, That an employee
15 who is on an approved leave of absence shall accrue seniority during the period of time that the
16 employee is on the approved leave of absence.

17 (c) Any professional employee whose employment with a county board of
18 education is terminated either voluntarily or through a reduction-in-force shall, upon
19 reemployment with the same board of education in a regular full-time position, receive credit for
20 all seniority previously accumulated with the board of education at the date the employee's
21 employment was terminated.

22 (d) Any professional employee whose employment has been terminated through
23 reduction in force and whose name is on the preferred recall list shall retain all accumulated
24 seniority for the purpose of seeking reemployment with the county from which he or she was
25 terminated and nothing in this section may be construed to the contrary.

26 (e) Any professional employee employed for a full employment term but in a
27 part-time position shall receive seniority credit for each day of employment prorated to the
28 proportion of a full employment day the employee is required to work: Provided, That nothing
29 herein allows a regular full-time employee to be credited with less than a full day of seniority
30 credit for each day the employee is employed by the board: Provided, however, That this
31 calculation of seniority for part-time professional personnel is prospective and does not reduce
32 any seniority credit accumulated by any employee prior to the effective date of this section:
33 Provided further, That for the purposes of this section a part-time employee shall be defined as
34 an employee who is employed less than three and one-half hours per day.

§ 18A-4-8b. Seniority rights for school service personnel.

(a) A county board shall make decisions affecting promotions and the filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight of this article, on the basis of seniority, qualifications and evaluation of past service.

(b) Qualifications means the applicant holds a classification title in his or her category of employment as provided in this section and is given first opportunity for promotion and filling vacancies. Other employees then shall be considered and shall qualify by meeting the definition of the job title that relates to the promotion or vacancy, as defined in section eight of this article. If requested by the employee, the county board shall show valid cause why a service person with the most seniority is not promoted or employed in the position for which he or she applies. Qualified applicants shall be considered in the following order:

(1) Regularly employed service personnel who hold a classification title within the classification category of the vacancy;

(2) Service personnel who have held a classification title within the classification category of the vacancy whose employment has been discontinued in accordance with this section;

(3) Regularly employed service personnel who do not hold a classification title within the classification category of vacancy;

(4) Service personnel who have not held a classification title within the classification category of the vacancy and whose employment has been discontinued in accordance with this section;

(5) Substitute service personnel who hold a classification title within the classification category of the vacancy;

(6) Substitute service personnel who do not hold a classification title within the classification category of the vacancy; and

(7) New service personnel.

(c) The county board may not prohibit a service person from retaining or continuing his or her employment in any positions or jobs held prior to the effective date of this section and thereafter.

(d) A promotion means any change in employment that the service person considers to improve his or her working circumstance within the classification category of employment.



34 (1) A promotion includes a transfer to another classification category or place of
35 employment if the position is not filled by an employee who holds a title within that
36 classification category of employment.

37 (2) Each class title listed in section eight of this article is considered a separate
38 classification category of employment for service personnel, except for those class titles having
39 Roman numeral designations, which are considered a single classification of employment:

40 (A) The cafeteria manager class title is included in the same classification
41 category as cooks;

42 (B) The executive secretary class title is included in the same classification
43 category as secretaries;

44 (C) Paraprofessional, autism mentor and braille or sign language specialist class
45 titles are included in the same classification category as aides; and

46 (D) The mechanic assistant and chief mechanic class titles are included in the
47 same classification category as mechanics.

48 (3) The assignment of an aide to a particular position within a school is based on
49 seniority within the aide classification category if the aide is qualified for the position.

50 (4) Assignment of a custodian to work shifts in a school or work site is based on
51 seniority within the custodian classification category.

52 (e) For purposes of determining seniority under this section a service person's
53 seniority begins on the date that he or she enters into the assigned duties.

54 (f) *Extra-duty assignments.* --

55 (1) For the purpose of this section, "extra-duty assignment" means an irregular
56 job that occurs periodically or occasionally such as, but not limited to, field trips, athletic events,
57 proms, banquets and band festival trips.

58 (2) Notwithstanding any other provisions of this chapter to the contrary, decisions
59 affecting service personnel with respect to extra-duty assignments are made in the following
60 manner:

61 (A) A service person with the greatest length of service time in a particular
62 category of employment is given priority in accepting extra duty assignments, followed by other



63 fellow employees on a rotating basis according to the length of their service time until all
64 employees have had an opportunity to perform similar assignments. The cycle then is repeated.

65 (B) An alternative procedure for making extra-duty assignments within a
66 particular classification category of employment may be used if the alternative procedure is
67 approved both by the county board and by an affirmative vote of two-thirds of the employees
68 within that classification category of employment.

69 (g) County boards shall post and date notices of all job vacancies of existing or
70 newly created positions in conspicuous places for all school service personnel to observe for at
71 least five working days.

72 (1) Posting locations include any website maintained by or available for the use of
73 the county board.

74 (2) Notice of a job vacancy shall include the job description, the period of
75 employment, the work site, the starting and ending time of the daily shift, the amount of pay and
76 any benefits and other information that is helpful to prospective applicants to understand the
77 particulars of the job. The notice of a job vacancy in the aide classification categories shall
78 include the program or primary assignment of the position. Job postings for vacancies made
79 pursuant to this section shall be written to ensure that the largest possible pool of qualified
80 applicants may apply. Job postings may not require criteria which are not necessary for the
81 successful performance of the job and may not be written with the intent to favor a specific
82 applicant.

83 (3) After the five-day minimum posting period, all vacancies shall be filled within
84 twenty working days from the posting date notice of any job vacancies of existing or newly
85 created positions.

86 (4) The county board shall notify any person who has applied for a job posted
87 pursuant to this section of the status of his or her application as soon as possible after the county
88 board makes a hiring decision regarding the posted position.

89 (h) All decisions by county boards concerning reduction in work force of service
90 personnel shall be made on the basis of seniority, as provided in this section.

91 (i) The seniority of a service person is determined on the basis of the length of
92 time the employee has been employed by the county board within a particular job classification.
93 For the purpose of establishing seniority for a preferred recall list as provided in this section, a
94 service person who has been employed in one or more classifications retains the seniority
95 accrued in each previous classification.



96 (j) If a county board is required to reduce the number of service personnel within
97 a particular job classification, the following conditions apply:

98 (1) The employee with the least amount of seniority within that classification or
99 grades of classification is properly released and employed in a different grade of that
100 classification if there is a job vacancy;

101 (2) If there is no job vacancy for employment within that classification or grades
102 of classification, the service person is employed in any other job classification which he or she
103 previously held with the county board if there is a vacancy and retains any seniority accrued in
104 the job classification or grade of classification.

105 (k) After a reduction in force or transfer is approved, but prior to August 1, a
106 county board in its sole and exclusive judgment may determine that the reason for any particular
107 reduction in force or transfer no longer exists.

108 (1) If the board makes this determination, it shall rescind the reduction in force or
109 transfer and notify the affected employee in writing of the right to be restored to his or her
110 former position of employment.

111 (2) The affected employee shall notify the county board of his or her intent to
112 return to the former position of employment within five days of being notified or lose the right to
113 be restored to the former position.

114 (3) The county board may not rescind the reduction in force of an employee until
115 all service personnel with more seniority in the classification category on the preferred recall list
116 have been offered the opportunity for recall to regular employment as provided in this section.

117 (4) If there are insufficient vacant positions to permit reemployment of all more
118 senior employees on the preferred recall list within the classification category of the service
119 person who was subject to reduction in force, the position of the released service person shall be
120 posted and filled in accordance with this section.

121 (l) If two or more service persons accumulate identical seniority, the priority is
122 determined by a random selection system established by the employees and approved by the
123 county board.

124 (m) All service personnel whose seniority with the county board is insufficient to
125 allow their retention by the county board during a reduction in work force are placed upon a
126 preferred recall list and shall be recalled to employment by the county board on the basis of
127 seniority.



128 (n) A service person placed upon the preferred recall list shall be recalled to any
129 position openings by the county board within the classification(s) where he or she had previously
130 been employed, to any lateral position for which the service person is qualified or to a lateral
131 area for which a service person has certification and/or licensure.

132 (o) A service person on the preferred recall list does not forfeit the right to recall
133 by the county board if compelling reasons require him or her to refuse an offer of reemployment
134 by the county board.

135 (p) The county board shall notify all service personnel on the preferred recall list
136 of all position openings that exist from time to time. The notice shall be sent by certified mail to
137 the last known address of the service person. Each service person shall notify the county board of
138 any change of address.

139 (q) No position openings may be filled by the county board, whether temporary or
140 permanent, until all service personnel on the preferred recall list have been properly notified of
141 existing vacancies and have been given an opportunity to accept reemployment.

142 (r) A service person released from employment for lack of need as provided in
143 sections six and eight-a, article two of this chapter is accorded preferred recall status on July 1 of
144 the succeeding school year if he or she has not been reemployed as a regular employee.

145 (s) A county board failing to comply with the provisions of this article may be
146 compelled to do so by mandamus and is liable to any party prevailing against the board for court
147 costs and the prevailing party's reasonable attorney fee, as determined and established by the
148 court.

149 (1) A service person denied promotion or employment in violation of this section
150 shall be awarded the job, pay and any applicable benefits retroactively to the date of the violation
151 and shall be paid entirely from local funds.

152 (2) The county board is liable to any party prevailing against the board for any
153 court reporter costs including copies of transcripts.

§ 18A-4-8f. Seniority rights, school consolidation.

(a) Notwithstanding any provision of this article to the contrary, when a majority of the classroom teachers or school service personnel, who vote to do so, in accordance with procedures established in this section, and who are employed by a county board, the board shall give priority to classroom teachers or school service personnel 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 consolidation or newly created positions in existing schools as a result of the merger.

(b) Each year a consolidation or merger is proposed, prior to the implementation of that plan, the superintendent shall cause to be prepared and distributed to all faculty senates and to all schools or other work sites a ballot on which teachers and service personnel may indicate whether or not they desire those affected by school closings to be given priority status in filling new positions. A secret ballot election shall be conducted:

(1) In each faculty senate for classroom teachers. The faculty senate chair shall convey the results of the election to the superintendent; and

(2) At each school or work site for school service personnel. The service personnel supervisor at each school or work site shall convey the results of the election to the superintendent.

(c) The superintendent shall tabulate and post all results prior to the notice requirements for reduction in force and transfer as outlined in sections two and seven, article two of this chapter. The total number of votes shall be tabulated separately for classroom teachers and for service personnel. The provisions of this section also shall be implemented separately as follows:

(1) For classroom teachers only if a majority of the total number of teachers who cast a ballot vote to do so; and

(2) For school service personnel only if a majority of the total number of service personnel who cast a ballot vote to do so.

(d) If a majority approves, the teachers or school service personnel in the school or schools to be closed have priority in filling new positions in the new or merged schools for which the teachers are certified or for which the school service personnel are qualified and meet the standards set forth in the job posting on the basis of seniority within the county. A teacher or school service person may receive priority for filling a position at a school affected by a merger or consolidation only for 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.

(1) The most senior teacher from 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



36 filled, or until all the teachers in the closed school or schools who wish to transfer into the newly
37 created positions are placed.

38 (2) The most senior service person from the closed school or schools has priority
39 in filling any position within his or her classification category. The second most senior service
40 person from the closed school or schools then has priority in filling remaining vacancies and so
41 on until all available positions are filled.

42 (3) If there are fewer new positions in the newly created school or merged school
43 than there are classroom teachers or school service personnel from the school or schools to be
44 closed, the teachers or school service personnel who were not placed in the new positions retain
45 the same rights as all other teachers or service personnel with regard to seniority, transfer and
46 reduction in force.

47 (4) This section does not grant any employee additional rights or protections with
48 regard to reduction in force.

49 (e) For the purposes of this section only:

50 (1) A consolidation means that one or more schools are closed, or one or more
51 grade levels are removed from one or more schools, and the students who previously attended
52 the closed schools or grade levels are assigned to a new school.

53 (2) A merger means that one or more schools are closed or one or more grade
54 levels are removed from one or more schools and the students who previously attended the
55 closed schools or grade levels are assigned to another existing school.

56 (f) The provisions of this section do not apply to positions that are filled by a
57 county board prior to the effective date of this section, as reenacted during the regular session of
58 the Legislature, two thousand seven.

1 **§ 18A-4-8g. Determination of seniority for service personnel.**

2 (a) Seniority accumulation for a regular school service person:

3 (1) Begins on the date the employee enters upon regular employment duties
4 pursuant to a contract as provided in section five, article two of this chapter;

5 (2) Continues until the service person's employment as a regular employee is
6 severed with the county board; and

7 (3) Does not cease to accumulate when the county board has authorized an
8 absence whether without pay or due to illness or other reason over which the employee has no
9 control.

10 (b) Seniority accumulation for a substitute service person:

11 (1) Begins on the date the employee enters upon the duties of a substitute as
12 provided in section fifteen of this article, after executing with the county board a contract of
13 employment as provided in section five, article two of this chapter; and

14 (2) Continues until the employee enters into the duties of a regular employment
15 contract as provided in section five, article two of this chapter; or employment as a substitute
16 service person with the county board is severed.

17 (c) Seniority of a regular or substitute service person does not continue to
18 accumulate under the following conditions:

19 (1) When a service person is willfully absent from employment duties because of
20 a concerted work stoppage or strike; or

21 (2) When a service person is suspended without pay.

22 (d) For all purposes including the filling of vacancies and reduction in force,
23 seniority shall be accumulated within particular classification categories of employment as those
24 classification categories are referred to in section eight-e of this article.

25 (e) When implementing a reduction in force, the service person with the least
26 seniority within a particular classification category shall be properly released and placed on the
27 preferred recall list. The particular classification title held by a service person within the
28 classification category may not be considered when implementing a reduction in force.

29 (f) On or before the first day of September and the fifteenth day of January of
30 each school year, county boards shall post at each county school or working station the current
31 seniority list or lists of each service personnel classification. Each list shall contain the name of
32 each regularly employed school service person employed in each classification and the date that



each employee began performing his or her assigned duties in each classification. Current seniority lists of substitute school service personnel shall be available to employees upon request at the county board office.

(g) The seniority of a service person who transfers out of a class title or classification category of employment and subsequently returns to that class title or classification category of employment is calculated as follows:

(1) The county board shall establish the number of calendar days between the date the service person left the class title or category of employment in question and the date of return to the class title or classification category of employment.

(2) This number of days shall be added to the service person's initial seniority date to establish a new beginning seniority date within the class title or classification category.

(3) The service person then shall be considered as having held uninterrupted service within the class title or classification category from the newly established seniority date. The seniority of an employee who has had a break in the accumulation of seniority as a result of being willfully absent from employment duties because of a concerted work stoppage or strike shall be calculated in the same manner.

(h) Beginning on the first day of July, two thousand seven, a substitute school service person shall acquire regular employment status, but not regular employee job bidding rights or regular seniority, if the employee receives a position pursuant to the leave of absence or suspension provisions of subdivisions (2) and (5), subsection (a), section fifteen of this article.

(1) A substitute service person shall accumulate substitute employee seniority while holding a position acquired pursuant to subsections (2) and (5).

(2) Upon termination of the regular service person's leave of absence or suspension, the substitute service person shall return to the status previously held.

(3) County boards are not prohibited from providing any benefits of regular employment for substitute service personnel, but the benefits may not include regular service personnel employee status or seniority.

(i) If two or more service personnel accumulate identical seniority, the priority shall be determined by a random selection system established by the service personnel and approved by the county board.

(1) A board shall conduct the random selection within thirty days of the time the service personnel establish an identical seniority date. All service personnel with an identical



seniority date within the same class title or classification category shall participate in the random selection.

(2) As long as the affected employees hold identical seniority within the same classification category, the initial random selection conducted by the board shall be permanent for the duration of the employment within the same classification category of the employees by the board. This random selection priority applies to the filling of vacancies and to the reduction in force of school service personnel.

(3) If any other service person subsequently acquires seniority identical to the employees involved in the original random selection, a second random selection shall be held within thirty days to determine the seniority ranking of the new employee within the group.

(A) The priority between the employees who participated in the original random selection remains the same.

(B) The second random selection is performed by placing numbered pieces of paper equal to the number of employees with identical seniority in a container. Any service person who was not involved in the original random selection shall draw a number from the container which will determine his or her seniority within the group as a whole.

(C) This process will be repeated if any additional service person subsequently acquires identical seniority.

(D) The same process shall be used if any additional service person is subsequently discovered to have the same seniority as the original group of employees but who did not participate in the original random selection due to oversight or mistake.

(j) Service personnel who are employed in a classification category of employment at the time when a vacancy is posted in the same classification category of employment shall be given first opportunity to fill the vacancy.

(k) Seniority acquired as a substitute service person and as a regular service person shall be calculated separately and may not be combined for any purpose. Seniority acquired within different classification categories shall be calculated separately. If a school service employee applies for a position outside of the classification category he or she currently holds, and if the vacancy is not filled by an applicant within the classification category of the vacancy, the applicant shall combine all regular employment seniority acquired for the purpose of bidding on the position.

(l) A school service person who holds a multiclassification title accrues seniority in each classification category of employment that the employee holds and is considered an



98 employee of each classification category contained within his or her multiclassification title. A
99 multiclassified service person is subject to reduction in force in any category of employment
100 contained within his or her multiclassification title, based upon the seniority accumulated within
101 that category of employment. If a multiclassified service person is subject to a reduction in force
102 in one classification category, the service person retains employment in any of the other
103 classification categories that he or she holds within his or her multiclassification title. In that
104 case, the county board shall delete the appropriate classification title or classification category
105 from the contract of the multiclassified employee.

106 (m) When applying to fill a vacancy outside the classification categories held by a
107 multiclassified service person, seniority acquired simultaneously in different classification
108 categories is calculated as if accrued in one classification category only.

109 (n) The seniority conferred in this section applies retroactively to all affected
110 school service personnel, but the rights incidental to the seniority commence as of the effective
111 date of this section.

1 **§ 18A-4-16. Extracurricular assignments.**

2 (1) The assignment of teachers and service personnel to extracurricular
3 assignments shall be made only by mutual agreement of the employee and the superintendent, or
4 designated representative, subject to board approval. Extracurricular duties shall mean, but not
5 be limited to, any activities that occur at times other than regularly scheduled working hours,
6 which include the instructing, coaching, chaperoning, escorting, providing support services or
7 caring for the needs of students, and which occur on a regularly scheduled basis: Provided, That
8 all school service personnel assignments shall be considered extracurricular assignments, except
9 such assignments as are considered either regular positions, as provided by section eight of this
10 article, or extra-duty assignments, as provided by section eight-b of this article.

11 (2) The employee and the superintendent, or a designated representative, subject
12 to board approval, shall mutually agree upon the maximum number of hours of extracurricular
13 assignment in each school year for each extracurricular assignment.

14 (3) The terms and conditions of the agreement between the employee and the
15 board shall be in writing and signed by both parties.

16 (4) An employee's contract of employment shall be separate from the
17 extracurricular assignment agreement provided for in this section and shall not be conditioned
18 upon the employee's acceptance or continuance of any extracurricular assignment proposed by
19 the superintendent, a designated representative, or the board.

20 (5) The board shall fill extracurricular school service personnel assignments and
21 vacancies in accordance with section eight-b of this article: Provided, That an alternative
22 procedure for making extracurricular school service personnel assignments within a particular
23 classification category of employment may be utilized if the alternative procedure is approved
24 both by the county board and by an affirmative vote of two thirds of the employees within that
25 classification category of employment.

26 (6) An employee who was employed in any service personnel extracurricular
27 assignment during the previous school year shall have the option of retaining the assignment if it
28 continues to exist in any succeeding school year. A county board of education may terminate
29 any school service personnel extracurricular assignment for lack of need pursuant to section
30 seven, article two of this chapter. If an extracurricular contract has been terminated and is
31 reestablished in any succeeding school year, it shall be offered to the employee who held the
32 assignment at the time of its termination. If the employee declines the assignment, the
33 extracurricular assignment shall be posted and filled pursuant to section eight-b, article four of
34 this chapter.



1 **§ 18A-4-19. Alteration of contract.**

2 (a) Notwithstanding the provisions of section seven-a of this article relating to
3 professional personnel or any other section of this code to the contrary, any alteration of an
4 employment contract of a professional educator who is employed for more than two hundred
5 days, which alteration changes the number of days in the employment term, shall not be deemed
6 a creation of a new position, nor shall such alteration require the posting of the position.

7 Notwithstanding the provisions of section seven-a of this article relating to
8 professional personnel or any other section of this code to the contrary, any alteration of an
9 employment contract of a professional educator which reduces or eliminates the local salary
10 supplement or the benefits provided to such employee due to a defeat of a special levy, or a loss
11 in assessed values or events over which it has no control and for which the county board has
12 received approval from the state board prior to making such reduction or elimination in
13 accordance with section five-a of this article, shall not require termination of said employment
14 contract as set forth in sections two and eight-a, article two of this chapter, nor shall it be deemed
15 a creation of a new position, nor shall such alteration require the posting of the position.

16 (b) Notwithstanding the provisions of section eight-b of this article relating to
17 school service personnel or any other section of this code to the contrary, any alteration of an
18 employment contract of a service personnel employee who is employed for more than two
19 hundred days, which alteration changes the number of days in the employment term, shall not be
20 deemed a creation of a new position, nor shall such alteration require the posting of the position.

21 Notwithstanding the provisions of section eight-b of this article relating to school
22 service personnel or any other section of this code to the contrary, any alteration of an
23 employment contract of a service personnel employee which reduces or eliminates the local
24 salary supplement or the benefits provided to such employee due to a defeat of a special levy, or
25 a loss in assessed values or events over which it has no control and for which the county board
26 has received approval from the state board prior to making such reduction or elimination in
27 accordance with section five-b of this article, shall not require termination of said employment
28 contract as set forth in sections six and eight-a, article two of this chapter, nor shall it be deemed
29 a creation of a new position, nor shall such alteration require the posting of the position.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1994 Term

No. 21957

DORRIS BERRY,
Plaintiff Below, Appellant

v.

KANAWHA COUNTY BOARD OF EDUCATION,
Defendant Below, Appellee

Appeal from the Circuit Court of Kanawha County

Honorable Tod J. Kaufman, Judge

Civil Action No. 92-AA-51

REVERSED AND REMANDED

Submitted: May 4, 1994

Filed: June 16, 1994

John Everett Roush
Charleston, West Virginia
Attorney for the Appellant

Gregory Bailey
Charleston, West Virginia
Attorney for the Appellee

JUSTICE MILLER delivered the Opinion of the Court.

JUSTICE McHUGH, deeming himself disqualified, did not participate in the consideration or decision of this case.

SYLLABUS BY THE COURT

If a board of education decides to reduce the number of jobs for service personnel, the board must follow the reduction in force procedures of W. Va. Code, 18A-4-8b (1990).

Miller, Justice:

The appellant and plaintiff below, Dorris Berry, appeals an order of the Circuit Court of Kanawha County, which affirmed the decision of the West Virginia Education and State Employees Grievance Board (Grievance Board) to uphold her termination and subsequent transfer. Ms. Berry contends that the Kanawha County Board of Education (Board) violated W. Va. Code, 18A-4-8b (1990), when it terminated her contract and retained a less senior employee within the same classification. We agree, and we reverse the judgment of the circuit court.

I.

Dorris Berry was employed as a Clerk II in the Permanent Records Department of the Board during the 1989-90 and 1990-91 school years. She had a continuing service employee contract and twelve years of seniority. Prior to working in the Permanent Records Department, Ms. Berry worked in the Psychological Services Department for ten years. Both the Permanent Records Department and the Psychological Services Department are located at the Board's central office.

Due to a budget deficit and declining enrollment, the Board decided to reduce the number of service personnel to be employed during the 1991-92 school year. Consequently, the least senior clerks employed in the county were terminated from employment so that sufficient clerical positions would be available to accommodate more senior clerks, including Ms. Berry. In

addition to the termination of the least senior clerks, the Board's Assistant Superintendent for the Department of Special Services was directed to identify two school service positions within his department that could be eliminated. He recommended that the plaintiff's position, along with another Clerk II position in a different part of the department, be eliminated.

In a letter dated February 27, 1991, Ms. Berry was notified that the Superintendent intended to recommend that her continuing contract of employment be terminated. On March 18, 1991, the Board voted to terminate her contract of employment after a hearing on the matter.

The Board later notified Ms. Berry that she would be recommended for transfer and subsequent assignment. She bid on and was awarded another Clerk II position outside the central office with a 225-day contract. The new contract resulted in a loss of thirty-six days of salary and, since county policy extends paid vacation only to employees with a 261-day employment term, the loss of paid vacation.

A grievance was filed with the Grievance Board, pursuant to W. Va. Code, 18-29-1, et seq., contending that the Board unlawfully reduced Ms. Berry's contract term in violation of W. Va. Code, 18A-2-6 (1989),¹ and 18A-4-8 (1990).² Ms. Berry further asserted that reducing

¹ W. Va. Code, 18A-2-6, provides, in part:

"The continuing contract of any such employee shall remain in full force and effect except as modified by mutual consent of the school board and the employee, unless and until terminated with written notice, stating cause or causes, to the employee, by a majority vote of the full membership of the board before the first day of April[.]"

² W. Va. Code, 18A-4-8, provides, in part:

"No service employee, without his written consent, may be reclassified by class title, nor may a service employee, without his written consent, be relegated to any condition of employment which would result in a reduction of his salary, rate of pay, compensation or benefits earned during the current fiscal year or which would result in a reduction of his salary, rate of pay,

her employment term while allowing a less senior Clerk II to maintain a 261-day employment term³ violated W. Va. Code, 18A-4-8b.⁴

A Level IV grievance hearing was conducted on September 4, 1991. Ms. Berry's grievance was denied by a decision rendered on January 17, 1992. She appealed to the Circuit Court of Kanawha County, pursuant to W. Va. Code, 18-29-7 (1985). Ms. Berry sought reinstatement of her 261-day contract term with back pay, plus interest, costs, and attorney's fees. On April 20, 1993, the circuit court affirmed the decision of the Grievance Board. This appeal ensued.

II.

Ms. Berry contends that the Board violated W. Va. Code, 18A-4-8, when it relegated her to a position of employment resulting in a loss of benefits and a reduction in salary without her written consent.⁵ This particular portion of W. Va. Code, 18A-4-8, is often referred to as the non-relegation clause, which we briefly discussed in Lucion v. McDowell County

compensation or benefits for which he would qualify by continuing in the same job position and classification held during said fiscal year and subsequent years."

This section was amended in 1993. The 1993 version is substantially similar to that in 1990.

³ It is not disputed that Rosemary Light is employed by the Board as a Clerk II in the Psychological Testing Department at the Board's central office. As of the 1990-91 school year, Ms. Light had approximately two years of seniority as a Clerk II and held a 261-day contract of employment. Though Ms. Light had ten years less seniority than Ms. Berry, her employment contract was not terminated.

⁴ The relevant portion of W. Va. Code, 18A-4-8b, states:

"Should a county board of education be required to reduce the number of employees within a particular job classification, the employee with the least amount of seniority within that classification or grades of classification shall be properly released and employed in a different grade of that classification if there is a job vacancy: Provided, That if there is no job vacancy for employment within such classification or grades of classification, he shall be employed in any other job classification which he previously held with the county board if there is a vacancy and shall retain any seniority accrued in such job classification or grade of classification."

⁵ For the relevant text of W. Va. Code, 18A-4-8, see note 2, supra.

Board of Education, ___ W. Va. ___, ___ S.E.2d ___ (No. 21897 2/17/94). In Lucion, some fifty-seven service employees were terminated by the Board, but were then reinstated. They were given the same employment contract, except that the number of days in the employment term was reduced. We approved this procedure as not violating the non-relegation clause, because there had been a termination of their service contracts under W. Va. Code, 18A-2-6. In Lucion, we relied on the Syllabus of Board of Education of Fayette County v. Hunley, 169 W. Va. 489, 288 S.E.2d 524 (1982).⁶

The Board relies on Hunley to assert that Ms. Berry was subject to termination under W. Va. Code, 18A-2-6. We agree that this proceeding initially was invoked by the Board. However, we do not believe that either Lucion or Hunley is controlling in this case.

The crucial distinction is that Ms. Berry's position was eliminated. The Board argues that her termination was not a reduction in force, because her job was eliminated. We do not agree because a reduction in force obviously can occur when job positions are eliminated. We recognized this point in Lucion where we said:

If a board of education decides to reduce the number of jobs for service personnel, the board must follow the reduction in force procedures of W. Va. Code, 18A-4-8b [1990]." ___ W. Va. at ___, ___ S.E.2d at ___. (Slip op. at 6).

The reduction in force procedures are set out in W. Va. Code, 18A-4-8b.⁷ Basically, the procedures require that where the number of employees within a particular job classification is reduced the employee with the least amount of seniority within that classification is to be released. Classifications are defined in W. Va. Code, 18A-4-8b, which utilizes the class

⁶ The Syllabus of Hunley states: "When a county school board seeks to reduce the working hours of a service employee by one half, the board must comply with the procedures set out in W. Va. Code, 18A-2-6 [1973]."

⁷ For the relevant portion of W. Va. Code, 18A-4-8b, see note 4, supra.

titles contained in W. Va. Code, 18A-4-8. There is one major exception -- "class titles having Roman numeral designations . . . shall be considered a single classification of employment."⁸ When we turn to W. Va. Code, 18A-4-8, the clerical job classification is divided into Clerk I and Clerk II.⁹ Therefore, these positions form one classification under W. Va. Code, 18A-4-8b, because they are designated by Roman numerals.

We are not informed as to the seniority of the entire clerical job classification of the Board. It is apparent that Ms. Berry had more seniority than Ms. Light who, as we stated in note 3, supra, was not released. Under the reduction in force provisions of W. Va. Code, 18A-4-8b, the least senior clerk should have been released. Clearly, Ms. Berry was not the least senior clerk. Thus, when her position was eliminated the Board erred in releasing her. The circuit court by adopting the Board's view made the same error.

For the foregoing reasons, we reverse the judgment of the Circuit Court of Kanawha County, and remand this case for further proceedings consistent with this opinion.

Reversed and remanded.

⁸ The applicable language of W. Va. Code, 18A-4-8b, states: "Each class title listed in section eight, article four of this chapter shall be considered a separate classification category of employment for service personnel, except for those class titles having Roman numeral designations, which shall be considered a single classification of employment."

⁹ W. Va. Code, 18A-4-8, states, in part:

"Clerk I' means personnel employed to perform clerical tasks.

"Clerk II' means personnel employed to perform general clerical tasks, prepare reports and tabulations and operate office machines."

**IN THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES
GRIEVANCE BOARD**

HOLLY TAYLOR,

Grievant,

v.

Docket No. 05-38-213

POCAHONTAS COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Holly Taylor ("Grievant") initiated this proceeding on April 22, 2005, alleging she should not have been reduced in force ("RIF'd") at the conclusion of the 2004-2005 school year. The record does not reflect what proceedings occurred at level one. A level two hearing was held on June 9, 2005, but the record does not contain a level two decision. Level three consideration was bypassed, and Grievant appealed to level four on June 23, 2005. A hearing was held in Elkins, West Virginia, on September 9, 2005. Grievant was represented by counsel, John E. Roush, and Respondent was represented by counsel, Gregory W. Bailey. This matter became mature for consideration upon receipt of the parties' fact/law proposals on October 3, 2005.

The following material facts have been proven by a preponderance of the evidence of record.

FINDINGS OF FACT

1. Grievant has been employed by Respondent as a regular aide since December 10, 2003.



2. During the 2004-2005 school year, Grievant was a half-time aide at Marlinton Elementary Preschool.

3. When Grievant began her employment, she and two other aides shared the same seniority date. Pursuant to a random drawing procedure, Grievant became the most senior, Nichole Dilley was the next most senior, and Susan Carr was the least senior of the three.

4. In August of 2004, due to her experience and training with autistic students, Ms. Carr became multiclassified as an aide/autism mentor. She was assigned to a specific autistic student for the entire 2004-2005 school year.

5. In the spring of 2005, Respondent determined that it would be necessary to impose a RIF in the aide classification for the upcoming school year.

6. Because Grievant was working only as an aide, and Ms. Carr was needed to continue working with the autistic student, Grievant was RIF'd from her position.¹⁰

7. As of the end of the 2004-2005 school year, Grievant had received autism mentor training, but she had never worked in that classification.

Discussion

¹⁰ The parties did not make issue of Ms. Dilley's position with regard to this RIF, so it is assumed that it did not come into play with regard to the issues in this grievance.



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 § 4.21 (2004); 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's basic argument is that "an aide is an aide," so Ms. Carr should have been RIF'd instead of her, due to Ms. Carr's lesser seniority in the aide classification. Grievant bases her contention, in part, upon the following portions of W. Va. Code § 18A-4-8b:

(d) Paraprofessional, autism mentor and braille or sign language specialist class titles shall be included in the same classification category as aides.

(j) If a county board is required to reduce the number of employees within a particular job classification, the employee with the least amount of seniority within that classification or grades of classification shall be properly released and employed in a different grade of that classification if there is a job vacancy; Provided, That if there is no job vacancy for employment within the classification or grades of classification, he or she shall be employed in any other job classification which he or she previously held with the county board if there is a vacancy and shall retain any seniority accrued in the job classification or grade of classification.

Also of importance to the outcome of this grievance is the following portion of W. Va. Code § 18A-4-8:

(14) 'Autism mentor' means personnel who work with autistic students and who meet standards and experience to be



determined by the state board: Provided, That if any employee has held or holds an aide title and becomes employed as an autism mentor, the employee shall hold a multiclassification status that includes aide and autism mentor titles, in accordance with section eight-b of this article.

As pointed out by Respondent, it appears that, by enacting this provision, the legislature intended for any aide who becomes employed as an autism mentor to maintain a multiclassified title, regardless of his or her job duties. An additional statutory provision applicable to this situation is W. Va. Code § 18A-4-8g(i), which provides, in part, that multiclassified employees accrue seniority in each classification they hold and can be subject to RIF in any category of their multiclassification. Importantly, that provision also states that, when such a RIF occurs, the employee retains employment in any other category of employment they hold, and the RIF'd classification is deleted from the employee's contract. Therefore, the question is whether or not the legislature intended to exclude autism mentors from this provision, thus requiring that these employees always maintain their multiclassified status and prohibiting deletion of the "aide" classification from their titles during a RIF.

The West Virginia Supreme Court of Appeals has attempted to clarify the seniority rights of these employees by holding, "[m]ulticlassified school service personnel: (1) do not belong to a separate classification category, but are employees of each category contained within their multiclassification titles; (2) are subject to a reduction in force in any individual job category, based on seniority accumulation within that category; and (3) in the event of a reduction in force, remain in the employ of the



county board of education with any categories that are subject to the reduction in force deleted from their multiclassification titles." Cornell v. Putnam County Bd. of Educ., Docket No. 03-40-111 (June 26, 2003), citing Taylor-Hurley v. Mingo County Bd. of Educ., 209 W. Va. 780, 551 S.E.2d 702 (2001).

As applied to the situation presented in the instant case, the inescapable conclusion is that a multiclassified aide/autism mentor is not exempt from this rule and may be RIF'd in either category of employment, because there is no specific statutory exemption for them. Clearly, the legislature's intent in automatically making new autism mentors multiclassified was to offer them some job security during the RIF process.

As applied to Ms. Carr and the instant situation, it is obvious that, as the least senior aide, she would have been subject to a RIF in the aide classification before Grievant, and would have been eligible for continued employment in any job vacancy in the autism mentor classification. However, as argued by Respondent, it is Ms. Carr's right to continue employment as an autism mentor that presents the problem here: the reduction in personnel was necessary in the aide classification, and Ms. Carr's autistic student continued to need services from an autism mentor, thus the need for her particular position would remain unchanged. Thus, RIFing Ms. Carr would not achieve the desired objective of reducing the number of aides employed by Respondent.

In order to make the appropriate decision in this case, Respondent sought an opinion from the State Superintendent of Schools. In his initial opinion, along with an



updated opinion based upon additional information, the Superintendent opined that employees classified as aide/autism mentor must be exempt from the requirement that multiclassified employees are subject to reduction in each of their classifications. While the basis for the Superintendent's opinion is clearly contrary to the undersigned's conclusion that there is no such exemption, and it cannot be implied from reading of the statutes, the undersigned does share the Superintendent's concern that it would seem inappropriate to release the employee who is currently working as an autism mentor, thus interrupting the continuity of services so important to these special children.

As noted in Riffle v. Webster County Board of Education, Docket No. 04-51-122 (July 30, 2004), while "an autism mentor is an aide, an aide is not necessarily an autism mentor." In that case, it was held that it was appropriate for a board of education to award an aide/autism mentor position to an applicant who had more seniority as an autism mentor, even though the grievant had far more regular seniority in the aide classification. It was noted that the particular situation, as with the situation presented here, was not specifically addressed by statute, requiring that it be reviewed pursuant to the arbitrary and capricious standard. Cornell, supra; Wellman v. Mercer County Bd. of Educ., Docket No. 95-27-327 (Nov. 30, 1995). Generally, a board of education's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its 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 view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985).

Pursuant to this standard, the undersigned finds that it was not arbitrary and capricious for Respondent to RIF the least senior aide, instead of the least senior aide/autism mentor, when it was the aide classification which needed reduction. Because aides who take autism mentor positions automatically become multiclassified, while still being included within the aide classification category, they are uniquely situated in a RIF situation. Moreover, as noted in Riffle, *supra*, while not all aides are autism mentors, all autism mentors are automatically aides. Accordingly, when the objective of a RIF is to reduce the overall number of aides, it would be inappropriate to include aides working as autism mentors when evaluating the relative seniority of the employees at issue. Conversely, if there is a reduced need for autism mentors, then it would be appropriate for a board of education to RIF the aide/autism mentor with the lowest seniority.

In accordance with this Decision, the following conclusions of law are made.

CONCLUSIONS OF LAW

1. In a non-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 § 4.21 (2004); 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. "Multiclassified school service personnel: (1) do not belong to a separate classification category, but are employees of each category contained within their multiclassification titles; (2) are subject to a reduction in force in any individual job category, based on seniority accumulation within that category; and (3) in the event of a reduction in force, remain in the employ of the county board of education with any categories that are subject to the reduction in force deleted from their multiclassification titles." Cornell v. Putnam County Bd. of Educ., Docket No. 03-40-111 (June 26, 2003), citing Taylor-Hurley v. Mingo County Bd. of Educ., 209 W. Va. 780, 551 S.E.2d 702 (2001).

3. Paraprofessional, autism mentor and braille or sign language specialist class titles shall be included in the same classification category as aides. W. Va. Code § 18A-4- 8b.

4. Any aide who becomes employed as an autism mentor becomes multiclassified as an aide/autism mentor, pursuant to the provisions of W. Va. Code § 18A-4-8.

5. When it becomes necessary for a board of education to reduce the number of aides in its employ, it should not include multiclassified aide/autism mentors



who are currently employed in autism mentor positions, in the reduction in force. See Riffle v. Webster County Board of Education, Docket No. 04-51-122 (July 30, 2004).

6. It was not arbitrary and capricious for Respondent to subject Grievant to a reduction in force when it sought to reduce the number of aides in its employ, rather than reducing the position of an aide/autism mentor who was assigned to an autistic student.

Accordingly, this grievance is **DENIED**.

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

Date: October 14, 2005
DENISE M. SPATAFORE
Administrative Law Judge

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SIDNEE FARR
Grievant,

v.

Docket No. 2008-1439-WooED

WOOD COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Sidnee Farr, filed this grievance on April 8, 2008, against Respondent, Wood County Board of Education ("WCBOE"), alleging violation of W. VA. CODE §§18A-4-8b and 18A-4-8g on behalf of the Respondent. Grievant, a teacher's aide, contends that Respondent, to her detriment, improperly gave preference to classroom aides with paraprofessional certification during a recent reduction in force action. Grievant requested as relief that the action taken by Respondent in selecting her for a reduction in force be rescinded, and that she be placed back into her current position.

The parties mutually agreed to waive the lower levels of the grievance procedure and proceed directly to level three. A level three hearing was held before the undersigned Administrative Law Judge on July 9, 2008, in the Grievance Board's Charleston office. The Grievant was represented by Bruce W. Boston, WVEA, and Rosemary Jenkins, AFT-West Virginia/AFL-CIO. Respondent was represented by Dean Furner, Esquire. On July 8, 2008, John Everett Roush, Esquire, of the West Virginia School Service Personnel Association, filed a Motion for Leave to File Amicus Curiae Brief in this matter. The motion was granted with no objection from the parties. The mailing deadline for the submission of memorandums, proposed findings of fact and conclusions of law documents submitted

by the parties was August 8, 2008. This case became mature for decision on January 8, 2009, the date that the complete record of the case was received by this Board.

Synopsis

With regard to the 2008-2009 school year of Wood County Schools, Respondent conducted a reduction in force ("RIF") in the "aide" classification of service personnel. In determining what positions would be RIFed, a conscious effort was made (preference given) to retain individuals with paraprofessional certification, over those who merely had aide certification. As a result of Respondent's actions, Grievant was RIFed, even though she had more seniority than a significant number of paraprofessional aides.

WEST VIRGINIA CODE clearly provides that the paraprofessional classification title does not stand alone as a classification category. The paraprofessional classification title is one of the class titles that comprise the aide classification category. Applicable W. VA. CODE provides that seniority is the basis for determining which employees are terminated and which are retained in a reduction in force action. When a RIF action is conducted, generally, the least senior employees within the classification category are the employees who are terminated and placed on the preferred recall list.

Unless the aide positions under review *require* the additional qualifications/skills of a paraprofessional for the successful performance of the job, it is improper to give retention preference to classroom aides with paraprofessional certification during a RIF of the aide classification. Generally, the particular classification title held by an employee within a classification category is not a factor during a reduction in force. Accordingly, this grievance is granted.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant, Sidnee Farr, was employed by Wood County Board of Education during the 2007-2008 school year as a Teacher's Aide at Parkersburg High School.¹

2. Grievant is not currently certified as a paraprofessional but has taken courses toward achieving that certification. Grievant is a service personnel employee of Respondent (behavior disorder aide).

3. Pursuant to WEST VIRGINIA CODE, each year, each county receives preliminary computations of public school support programs service personnel data which indicates how many service personnel will be paid for by the State. Any employees hired or retained over the State allotment must be funded by some other means.

4. The State Aid formula and the number of employees were reflected in the Board of Education minutes dated January 22, 2008, where the staffing goals for 2008-09 were approved by Respondent. By unanimous vote, Respondent approved the staffing goals for service personnel to be 590,192.

5. For the 2008-09 school year, Wood County was over the number of service employees paid for by the State. Wood County Schools had an overage of 16.6 School Service Personnel according to the preliminary computations for the 2008-2009 school year.

¹ Grievant has held several positions in Wood County including two years as a Behavior Disorder Aide, and three years as a one-on-one aide serving a student in a wheelchair. Prior to her employment as a teacher's aide, Grievant was employed as a cook.

6. On January 22, 2008, Respondent directed its administration to bring the professional and service personnel staff in line with the number of positions funded through the State Aid formula.

7. Respondent's primary task, at that point in time, was to determine which jobs could be eliminated in order to comply with the State Aid formula (16.6 service personnel employees). In order to determine the positions to eliminate, Respondent obtained information and data from the various schools in the county, attempting to determine those employees who could be reduced in force while still providing quality education to the students in Wood County.

8. Respondent's administration determined that it would need fewer aides for 2008-2009 than were under contract in the 2007-2008 school year.

9. The administration initiated a reduction in force in the teacher's aide classification category for the 2008-2009 school year.²

10. Meetings were held with service personnel on February 4 and February 25, 2008, to discuss who would be effected by the proposed reduction in force and transfers.

11. In determining what positions would be RIFed, the administration implemented a preference for keeping individuals with a paraprofessional certification, over those who merely had an aide certification.

12. The requisite training and educational requirements to obtain a paraprofessional certificate is greater than the training needed to obtain aide certification.

² A reduction in force is a process effected and governed by numerous rules, regulations and various applicable WEST VIRGINIA CODE. See W. VA. CODE §§ 18A-2-8a, 18A-2-6, 18A-4-8b and 18A-4-8g.

The paraprofessional certificate requires 36 semester hours of college credit. The classes that are set forth under West Virginia law in order to obtain paraprofessional certification are specifically tailored to give the person, who assists the preschool or kindergarten teacher, essential skills which will help children of the appropriate age group be more apt to master many of the skills that they will need when they begin first grade.

13. Granting preference to "Paraprofessional aides" is not part of Wood County Schools Policies.³ Wood County Board of Education Policy 4119.1-Reduction in Force and Recall Policy – Service Personnel.

14. As part of the reduction in force action, Grievant and a number of other aides were notified that they would be recommended for termination. Grievant and four other teachers' aides requested a hearing before the board of education.

15. Respondent scheduled and conducted reduction in force/termination hearings on March 13, 2008.

16. Respondent approved the termination of Grievant as part of the reduction in force.

17. Respondent retained several employees for the 2008-2009 school year who held the multiclassification title of Paraprofessional/Aide who were less senior in the aide

³ In conjunction with applicable WEST VIRGINIA CODE, Wood County Board of Education Policy 4119.1-Reduction in Force and Recall Policy – Service Personnel outlines the procedure for the reduction in force of service personnel in Wood County. (Resp. Ex. 9). Said policy does NOT address a preference of paraprofessional aides during a reduction in force. Reportedly, Respondent began the practice approximately eight years ago, 2001.

classification category than Grievant. The parties do not agree on the specific number; however, the number was somewhere between three and forty-nine employees.⁴

Discussion

In that this is not a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence 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). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employee has not met her burden. *Id.*

Respondent conducted a reduction in force in the aide classification for the 2008-2009 school year of Wood County. In determining what positions would be reduced in force, there was a conscious effort (preference given) to retain service personnel employees with a paraprofessional certification, over those who merely had an aide

⁴The exact number of paraprofessional aides retained (not placed on the RIF list), with less seniority than Grievant, is not established with reliable specificity by the record. However, it is clear that the circumstance occurred.

certification.⁵ Grievant maintains Respondent's actions were in violation of applicable rules, regulations and statutes which govern a reduction in force actions.

Relevant to this discussion, it may be helpful to note that; "Aide I" means those personnel selected and trained for teacher-aide classifications such as monitor aide, clerical aide, classroom aide or general aides. W. VA. CODE § 18A-4-8(i)(8). Aides II, III and IV are all essentially identical to the Aide I, but require more education, training or experience.⁶

"Paraprofessional" means a person certified pursuant to [W. VA. CODE § 18A-3-2a] to perform duties in a support capacity including, but not limited to, facilitating in the instruction and direct or indirect supervision of pupils under the direction of a principal, a teacher or another designated professional educator

W. VA. CODE § 18A-4-8(i)(66)

A paraprofessional certificate may be issued to a person who has completed thirty-six semester hours of post-secondary education or its equivalent in subjects directly related to performance of the job, as approved by the state board, and can demonstrate the proficiencies to perform duties as required of a paraprofessional as defined in [W. VA. CODE § 18A-4-8].

W. VA. CODE § 18A-3-2a(B)(3)

⁵ Respondent maintains one of the basic foundations for giving paraprofessionals preference in hiring and reductions in force is to put a more highly trained individual in the classroom to assist the teacher. Respondent, in defense of its actions, acknowledges that an aide without a paraprofessional certificate makes valuable contributions to the classroom; however contends seniority does not, in and of itself, make an aide better than a paraprofessional. The undersigned notes it was not established that the aide positions relevant to this grievance *required* the additional qualifications/skills of paraprofessionals exclusively for the successful performance of the positions' duties.

⁶ Generally speaking, an Aide I works with children. If the employee has a GED or high school diploma, the employee is classified as an Aide II and receives a higher rate of pay. If the employee also has six hours of college credit, he/she is classified as an Aide III and receives an even higher pay grade. If the employee has sixteen hours of college credit, he/she is classified as an Aide IV with an even higher pay grade. Finally, if the employee acquires thirty-six hours of college credit, he/she is a Paraprofessional and again receives a still higher pay grade. The differences between Aide I, Aide II, Aide III, Aide IV and Paraprofessional are differences in degree.

⁷ The other class titles are Aide I, Aide II, Aide III, Aide IV, Autism Mentor, and Braille or Sign Language Specialist.

⁸ There are new federal guidelines such as the No Child Left Behind Act, and state guidelines, which require students to achieve at a higher level than expected of children in the past. Respondent strongly infers that having a person with these additional

paraprofessional qualifications is a benefit to the classroom teacher and to the students in the classroom when it comes to developing the skills they need to achieve these tasks, many of which were not formerly expected of students. This inference did not establish that the aide positions relevant to this grievance *exclusively required* paraprofessionals for the successful performance of the positions' duties.

⁹ See *Flint v. Board of Education*, 207 W. Va. 251, 531 S.E.2d 76 (1999).

While Respondent maintains it acted with rational purpose and with the goal of increasing the educational quality and skills of the employee servicing county's students, its actions must be reviewed in the context of applicable controlling statute. The undersigned finds the circumstance which would compel and/or justify preferential retention of paraprofessional aides has not been established in the facts of this case. Paraprofessionals and Grievant are in the aide classification category. Grievant and the paraprofessionals have, by their service in their particular classification titles, earned the same kind of seniority, i.e., aide seniority. A reduction in force in the aide classification category, based on seniority, must include all aides including paraprofessionals. Grievant has more seniority than a significant number of paraprofessionals. Consequently, a reduction in force in the aide classification category cannot legally result in Grievant's termination while still retaining all paraprofessional aides.

During the course of the instant grievance, two specific cases were cited in opposition to the analysis given above. These cases are distinguishable from the case at hand. First, *McDonald v. Wood County Board of Education*, Docket No. 03-54-285 (Jan. 13, 2005), though it dealt with the paraprofessional classification title, it primarily involved the filling of a job rather than a reduction in force (selection as opposed to termination). In that case, this Grievance Board held that a Board of Education could give preference to paraprofessionals over aides in the hiring process under certain circumstances. The process for filling a job involves three criteria, i.e., seniority, evaluation and qualification. The process of a reduction in force, by contrast, involves a single criterion, i.e., seniority. Consequently, one may simply disregard *McDonald* as inapplicable to the current case, as it relates to a different process with different rules.

¹⁰ An autism mentor has specialized training for dealing specifically with autistic children. It does not simply require additional college courses. The autism mentor deals with children with a different type of need. To become an autism mentor one also needs two years of experience working with autistic children. There is no similar experience requirement when going from aide IV to paraprofessional. Further, the legislature has also placed restrictions on the mobility of autism mentors that it does not place on paraprofessionals or employees holding the aide I, II, III, or IV classification. See W. VA. CODE § 18A-5-8(g).

¹¹ Transfers and the preferred recall list, coupled with the passage of time, affect the precise number. The exact number is not readily established to any degree of certainty.

aides. Nor was it established that these aide positions *uniquely required* the additional qualifications/skills of a paraprofessional for the successful performance of the positions' duties. The language of W. VA. CODE § 18A-4-8b(d)(2)(C) clearly provides that the paraprofessional classification title does not stand alone as a classification category. The inescapable truth is that the paraprofessional/multiclassified classification is not exempt from review during a reduction in force action, and the rules outlined by WEST VIRGINIA CODE must be followed.

The undersigned finds that unless the aide job in discussion *requires* the additional qualifications/skills of a paraprofessional for the successful performance of the job, it is improper to intentionally give retention preference to classroom aides with paraprofessional certification during a reduction in force of the aide classification. Accordingly, when the objective is to reduce the overall number of aides, it would be appropriate to include aides working as paraprofessionals when evaluating the seniority of the employees at issue. Therefore, Grievant would be entitled to keep her aide position over a less senior paraprofessional.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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-

Nevertheless, paraprofessional aides, with less seniority than Grievant, were not identified for reduction in force. Testimony of various witnesses and position statements of the parties quantify three to forty-nine paraprofessionals.

130 (Aug. 19, 1988). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employee has not met her burden. *Id.*

2. The Paraprofessional classification title is a part of the aide classification category. W. VA. CODE § 18A-4-8b(d)(2)(C). Paraprofessional, autism mentor and Braille or sign language specialist class titles shall be included in the same classification category as aides. W. VA. CODE § 18A-4-8b.

3. Any aide who becomes employed as a paraprofessional shall hold a multiclassification status that includes both aide and paraprofessional titles. W. VA. CODE § 18A-4-8(i)(66)(B).

4. Multiclassified school service personnel: (1) do not belong to a separate classification category, but are employees of each category contained within their multiclassification titles; (2) are subject to a reduction in force in any individual job category, based on seniority accumulation within that category; and (3) in the event of a reduction in force, remain in the employ of the county board of education with any categories that are subject to the reduction in force deleted from their multiclassification titles." *Cornell v. Putnam County Bd. of Educ.* Docket No. 03-40-111 (June 26, 2003) *citing Taylor-Hurley v. Mingo County Bd. of Educ.*, 209 W. Va. 780, 551 S.E.2d 702 (2001).

5. Reductions in force are based solely upon seniority within the classification category with the least senior employees within the classification category being released and the more senior retained. W. VA. CODE § 18A-4-8b(h) & (j). All decisions by county

boards concerning reduction of service personnel shall be made on the basis of seniority. W. VA. CODE § 18A-4-8b(h).

Accordingly, this grievance is **GRANTED**. When the objective is to reduce the overall number of aides, in determining which aides will be reduced in force, it is appropriate to include aides working as paraprofessionals when evaluating the seniority of the employees at issue. Grievant is entitled to be evaluated for the reduction in force action based upon her seniority within the classification. Unless the aide position in discussion requires a paraprofessional (explicitly for the successful performance of the job), Grievant is entitled to keep her aide position over least senior paraprofessional aides.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 WEST VIRGINIA CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. See also 156 C.S.R. 1 § 6.20 (2008).

Date: June 18, 2009

Landon R. Brown
Administrative Law Judge

THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

PHOEBE ECHOLS MCGUIRE,
Grievant,

v.

Docket No. 2011-1154-MnrED

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

DECISION

Grievant, Phoebe Echols McGuire, filed a grievance against Respondent on February 9, 2011. The statement of grievance reads,

On January 28, 2011, I was notified by letter of the superintendent of Monroe County Schools dated January 27, 2011, of the decision of the Monroe County Board of Education on January 25, 2011[,] to terminate my employment contract at the end of the 2010-2011 school year. This action violates WV Code 6C-1 et seq., whistle-blower law and WV Code 18A-4-7a.

For relief, Grievant seeks to be "retained in my current employment or in a position held by a less senior employee." By letter dated March 2, 2011, Grievant elected to proceed directly to a level three hearing as authorized by W. VA. CODE § 6C-2-4(a)(4). A level three hearing was held on May 6, 2011, before Administrative Law Judge Carrie LeFevre in Beckley, West Virginia.¹ Appearing for Grievant were R.M. James, Jr., representative, and Kathy H. Martin and Ben Barkey, West Virginia Education Association.

¹For administrative purposes, the case was reassigned to the undersigned on October 7, 2011.

Respondent was represented by Gregory W. Bailey, Esq., Bowles Rice McDavid Graff & Love LLP. This matter became mature for decision upon final receipt of the parties' proposed findings of fact and conclusions of law on June 7, 2011.²

Synopsis

Grievant asserts that Respondent's termination of her employment contract pursuant to a reduction-in-force (RIF) was contrary to RIF provisions in WEST VIRGINIA CODE § 18A-4-7a. Specifically, Grievant contends that Respondent was required to allow her to laterally "bump" a less senior employee in a professional position that only required a teaching certificate. Grievant contends that the curriculum of parenting education is required to be taught in West Virginia public schools, therefore her position of Family and Consumer Science teacher should not have been terminated. Also, Grievant argues that Respondent's decision to terminate her employment contract was in retaliation for her having engaged in protected activities. Respondent asserts a RIF was undertaken due to budget deficits and that the decision to terminate Grievant's employment contract was not motivated by reprisal. Respondent argues that it did not rescind its decision to eliminate the SAT Specialist position until after Grievant filed this grievance and that Grievant did not prove that she met the qualifications for the position.

²Respondent filed a Motion to Dismiss, received by this Board on July 5, 2011. Respondent asserts that because Grievant has accepted employment with Greenbrier County Schools for the 2011-2012 school year, the grievance is moot. Respondent asserts that Grievant has lost her standing to pursue a grievance against it because she is no longer an employee. Grievant filed a Response to the Motion to Dismiss, received by this Board on July 18, 2011. Grievant asserts that she did not voluntarily end her employment with Respondent. Grievant asserts that seeking some form of income while pursuing this grievance does not render the grievance moot. The undersigned is in agreement with Grievant's position that this matter is not moot. The Motion to Dismiss is denied.

Grievant met her burden of proof and established that Respondent violated WEST VIRGINIA CODE § 18A-4-7a when it did not place her into the restored professional position of SAT Specialist. Grievant failed to establish that Respondent's decision to eliminate her position of Family and Consumer Science teacher was retaliation and that the policy required parenting education curriculum is not being taught at JMHS. Accordingly, this grievance is GRANTED, in part, and DENIED, in part.

Findings of Fact

1. At the time of filing this grievance, Grievant was employed as a vocational educator for Respondent. Grievant taught Family and Consumer Science at James Monroe High School (JMHS).

2. Grievant taught parenting education, a curriculum that is required to be taught in West Virginia public schools by West Virginia Department of Education Policy 2530.02.

3. Grievant has twelve years seniority in Monroe County.³

4. Sherry Baker, SAT Specialist, has ten years seniority in Monroe County.⁴

5. On May 7, 2010, Grievant emailed Donna Wilkes with the West Virginia State Board of Education to express concern that Carl Perkins funding was being improperly used at JMHS.⁵

6. In October 2010, Grievant filed a grievance asserting that the Director of Monroe County Technical Center was not ensuring that vocational teachers were

³See Grievant's Exhibit No. 6, Professional Seniority List.

⁴*Id.*

⁵See Grievant's Exhibit No. 9, Email dated May 7, 2010, and level three testimony of Grievant.

performing their assigned bus duty.

7. On October 19, 2010, Grievant emailed Kevin Siers, Superintendent for Monroe County Schools, to request that he look into the Carl Perkins funding for vocational teachers at JMHS.⁶

8. At a public meeting on March 11, 2010, Grievant expressed her opinion in a presentation that a trimester schedule at JMHS would be disadvantageous to students.

9. Respondent has experienced budget deficits. As a result, a reduction-in-force (RIF) was undertaken in an effort to reduce the number of positions above the amount funded under the State Aid Funding formula.⁷ Any positions over the number funded under the formula are paid for by the county's board of education.

10. Superintendent Siers requested that each principal, including then principal at JMHS, Paul Lovett, identify positions to be considered for elimination. The teaching position held by Grievant was among the positions Principal Lovett identified to be considered for elimination. Prior to Superintendent Siers' recommendation to the county board of education of which positions to eliminate, Principal Lovett resigned from his employment with Respondent.

11. After receiving Principal Lovett's recommendations for positions to eliminate, Superintendent Siers conducted his own review of the facts and circumstances surrounding the proposed eliminations as well as consulted with Lisa Mustain, now

⁶See Grievant's Exhibit No. 10, Email dated October 19, 2010, and level three testimony of Grievant.

⁷Testimony of Kevin Siers, Superintendent for Monroe County Schools.

principal at JMHS.⁸

12. Grievant was notified by letter⁹ dated December 22, 2010, of Superintendent Siers' intent to recommend that the position being taught by Grievant be terminated at the close of the 2010-2011 school year. The letter provided the following reason for the recommended termination: "Declining enrollment has led to a loss of funding for Monroe County Schools which has necessitated the elimination of positions such as yours." In compliance with W.Va. CODE § 18A-2-2, Grievant was extended the opportunity for a hearing with Respondent regarding the recommendation. Grievant's hearing was held on January 22, 2011.¹⁰

13. Superintendent Siers presented personnel recommendations, including the elimination of the teaching position held by Grievant, to Respondent at a special meeting held on January 25, 2011.¹¹ The position of SAT Specialist was also included on the list of recommended professional terminations. The entire list of 30 recommended professional terminations was approved by unanimous vote.

14. Also at the January 25, 2011, special meeting, Superintendent Siers presented eight professional transfer recommendations, including Ms. Baker. All eight

⁸*Id.*

⁹Grievant's Exhibit No. 3.

¹⁰Due to a recording device's mechanical malfunction, a transcript could not be produced from Grievant's termination hearing on January 22, 2011. See Grievant's Exhibit No. 6, Letter to Grievant from Superintendent Siers dated February 14, 2011.

¹¹See Grievant's Exhibit No. 14, Monroe County Board of Education Special Meeting minutes.

transfer recommendations were approved by unanimous vote.¹²

15. The decision to terminate the SAT Specialist position was later rescinded by Respondent. Ms. Baker was retained in the SAT Specialist position.

16. The position of SAT Specialist is a professional position that has no specific subject area license or certification requirement. Applicants simply must have a teaching certificate.

Discussion

This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE § 18-29-6, 156 C.S.R. 1 § 3. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

Grievant asserts that Respondent's termination of her employment contract pursuant to a reduction-in-force (RIF) was contrary to RIF provisions in WEST VIRGINIA CODE § 18A-4-7a. Specifically, Grievant contends that Respondent was required to allow her to laterally "bump" a less senior employee in a professional position that only required a teaching certificate. Grievant contends that the curriculum of parenting education is required to be taught in West Virginia public schools, therefore her position of Family and Consumer Science teacher should not have been terminated. Also, Grievant argues that

¹²*Id.*

Respondent's decision to terminate her employment contract was in retaliation for her having engaged in protected activities. Respondent asserts a RIF was undertaken due to budget deficits and that the decision to terminate Grievant's employment contract was not motivated by reprisal. Respondent argues that it did not rescind its decision to eliminate the SAT Specialist position until after Grievant filed this grievance and that Grievant did not prove that she met the qualifications for the position.

WEST VIRGINIA CODE § 18A-4-7a provides, in pertinent part:

(f) ~~The seniority of an employee 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, licensed or both.

...

- (j) 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...
- (2) An employee subject to release shall be employed in any other professional position where the employee is certified and was previously employed or to any lateral area for which the employee is certified, licensed or both, if the employee's seniority is greater than the seniority of any other employee in that area of certification, licensure or both;
- (3) If an employee subject to release holds certification, licensure or both in more than one lateral area and if the employee's seniority is greater than the seniority of any other employee in one or more of those areas of certification, licensure or both, 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, licensure or both; and
- (4) If, prior to the first day of August of the year a reduction in force is approved, the reason for any particular reduction in force no longer exists as determined by the county board in its sole and exclusive judgment, the board shall rescind the reduction in force or transfer and shall notify the released employee in writing of his or her right to

be restored to his or her position of employment... if there is another employee on the preferred recall list with proper certification and higher seniority, that person shall be placed in the position restored as a result of the reduction in force being rescinded.

Grievant asserts that as a RIF'd employee she should have bumped a less senior professional employee for the position of SAT Specialist.¹³ The professional position of SAT Specialist requires a teaching certificate. No specific area of licensure or certification is required. Grievant possesses a teaching certificate and has greater seniority in the county than the employee currently holding the SAT Specialist position. In *Angus v. Cabell County Board of Education*, Civil Action No. 01-AA-9 (August 2, 2002), the Kanawha County Circuit Court reversed a Grievance Board decision and held that a teacher with greater seniority has the right to bump another teacher for a professional position when there is no special area of certification required. The Court found this result "is consistent with the provisions of West Virginia Code section 18A-4-7a and the underlying purposes of seniority. Further, it is consistent with the policy of placing the best qualified, most experienced teachers in our classrooms." *Id.*

Respondent argues that it did not decide to rescind the termination of the SAT Specialist position until after Grievant filed this grievance, therefore Grievant may not seek to be placed into that position as relief. If after a RIF action is approved, the RIF is no

¹³Under WEST VIRGINIA CODE § 18A-4-7a(j)(2), the position in question must have been previously held by the RIF'd employee or be a lateral position. Grievant has not previously held the position of SAT Specialist. Grievant's Exhibit No. 15, the vacancy posting for SAT Specialist from June 18, 2008, states in parenthesis under the position title that it is "not a teaching position." The undersigned finds upon review of the definitions for professional personnel contained within WEST VIRGINIA CODE § 18A-1-1, that because the position requires a teaching certification and does not involve supervisory or management responsibilities, the SAT Specialist position is a lateral position to that of classroom teacher.

longer required for a position, the board of education may rescind the RIF and fill that position according to proper statutory provisions. See *Harshbarger v. Lincoln County Board of Education*, Docket No. 96-22-528 (Dec. 31, 1997). WEST VIRGINIA CODE § 18A-4-7a(j)(4) states that "the board shall rescind the reduction in force or transfer and shall notify the released employee in writing of his or her right to be restored to his or her position of employment... if there is another employee on the preferred recall list with proper certification and higher seniority, that person shall be placed in the position restored as a result of the reduction in force being rescinded." Upon rescinding the RIF of the SAT Specialist position, Respondent should have placed Grievant into the restored position because she holds the required teaching certification and has greater seniority than Ms. Baker.

Respondent argues that Grievant did not offer any evidence that she meets the qualifications of the SAT Specialist position. WEST VIRGINIA CODE § 18A-4-7a allows a RIF'd professional employee, such as Grievant, to bump another professional employee with less seniority in any of the RIF'd employee's areas of licensures, certificates, or both. Grievant holds the required teaching certificate for the SAT Specialist position. Grievant has proven that Respondent violated WEST VIRGINIA CODE § 18A-4-7a and that she should be placed into the restored position of SAT Specialist.

Grievant argues that because parenting education is a curriculum that is required to be taught in West Virginia public school by West Virginia Department of Education Policy 2530.02, her position as Family and Consumer Science teacher should not have been terminated. Grievant did not demonstrate that Respondent was not assigning the required parenting education curriculum to another teaching position. Simply because

Grievant is no longer employed as a Family and Consumer Science teacher at JMHS, does not necessarily mean that the parenting education curriculum is not being taught at the school. Grievant has failed to prove that Respondent committed any violation by terminating the position of Family and Consumer Science teacher.

Grievant argues that Respondent's decision to terminate her position was based on reprisal for her participating in protected activities. WEST VIRGINIA CODE § 6C-2-2(o) defines reprisal as "the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." To demonstrate a *prima facie* case of reprisal, Grievant must establish by a preponderance of the evidence the following elements:

- (1) That he engaged in protected activity (i.e., filing a grievance);
- (2) That he was subsequently treated in an adverse manner by the employer or an agent;
- (3) That the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
- (4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Cook v. Div. of Natural Res., Docket No. 2009-0875-DOC (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.* Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also *Frank's Shoe Store v. W. Va. Human Rights Comm'n*, 179 W. Va. 53, 365 S.E.2d 251 (1986).

Grievant asserts that the previous Principal at JMHS, Paul Lovett, included her position on the list of recommended positions to eliminate, as retaliation for Grievant filing

a grievance asserting that other vocational teachers were not participating in bus duty, speaking at a public meeting against a trimester schedule change, and expressing concerns that Carl Perkins funding was not being appropriately spent. Grievant attributes differences she had with Mr. Lovett as the reason he identified her position for elimination. Prior to the Superintendent's recommendation to Respondent that Grievant's position be eliminated, Mr. Lovett resigned from his employment with Respondent. Superintendent Siers conducted his own review of the facts and circumstances surrounding the proposed elimination of Grievant's position. Superintendent Siers, not Mr. Lovett, recommended to Respondent that 30 professional positions, including Grievant's, be terminated. Respondent unanimously voted to terminate all 30 positions. Grievant did not assert that Superintendent Siers or the members of the board of education held improper motives for the elimination of her position. Grievant has failed to establish by a preponderance of the evidence that there was a causal connection between her protected activity and the elimination of her position.

Conclusions of Law

1. This grievance does not challenge a disciplinary action, so Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. See, W. VA. CODE § 18-29-6, 156 C.S.R. 1 § 3. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichtliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. *Id.*

2. In *Angus v. Cabell County Board of Education*, Civil Action No. 01-AA-9 (August 2, 2002), the Kanawha County Circuit Court reversed a Grievance Board decision and held that a teacher with greater seniority has the right to bump another teacher for a professional position when there is no special area of certification required. The Court found this result "is consistent with the provisions of West Virginia Code section 18A-4-7a and the underlying purposes of seniority. Further, it is consistent with the policy of placing the best qualified, most experienced teachers in our classrooms." *Id.*

3. If after a RIF action is approved, the RIF is no longer required for a position, the board of education may rescind the RIF and fill that position according to proper statutory provisions. See *Harshbarger v. Lincoln County Board of Education*, Docket No. 96-22-528 (Dec. 31, 1997).

4. Grievant holds the required teaching certificate for the SAT Specialist position. Grievant has greater seniority in the county than Ms. Baker. Grievant proved that Respondent violated WEST VIRGINIA CODE § 18A-4-7a and that she should be placed into the restored position of SAT Specialist.

5. Grievant failed to prove that Respondent committed any violation by terminating the position of Family and Consumer Science teacher.

6. To demonstrate a *prima facie* case of reprisal, Grievant must establish by a preponderance of the evidence the following elements:

- (1) That he engaged in protected activity (i.e., filing a grievance);
- (2) That he was subsequently treated in an adverse manner by the employer or an agent;
- (3) That the employer's official or agent had actual or constructive knowledge

that the employee engaged in the protected activity; and

(4) That there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Cook v. Div. of Natural Res., Docket No. 2009-0875-D0C (Jan. 22, 2010); *Vance v. Jefferson County Bd. of Educ.*, Docket No. 02-19-272 (Oct. 31, 2002); *Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995). See also *Frank's Shoe Store v. W. Va. Human Rights Commission*, 179 W. Va. 53, 365 S.E.2d 251 (1986).

7. Grievant failed to establish by a preponderance of the evidence that there was a causal connection between her protected activity and the elimination of her position.

Accordingly, this grievance is GRANTED, in part, and DENIED, in part. Respondent is directed to place Grievant in the lateral professional position of SAT Specialist, with any applicable backpay and benefits.

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

such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. See also 156 C.S.R. 1 § 6.20 (2008).

DATE: November 7, 2011

Jennifer Lea Stollings-Parr
Administrative Law Judge

THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

RITA NOTT, et al.,

Grievants,

v.

DOCKET NO. 2012-0140-CONS

MASON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Rita Nott filed the following grievance at Level One of the grievance procedure on July 6, 2011, against her employer, the Mason County Board of Education ("Respondent"):

Grievant contends that respondent extended Grievant's daily schedule for the 2011-2012 school year and future school years without the consent of the grievant and without due process, i.e., notice and an opportunity for hearing. Grievant alleges a violation of W. Va. Code 18A-2-5, 18A-2-6, 18A-2-8a, 18A-2-12a & 18A-4-8(m).

As relief, Grievant sought "restoration of Grievant's daily schedule to the 2010-2011 number of hours worked and compensation for all time worked over and above the 2010-2011 required number of hours worked per day with interest." This grievance was assigned Docket No. 2012-0037-MasED. In early July 2011, another 50 school service personnel¹ employed by Respondent filed nearly identical grievances. On August 8,

¹ Shirley Livingston, Denise Bonecutter, Dale L. Dalton, Marketta Crum, Sheila Lanz, Sheila D. Ball, Mala Dawn Endicott, Lisa Ann Gardner, Grace Ann Connolly, Dorothy G. Cook, Lisa Albright, Sandra K. Buttrick, Deborah K. Hopson, Madora May McCarty, Lana J. Rayburn, Doris E. Cromley, Darla M. Jackson, Wanda G. Watterson, L. Sue Smithson, Teresa L. Pyatt, Bonnie Sue Corfee, Cathrine M. Kirby, Janet Sue Reynolds, Diana Lynn Roach, Debra Sayre, Mirjie Sue Castro, Okey W. Livingston, Jennifer Sue Cundiff, Donna Fay Greene, Marcela L. Keefer, Wilma Jane McClure, Summer D. Mitchell, Brigitte Rhodes, Christi Regina Roush, Venis G. Roush, Lawhana Sue Smithson, Kimberly Kay Wilson, Kristen Nichole Wray, Shirley Jean Billings, Cheryl L. Ellis, Angela Michelle Lloyd, Linda C. Nibert, Brenda Lee Keefer, Jean A. Waugh, Manuela Connie Hall, Kathryn Elaine Farr, Nancy M. Warner, Cheryl Suzanne Hull, Lisa Gall Hill, and Tammy L. Watterson.

2011, all of these grievances were consolidated by the Mason County School Superintendent and assigned Docket No. 2012-0140-CONS.

Following a Level One hearing on August 10, 2011, the chief administrator's designee, Jack Cullen, denied the grievance in a written decision issued on September 14, 2011. This matter proceeded through mediation at Level Two and Grievants appealed to Level Three on January 12, 2012. A Level Three hearing was conducted in Point Pleasant, West Virginia, on June 5, 2012, by Administrative Law Judge Landon R. Brown. All Grievants except Shirley Livingston were represented by John Roush, Esquire, with the West Virginia School Service Personnel Association. Grievant Livingston was represented by Jeremy B. Radabaugh with the West Virginia Education Association. Respondent was represented by Gregory Bailey, Esquire, with Bowles Rice.

This matter became mature for decision on July 3, 2012, upon receipt of the last of the parties' post-hearing proposals. Thereafter, for administrative reasons, this grievance was reassigned to the undersigned Administrative Law Judge for adjudication. The undersigned Administrative Law Judge has reviewed the Level One record, the recording of the Level Three hearing, all exhibits, and the parties' post-hearing arguments, prior to rendering this decision.

Synopsis

Respondent Mason County Board of Education began implementing a new "overtime" policy at the beginning of the 2011-12 school year which required certain school service personnel working as cooks, aides and school secretaries (which category

included all named Grievants in this matter) to work an eight-hour work day. Previously, by approved written policy, Grievants' standard work schedule involved a seven-hour work day. Pursuant to an unwritten policy or practice which was never formally approved by the Mason County Board of Education, Grievants were paid at their regular rate of pay for each hour worked over 35 per week up to 40 per week. In calculating "hours worked" for purposes of applying this unwritten policy, a one-half hour duty-free lunch period and two 15-minute duty free breaks were included as work time. Once Grievants' work hours were increased to eight per day and a 40-hour week, Respondent only paid overtime to Grievants as mandated by the federal Fair Labor Standards Act, although Respondent continued to count the one-half hour duty-free lunch period and two 15-minute duty-free breaks as hours worked toward the 40-hour week threshold.

Respondent presented evidence that it was facing a budget deficit in excess of \$1 million, and it was mandated by law to provide aides for certain students more than seven hours per day. However, this increase in Grievants' work hours violated the limitations in the "non-relegation clause" of W.Va. Code § 18A-4-8(m), and Respondent failed to demonstrate any legal basis for superseding that Code provision. Accordingly, this Grievance must be **GRANTED**.

The following Findings of Fact are made based upon the record developed at Level One and continuing through the Level Three hearing.

Findings of Fact

1. Grievants, Rita Nott, Shirley Livingston, Denise Boneclutter, Dale L. Dalton, Marketta Crum, Shelia Lanz, Sheila D. Ball, Maia Dawn Endicott, Lisa Ann Gardner,

Grace Ann Connolly, Dorothy G. Cook, Lisa Albright, Sandra K. Buttrick, Deborah K. Hopson, Madora May McCarty, Lana J. Rayburn, Doris E. Cromley, Darla M. Jackson, Wanda G. Watterson, L. Sue Smithson, Teresa L. Pyatt, Bonnie Sue Corfee, Cathrine M. Kirby, Janet Sue Reynolds, Diana Lynn Roach, Debra Sayre, Mirrie Sue Castro, Okey W. Livingston, Jennifer Sue Cundiff, Donna Fay Greene, Marcela L. Keefer, Wilma Jane McClure, Summer D. Mitchell, Brightte Rhodes, Christi Regina Roush, Venis G. Roush, Lawhana Sue Smithson, Kimberly Kay Wilson, Kristen Nichole Wray, Shirley Jean Billings, Cheryl L. Ellis, Angela Michelle Lloyd, Linda C. Nibert, Brenda Lee Keefer, Jean A Waugh, Manuela Connie Hall, Kathryn Elaine Farr, Nancy M. Warner, Cheryl Suzanne Hull, Lisa Gail Hill, and Tammy L. Watterson, are employed by Respondent Mason County Board of Education ("MCBOE") in various job classifications as school service personnel.

2. Prior to the 2011-12 school year, certain Mason County school service personnel worked a seven-hour day, while others worked an eight-hour day. Grievants were within the group of employees who, based upon their classifications, worked a seven-hour day.

3. Under MCBOE Policy 4251, the normal work day for cooks, aides and school secretaries employed by the Mason County Board of Education was seven hours per day. R Ex 4. During the 2010-2011 school year, school service personnel employed as school secretaries, cooks and aides worked this seven-hour day, which was authorized to include a one-half hour duty-free lunch period and two 15-minute duty-free breaks.

4. During the 2010-11 school year, these duty-free lunch periods and two 15-minute breaks (five hours per week) were counted toward an employee's hours worked for purposes of calculating overtime at time and one-half the employee's regular rate of pay, for any time worked over 40 hours. This practice of including these five hours on the clock was not included in any written policy nor had this practice ever been approved or adopted by the Mason County Board of Education.

5. During the 2010-11 school year, school service personnel employed as school secretaries, cooks and aides received additional pay when they worked more than 35 hours in a week, after counting the duty-free lunch hour and two daily breaks as hours worked for purposes of reaching this 35-hour threshold. Such employees were then paid at their regular rate of pay for their first five hours (from 35 hours to 40 hours) and time and one-half for each hour after exceeding the 40-hour limit.

6. On July 13, 2010, the Mason County Board of Education adopted MCBOE Policy 6700 governing overtime. R Ex 1. Policy 6700 required cooks, aides and school secretaries to work an eight-hour day, including a one-half hour duty-free lunch period and two 15-minute breaks. There was no evidence presented that this policy change was actually implemented until the 2011-12 school year.

7. On August 17, 2010, the Mason County Board of Education rescinded its previously adopted by-laws and policies and adopted an online policy manual referred to by its acronym as "NEOLA."² R Ex 6.

8. On June 16, 2011, the Mason County Board of Education rescinded Policy 4251, in order to make it clear that school secretaries, cooks and aides would work

² None of the witnesses were able to explain what these letters stand for.

eight-hour days rather than seven-hour days, and that the regular work week would consist of 40 hours rather than 35.³

9. Grievants' salaries were not increased in response to this change to an eight-hour week. For example, a school secretary whose annual salary was \$25,000 continued to receive the same \$25,000 annual salary after her hours were increased.

10. Respondent Mason County Board of Education made a good faith effort to notify all persons in the service personnel classifications represented by Grievants that Policy 6700 would be implemented during the 2011-12 school year through correspondence addressed to individual employees mailed on or about June 9, 2011. See R Exs 7a, 7b & 7c.

11. Respondent Mason County Board of Education made no effort to invoke W. Va. Code § 18A-2-6, 18A-2-7 or 18A-2-8a, and provide Grievants with timely notice of a proposed change to their employment status and a due process hearing.

12. As of June 30, 2010, Mason County Board of Education was facing a budget deficit of \$1,359,304. R Ex 5.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving each element of their grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008). See *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997). "A preponderance of the evidence is evidence of greater weight or more convincing than

³ This policy was purportedly rescinded in the "NEOLA" process. However, given some confusion over which policies were actually included in this process, the Board later rescinded Policy 4251 as a separate agenda item.

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).

There are multiple statutory provisions governing the employment of school service personnel, and school employees in general, including the Code language quoted in the following paragraphs.

W. Va. Code § 18A-2-6 provides, in pertinent part:

The continuing contract of any such employee shall remain in full force and effect except as modified by mutual consent of the school board and the employee, unless and until terminated with written notice, stating cause or causes, to the employee, by a majority vote of the full membership of the board before March 1 of the then current school year, or by written resignation of the employee on or before that date. The affected employee has a right of a hearing before the board, if requested, before final action is taken by the board upon the termination of such employment.

W. Va. Code § 18A-2-7 provides, in pertinent part, as follows:

(a) The superintendent, subject only to approval of the board, may assign, transfer, promote, demote or suspend school personnel and recommend their dismissal pursuant to provisions of this chapter. However, an employee shall be notified in writing by the superintendent on or before March 1 if he or she is being considered for transfer or to be transferred. Only those employees whose consideration for transfer or intended transfer is based upon known or expected circumstances which will require the transfer of employees shall be considered for transfer or intended for transfer and the notification shall be limited to only those employees. Any teacher or employee who desires to protest the proposed transfer may request in writing a statement of the reasons for the proposed transfer. The statement of reasons shall be delivered to the teacher or employee within 10 days of the receipt of the request. Within ten days of the receipt of the statement of the reasons, the teacher or employee may make written demand upon the superintendent for a hearing on the proposed transfer before the County board of education. The hearing on the proposed transfer shall be held on or before April 15. At the hearing, the reasons for the proposed transfer must be shown.

(b) The superintendent at a meeting of the board on or before April 15 shall furnish in writing to the board a list of teachers and other employees to be considered for transfer and subsequent assignment for the next ensuing school year. An employee who was not provided notice and an opportunity for hearing pursuant to subsection (a) of this section may not be included on the list. All other teachers and employees not so listed shall be considered as reassigned to the positions or jobs held at the time of this meeting the list of those recommended for transfer shall be included in the minute record of the meeting and all those so listed shall be notified in writing, which notice shall be delivered in writing, by certified mail, return receipt requested, to the persons' last known addresses within ten days following the board meeting, or they're having been so recommended for transfer and subsequent assignment and the reasons therefor.

W. Va. Code § 18A-2-12a(b)(6) provides the following guidance: "All school personnel are entitled to due process in matters affecting their employment, transfer, demotion or promotion"

W. Va. Code § 18A-4-8(m) provides:

Without his or her written consent, a service person may not be:

- (1) Reclassified by class title; or
- (2) Relegated to any condition of employment which would result in a reduction of his or her salary, rate of pay, compensation or benefits earned during the current fiscal year; or for which he or she would qualify by continuing in the same job position and classification held during that fiscal year and subsequent years.

W. Va. Code § 18A-4-14(1) provides:

Notwithstanding the provisions of section seven, article two of this chapter, every teacher who is employed for a period of time more than one-half the class periods of the regular school day and every service personnel whose employment is for a period of more than three and one-half hours per day and whose pay is at least the amount in the "state minimum pay scale" as set forth in section eight-a of this article shall be provided a daily lunch recess of not less than thirty consecutive minutes, and such employees shall not be assigned any responsibilities during this recess. Such recess shall be included in the number of hours worked, and no county shall increase the number of hours to be worked by an employee as a result of such employee being granted a recess under the provisions of this section.

W. Va. Code § 18A-4-5b provides, in pertinent part:

These county schedules shall be uniform throughout the county with regard to any training classification, experience, years of employment, responsibility, duties, pupil participation, pupil enrollment, size of buildings, operation of equipment or other requirements. Further, uniformity shall apply to all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county: Provided, That in establishing such local salary schedules, no county shall reduce local funds allocated for salaries in effect on the first day of January, one thousand nine hundred ninety, and used in supplementing the state minimum salaries as provided for in this article, unless forced to do so by defeat of a special levy, or a loss in assessed values or events over which it has no control and for which the county board has received approval from the state board prior to making such reduction.

There is also a significant body of law in West Virginia guiding the application of these statutes to school service personnel and other county board of education employees. Thus, any analysis must begin by recognizing 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). Further, "[w]hen a board of education seeks to reduce employment costs, the board may decide that the schools' best interests require either the elimination of some service personnel jobs or the retention of all service personnel jobs but with reduced employment terms." *Lucion v. McDowell County Bd. of Educ.*, 191 W. Va. 399, 402, 446 S.E.2d 487, 490 (1994). Moreover, "[d]eterminations of the number of service personnel and the length of their employment terms are primarily management decisions. Without

a clear statutory requirement, such determinations should remain with a board of education." *Id.*

However, "[s]chool personnel regulations and laws are to be construed strictly in favor of the employee." Syl. Pt. 1, *Morgan v. Plizzino*, 163 W. Va. 454, 256 S.E.2d 592 (1979). See *Trimboli v. Bd. of Educ.*, 163 W. Va. 1, 254 S.E.2d 561 (1979). Likewise, "[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs." Syl. Pt. 1, *Powell v. Brown*, 160 W. Va. 723, 238 S.E.2d 220 (1977).

Under W. Va. Code § 18A-4-14(1), all school service personnel who are employed for more than three and one-half hours per day must be provided a duty-free lunch "recess" of not less than thirty minutes daily and this "recess shall be included in the number of hours worked." Based upon the clear language of this statute, it does not matter whether or not the Mason County Board of Education ever adopted a policy which included the duty-free lunch period as part of an employee's hours worked, because that was already mandated by law.

However, the Mason County Board of Education went on and paid employees who worked seven-hour work days at their regular rate of pay for each hour they worked over 35 per week, up to 40 hours per week. In 2011, Respondent sought to halt that practice, which was never put in writing, ostensibly to conform to the federal Fair Labor Standards Act.

This Grievance Board has recognized that a county board of education may seek to conform to the requirements of the Fair Labor Standards Act with regard to the

calculation and recording of time, without violating the non-relegation clause in W. Va. Code § 18A-4-8(m). *Zirkle v. Hancock County Bd. of Educ.*, Docket No. 07-15-124 (Mar. 6, 2008); *Goins v. Raleigh County Bd. of Educ.*, Docket No. 06-41-453 (Mar. 23, 2007). See *Dillon v. Mingo County Bd. of Educ.*, Docket No. 05-29-413 (Apr. 28, 2006). The Fair Labor Standards Act ("FLSA") does not mandate that non-exempt employees (including Grievants) be paid overtime for each hour worked over 35 per week. However, Respondent was not paying Grievants FLSA overtime in this circumstance. Respondent simply compensated Grievants at their regular rate of pay for each hour worked as a result of the fact that their "regular" work day was seven hours or 35 hours per week, and when Grievants were required to work between 35 and 40 hours per week, it was reasonable to compensate them in some manner. Otherwise, having a seven-hour work day as stated in Policy 4251 would have no consequence, if employees were required to work additional hours each week without compensation.

This becomes something of a "chicken and egg" argument as to which happened first. Of course, the school board is free to conform its policies to follow the Fair Labor Standards Act. *Goins, supra*. However, when the Grievant's daily work schedule is extended from a seven-hour day to an eight-hour day, conformity is no longer necessary because there is no longer any basis to compensate Grievants for any work they perform between 35 and 40 hours weekly, as those hours have now become part of the established workweek. At the end of the day, this is the crux of what took place here – Grievants' normal working hours were extended from a seven-hour day and 35-hour week to an eight-hour day and a 40-hour week. Once that change was made,

Respondent decided to include the one-half hour duty-free lunch recess as part of the eight hours worked, as it was already required to do under W. Va. Code § 18A-4-14(1), as well as the two 15-minute break periods, which it is arguably required to count by Department of Education policy which treats such breaks as "hours worked."

The factual scenario presented here is substantially similar to the facts in *Lambert v. Mercer County Bd. of Educ.*, Docket No. 91-27-520 (May 27, 1992), where this Grievance Board found a violation of the "non-relegation clause" included in W. Va. Code § 18A-4-8 when a service employee's work hours were increased by one-half hour each day, without her consent or an increase in her salary. *Accord, Pietrantozzi v. Mercer County Bd. of Educ.*, Docket No. 94-27-130 (Dec. 29, 1994).

Respondent explains that because the Mason County Board of Education was experiencing a budget deficit in excess of \$1 million as a result of an unforeseen rise in construction costs, and this was a matter beyond the Board's control which had been duly reported to the West Virginia Department of Education, and a deficit reduction plan had been approved by the State Board, Respondent was authorized by the language in W. Va. Code § 18A-4-5b to implement these changes, notwithstanding the requirements in the non-relegation clause in W. Va. Code § 18A-4-8(m).

Respondent cited no authority to support this expansive application of W. Va. Code § 18A-4-5b. The primary object in construing a statute is to "ascertain and give effect to the intent of the Legislature." Syl. pt. 1, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). In this same regard, where the language of a statute is free from ambiguity, its plain meaning is to be applied without

resort to interpretation. Syl. Pt. 2, *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (1970). Moreover, statutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be ascertained from the whole of the enactments. *Poling v. Bd. of Educ.*, 215 W. Va. 231, 234, 599 S.E.2d 654, 657 ((2004). See *W. Va. Dep't of Health & Human Res. v. Hess*, 189 W. Va. 357, 432 S.E.2d 27 (1993).

The pertinent portion of W. Va. Code § 18A-4-5b reads as follows:

These county schedules shall be uniform throughout the county with regard to any training classification, experience, years of employment, responsibility, duties, pupil participation, pupil enrollment, size of buildings, operation of equipment or other requirements. Further, uniformity shall apply to all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county; Provided, That in establishing such local salary schedules, no county shall reduce local funds allocated for salaries in effect on the first day of January, one thousand nine hundred ninety, and used in supplementing the state minimum salaries as provided for in this article, unless forced to do so by defeat of a special levy, or a loss in assessed values or events over which it has no control and for which the county board has received approval from the state board prior to making such reduction.

This Code provision makes specific reference to "local salary schedules" and "local funds allocated for salaries" which are "used in supplementing the state minimum salaries" provided for in the Code. It is these local salary supplements to the state minimum salaries which may be adjusted, provided certain specific conditions relating to a budget deficit are met. Respondent was changing employee work schedules and policies, not salaries, or anything that could legitimately be considered as an across-the-board salary supplement. Therefore, the language in W. Va. Code § 18A-4-5b cited by Respondent has no bearing on this grievance.

Respondent also produced evidence that it was mandated under the kindergarten aide/pupil ratio set forth in W. Va. Code § 18-5-18a, and West Virginia Board of Education Policy 2419, to provide aides to students for more than seven hours each day so as to maintain compliance with these requirements. However, there was no viable explanation why the only way to meet these requirements was to assign more time at work for the same pay to aides. This same argument as to why school secretaries needed to be present during the entire school day was likewise unpersuasive. (It also raised the question of how a school secretary would ever receive a 30-minute duty-free lunch recess and two 15-minute duty-free breaks, if someone needs to be present to provide support throughout the school day.)⁴

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. In a non-disciplinary matter, Grievants have the burden of proving each element of their grievance by a preponderance of the evidence. Procedural Rule of the W. Va. Public Employees Grievance Bd., 156 C.S.R. 1 § 3 (2008). See *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Runyon v. Mingo County Bd. of Educ.*, Docket No. 93-29-481 (Apr. 4, 1993).

2. Grievants established by a preponderance of the evidence that Respondent violated the "non-relegation clause" in W. Va. Code § 18A-4-8(m) by increasing their regular working hours from a seven-hour day to an eight-hour day without

⁴ As an alternative course of action, Respondent could have followed W. Va. Code § 18A-2-6 by terminating Grievants' employment contracts and then filling new jobs with reduced employment terms. See *Luolon v. McDowell County Bd. of Educ.*, 191 W. Va. 399, 446 S.E.2d 487 (1994) (*per curiam*). However, Respondent apparently elected not to take such action to address its deficit issues.

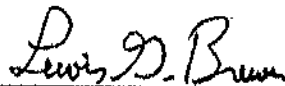
any change in salary, and concomitantly discontinued paying each of them their regular rate of pay for each hour worked over 35 hours per week up to and including 40 hours per week. See *Pietrantozzi v. Mercer County Bd. of Educ.*, Docket No. 94-27-130 (Dec. 29, 1994); *Lambert v. Mercer County Bd. of Educ.*, Docket No. 91-27-520 (May 27, 1992). See also *Crock v. Harrison County Bd. of Educ.*, 211 W. Va. 40, 560 S.E.2d 515 (2002); *Hill, et al., v. Barbour County Bd. of Educ.*, Docket No. 2009-1503-CONS (Mar. 10, 2010).

3. Respondent failed to establish that any provision in W. Va. Code § 18A-4-5b, 18-5-18a, or any other statute, regulation or legal precedent, provided superseding authority for Respondent to disregard the requirements of W. Va. Code § 18A-4-8(m).

Therefore, this grievance is hereby **GRANTED**. Further, it is hereby **ORDERED** that Grievants be returned to a seven-hour per day work schedule, and that each Grievant be compensated at their regular hourly rate of pay, as back pay with statutory interest, less any appropriate deductions but including all benefits derived therefrom, for each hour greater than 35 hours per week, up to and including 40 hours per week, which any Grievant worked during the 2011-12 or 2012-13 school years, and forward from the date of this Decision until the prior work schedule is restored. It is further **ORDERED** that any Grievant who worked more than 40 hours per week during the 2011-12 or 2012-13 school years, and who did not receive FLSA overtime for such hours, be paid at one and one-half times their regular rate of pay, as back pay with statutory interest, less any appropriate deductions, and such payments shall continue forward from the date of this Decision until the prior work schedule is restored. In calculating any such 35-hour or

greater work week, Respondent will include the 30-minute duty-free lunch hour and two 15-minute duty-free breaks each workday, unless a Grievant previously waived such benefits in writing.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. Va. Code § 6C-2-5. Neither the West Virginia Public 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 certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. See also 156 C.S.R. 1 § 6.20 (2008).



LEWIS G. BREWER
Administrative Law Judge

Date: January 17, 2013



BASIC PLANNING – TOOLS OF THE TRADE

1. First Step - Ascertaining The Status Quo

Regardless of the nature of student population changes, it is necessary to accurately ascertain the number of professional and service positions that are being funded through the state aid formula as a first step in the process. It is then necessary to ascertain the number of professional and service personnel who are actually employed. From the group of professional employees who are currently employed it is necessary to determine the number of certified administrators that are employed and the number of administrators who are not eligible for state aid formula reimbursement.

2. Determining Projected Resources

Armed with information on the status quo, a school district must then undertake to accurately project, based upon the second month report, the number of professional (including administrators) and service employees that will be funded in the upcoming school year. It is critical that appropriately certified professional personnel be employed and deployed in a manner to satisfy state requirements, especially in the area of special education, to maximize state aid formula funding. A school district with a room full of special education students will not be in a position to receive full funding for such students if a properly certified teacher is not in place to provide instruction to such students.

A school district that knows where it is in terms of funded position and where it wants or needs to be in the next school year is in a position to begin making informed personnel



decisions. The amount of local funding that may be available to fund positions above the state aid formula provides an additional variable to the equation in many school districts.

3. Absolute Personnel Requirements

Although the personnel allocation decision process varies from county to county, most counties start with an inventory of positions that will be absolutely required by state and federal law. Such positions include:

- a. Full-time principals for each school with a net enrollment that equals or exceeds 170 students. W. Va. Code §18A-2-9.
- b. At least one full-time school counselor. W. Va. Code §18-5-18b.
- c. A full-time school nurse for each 1500 (or major fraction thereof) K-7 grade students, with a minimum of 1 full-time school nurse. W. Va. Code §18-5-22. Counties may contract for equivalent services with a public health department.
- d. A full-time Attendance Director in counties with a student population of more than 4000 students. A half-time Attendance Director in counties with a student population of 4000 or less. W. Va. Code §18-8-3.
- e. A School Nutrition Program Director. A full-time director is “strongly recommended.” West Virginia Board of Education Policy 4321.1.



- f. A sufficient number of classroom teachers necessary to meet the minimum student-teacher ratios for grades K-6, contained in W. Va. Code §18-5-18a. A sufficient number of classroom teachers and aides to comply with the Pre-K program requirements. West Virginia Board of Education Policy 2525.
- g. A sufficient number of professional and service personnel to meet existing IEP and West Virginia Board of Education Policy 2419 requirements.
- h. Although no precise student/teacher ratios exists for secondary programs, a sufficient number of properly certified classroom teachers must be available to permit students to attain the credit requirements set forth in State Board Policy 2510. See *Donna McCoy v. Tucker County Board of Education*, Docket No. 92-47-154 (November 30, 1992).
- i. No minimum requirements exist with respect to any service personnel classification, except in the areas of kindergarten aide and special education aide. However, the scope of the service activity undertaken, e.g. transportation, food service (other than the designation of a School Nutrition Program Director), custodial, clerical, etc., dictates certain minimums necessary to perform the required service.



4. Discretion

After identification of the number of employees that must be maintained to meet state and federal requirements, it is then possible to determine the number and type of positions that the school system is able and willing to fund through any remaining state aid and any available local funds. The discretion to be exercised in this area is entirely dependent upon the existence of such funds. Positions over and above those funded through the state aid formula are evaluated under criteria generally related to the goals and objectives of the school system. Required positions and discretionary positions are typically combined into a “staffing formula” that is followed in allocating professional and service staff to each school.

5. Methodology

Discretion in determining which positions to retain, eliminate or add may take various forms. Staffing priorities may be set forth in county board policy, administrative regulation, or ad hoc written communications. Most policies vest the principal with some measure of authority relative to recommendations that require an analysis of the curricular offerings. W. Va. Code § 18A-2-9 identifies principals as the instructional supervising authority. See *Burris v. Mason County Board of Education*, Docket No. 92-26-217, (November 10, 1992), principal’s role in decision making cited in upholding exercise of discretion in decision to eliminate German from the curriculum.

Consistent adherence to established priorities, regardless of the form in which they are expressed, serves to demonstrate an appropriate exercise of discretion. Deviation from



past practices, unless accompanied with a rational explanation, is susceptible to charges of favoritism or arbitrary and capricious decision making.

It is not always possible to predict the circumstances that may require a particular transfer. In such cases, an ad hoc written communication should articulate the precise reasons for the proposed transfer and should be prefaced by an acknowledgment that existing policy or regulation did not anticipate the circumstances requiring the transfer. In all cases the reasons for transfer should be grounded in sound educational reasoning. Policies should also include a statement to the effect that they are not all encompassing and that individual circumstances may require a recommendation that is not covered by the policy.

6. Board Awareness

It is very important that the county board of education understand and be in agreement with the criteria that are observed in making transfer decisions. The middle of a transfer hearing is not the place to discover that the majority of the board has a different notion of priorities than was followed in making transfer recommendations. This subject should be openly discussed well before the commencement of each personnel season.

7. Employee Awareness

If employees understand the process and are confident that it is applied in an evenhanded and fair manner, the number of nasty hearings will be significantly reduced. A hearing or grievance avoided translates into a reduction of the risk of adverse budgetary consequences. Consideration should be given to a newsletter style communication to employees that provides basic information on the need to make adjustments and a description of the



decision making process. It is also recommended that personnel staff be available to answer questions. Employee organization representatives should be afforded full access to all of the information that is used to formulate personnel recommendations. If such representatives are convinced that personnel recommendations have been accurately formulated and are fair, they sometimes counsel employees to accept proposed personnel actions. A side benefit to an open process is an additional opportunity to discover mistakes in time to make adjustments in personnel recommendations.

The sometimes painful process that we have described provides the starting point for transfer decisions. The budgetary limits for funding positions, shifting student demographics and changes in educational programming translate into a need to realign staff. However, it is necessary to determine where you need to be, from a staffing perspective, before reasoned decisions may be made about how to get there.

8. Compliance With New W. Va. Code §18A-4-7a RIF Procedure

(2) Notwithstanding any provision of this code to the contrary, all employees subject to release shall be considered applicants for any vacancy in an established, existing or newly created position that, on or before February 15, is known to exist for the ensuing school year, and for which they are qualified, and, upon recommendation of the superintendent, the board shall appoint the successful applicant from among them before posting such vacancies for application by other persons.

Step 1 – create a list of all vacancies in established, existing or newly created position that will be available for the next ensuing school year. (cutoff date - on or before February 15).

Step 2 – following the procedure outlined below, create a list of employees subject to release as part of a reduction-in-force.



Step 3 – for each available vacancy, create a list of “applicants” (from the list of employees subject to release) who meet the minimum qualifications.

Step 4 – applying the 9 factor test (with equal weight given to each factor), select the most qualified candidate for each available vacancy. *Note: application of the 9 factor test is unnecessary if there is only 1 applicant who meets the minimum qualifications for a position.*

Step 5 – if an applicant is determined to be the most qualified candidate for multiple vacancies, the candidate must elect one position (recommend starting with the most senior applicant who is qualified for multiple positions).

Step 6 – re-determine the most qualified applicant for vacancies for which the applicant, initially determined to be the most qualified, elected another position. *Note: application of the 9 factor test is unnecessary if there is only 1 applicant who meets the minimum qualifications for a position remains.*

Step 7 – repeat Step 5

Step 8 – continue process until all possible vacancies are filled.

9. **The Lists - Professional Employees**

The first list. The first list that must be compiled is that of employees who, through application of the staffing formula, no longer have a position. This is affectionately known in most circles as the **transfer list**. The identification of the right employees to be placed on the transfer list will be covered in more detail. However, for the time being, we recommend that this list be created starting with the most senior employees.

The second list. The second list is created by the identification of all existing vacancies pertaining to positions that will continue to exist at the start of the next school year and the identification of all vacancies that will exist at the start of the new school year as a result of newly created positions. We will call this list the **vacancy list**.



The third list. The list of employees who, by their seniority, are entitled to a position, may be called the **transfer into a specific assignment list**. Employees on this list are transferred into specific assignments that are vacated by less senior employees as part of a reduction-in-force.

The fourth list. Employees who are placed on transfer through the application of the staffing formula or who are placed on transfer as a result of displacement by a more senior employee, who lack the seniority to displace another employee are placed on the **reduction in force list**. This is the list of employees who are entitled to be considered for vacancies in established, existing or newly created position that will be available for the next ensuing school year.

The fifth list. A master list of professional employees is necessary to ensure the previous lists are accurate. The list must accurately reflect seniority, certification(s), and subjects currently being taught. It is also important to determine if teachers are appropriately certified to teach the courses they are teaching. Refer to the WVEIS Course Codes For Scheduling.

The sixth list. Regardless of how well an administration performs in terms of technical compliance with all pertinent policies and statutes in proposing recommendations to a county board of education, such boards may be persuaded to consider an exception to what has been recommended. In such cases it is important that the board be provided with a price tag for making the exception. A seventh list should reflect the dollar amount that would be required if



one or more employees were restored to their positions based upon the rejection of a superintendent's recommendation. The board is then in a position to consider the relative value of the status quo in relation to required cuts in other areas of the budget. As always, consideration should be given to fairness to other employees for which no exception is made.

10. **Lists - Service Employees**

All service employees who are on the transfer list make the **transfer for subsequent assignment list**. However, one exception to this rule exists. Employee who hold contracts in excess of 200 days are entitled to bump into a position held by the least senior employee within classification at the same level in terms of contract days. If there are no less senior employees within classification at the same contract day level and one or more contract days levels in excess of 200 exist, the employee is entitled to bump into a position held by a less senior employee within classification at the next greatest level of contract days in excess of 200. This procedure is referred to as a "Berry bump" in honor of Doris Berry, an employee of Kanawha County Schools who prevailed on her argument, made to the West Virginia Supreme Court of Appeals, to be awarded a position taking into account her contract days in excess of 200.



CENTRAL OFFICE REORGANIZATION

While the school laws are not clear regarding reassignments and reorganizations, there is authority for the proposition that the county superintendent may unilaterally decide not to fill particular assistant superintendent and director positions which fall vacant by "attrition," and to reassign the duties of those positions to incumbent assistant superintendents and directors.

Helpful, but not determinative, statutes include W. Va. Code § 18-5-32, which authorizes the employment by a county board of education, upon the recommendation of the county superintendent, of assistant superintendents and "such general and special supervisors or directors of instruction and of such other education activities as may be deemed necessary."

Another statute, W. Va. Code § 18A-2-1, provides, in pertinent part:

Professional personnel employed as deputy, associate or assistant superintendents by the board in offices, departments or divisions at locations other than a school and who are directly answerable to the superintendent shall serve at the will and pleasure of the superintendent and may be removed by the superintendent upon approval by the board.

It appears that the following general rules apply.

First, so long as changes in the duties of a superintendent's subordinates do not violate the terms of any employment contract, the superintendent may, without board approval, "reasonably" increase or decrease the various duties of an employee, at least if "whatever is added is within the employee's areas of responsibilities" and if "whatever is subtracted is not something which earlier had been specifically approved by the board for the employee upon a superintendent's recommendation."

Second, the State Superintendent takes the position that the re-shuffling of duties cannot result in a salary reduction, and it must involve persons who are certified or qualified for their changed duties.

Third, rearrangement of such duties cannot result in the creation of new administrative positions unless the board approves, the position is posted, and all other requirements for filling the new vacancy are met.

Fourth, it is the State Superintendent's recommendation that a county superintendent who intends to reorganize the staff should first present a new organizational chart to the board for approval.

In some counties there are county policies which have a bearing upon the manner in which the central office may be reorganized. Some counties also have policies which specify an organizational chart. Any such policies must be considered and cannot be ignored (unless they are contrary to State law).

Some Deadlines For County Board Personnel Actions
(Always consult appropriate statutes for details)

On July 1, 2014, the board must make available to all employees, by electronic or other means, a list of all professional personnel employed, showing their certifications and seniority. *West Virginia Code § 18A-4-7a(t)*.

If, before August 1, 2014, the reason for an employee's reduction in force or transfer previously approved in 2014 no longer exists as determined by the board, the board must, with certain exceptions, rescind the action under the rules of *West Virginia Code §§ 18A-4-7a(k)(5) or 18A-4-8b(k)*.

On or before September 2, 2014, the board must post at each school or working station current seniority lists of each service employee classification. *West Virginia Code § 18A-4-8g(f)*.

On or before September 30, 2014, if actual student enrollment in a grade level or program, unforeseen before March 1, 2014, allows the assignment of fewer professional or service employees to or within a school under certain pupil-teacher ratio, class size or caseload standards, the board may reassign the least senior certified or classified surplus personnel to another grade level or program in the same school, or to another school, if needed to there comply with any such standard. *W. Va. Code § 18A-2-7(e)*. (This is arguably a conservative version of the deadline. See the statute and Section 9 of State Board Policy 5000 for notice and hearing requirements that precede the vote and other details.)

On or before January 15, 2015, a classroom teacher may give written notice of retirement, to take effect at the end of the school year, so as to be paid \$500 for early notification of retirement. *West Virginia Code § 18A-2-2(g)*.

On or before January 15, 2015, the board must post at each school or working station current seniority lists of each service employee classification. *West Virginia Code § 18A-4-8g(f)*.

On or before March 2, 2015, a teacher or service employee may initiate termination of a continuing contract by written resignation, to take effect at the close of the school year. *West Virginia Code §§ 18A-2-2(c)(1)(B) or 18A-2-6*.

Before March 2, 2015, a service employee's continuing contract may be terminated by a majority vote of the full membership of the board, to take effect at the close of the school year (as in a reduction-in-force). *West Virginia Code § 18A-2-6*. (See the statute for notice and hearing requirements that precede the vote.) **Note: The corresponding deadline for teachers is "on or before" March 2. See below.**

On or before March 2, 2015, a teacher's continuing contract may be terminated by a majority vote of the full membership of the board, to take effect at the close of the school year (as in a reduction-in-force). *West Virginia Code § 18A-2-2(c)(1)(A)*. (See the statute for notice and hearing requirements that precede the vote.) **Note: The corresponding deadline for service employees is "before" March 2. See above.**

On or before March 2, 2015, the superintendent must provide written notice to professional and service employees who are being considered for transfer. *West Virginia Code § 18A-2-7(a)*. (See the statute for time within which any statements of reasons must then be given and any hearing requests must then be made.)

On or before April 15, 2015, the board must conduct a hearing for any employee who has requested one regarding his or her proposed transfer, and the superintendent must furnish the board with a written list of teachers and other employees to be considered for transfer for the ensuing school year. *West Virginia Code § 18A-2-7(a),(b)*. (See the statute for requirement of subsequent notice to such employees.)

On or before April 15, 2015, the superintendent, at a board meeting, must provide the board with a written list of all probationary teachers and service personnel that the superintendent recommends to be rehired for the ensuing school year. The board must act upon the superintendent's recommendations at the same meeting. *West Virginia Code § 18A-2-8a*. (See the statute for requirement of subsequent notice to probationary employees not listed, and for provisions regarding subsequent hearings.)

On or before June 30, 2015, a new or existing classroom teacher position for the 2015-2016 school year cannot be filled under *W. Va. Code § 18A-4-7a(u)* (i.e., without posting, and by agreement of the board, the teacher and the school's principal). *Section 10 of State Board Policy 5000*.



SUMMARY OF TRANSFER PROCEDURE

(See West Virginia Code § 18A-2-7 for Further Detail)

1. On or before March 1, the superintendent must provide written notice to professional and service employees who are being considered for transfer or to be transferred.
2. Any employee who desires to protest such proposed transfer may request in writing a statement of the reasons for the proposed transfer, in which case:
 - a. The statement of reasons shall be delivered to the employee within ten calendar days of the receipt of the request.
 - b. Within ten days of the receipt of the statement of reasons, the employee may make written demand upon the superintendent for a hearing on the proposed transfer before the county board of education.
 - c. The requested hearing on the proposed transfer shall be held on or before April 15. At the hearing, the reasons for the proposed transfer must be shown.
3. At a meeting of the board on or before April 15, the superintendent shall furnish in writing to the board a list of teachers and other employees to be considered for transfer and subsequent assignment for the next ensuing school year. All employees not so listed shall be considered as reassigned to the positions or jobs held at the time of this meeting. The list of those recommended for transfer shall be included in the minute record of such meeting.
4. Each employee so listed shall be notified in writing by certified mail, return receipt requested, to such person's last known address within ten days following the board meeting. The notice shall advise the employee that he/she has been recommended for transfer and subsequent assignment and the reasons therefor.
5. Only upon recommendation of the superintendent and by action of the board may an employee whose name is on the list of persons to be considered for transfer and subsequent assignment actually be transferred and assigned to a new position.



SUGGESTED FORMS FOR TRANSFERRING EMPLOYEES

1. LETTER TO BE SENT TO ALL PROFESSIONAL AND SERVICE EMPLOYEES WHO ARE BEING CONSIDERED FOR TRANSFER ACTION DURING "PERSONNEL SEASON" PURSUANT TO W. VA. CODE § 18A-2-7(a): **NOTICE OF PROPOSED TRANSFER ACTION**
2. LETTER TO BE SENT TO EACH SUCH EMPLOYEE WHO REQUESTS REASONS: **STATEMENT OF REASONS FOR THE PROPOSED TRANSFER**
3. LETTER TO BE SENT TO EACH SUCH EMPLOYEE WHO REQUESTS A HEARING: **CONFIRMING DATE OF HEARING UPON PROPOSED TRANSFER**
4. LETTER TO BE SENT TO EACH SUCH EMPLOYEE WHOSE NAME IS ON THE FINAL TRANSFER LIST: **NOTICE THAT THE LIST WAS PRESENTED TO THE BOARD**

1. *LETTER TO BE SENT TO ALL PROFESSIONAL AND SERVICE EMPLOYEES WHO ARE BEING CONSIDERED FOR TRANSFER ACTION DURING "PERSONNEL SEASON" PURSUANT TO W. VA. CODE § 18A-2-7(a): NOTICE OF PROPOSED TRANSFER ACTION*

[_____ COUNTY BOARD OF EDUCATION
LETTERHEAD]

_____, 20__

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

[Insert employee name and
mailing address]

Dear [insert name]:

Pursuant to Chapter 18A, Article 2, Section 7 of the Code of West Virginia, as amended, you are hereby notified that I am considering you for transfer or to be transferred for the 20__ - 20__ school year.

Sincerely,

_____, Superintendent

County Schools

Enclosure: § 18A-2-7

§18A-2-7. Assignment, transfer, promotion, demotion, suspension and recommendation of dismissal of school personnel by superintendent; preliminary notice of transfer; hearing on the transfer; proof required.

(a) The superintendent, subject only to approval of the board, may assign, transfer, promote, demote or suspend school personnel and recommend their dismissal pursuant to provisions of this chapter. However, an employee shall be notified in writing by the superintendent on or before March 1 if he or she is being considered for transfer or to be transferred. Only those employees whose consideration for transfer or intended transfer is based upon known or expected circumstances which will require the transfer of employees shall be considered for transfer or intended for transfer and the notification shall be limited to only those employees. Any teacher or employee who desires to protest the proposed transfer may request in writing a statement of the reasons for the proposed transfer. The statement of reasons shall be delivered to the teacher or employee within ten days of the receipt of the request. Within ten days of the receipt of the statement of the reasons, the teacher or employee may make written demand upon the superintendent for a hearing on the proposed transfer before the county board. The hearing on the proposed transfer shall be held on or before April 15. At the hearing, the reasons for the proposed transfer must be shown.

(b) The superintendent at a meeting of the board on or before April 15 shall furnish in writing to the board a list of teachers and other employees to be considered for transfer and subsequent assignment for the next ensuing school year. An employee who was not provided notice and an opportunity for a hearing pursuant to subsection (a) of this section may not be included on the list. All other teachers and employees not so listed shall be considered as reassigned to the positions or jobs held at the time of this meeting. The list of those recommended for transfer shall be included in the minute record of the meeting and all those so listed shall be notified in writing, which notice shall be delivered in writing, by certified mail, return receipt requested, to the persons' last known addresses within ten days following the board meeting, of their having been so recommended for transfer and subsequent assignment and the reasons therefor.

(c) The superintendent's authority to suspend school personnel shall be temporary only pending a hearing upon charges filed by the superintendent with the county board and the period of suspension may not exceed thirty days unless extended by order of the board.

(d) The provisions of this section respecting hearing upon notice of transfer is not applicable in emergency situations where the school building becomes damaged or destroyed through an unforeseeable act and which act necessitates a transfer of the school personnel because of the aforementioned condition of the building.

(e) Notwithstanding this section or any provision of this code, when actual student enrollment in a grade level or program, unforeseen before March 1 of the preceding school year, permits the assignment of fewer teachers or service personnel to or within a school under any pupil-teacher ratio, class size or caseload standard established in section eighteen-a, article five, chapter eighteen of this code or any policy of the state board, the superintendent, with board approval, may reassign the surplus

personnel to another school or to another grade level or program within the school if needed there to comply with any such pupil-teacher ratio, class size or caseload standard.

(1) Before any reassignment may occur pursuant to this subsection, notice shall be provided to the employee and the employee shall be provided an opportunity to appear before the county board to state the reasons for his or her objections, if any, prior to the board voting on the reassignment.

(2) Except as otherwise provided in subdivision (1) of this subsection, the reassignment may be made without following the notice and hearing provisions of this section, and at any time during the school year when the conditions of this subsection are met: Provided, That the reassignment may not occur after the last day of the second school month.

(3) A professional employee reassigned under this subsection shall be the least senior of the surplus professional personnel who holds certification or licensure to perform the duties at the other school or at the grade level or program within the school.

(4) A service employee reassigned under this subsection shall be the least senior of the surplus personnel who holds the same classification or multiclassification needed to perform the duties at the other school or at the grade level or program within the same school.

(5) No school employee's annual contract term, compensation or benefits shall be changed as a result of a reassignment under this subsection.

2. *LETTER TO BE SENT TO EACH SUCH EMPLOYEE WHO REQUESTS REASONS: STATEMENT OF REASONS FOR THE PROPOSED TRANSFER*

[_____ COUNTY BOARD OF EDUCATION LETTERHEAD]

_____, 20__

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

[Insert employee name and
mailing address]

Dear [insert name]:

I am responding to your request for a statement of the reasons why you are being considered for transfer for the 20__ - 20__ school year.

You are being considered for transfer because:

[Insert reasons]

West Virginia law provides that within ten days of the receipt of this statement of reasons, you may make written demand for a hearing on the proposed transfer before the Board of Education. The hearing will be held on or before _____, 20__. At the hearing, the reasons for the proposed transfer will be shown.

If you desire such a hearing, the Board of Education will conduct one, but only if you deliver a written request for a hearing to my office within ten days after the day on which you receive this notice.

Sincerely,

_____, Superintendent

County Schools

3. **LETTER TO BE SENT TO EACH SUCH EMPLOYEE WHO REQUESTS A HEARING: CONFIRMING DATE OF HEARING UPON PROPOSED TRANSFER**

_____ COUNTY BOARD OF EDUCATION LETTERHEAD]

_____, 20__

CERTIFIED MAIL - RETURN RECEIPT REQUESTED
AND HAND DELIVERY

[Insert employee name and
mailing address]

Dear [insert name]:

I have received your request for a hearing regarding the placement of your name upon the list of persons to be considered for transfer for the 20__ - 20__ school year.

Please be advised that your hearing will be held at a meeting of the Board of Education to be held on _____, 20__, beginning at __:__ .m., at the Board Office at [Street Address], [City], West Virginia.

Sincerely,

_____, Superintendent
_____, County Schools

4. **LETTER TO BE SENT TO EACH SUCH EMPLOYEE WHOSE
NAME IS ON THE FINAL TRANSFER LIST: NOTICE THAT
THE LIST WAS PRESENTED TO THE BOARD**

[_____ COUNTY BOARD OF EDUCATION LETTERHEAD]

_____, 20__

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

[Insert employee name and
mailing address]

Dear [insert name]:

Pursuant to Chapter 18A, Article 2, Section 7 of the Code of West Virginia, as amended, you are hereby notified that at a meeting of the Board of Education of the County of _____ held on _____, 20__, your name was presented to the Board by the Superintendent and you were recommended by the Superintendent to be considered for transfer and subsequent assignment for the 20__ - 20__ school year for the following reasons:

[Insert reasons]

When the final recommendation for your assignment for the 20__ - 20__ school year is made by the Superintendent and approved by the Board, you will be notified.

Sincerely,

_____, Superintendent

County Schools



SUMMARY OF “LACK OF NEED” DISMISSAL PROCEDURE

(See West Virginia Code §§ 18A-2-2 and 18A-2-6 for Details)

1. Well before the first day of March, each affected employee shall first receive written notice by certified mail, return receipt requested, advising the employee that the superintendent intends to ask the board of education, before the first day of March, to terminate the employee's contract at the close of the school year. The notice must state the reasons for the superintendent's proposal and extend to the employee an opportunity to be heard at a meeting of the board prior to the board's action on the recommendation.

2. Before March 1, the board of education must conduct a dismissal hearing for each service employee who takes advantage of the opportunity to be heard.

3. On or before March 1, the board of education must conduct a dismissal hearing for each professional employee who takes advantage of the opportunity to be heard.

4. A service employee's contract may thereafter be terminated under this procedure only by a majority vote of the full membership of the board before March 1.

5. A professional employee's contract may thereafter be terminated under this procedure only by a majority vote of the full membership of the board on or before March 1.



**SUGGESTED FORMS FOR
TERMINATING EMPLOYMENT CONTRACTS
(OTHER THAN FOR CAUSE)**

- 1A. LETTER TO BE SENT TO EACH CONTINUING CONTRACT PROFESSIONAL EMPLOYEE WHO IS SUBJECT TO TERMINATION: **NOTICE OF PROPOSED TERMINATION OF CONTRACT** (*THIS LETTER MAY ADVISEDLY ALSO BE SENT TO EACH PROBATIONARY PROFESSIONAL EMPLOYEE WHOSE RELEASE WILL BE RECOMMENDED DUE TO A REDUCTION IN FORCE, BUT EACH SUCH EMPLOYEE SHOULD ALSO BE PROCESSED AGAIN LATER UNDER THE PROCEDURE FOR NON-RENEWAL OF PROBATIONARY CONTRACT*)
- 1B. LETTER TO BE SENT TO EACH CONTINUING CONTRACT SERVICE EMPLOYEE WHO IS SUBJECT TO TERMINATION: **NOTICE OF PROPOSED TERMINATION OF CONTRACT** (*THIS LETTER MAY ADVISEDLY ALSO BE SENT TO EACH PROBATIONARY SERVICE EMPLOYEE WHOSE RELEASE WILL BE RECOMMENDED DUE TO A REDUCTION IN FORCE, BUT EACH SUCH EMPLOYEE SHOULD ALSO BE PROCESSED AGAIN LATER UNDER THE PROCEDURE FOR NON-RENEWAL OF PROBATIONARY CONTRACT*)
2. LETTER TO BE SENT TO EACH EMPLOYEE WHO REQUESTS A PRE-TERMINATION HEARING: **CONFIRMING DATE OF HEARING UPON PROPOSED RELEASE**
3. LETTER TO BE SENT TO EACH TERMINATED EMPLOYEE: **CONFIRMING THAT CONTRACT HAS BEEN TERMINATED**

**1A. LETTER TO BE SENT TO EACH CONTINUING CONTRACT
PROFESSIONAL EMPLOYEE WHO IS SUBJECT TO
TERMINATION: NOTICE OF PROPOSED TERMINATION
OF CONTRACT**

[_____ COUNTY BOARD OF EDUCATION LETTERHEAD]

_____, 20__

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

[Insert employee name and
mailing address]

Dear [insert name]:

Pursuant to Chapter 18A, Article 2, Section 2 of the Code of West Virginia, as amended, you are hereby notified that at a meeting of the Board of Education of the County of _____ to be held at the Board Office at [Street Address], [City], West Virginia, at __:__.m. on _____, 20__, I will recommend to the Board that your contract of employment be terminated at the close of the 20__ - 20__ school year, for the following reasons:

[Insert reasons]

Chapter 18A, Article 2, Section 2 of the Code of West Virginia, as amended, provides that you shall be extended the opportunity to be heard at a meeting of the Board prior to the Board's action on my recommendation. If you wish to be heard by the Board, please deliver a written request for a hearing to my office no later than __:__.m. on _____, 20__, in which case a hearing will be scheduled for _____.

Sincerely,

_____, Superintendent
_____, County Schools

Enclosure: § 18A-2-2

§ 18A-2-2. Employment of teachers; contracts; continuing contract status; how terminated; dismissal for lack of need; released time; failure of teacher to perform contract or violation thereof; written notice bonus for teachers and professional personnel.

(a) Before entering upon their duties, all teachers shall execute a contract with their county boards, which shall state the salary to be paid and shall be in the form prescribed by the state superintendent. Each contract shall be signed by the teacher and by the president and secretary of the county board and shall be filed, together with the certificate of the teacher, by the secretary of the office of the county board: *Provided*, That when necessary to facilitate the employment of employable professional personnel and prospective and recent graduates of teacher education programs who have not yet attained certification, the contract may be signed upon the condition that the certificate is issued to the employee prior to the beginning of the employment term in which the employee enters upon his or her duties.

(b) Each teacher's contract, under this section, shall be designated as a probationary or continuing contract. A probationary teacher's contract shall be for a term of not less than one nor more than three years, one of which shall be for completion of a beginning teacher internship pursuant to the provisions of section two-b, article three of this chapter, if applicable. If, after three years of such employment, the teacher who holds a professional certificate, based on at least a bachelor's degree, has met the qualifications for a bachelor's degree and the county board enter into a new contract of employment, it shall be a continuing contract, subject to the following:

(1) Any teacher holding a valid certificate with less than a bachelor's degree who is employed in a county beyond the three-year probationary period shall upon qualifying for the professional certificate based upon a bachelor's degree, if reemployed, be granted continuing contract status; and

(2) A teacher holding continuing contract status with one county shall be granted continuing contract status with any other county upon completion of one year of acceptable employment if the employment is during the next succeeding school year or immediately following an approved leave of absence extending no more than one year.

(c) The continuing contract of any teacher shall remain in full force and effect except as modified by mutual consent of the school board and the teacher, unless and until terminated, subject to the following:

(1) A continuing contract may not be terminated except:

(A) By a majority vote of the full membership of the county board on or before March 1 of the then current year, after written notice, served upon the teacher, return receipt requested, stating cause or causes and an opportunity to be heard at a meeting of the board prior to the board's action on the termination issue; or

(B) By written resignation of the teacher on or before March 1 to initiate termination of a continuing contract;

(2) The termination shall take effect at the close of the school year in which the contract is terminated;

(3) The contract may be terminated at any time by mutual consent of the school board and the teacher;

(4) This section does not affect the powers of the school board to suspend or dismiss a principal or teacher pursuant to section eight of this article;

(5) A continuing contract for any teacher holding a certificate valid for more than one year and in full force and effect during the school year 1984-1985 shall remain in full force and effect;

(6) A continuing contract does not operate to prevent a teacher's dismissal based upon the lack of need for the teacher's services pursuant to the provisions of law relating to the allocation to teachers and pupil-teacher ratios. The written notification of teachers being considered for dismissal for lack of need shall be limited to only those teachers whose consideration for dismissal is based upon known or expected circumstances which will require dismissal for lack of need. An employee who was not provided notice and an opportunity for a hearing pursuant to this subsection may not be included on the list. In case of dismissal for lack of need, a dismissed teacher shall be placed upon a preferred list in the order of their length of service with that board. No teacher may be employed by the board until each qualified teacher upon the preferred list, in order, has been offered the opportunity for reemployment in a position for which he or she is qualified, not including a teacher who has accepted a teaching position elsewhere. The reemployment shall be upon a teacher's preexisting continuing contract and has the same effect as though the contract had been suspended during the time the teacher was not employed.

(d) In the assignment of position or duties of a teacher under a continuing contract, the board may provide for released time of a teacher for any special professional or governmental assignment without jeopardizing the contractual rights of the teacher or any other rights, privileges or benefits under the provisions of this chapter. Released time shall be provided for any professional educator while serving as a member of the Legislature during any duly constituted session of that body and its interim and statutory committees and commissions without jeopardizing his or her contractual rights or any other rights, privileges, benefits or accrual of experience for placement on the state minimum salary schedule in the following school year under the provisions of this chapter, board policy and law.

(e) Any teacher who fails to fulfill his or her contract with the board, unless prevented from doing so by personal illness or other just cause or unless released from his or her contract by the board, or who violates any lawful provision of the contract, is disqualified to teach in any other public school in the state for a period of the next ensuing school year and the State Department of Education or board may hold all papers and credentials of the teacher on file for a period of one year for the violation: *Provided*, That marriage of a teacher is not considered a failure to fulfill, or violation of, the contract.

(f) Any classroom teacher, as defined in section one, article one of this chapter, who desires to resign employment with a county board or request a leave of absence, the

resignation or leave of absence to become effective on or before July 15 of the same year and after completion of the employment term, may do so at any time during the school year by written notification of the resignation or leave of absence and any notification received by a county board shall automatically extend the teacher's public employee insurance coverage until August 31 of the same year.

(g) (1) A classroom teacher who gives written notice to the county board on or before January 15 of the school year of his or her retirement from employment with the board at the conclusion of the school year shall be paid \$500 from the Early Notification of Retirement line item established for the Department of Education for this purpose, subject to appropriation by the Legislature. If the appropriations to the Department of Education for this purpose are insufficient to compensate all applicable teachers, the Department of Education shall request a supplemental appropriation in an amount sufficient to compensate all such teachers. Additionally, if funds are still insufficient to compensate all applicable teachers, the priority of payment is for teachers who give written notice the earliest. This payment shall not be counted as part of the final average salary for the purpose of calculating retirement.

(2) The position of a classroom teacher providing written notice of retirement pursuant to this subsection may be considered vacant and the county board may immediately post the position as an opening to be filled at the conclusion of the school year. If a teacher has been hired to fill the position of a retiring classroom teacher prior to the start of the next school year, the retiring classroom teacher is disqualified from continuing his or her employment in that position. However, the retiring classroom teacher may be permitted to continue his or her employment in that position and forfeit the early retirement notification payment if, after giving notice of retirement in accordance with this subsection, he or she becomes subject to a significant unforeseen financial hardship, including a hardship caused by the death or illness of an immediate family member or loss of employment of a spouse. Other significant unforeseen financial hardships shall be determined by the county superintendent on a case-by-case basis. This subsection does not prohibit a county school board from eliminating the position of a retiring classroom teacher.

***1B. LETTER TO BE SENT TO EACH CONTINUING CONTRACT SERVICE
EMPLOYEE WHO IS SUBJECT TO TERMINATION: NOTICE OF PROPOSED
TERMINATION OF CONTRACT***

[_____ COUNTY BOARD OF EDUCATION LETTERHEAD]

_____, 20__

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

[Insert employee name and
mailing address]

Dear [insert name]:

Pursuant to Chapter 18A, Article 2, Section 6 of the Code of West Virginia, as amended, you are hereby notified that at a meeting of the Board of Education of the County of _____ to be held at the Board Office at [Street Address], [City], West Virginia, at __:__.m. on _____, 20__, I will recommend to the Board that your contract of employment be terminated at the close of the 20__ - 20__ school year, and that your name be placed upon a preferred recall list, for the following reasons:

[Insert reasons]

Chapter 18A, Article 2, Section 6 of the Code of West Virginia, as amended, provides that you shall be extended the opportunity to be heard at a meeting of the Board prior to the Board's action on my recommendation. If you wish to be heard by the Board, please deliver a written request for a hearing to my office no later than __:__. m. on _____, 20__, in which case a hearing will be scheduled for _____.

Sincerely,

_____, Superintendent

County Schools

Enclosure: § 18A-2-6

§ 18A-2-6. Continuing contract status for service personnel; termination.

After three years of acceptable employment, each service personnel employee who enters into a new contract of employment with the board shall be granted continuing contract status: *Provided*, That a service personnel employee holding continuing contract status with one county shall be granted continuing contract status with any other county upon completion of one year of acceptable employment if such employment is during the next succeeding school year or immediately following an approved leave of absence extending no more than one year. The continuing contract of any such employee shall remain in full force and effect except as modified by mutual consent of the school board and the employee, unless and until terminated with written notice, stating cause or causes, to the employee, by a majority vote of the full membership of the board before March 1 of the then current year, or by written resignation of the employee on or before that date. The affected employee has the right of a hearing before the board, if requested, before final action is taken by the board upon the termination of such employment.

Those employees who have completed three years of acceptable employment as of the effective date of this legislation shall be granted continuing contract status.

2. LETTER TO BE SENT TO EACH SUCH EMPLOYEE WHO REQUESTS A PRE-TERMINATION HEARING: CONFIRMING DATE OF HEARING UPON PROPOSED RELEASE

[_____ COUNTY BOARD OF EDUCATION LETTERHEAD]

_____, 20__

CERTIFIED MAIL - RETURN RECEIPT REQUESTED
AND HAND DELIVERY

[Insert employee name and
mailing address]

Dear [insert name]:

I have received your request for a hearing regarding the recommendation that your contract of employment be terminated at the end of the 20__ - 20__ school year.

Please be advised that your hearing will be held at a meeting of the Board of Education to be held on _____, 20__, beginning at __:__ .m., at the Board Office at [Street Address], [City], West Virginia.

Sincerely,

_____, Superintendent

County Schools

3. **LETTER TO BE SENT TO EACH TERMINATED EMPLOYEE:
CONFIRMING THAT CONTRACT HAS BEEN
TERMINATED**

[_____ COUNTY BOARD OF EDUCATION LETTERHEAD]

_____, 20__

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

[Insert employee name and
mailing address]

Dear [insert name]:

Please be advised that the Board of Education of the County of _____, meeting on _____, 20__, voted to terminate your employment contract at the end of the 20__ - 20__ school year.

Your name will be placed on a preferred recall list in accordance with West Virginia law.

Sincerely,

_____, Superintendent

County Schools



**SUMMARY OF PROCEDURE FOR THE
NON-REHIRING OF PROBATIONARY PERSONNEL
(See West Virginia Code § 18A-2-8a)**

1. At a meeting of the board on or before April 15, the superintendent shall provide in writing to the board a list of all probationary employees that he recommends to be rehired for the next ensuing school year. The board shall act upon the superintendent's recommendations at that meeting.

2. Any probationary employee who is not rehired by the board at that meeting shall be notified in writing, by certified mail, return receipt requested, to such person's last known address within ten days following the board meeting, of their not having been rehired or not having been rehired or not having been recommended for rehiring.

3. Within ten calendar days after receiving the written notice, any probationary employee may request a statement of the reasons for not having been rehired and may request a hearing before the board of education. Any such hearing shall be held at the next regularly scheduled board of education meeting or at a special meeting of the board called within 30 calendar days of the request for the hearing. At the hearing, the reasons for the non-rehiring must be shown.



SUGGESTED FORMS FOR
NON-RENEWING PROBATIONARY CONTRACTS

1. LETTER TO BE SENT TO EACH PROBATIONARY EMPLOYEE WHO IS TO BE NON-RENEWED: **NOTICE OF NON-RENEWAL RECOMMENDATION**
2. LETTER TO BE SENT TO EACH EMPLOYEE WHO REQUESTS REASONS FOR NON-RENEWAL: **STATEMENT OF REASONS FOR NON-RENEWAL**
3. LETTER TO BE SENT TO EACH EMPLOYEE WHO REQUESTS A NON-RENEWAL HEARING: **CONFIRMING DATE OF HEARING UPON NON-RENEWAL OF PROBATIONARY CONTRACT**
4. POST-HEARING LETTER TO BE SENT TO PROBATIONARY EMPLOYEES WHO REQUEST AND RECEIVE A HEARING; **BOARD VOTE TO RENEW OR NOT TO RENEW CONTRACT**

1. **LETTER TO BE SENT TO EACH PROBATIONARY EMPLOYEE
WHO IS TO BE NON-RENEWED: NOTICE OF NON-
RENEWAL RECOMMENDATION**

[_____ COUNTY BOARD OF EDUCATION LETTERHEAD]

_____, 20__

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

[Insert employee name and
mailing address]

Dear [insert name]:

Please be advised that, at a meeting of the Board of Education of the County of _____ held on _____, 20__, I provided in writing to the Board a list of all probationary employees that I recommend to be rehired for the 20__ - 20__ school year. Your name was not on the list.

This notice is being sent to you as required by Chapter 18A, Article 2, Section 8a of the Code of West Virginia, as amended.

Sincerely,

_____, Superintendent

County Schools

Enclosure: § 18A-2-8a



§ 18A-2-8a. Notice to probationary personnel of rehiring or nonrehiring; hearing.

The superintendent at a meeting of the board on or before April 15 of each year shall provide in writing to the board a list of all probationary teachers that he or she recommends to be rehired for the next ensuing school year. The board shall act upon the superintendent's recommendations at that meeting in accordance with section one of this article. The board at this same meeting shall also act upon the retention of other probationary employees as provided in sections two and five of this article. Any such probationary teacher or other probationary employee who is not rehired by the board at that meeting shall be notified in writing, by certified mail, return receipt requested, to such persons' last known addresses within ten days following said board meeting, of their not having been rehired or not having been recommended for rehiring.

Any probationary teacher who receives notice that he or she has not been recommended for rehiring or other probationary employee who has not been reemployed may within ten days after receiving the written notice request a statement of the reasons for not having been rehired and may request a hearing before the board. The hearing shall be held at the next regularly scheduled board of education meeting or a special meeting of the board called within thirty days of the request for hearing. At the hearing, the reasons for the nonrehiring must be shown.



2. LETTER TO BE SENT TO EACH EMPLOYEE WHO REQUESTS REASONS FOR NON-RENEWAL: STATEMENT OF REASONS FOR NON-RENEWAL

[_____ COUNTY BOARD OF EDUCATION LETTERHEAD]

_____, 20__

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

[Insert employee name and
mailing address]

Dear [insert name]:

I am responding to your request for a statement of the reasons why you are not being rehired for the school year 20__ - 20__.

You are not being rehired for the school year 20__ - 20__ because:

[Insert reasons]

West Virginia law provides that you may request a hearing before the Board and that the hearing shall be held at the next regularly scheduled board of education meeting or a special meeting of the Board called within thirty days of the request for a hearing. If you desire such a hearing, the Board of Education will conduct one, but only if you deliver a written request for a hearing to my office in sufficient time for the Board to accommodate the request.

Sincerely,

_____, Superintendent

County Schools



3. *LETTER TO BE SENT TO EACH EMPLOYEE WHO REQUESTS
A NON-RENEWAL HEARING: CONFIRMING DATE OF
HEARING UPON NON-RENEWAL OF PROBATIONARY
CONTRACT*

[_____ COUNTY BOARD OF EDUCATION LETTERHEAD]

_____, 20__

CERTIFIED MAIL - RETURN RECEIPT REQUESTED
AND HAND DELIVERY

[Insert employee name and
mailing address]

Dear [insert name]:

I have received your request for a hearing regarding the non-renewal of your probationary contract of employment for the 20__ - 20__ school year.

Please be advised that your hearing will be held at a meeting of the Board of Education to be held on _____, 20__, beginning at __:___.m., at the Board Office at [Street Address], [City], West Virginia.

Sincerely,

_____, Superintendent
_____, County Schools



4. *POST-HEARING LETTER TO BE SENT TO PROBATIONARY
EMPLOYEES WHO REQUEST AND RECEIVE A HEARING:
BOARD VOTE TO RENEW OR NOT TO RENEW CONTRACT*

_____ COUNTY BOARD OF EDUCATION LETTERHEAD]

_____, 20__

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

[Insert employee name and
mailing address]

Dear [insert name]:

Please be advised that following your hearing on
_____, 20__, the Board of Education of the County of
_____ (choose one) [voted to renew] [voted not to renew] your
probationary contract for the 20__ - 20__ school year.

Sincerely,

_____, Superintendent

County Schools



BASIC OUTLINE OF A PERSONNEL HEARING

- A. Chairperson calls meeting to order and tests recording equipment.
- B. A decision is made on whether the hearing will be in open or closed session.
- C. Chairperson summarizes procedure to be followed. The board resolves any procedural problems and any objections to proceeding with the hearing. Upon request, witnesses (other than the parties) may be sequestered.
- D. The administration's representative is given an opportunity to make an opening statement.
- E. The employee's representative is given an opportunity to make an opening statement.
- F. The administration puts on its evidence.
 - 1. The administration's first witness is sworn.
 - 2. The administration's representative questions the witness. The administration may introduce documents into evidence through the witness.
 - 3. The employee's representative cross-examines the witness.
 - 4. The administration's representative conducts redirect examination of the witness.
 - 5. The employee's representative is given an opportunity to recross-examine the witness.
 - 6. Board members are given an opportunity to ask questions.
 - 7. The administration's representative is given an opportunity to ask any additional questions of the witness occasioned by board member questions.
 - 8. The employee's representative is given an opportunity to ask any additional questions of the witness occasioned by board member questions.
 - 9. The witness is excused.
 - 10. The administration's next witness is called and the process repeats.
 - 11. The administration's representative rests its case.



- G. The employee's representative puts on his or her evidence.
1. The employee's first witness is sworn.
 2. The employee's representative questions the witness. The employee may introduce documents into evidence through the witness.
 3. The administration's representative cross-examines the witness.
 4. The employee's representative conducts redirect examination of the witness.
 5. The administration's representative is given an opportunity to recross-examine the witness.
 6. Board members are given an opportunity to ask questions.
 7. The employee's representative is given an opportunity to ask any additional questions of the witness occasioned by board member questions.
 8. The administration's representative is given an opportunity to ask any additional questions of the witness occasioned by board member questions.
 9. The witness is excused.
 10. The employee's next witness is called and the process repeats.
 11. The employee's representative rests his or her case.
- H. The administration's representative is given an opportunity to put on rebuttal evidence.
- I. The employee's representative is given the opportunity to put on any evidence in response to the administration's rebuttal evidence.
- J. The administration's representative is given the opportunity to make a closing statement.
- K. The employee's representative is given the opportunity to make a closing statement.
- L. The board withdraws to deliberate privately.
- M. The board comes back into open session. It either then or later makes a decision (depending upon the nature of the hearing and pertinent statutory deadlines).

NOTE: In grievance hearings, the order of presentations is reversed, with the employee going first and the administration last. The board must also issue written findings of fact and conclusions of law in support of its decision on a grievance.



PROCEDURE TO BE FOLLOWED BY A COUNTY BOARD OF EDUCATION
TO PROPERLY CONVENE AN EXECUTIVE SESSION
TO CONDUCT A PERSONNEL HEARING

BOARD MEMBER #1: "I move that we go into executive session to conduct a *(termination/transfer/nonrenewal)* hearing requested by an employee."

BOARD MEMBER #2: "I second the motion."

BOARD PRESIDENT: "It has been moved and seconded that we go into executive session to conduct a *(termination/transfer/nonrenewal)* hearing requested by an employee. Is there any discussion?"

BOARD PRESIDENT (following any discussion): "Are you ready for the question?" [*Pause.*]
"The question is on the motion that we go into executive session to conduct a *(termination/transfer/nonrenewal)* hearing requested by an employee. All in favor, say yes. All opposed, say no."

(If the motion is adopted by a majority affirmative vote of the members present) BOARD PRESIDENT (in a voice audible to all in attendance at the meeting): "The motion is adopted. We will now go into executive session to conduct a *(termination/transfer/nonrenewal)* hearing requested by an employee."

(If the motion is not adopted by a majority affirmative vote of the members present) BOARD PRESIDENT: "The motion fails."

**TITLE 126
LEGISLATIVE RULE
BOARD OF EDUCATION**

SERIES 126

Procedures for Designated Hiring and Transfer of School Personnel (5000)

§126-126-1. General.

1.1. Scope. - This legislative rule sets forth general hiring criteria for classroom teachers, establishes processes that a faculty senate may adopt when making hiring recommendations for classroom teachers, clarifies certain transfer procedures, and outlines the roles of the principal, county superintendent, and county board of education in the limited hiring and transfer procedures set forth herein.

1.2. Authority. - W. Va. Constitution, Article XII, §2 and W. Va. Code §§18-2-5, 18-5A-5, 18A-2-1, 18A-2-7, and 18A-4-7a.

1.3. Filing Date. - August 16, 2013.

1.4. Effective Date. - September 16, 2013.

1.5. Repeal of Former Rule. - This legislative rule amends W. Va. 126CSR126, West Virginia Board of Education Policy 5000, Procedures for Designated Hiring and Transfer of School Personnel, filed July 17, 2013, and effective July 17, 2013.

§126-126-2. Purpose.

2.1 The purpose of this rule is to set forth general hiring criteria for classroom teachers, establish processes that a faculty senate may adopt when making hiring recommendations for classroom teachers, clarify certain transfer procedures, and outline the roles of the principal, county superintendent, and county board of education in the limited hiring and transfer procedures set forth herein. Utilization of these processes and procedures will provide teachers and principals with the ability to have a significant voice in determining the makeup of their school communities and will provide counties with flexibility in staffing schools to meet changing needs and enrollment.

§126-126-3. Application.

3.1. These regulations apply to the filling of vacancies for classroom teachers and the transfers of employees by county boards of education in the limited instances set forth herein and is not a comprehensive hiring manual for all public school employees.

§126-126-4. Definitions.

4.1. County board of education - Pursuant to W. Va. Code §18-5-1, the body charged with the supervision and control of a county board school district, which is composed of five members, nominated and elected by the voters of the respective county.

4.2. Classroom teacher - A professional educator who has a direct instructional or counseling relationship with students and who spends the majority of his or her time in this capacity.

4.3. Classroom teaching position - A position posted pursuant to W. Va. Code §18A-4-7a to fill a vacancy for a professional educator who has a direct instructional or counseling relationship with students

and who spends the majority of his or her time in this capacity.

4.4. Faculty senate - As provided by W. Va. Code §18-5A-5, a faculty senate consists of all permanent, full-time professional educators employed at the school.

4.5. Permanently employed instructional personnel - Professional educators who are employed by a county board of education under either a probationary or continuing contract of employment and who, as part of their employment, have instructional duties.

4.6. Principal - A professional educator employed pursuant to W. Va. Code §18A-2-9 who has administrative and instructional supervisory responsibility for the planning, management, operation and evaluation of the total educational program of the school or schools to which he or she is assigned.

4.7. Service employee - Service person, service personnel, or service employee means any nonteaching school employee who is not included in the meaning of teacher as defined W. Va. Code §18-1-1 and who serves the school or schools as a whole in a nonprofessional capacity including such areas as secretarial, custodial, maintenance, transportation, school lunch and aides.

§126-126-5. Roles and Responsibilities.

5.1. Among the other roles and responsibilities assigned to the following individuals and entities by operation of statute or West Virginia Board of Education [WVBE] policy, for purposes of this policy, the following individuals and entities shall exercise the roles and responsibilities set forth below.

5.1.a. West Virginia Department of Education [WVDE] - The WVDE shall designate or approve an interview training tool(s) which shall be completed by a faculty senate member and principal prior to his or her participation in an interview. The targeted duration of the training is one hour.

5.1.b. County Board of Education - The county board of education shall make decisions affecting the filling of vacancies in professional positions of employment other than the county superintendent on the basis of the applicant with the highest qualifications as set forth in statute and in this policy.

5.1.c. Superintendent - The superintendent shall receive hiring recommendations for classroom teaching positions from principals and faculty senates and shall nominate and recommend applicants to the county board of education. The superintendent may, at his or her discretion, conduct interviews of applicants for vacancies in addition to any interview conducted by the principal and faculty senate hiring committee, single designee, or faculty senate chair.

5.1.d. Principal - The principal shall submit recommendations to the superintendent regarding the appointment, assignment, promotion, transfer and dismissal of all personnel assigned to the school or schools under said principal's control. Such recommendation shall be submitted in writing as prescribed by the superintendent. Additionally, the principal shall receive hiring recommendations from the faculty senate at his or her school as provided in this policy and shall submit those recommendations in writing as prescribed by the superintendent. In the event that a principal is unable to submit hiring recommendations or receive hiring recommendations from the faculty senate as set forth in this policy due to illness or absence, the assistant principal shall submit hiring recommendations. If there is no assistant principal, the superintendent shall assign a designee to carry out the role of the principal. In the event that a principal is unable to submit hiring recommendations or receive hiring recommendations from the faculty senate due to a conflict as set forth in W. Va. Code §18A-2-1(a)(2), the superintendent shall assign a designee from the central office to carry out the role of the principal. Whenever possible, the designee from the central office shall be a coordinator in the same programmatic level as the position to be filled. If it is not possible or practical to designate a coordinator from the same programmatic level, the

recommendation of the designee shall not be invalidated or be the basis for objection by any prospective employee or any other person. If a principal or his or her designated replacement does not participate in the hiring process as set forth in this policy for a particular vacancy, the right of the principal to submit recommendations regarding employment is forfeited for that vacancy. However, if a principal or his or her designated replacement does not participate in the hiring process as set forth in this policy, the principal or his or her designee must still receive any hiring recommendation made by the faculty senate and transmit that recommendation to the superintendent. A forfeiture of the principal's right to submit a hiring recommendation shall not be the basis for objection by any prospective employee or any other person.

5.1.e. Faculty Senates - Faculty senates may choose one of the options set forth in this policy as a mechanism by which to make hiring recommendations to the school principal. If a faculty senate does not participate in the hiring process as set forth in this policy for a particular vacancy, the right of the faculty senate to submit recommendations regarding employment is forfeited for that vacancy. A forfeiture of the faculty senate's right to submit a hiring recommendation shall not be the basis for objection by any prospective employee or any other person.

§126-126-6. Criteria for Hiring Classroom Teachers.

6.1. A county board of education shall make decisions affecting the filling of vacancies for classroom teachers on the basis of the applicant with the highest qualifications.

6.2. In judging qualifications for the filling of vacancies for classroom teachers, consideration shall be given to each of the following:

6.2.a. Appropriate certification, licensure or both;

6.2.b. Amount of experience relevant to the position or, in the case of a classroom teaching position, the amount of teaching experience in the required certification area;

6.2.c. The amount of course work, degree level or both in the relevant field and degree level generally;

6.2.d. Academic achievement;

6.2.e. In the case of a classroom teaching position or the position of principal, certification by the National Board for Professional Teaching Standards;

6.2.f. Specialized training relevant to the performance of the duties of the job;

6.2.g. Past performance evaluations conducted pursuant to W. Va. Code §§18A-2-12 and 18A-3C-2 or, in the case of a classroom teacher, past evaluations of the applicant's performance in the teaching profession as a certified educator;

6.2.h. Seniority;

6.2.i. Other measures or indicators upon which the relative qualifications of the applicant may fairly be judged;

6.2.j. The recommendation, if any, of the principal of the school at which the applicant will be performing a majority of his or her duties; and

6.2.k. The recommendation, if any, resulting from the process established by the faculty senate of the school at which the employee will be performing a majority of his or her duties.

6.3. If one or more permanently employed instructional personnel apply for a classroom teaching position and meet the standards set forth in the job posting, each criterion under section 6.2 shall be given equal weight except that the criterion in subdivisions 6.2.j and 6.2.k shall each be double weighted. This shall apply when the faculty senate and the principal do not agree on a recommendation, when either the faculty senate or principal forfeit or cannot make a recommendation, or when the superintendent does not concur with the recommendation of the principal and the faculty senate.

6.4. For a classroom teaching position, if the recommendations resulting from the operations of sections 6.2.j and 6.2.k are for the same applicant, and the superintendent concurs with that recommendation, then the other provisions of sections 6.2 and 6.3 do not apply and the county board shall appoint that applicant notwithstanding any other provision of this policy to the contrary.

6.5. Recommendations made pursuant to sections 6.2.j and 6.2.k shall be made based on a determination as to which of the applicants is the highest qualified for the position. When making recommendations, principals and faculty senates shall consider each criterion listed in sections 6.2.a. through 6.2.i. Neither principals nor faculty senates are required to assign any amount of weight to any factor. Principals and faculty senate chairs or single designees shall complete the applicable hiring recommendation forms (See Appendices A and B) and shall submit a completed form as documentation of the recommendation. Other than the recommendation form, no other matrix or documentation of the selection shall be required.

6.6. Any professional educator who is employed within the public school system of this state shall hold a valid teaching certificate licensing him or her to teach in the specializations and grade levels shown on the certificate for the period of his or her employment.

6.7. As provided in W. Va. Code §18-5A-5(b)(2), the processes and procedures set forth in this policy are designed to be effective and consistent among schools and counties and are designed to avoid litigation or grievance. To that end, this policy is designed to allow teachers to be meaningfully involved in the hiring recommendation process in an open and honest manner without fear of reprisal, retaliation or coercion and to minimize lost instructional time and classroom disruption.

6.8. These criteria shall be utilized in making hiring decisions for any classroom teacher hired on or after July 1, 2013.

§126-126-7. Faculty Senate Recommendation Process.

7.1. A faculty senate may establish a process for members to interview or otherwise obtain information regarding applicants for classroom teaching vacancies that will enable the faculty senate to submit recommendations regarding employment to the principal. A faculty senate wishing to submit hiring recommendations to the principal shall utilize one of the processes set forth below. These processes and procedures are designed to be effective and consistent among schools and counties and are designed to avoid litigation or grievance. At the conclusion of each school semester a faculty senate may vote to change its adopted process for the next ensuing semester. Additionally, if a faculty senate desires to make hiring recommendations over the summer break, it may use the process then in place, if any, or it may vote to adopt a different process to be used only during the summer break. Nothing herein shall be construed to require a faculty senate to participate in the recommendation process, however, failure to participate as provided below will cause the right of the faculty senate to make employment recommendations to be forfeited.

7.1.a. Hiring Committee

7.1.a.1. The majority of the faculty senate may elect a committee, including a committee chair, which will be responsible for making hiring recommendations regarding classroom teachers. Committees and chairs shall be elected by the faculty senate according to one of the following models:

7.1.a.1.A. Three individuals, which shall include a chair, elected by the majority of the members of the faculty senate; or

7.1.a.1.B. Not less than seven nor more than eleven individuals, which shall include a chair, elected by a majority of the faculty senate.

7.1.a.1.B.1. When electing the committee members the faculty senate should give consideration to selecting individuals who represent the spectrum of curriculum and content areas taught at the school, provided that the failure of the faculty senate to select individuals who represent the spectrum of curriculum and content areas at the school shall not invalidate their election or any subsequent recommendation they render.

7.1.a.1.B.2. When utilizing this option, the committee chair shall select three members from the larger committee to form a panel which will make a recommendation for each classroom teacher to be hired. The selection of the three members shall be based, as far as is practical, on the subject matter to be taught by the teacher to be hired as determined on a case by case basis. The failure of the committee chair to select three members based on the subject matter to be taught by the new teacher will not invalidate the faculty senate's selection or be the basis for objection by any prospective employee or any other person. The committee chair shall be responsible for ensuring that the hiring recommendation made by the three person panel is delivered to the principal in a timely manner.

7.1.b. Single Designee

7.1.b.1. The majority of the faculty senate may elect a single designee who will be responsible for making hiring recommendations regarding classroom teachers. In choosing the single designee model, the faculty senate shall select one of the following options:

7.1.b.1.A. The single designee shall have the discretion to ask up to two other faculty senate members to assist him or her in reviewing relevant application materials or interviewing applicants at his or her discretion. The selection of assistants by the single designee shall be based, as far as is practical, on the subject matter to be taught by the teacher to be hired as determined on a case by case basis. The additional faculty senate members must have completed the WVDE designated or approved interview training prior to assisting the single designee. Failure of the single designee to select additional faculty senate members to assist him or her in rendering a recommendation will not invalidate the designee's recommendation or be the basis for objection by any prospective employee or any other person. The single designee shall be responsible for ensuring that the recommendation is delivered to the principal in a timely manner.

7.1.b.1.B. The single designee shall ask up to two other faculty senate members to assist in reviewing relevant application materials or interviewing applicants at the designee's discretion. The selection of assistants by the single designee shall be based, as far as is practical, on the subject matter to be taught by the teacher to be hired as determined on a case by case basis. The additional faculty senate members must have completed the WVDE designated or approved interview training prior to assisting the single designee. Failure of the single designee to select additional faculty senate members to assist him or her in rendering a recommendation shall invalidate the designee's recommendation. The single designee shall be responsible for ensuring that the recommendation is delivered to the principal in a timely manner.

7.2. For purposes of considering and making hiring recommendations, the following rules shall apply to faculty senates:

7.2.a. The principal will notify the chair of the hiring committee or the single designee in writing when the list of candidates meeting the minimum qualifications listed in the job posting for a classroom teaching position is final and will provide the chair of the hiring committee or the single designee with a list of the candidates and relevant application materials. A faculty senate may, but is not required, to adopt a policy permitting the superintendent or his or her designee to narrow the pool of qualified applicants to no fewer than three qualified applicants, unless fewer than three qualified individuals apply, who appear to be the most qualified based on an examination of the factors set forth in W. Va. Code §18A-4-7a(b)(1) through (9). Within twenty-four hours of such notice, the hiring committee chair or single designee will notify the principal in writing if an interview of candidates is requested. For purposes of this section, electronic mail communications shall satisfy the requirement of providing written notification. Further, for purposes of this section and this policy, interviews shall be permitted to occur in-person or via telephone, teleconference or other virtual means.

7.2.b. A faculty senate hiring committee or single designee may consider and make recommendations after reviewing the application materials provided without participation in an interview. All application materials shall be maintained confidentially by all parties and shall not be disclosed or discussed in any manner with individuals who are not part of the hiring/recommendation process for an individual teacher. All application materials shall be returned to the principal by the hiring committee chair or single designee at the time the recommendation is delivered to the principal.

7.2.c. If a request for an interview is made, then a faculty senate hiring committee or single designee may consider and make recommendations after participating in interviews of candidates for classroom teaching positions, subject to the following:

7.2.c.1. Prior to participating in interviews or otherwise participating in the recommendation process, a faculty senate member must complete interview training as designated or approved by the West Virginia Department of Education. Once a faculty senate member has completed the designated interview training, additional training shall not be required unless the WVDE or superintendent determines that additional training shall occur.

7.2.c.2. The principal will notify the hiring committee members or single designee in writing of the time and place that the interview will be conducted. For purposes of this section, electronic mail communications shall satisfy the requirement of providing written notification. In determining when and where interviews will occur, consideration shall be given to accommodating the time and travel needs of the applicants and the faculty senate members. Interviews shall be scheduled in such a way that faculty senate members can participate while also minimizing classroom disruption to the greatest extent possible. Whenever possible, interviews shall be conducted at the school where the applicant will spend the majority of his or her instructional time. However, the superintendent or his or her designee shall have the authority to conduct interviews at alternate locations if necessary.

7.2.c.3. Interviews of applicants will be conducted jointly with the principal, however, hiring committee members or single designees shall have the authority to deliberate and make their hiring selections separate and apart from the principal.

7.2.c.4. In asking questions during an interview, each applicant shall be asked an identical set of initial questions. The questions to be asked may be determined jointly by the principal and the hiring committee or single designee or, in the alternative, the principal and the hiring committee or single designee may prepare questions independently of one another. Provided, that nothing herein shall

prohibit the asking of unique follow-up questions to each applicant based on his or her responses to the uniform set of initial questions. The asking of unique follow-up questions to each applicant based on his or her responses to the uniform set of initial questions will not invalidate the recommendation or selection of the applicant by either the superintendent, principal, hiring committee, single designee, or faculty senate chair and shall not be the basis for objection by any prospective employee or any other person so long as those questions do not violate federal or state employment laws.

7.2.d. A hiring committee chair or a single designee must submit a recommendation to the principal within the following timelines:

7.2.d.1. Where no interview is requested by the hiring committee or single designee, three days after receipt of application materials.

7.2.d.2. Where an interview is requested and conducted, within two days of the completion of interviews for a position.

7.2.d.3. The timelines set forth above may be shortened by the superintendent if necessary to comply with the timelines for filling positions set forth in W. Va. Code §18A-4-7a. The timelines may also be shortened to meet other hiring needs of the county school system with the approval of the hiring committee chair or single designee.

7.2.e. Nothing in this policy or in statute requires that any applicant be interviewed prior to being recommended or selected to fill a vacancy and nothing requires that every applicant meeting the minimum qualifications of a posting be interviewed prior to being recommended or selected to fill a vacancy. However, the superintendent, principal, hiring committee, or single designee, as applicable, shall each have the authority to interview qualified job applicants at their discretion. A faculty senate may, but is not required, to adopt a policy permitting the superintendent or his or her designee to narrow the pool of qualified applicants to no fewer than three qualified applicants, unless fewer than three qualified individuals apply, who appear to be the most qualified based on an examination of the factors set forth in W. Va. Code §18A-4-7a(b)(1) through (9).

7.3. Classroom teachers who directly participate in making recommendations for filling classroom teaching positions pursuant to the options set forth in this policy for periods beyond his or her individual contract shall be compensated based on his or her daily rate of pay, prorated to an hourly rate. The principal shall require that the participating teachers keep time sheets documenting the actual time spent on the recommendation process and shall verify that the time sheets are accurate before submitting them for payment. In no event shall a teacher be entitled to payment for more than two hours per position. However, if there are more than four qualified applicants for a single classroom teacher position who are selected for an interview by the hiring committee chair or single designee, the faculty senate members participating in the interviews may be compensated for an additional hour for actual time spent on the interview process for that position.

7.4. For purposes of this policy, an itinerant teacher shall be considered to be assigned to the school where he or she spends the majority of his or her instructional time. If an itinerant teacher does not spend the majority of his or her instructional time in any one school the itinerant teacher shall be considered to be assigned to a school as designated by the county superintendent.

7.5. The West Virginia Ethics Act prohibits public school employees from participating in any hiring decisions involving relatives or cohabitating sexual partners. "Relatives" are defined as individuals who are related to the employee as father, mother, son, daughter, brother, sister, spouse, grandmother, grandfather, grandchild, mother-in-law, father-in-law, sister-in-law, brother-in-law, son-in-law or daughter-in-law. If a faculty senate representative must recuse himself or herself for this reason, an

alternate member may be appointed by the committee chair or the single designee.

§126-126-8. Training for Faculty Senates and Principals.

8.1. Prior to participating in an interview or otherwise making any hiring recommendations pursuant to this policy, faculty senate hiring committees, single designees, any other faculty senate participants, and principals must complete interview training as designated or approved by the WVDE. Once a faculty senate member or principal has completed the designated interview training, additional training shall not be required unless the WVDE or superintendent determines that additional training shall occur.

8.2. Compensation for participation in training shall be based on the daily rate of pay for the participating classroom teacher who directly participated in the training for periods beyond his or her individual contract. Compensation for training shall not exceed one hour.

8.3. For the 2013-2014 school year only, principals have until September 1 to complete the interview training designated or approved by the WVDE.

§126-126-9. Reassignment of Surplus Personnel Without Posting Based on Pupil-Teacher Ratio and Class Size Rules.

9.1. When actual student enrollment in a grade level or program, unforeseen before March 1 of the preceding school year, permits the assignment of fewer teachers or service personnel to or within a school under any pupil-teacher ratio, class size or caseload standard established in W. Va. Code §18-5-18a or any policy of the WVBE, the county superintendent, with board approval, may reassign the surplus personnel to another school or to another grade level or program within the school if needed there to comply with any such pupil-teacher ratio, class size or caseload standard.

9.1.a. Before any reassignment may occur pursuant to this subsection, written notice shall be provided to the employee via certified mail or hand delivery at least 10 days prior and the employee shall be provided an opportunity to appear before the county board to state the reasons for his or her objections, if any, prior to the board voting on the reassignment. The opportunity to be heard shall not be a hearing with the right to present witnesses, rather, it is an opportunity for the employee to concisely state his or her objections to the board. The reassignment may be made without following the notice and hearing provisions of W. Va. Code §18A-2-7(a) and (b) and may occur at any time during the school year when the conditions in section 9.1 are met. However, reassignments may not occur after the last day of the second school month.

9.1.b. A professional employee reassigned under this subsection shall be the least senior of the surplus professional personnel who holds certification or licensure to perform the duties at the other school or at the grade level or program within the school.

9.1.c. A service employee reassigned under this subsection shall be the least senior of the surplus personnel who holds the same classification or multiclassification needed to perform the duties at the other school or at the grade level or program within the same school. In considering whether an aide is a surplus employee, the county shall consider each classification and/or multiclassification held by him or her and shall not be limited only to the current program or assignment held by the surplus aide.

9.1.d. No school employee's annual contract term, compensation or benefits shall be changed as a result of a reassignment under this subsection.

§126-126-10. Reassigning Classroom Teachers Within a School Without Posting.

10.1. Notwithstanding any other provision of W. Va. Code to the contrary, upon recommendation of the principal and approval by the classroom teacher, county superintendent, and county board, a classroom teacher assigned to the school may at any time during the school year be assigned to a new or existing classroom teacher position at the school during that school year without the position being posted. This provision shall not apply to vacancies that will occur in the ensuing year or other future years.

10.2. Transfers made under these provisions are not subject to the limitation on transfers found in W. Va. Code §18A-4-7a(m).

10.3. For purposes of this section, an itinerant teacher shall be considered to be assigned to the school where he or she spends the majority of his or her instructional time. If an itinerant teacher does not spend the majority of his or her instructional time in any one school the itinerant teacher shall be considered to be assigned to a school as designated by the county superintendent.

§126-126-11. Reposting of Professional Vacancies.

11.1. Boards shall be required to post and date notices of each opening at least once. At their discretion, boards may post an opening for a position other than classroom teacher more than once in order to attract more qualified applicants. At their discretion, boards may post an opening for a classroom teacher one additional time after the first posting in order to attract more qualified applicants only if fewer than three qualified individuals apply during the first posting.

11.2. If no applicant meets the qualifications set forth in the job posting, a board may continue to post or repost as set forth in section 11.1 without limitation.

11.3. The county superintendent of schools shall have the authority to determine whether a professional position will be reposted.

11.4. These provisions shall apply to both professional positions and extra-curricular positions.

§126-126-12. Reserving Vacancies for Individuals Subject to Release.

12.1. All employees subject to release shall be considered applicants for any vacancy in an established, existing or newly created position that, on or before February 15, is known to exist for the next ensuing school year, and for which they are qualified, and, upon recommendation of the superintendent, the board shall appoint the successful applicant from among them before posting such vacancies for application by other persons. This provision shall not preclude a county board of education from posting and filling vacancies that exist in the current school year nor shall it supersede or alter the operation of W. Va. Code §18A-4-8f or W. Va. Code §18A-4-8i.

12.2. An employee shall be considered subject to release if the superintendent would recommend the individual to the board for release but for the availability of the known position.

12.3. A vacancy for a position that will exist on the first day of the next ensuing school year will be known to exist when the person holding the position has submitted his or her resignation or retirement to the board, in writing, and the resignation or retirement has been accepted by the board.

12.4. Newly created positions will not be considered to be known to exist until the county board has voted to approve their creation.

12.5. For purposes of this section, an individual will be considered to be qualified for a known vacancy if he or she fully meets the qualifications for the vacancy.

12.6. If more than one individual subject to release is qualified for a known vacancy, the successful candidate shall be selected based on application of the factors set forth in W. Va. Code §18A-4-7a(b)(1) through (9), weighted equally.

12.7. This provision shall apply to vacancies and newly created positions known to exist on or before February 15, 2014, and in subsequent school years.

§126-126-13. Severability.

13.1. If any provision of this rule or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this rule.

Appendix A

The following form shall be completed by the principal and shall be submitted as set forth in section 6.6. of WVBE Policy 5000 and according to timelines as determined by the county superintendent.

Principal Recommendation:

In accordance with section 6.2 of WVBE Policy 5000, the undersigned certifies that the qualifications of the selected applicants meeting the minimum qualifications/requirements set forth in the job posting for the position of _____ have been reviewed.

In determining which of the applicants is the highest qualified for the position, the following factors set forth in sections 6.2.a. through 6.2.i. of WVBE Policy 5000 have been considered:

- a. Appropriate certification, licensure or both;
- b. Amount of experience relevant to the position or, in the case of a classroom teaching position, the amount of teaching experience in the required certification area;
- c. The amount of course work, degree level or both in the relevant field and degree level generally;
- d. Academic achievement;
- e. In the case of a classroom teaching position or the position of principal, certification by the National Board for Professional Teaching Standards;
- f. Specialized training relevant to the performance of the duties of the job;
- g. Past performance evaluations conducted pursuant to W. Va. Code §§18A-2-12 and 18A-3C-2 or, in the case of a classroom teacher, past evaluations of the applicant's performance in the teaching profession as a certified educator;
- h. Seniority;
- i. Other measures or indicators upon which the relative qualifications of the applicant may fairly be judged;

I recognize that no amount of weight is required to be assigned to any factor in making a recommendation and further recognize that a factor may be assigned no weight at all.

Other than this recommendation form, no other matrix or documentation of my recommendation shall be required.

Pursuant to this review as principal or designated representative of the principal of the school at which the applicant will be performing a majority of his or her duties, I hereby recommend _____ for the above-referenced position.

Date: _____

Principal / Designee

Appendix B

The following form shall be completed by the faculty senate hiring committee chair or single designee and shall be submitted as set forth in sections 6.6, and 7.2.d. of WVBE Policy 5000.

Faculty Senate Recommendation:

In accordance with section 6.2 of WVBE Policy 5000, the undersigned certify that the qualifications of the selected applicants meeting the minimum qualifications/requirements set forth in the job posting for the position of _____ have been reviewed.

In determining which of the applicants is the highest qualified for the position, the following factors set forth in sections 6.2.a. through 6.2.i. of WVBE Policy 5000 have been considered:

- a. Appropriate certification, licensure or both;
- b. Amount of experience relevant to the position or, in the case of a classroom teaching position, the amount of teaching experience in the required certification area;
- c. The amount of course work, degree level or both in the relevant field and degree level generally;
- d. Academic achievement;
- e. In the case of a classroom teaching position or the position of principal, certification by the National Board for Professional Teaching Standards;
- f. Specialized training relevant to the performance of the duties of the job;
- g. Past performance evaluations conducted pursuant to W. Va. Code §§18A-2-12 and 18A-3C-2 or, in the case of a classroom teacher, past evaluations of the applicant's performance in the teaching profession as a certified educator;
- h. Seniority;
- i. Other measures or indicators upon which the relative qualifications of the applicant may fairly be judged;

I/we recognize that no amount of weight is required to be assigned to any factor in making a recommendation and further recognize that a factor may be assigned no weight at all.

Other than this recommendation form, no other matrix or documentation of this recommendation shall be required.

Pursuant to this review, the faculty senate of the school at which the applicant will be performing a majority of his or her duties has recommended _____ for the above-referenced position. This recommendation is based on the majority vote of those members participating in the recommendation process or on the recommendation of the single designee.

Date: _____

Faculty Senate Hiring Committee Chair or Single Designee

Faculty Senate Representative (if applicable)

Faculty Senate Representative (if applicable)



These materials are general in nature and are presented with the understanding that the information provided is not legal advice. Due to the rapidly changing nature of the law, information contained in these materials may become outdated. For example, statutes and policies may be amended or repealed, in whole or in part, and summaries may, with the passage of time, become unreliable representations of current legal requirements. Anyone using information contained in these materials should always research original sources of authority and update this information to ensure accuracy when dealing with a specific matter. No person should act or rely upon the information contained in these materials without seeking the advice of an attorney.