BARBARA R. GILES,

Grievant,

v. DOCKET NO. 96-42-349

RANDOLPH COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Barbara R. Giles, is employed as an Aide by the

Randolph County Board of Education (Respondent). She alleges:

> Grievant, a regularly employed aide, was reduced in force pursuant to West Virginia Code §§ 18A-2-6 and 18A-4-8b. Prior to July 1, 1996[,] the need for reduction in force was established. Grievant seeks reinstatement to the position she held during the 1995-96 school year. (This position was posted and awarded to another employee.)"

Grievant also seeks backpay.

At Level I, the grievance was denied on June 24, 1996. On August 7, 1996, Larry G. Prichard, Superintendent, denied the

grievance at Level II. Pursuant to W. Va. Code §18-29-4(c), Grievant waived a hearing at Level III, and appealed directly to Level IV on August 12, 1996. A Level IV hearing was scheduled for September 19, 1996, but was continued at Grievant's behest for good

cause shown. A Level IV evidentiary hearing was held on October 24, 1996, at the Grievance Board's office in Elkins, West Virginia. The case became mature for decision on October 29, 1996, upon receipt of Grievant's post-hearing submission.

The following Findings of Fact were derived from the record.

FINDINGS OF FACT

1. Grievant was hired on August 21, 1995, as an Aide. During the 1995-1996 school year, she served as an early childhood education (kindergarten) Aide at North Elementary School (NES).

2. In the Spring of 1996, a total of nine aides, including Grievant, were reduced in force (RIF'd) or

transferred.

3. Grievant's position at NES was not eliminated.

4. The positions of two of the nine aides, Mary Folks and Alice VanDevender, were eliminated. Both Ms. Folks and Ms. Vandevender are more senior than Grievant.

5. Grievant desires to be instated into one of the two aide positions at NES.

6. Respondent posted a total of eleven vacancies for aides on two postings, the first from June 11, 1996, to June 17, 1996, and the second from June 14, 1996, to June 21, 1996. The eleven vacancies included six different types of aides.

7. One of the posted positions was the position Grievant had held during the 1995-1996 school year.

8. The two aide positions at NES were awarded to Ms. Folks and Ms. VanDevender after posting and the competitive bidding process were concluded.

9. Grievant successfully bid on an aide position, and was re- employed for the 1996-1997 school year. This position is not at NES.

DISCUSSION

This grievance must be denied for several reasons. First, Grievant's claim fails because she did not distinguish between the various types of aide positions listed in the posting. Grievant argued that the need for her RIF disappeared prior to July 1, 1996, and therefore, Respondent had a duty to rescind her RIF. The theory of her case is based on the following two points:

1. that the NES position she held during the 1995-1996 school year was posted, indicates that her position was available; and,

2. that given the number of positions posted, she was able to bid on and receive a full-time aide position, indicates that there were enough full-time positions available for her to be employed for the 1996-1997 school year.

However, these two facts mean little without identifying the qualifications/certifications of the more senior aides, and distinguishing between the various types of aide positions listed in the posting. It lists three ECE Aide II positions, two Bus/Classroom Aide II positions, one TMI Classroom Aide II position, one Classroom Aide III/Vision Impaired Aide/Autism Mentor (Female) position, two Classroom Aides III/Autism Mentor positions, and one TMI/Autism Mentor(Male - able to lift 200 pounds) position. The record fails to specify or define ECE and TMI.

Furthermore, the Code indicates that special requirements attend an AutismMentor aide position. Therefore, it cannot be maintained that an aide is an aide. Nor can the Undersigned omit this factor when analyzing the allegations in this grievance.

Second, Grievant failed to provide sufficient evidence for a reasoned decision. Grievant failed to link RIF'd/transferred aides to posted aide positions. Grievant failed to address the specific facts related to each posting or affected aide which would have provided an overall view of what occurred and why.

Third, even though Grievant asserted that the "stated justification" for her RIF had been eliminated, and cited Brown v. Logan County Bd. of Educ., Docket No. 90-23-177 (Oct. 31, 1990), (See footnote 1) her claim must still be denied. Grievant failed to introduce her RIF letter stating the reasons for her RIF. At Level II, Grievant indicated that the reasons for her RIF were because of lack of seniority and need. Superintendent Pritchard testified that the reasons for Grievant's RIF were a decrease in federal funding, special educations students moving, and problems with bus aides.Therefore, Brown is of no value since she failed to prove by a preponderance of the evidence the "stated justification" for her RIF. Without establishing the "stated justification," the Undersigned cannot determine whether it has been "lost" and the applicability of analysis under Brown. Therefore, Grievant failed to prove by a preponderance of the evidence that the "stated justification" for her RIF was "lost," or had changed.

The principle established in Brown is distinguishable from the facts in this case. In Brown, a teacher was transferred because the county board of education intended to eliminate her position. However, the board reversed it's decision and did not eliminate her position for the next school year. The holding in Brown was intended to allow such an employee to return to her prior position because the "stated justification" disappeared. In this case, the reasons Superintendent Pritchard stated for Grievant's RIF did not dissipate. (See footnote 2)

Fourth, the Code is silent with respect to the procedure Grievant wishes the Grievance Board to adopt. In Wellman v. Mercer County Bd. of Educ., Docket No. 95-27-327 (Nov. 30, 1995), the Grievance Board stated that:

> [p]ersonnel actions of a county board of education which are not encompassed by statute are reviewed against the "arbitrary and capricious" standard pronounced in Dillon v. Bd. of Educ., 351 S.E.2d 58 (W.Va. 1986). See, Pockl v. Ohio County Bd. of Educ., 406 S.E.2d 687 (W.Va. 1991); Moses v. Mercer County Bd. of Educ, Docket No. 93-27-001 (Apr. 8, 1993).

In the case at bar, Grievant failed to prove by a preponderance of the evidence that Respondent acted arbitrarily or capriciously in the RIF of Grievant. Based on the information Respondent had at the time, it needed to make positions available for its more senior personnel.

In addition to the foregoing findings of fact and narration, it is appropriate to make the following conclusions of law.

CONCLUSION OF LAW

1. In a nondisciplinary action, Grievant has the burden of proving her case by a preponderance of the evidence. Gwilliam v. Preston County Bd. of Educ., Docket No. 95-39-255 (Dec. 22, 1995).

2. "Personnel actions of a county board of education which are not encompassed by statute are reviewed against the 'arbitrary and capricious' standard pronounced in Dillon v. Bd. of Educ., 351 S.E. 2d 58 (W.Va. 1986)." Wellman v. Mercer County Bd. of Educ., Docket No. 95-27-327 (Nov. 30, 1995).

3. Grievant failed to prove by a preponderance of the evidence that the "stated justification" for her RIF was "lost," or that Respondent acted arbitrarily or capriciously in not rescinding her RIF.

Accordingly, the grievance is **DENIED**.

Any party may appeal this DECISION to the Circuit of Kanawha County or to the Circuit Court of Randolph County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

DATED: January 31, 1997 _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE

Footnote: 1 *In Brown, the Grievance Board held:*

> *when a teacher's transfer, otherwise valid but not initiated by her, loses its stated justification prior to the end of the school-year in which the transfer was processed, absent some extraordinary circumstance the employee is entitled to instatement into the position he would have held but-for the transfer. A*

> *county board of education's failure to offer such is, absent the referenced "extraordinary circumstance," an abuse of discretion. When the stated justification is lost after the close of the aforementioned school-year, the county board's decision to not offer automatic reinstatement will not, again absent extremely compelling cause, be deemed an abuse of discretion.*

Id. at 14.

Footnote: 2 Ramey v. Lincoln Bd. of Educ., Docket No. 96-22-298 (Oct. 30, 1996), extended the holding in Brown, a transfer case, to RIFs.