SYLVIA NAPIER,

Grievant,

v. **Docket No. 98-03-419**

BOONE COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

This grievance was filed by Grievant Sylvia Napier, a special education aide, against Respondent Boone County Board of Education ("BBOE"), on or about September 21, 1998. The statement of the grievance reads as follows:

> Grievant is a regularly employed teacher's aide. During the 1997- 98 school year, Grievant worked with an autistic student at Madison Elementary School. At the end of the 1997-98 school year, Grievant was reassigned to other duties at Madison Elementary School which did not involve working with said autistic student. After Grievant's reassignment, the Respondent assigned Betty Dickson, another teacher's aide at the school to this position. However, Ms. Dickson subsequently bid upon a "temporary" position at Scott High School caused by the leave of absence by another teacher's aide. The Respondent advertised the position formerly held by Ms. Dickson (and the Grievant). Grievant applied for and was the most senior candidate for this position. However, Grievant was was [sic] not assigned to work with the autistic student. Grievant alleges a violation of West Virginia Code §§18A-4-8b and 18A-4-8g and simply requests reassignment to work with the autistic student.Grievant requests as relief to be allowed to work with the autistic student. (See footnote 1)

The following Findings of Fact necessary to the Decision reached, are made based upon the evidence presented at the Level II and Level IV hearings.

Findings of Fact

1. Grievant has been employed 27 years by BBOE, and is currently employed as a teacher's aide in special education, an Aide IV, at Madison Elementary School.

2. Grievant was assigned to work with one student, R.J., (See footnote 2) at Madison Elementary School during the 1996-97 and 1997-98 school years. R.J. has been diagnosed as having autistic tendencies.

3. At the end of the 1997-98 school year, the principal of Madison Elementary, Gary Bell, told

Grievant she would not be working with R.J. the following school year, because he felt R.J. needed an aide who would be more strict.

4. Betty Dixon was assigned to work with R.J., now a fifth grade student, during the 1998-99 school year, and Grievant was assigned to the duties Ms. Dixonhad previously performed, still working as a special education aide at Madison Elementary. Grievant did not file a grievance over this change in her job duties.

5. Ms. Dixon bid on a posted long-term temporary position at Scott High School, and was selected for that position.

6. On August 31, 1998, BBOE posted Ms. Dixon's position as POSITION

TITLE: TEACHER AIDE (100%)

(one 100% position available)

(In Betty Dickson's place).

RESPONSIBLE TO: School Principal

LOCATION OF POSITION: 1 - MADISON ELEMENTARY SCHOOL

(Special Education - 100%)

(Temporary Assignment in the place of Betty Dickson while she is working in a temporary assignment at Scott High School for an undetermined period of time in the 1998-99 School Year)

The duties and responsibilities listed do not reference a particular student or classroom, but they do state, "[m]eet each student's needs as identified in the IEP [Individual Educational Plan]."

7. Grievant bid on the posted position, was the most senior applicant, and was selected for the position; however, Principal Bell would not let her assume the duties which had been assigned to Ms. Dixon of working with R.J. Grievant's duties did not change at all when she was placed in Ms. Dixon's position.

8. It has been BBOE's practice for the last six years to assign special education aides to a particular school building, but not to a particular student or assignment in the building, so that as the number of students changes and thestudents' needs change, the aides' assignments can be changed to best serve the needs of the students within the building.

9. Grievant has received no training in working with autistic children.

10. Mary Knapp, Director of Special Education for Boone County Schools, asked the Personnel Director to try to get an autism mentor assigned to R.J. for the 1998-99 school year. An autism mentor was not assigned to R.J.

11. In May 1998, Ms. Knapp met with R.J.'s parents and his autism teacher to discuss his IEP for the coming school year. All were dissatisfied that his behavior had worsened during the past school year. They decided a change in his aide should be tried.

Discussion

Grievant bears the burden of proving the allegations of her grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar. 28, 1996). Grievant argued she should have been placed in the posted position, which she believed meant she would be assigned to assist R.J. Grievant pointed to Webster County Board of Education v. Johns, 191 W. Va. 664, 447 S.E.2d 599 (1994), in support of her position that Respondent could not place her in an assignment other than that which Ms. Dixon held.

Respondent argued Grievant was assigned to Madison Elementary School as a special education aide, as was Ms. Dixon, and that neither was assigned to a particular child, nor did an aide have a right to a particular job. Respondent noted the posting of Ms. Dixon's position did not reference R.J. Respondent further argued itwas in the best position to determine assignments, and it was within its discretion to assign duties to school service personnel. Respondent compared the change in Grievant's duties to moving a custodian from cleaning the hallways to cleaning the gymnasium, or moving a cook from preparing food using the deep fryer to setting up the salad bar. Respondent noted the duties of special education aides must be changed when a student moves to another school; otherwise, when a child left a school, the aide who had been assisting him could not be assigned to perform any other duties, but would have to be paid for doing nothing.

Respondent also argued Grievant had been directed to change the way she responded to R.J. in order to try to prepare him for middle school, and she had been repeatedly reminded of this, but failed to comply. Respondent argued it was in R.J.'s best interest that Grievant no longer work with him, and that is the reason her assignment had been changed, and why she was not assigned the same duties Ms. Dixon had performed. Grievant denied that she failed to do as she had been told with regard to R.J., and pointed to her good evaluations.

In regard to this last argument, the undersigned is in no position to second- guess the wisdom of R.J.'s IEP, or otherwise to determine the best approach in dealing with an autistic child. The evidence presented is that those responsible for preparing R.J.'s IEP decided it was in the best interest of the child's educational development that Grievant not be assigned to assist him.

Special education aides are in a unique setting. Their assignment consists not of assisting in a classroom, but assisting a special needs child. However, if that childtransfers to another school during the school year, the aide cannot be required to move with the child due to the statutory transfer provisions which allow a school board to transfer employees only at the end of a school year. Surber v. Mingo County Bd. of Educ., Docket No. 96-29-015 (Dec. 30, 1996) Surber v. Mingo County Bd. of Educ., Docket No. 89-29-662 (Jan. 31, 1990). But cf., Sipple v. Mingo County Bd. of Educ., Docket No. 95-29-487 (Mar. 27, 1996) (where the Administrative Law Judge stated, "[bus] aides who assist special education students commuting to and from school on school-provided transportation, are assigned duties of an itinerant nature.") This problem has been remedied by some school boards by designating special education aides as itinerant. See Conrad v. Nicholas County Bd. of Educ., Docket No. 97-34-388 (Jan. 12, 1998). If the non-itinerant aide assignment were to a particular child as Grievant argues, then a school board would be allowed to move the aide to any school to which the child moved, as she would be assigned to the child, not to the building.

Grievant has not been designated as an itinerant aide. Thus, if R.J. had transferred during the 1997-98 school year to another school, and Grievant did not like that school, or it was inconvenient for her to travel to that school, or for whatever reason she did not wish to transfer with R.J. during the school year, BBOE could not have required her to go to that school with R.J. The same is true of Ms. Dixon during the current school year. Grievant's assignment, and Ms. Dixon's assignment, were as teacher aides in special education at Madison Elementary School. Neither was assigned permanently to a particular child. The Johns case cited by Grievant is not applicable to this situation. That case did not involve the assignment of duties to a special education aide. It involved an employee (Ms. Johns) who had applied for a kindergarten aide position, but was instead placed in an early childhood aide position for which she did not apply, while an employee (Ms. Weese) who had not applied for the kindergarten aide position was placed in it. The Supreme Court of Appeals of West Virginia stated:

> Given that the terms "applicant" and "apply" appear to be an integral part of West Virginia Code § 18A-4-8b, a board of education clearly exceeds its discretion in

> assigning an individual to a newly-created service personnel position who did not apply for the position, but was otherwise qualified for the opening, when another individual, holding the necessary qualifications and superior seniority, applied for the position. By this ruling, we do not suggest that a board of education has no discretion in filling positions, nor that a school principal lacks discretion in assignments of aides to selected groups of students, but instead we require, consistent with the statutory requirements, that this discretion does not come into play until an individual has first applied for the position opening. See W.Va. Code § 18A-4-8b. For example, in the event that both Ms. Johns and Ms. Weese had applied for the traditional kindergarten position, the Board would have had discretion statutorily to determine who would be the best person to fill the position after first considering the statutorily-required factors. See W.Va. Code § 18A-4- 8b.

Id at 191 W. Va. 667. Obviously, the holding is narrow.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The burden of proof is upon Grievant to prove the elements of her grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar. 28, 1996). 2. "County boards of education have broad discretion in personnel matters, including transfers, but must exercise that discretion in a manner which is not arbitrary or capricious." Dodson v. McDowell County Bd. of Educ., Docket No. 93- 33-243 (Feb. 15, 1994). See Dillon v. Bd. of Educ. of County of Wyoming, 351 S.E.2d 58 (W. Va. 1986). That discretion extends only to those matters not dictated by statute or regulation.

3. If a special needs child transfers to another school during the school year, the aide who has been assisting him cannot be required to move with the child to another building due to the statutory transfer provisions which allow a school board to transfer employees only at the end of a school year. Surber v. Mingo County Bd. of Educ., Docket No. 96-29-015 (Dec. 30, 1996) Surber v. Mingo County Bd. of Educ., Docket No. 89-29-662 (Jan. 31, 1990). Thus, the aide is assigned to special education duties in the building, not to a particular special needs child.

4. Grievant's selection to fill a long-term temporary special education aide position at Madison Elementary School did not require that she be assigned to a particular special needs child, and it was the determination of those who were responsible for R.J.'s IEP that she not be assigned to assist him.

Accordingly, this grievance is **DENIED**.

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

of Boone 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.

BRENDA L. GOULD

Administrative Law Judge

Dated: March 30, 1999

Footnote: 1

The grievance was denied by Grievant's supervisor on September 21, 1998. Grievant appealed to Level II, and a hearing was held on October 7, 1998. A Level II decision denying the grievance was issued on October 14, 1998. Grievant bypassed Level III, appealing to Level IV on October 23, 1998. A Level IV hearing was held on February 18, 1999. Grievant was represented by John Roush, Esquire, and Respondent was represented by Timothy R. Conaway, Esquire. This matter became mature for decision on March 15, 1999, upon receipt of the last of the parties' written arguments.

Footnote: 2

Consistent with this Grievance Board's practice, the student's initials will be used rather than his full name.