KIMBERLY OSBORNE,

Grievant,

v. **Docket No. 01-13-035**

GREENBRIER COUNTY BOARD OF EDUCATION,

Respondent,

D E C I S I O N

Grievant, Kimberly Osborne, filed this grievance against her employer the Greenbrier County Board of Education ("GCBOE" or "Board") on November 9, 2000. Her Statement of Grievance at Level IV (See footnote 1) reads:

> Grievant, a regular aide, contends that the board of education filled an aide position at Lewisburg Elementary School with a non-employee in violation of W. Va. Code §§ 18A-4-8, 18A-4-8b, and 18A-4-8g.
>
> Relief Sought: Grievant seeks posting of the position in question.

This grievance was denied at Levels I and II, Grievant by-passed Level III, and appealed to Level IV on February 13, 2001. A Level IV hearing was held on April 10, 2001. This case became mature for decision on September 20, 2001. (See footnote 2) (See footnote 3)

Issues and Arguments

Grievant argues that if there is a need for an aide to work with an autistic student at Lewisburg Elementary, that aide must be provided by GCBOE, and these needs

cannotbe provided by a volunteer paid for by the parents or some other entity. (See footnote 4) Grievant notes it would be unfair to allow this practice to continue because then only the "very wealthy" could afford to have the needs of their children met, when the school system refused or "is unwilling to do so." (Grievant's Brief.) Grievant argues if the student needs an aide, GCBOE should meet this need, and if not, "[the volunteer] should not be in the school day after day." (Grievant's Brief.)

Respondent asserts the parents asked to have a volunteer work with their child one-on-one, and GCBOE agreed to this arrangement as long as the volunteer agreed to follow the Board's rules and regulations. The volunteer agreed to follow these directives. Respondent maintains if the volunteer were not there, the needs of the student would be met by the aides already present at the school, as they had been for the past five years. There would be no posting of a new or of another position. Additionally, Respondent asserts Grievant does not have standing to file this grievance, as she would be unable to fill the position, even if there were a need for such a position; Grievant is not trained as an autism mentor.

Grievant asserts the standing argument is without merit as Grievant does not seek placement into the position, but rather the posting of the position. Additionally, Grievant argues the child might not need an aide with special training, or if he does, GCBOE should provide this training to the successful applicant or to her. After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is currently employed as a regular aide in a non-special education position.
2. Grievant is not certified as an autism mentor.
3. Grievant attended the September board meeting where the parents received

approval for the volunteer to work one-on-one with their child, M.S.

4. The volunteer, Jennifer Brubrecker, is certified as an autism mentor.

5. At least once, when Ms. Brubrecker needed to be absent, the principal at Lewisburg Elementary called a substitute to fill her position. (See footnote 5) The Director of Personnel, John Curry, informed the principal this should not occur again, and if Ms. Brubrecker was absent, the needs of M.S. were to be met by the current staff, just like they had been in the past.

6. In the spring, Ms. Brubecker was absent for a day or so, and an autism mentor, Brenda Hensley, cared for M.S., as well as her other students, on those days. Ms. Hensley had worked with M.S. for several years.

7. There was no evidence presented to indicate M.S.'s Individual Educational Plan ("IEP") required a one-on-one autism mentor. This requirement had not been in the IEP in the past. 8. The number of aide positions was not decreased by allowing the volunteer to work with M.S. In fact, an additional aide was hired for Lewisburg Elementary in either November or December 2000.

9. If the volunteer were to cease working with M.S., an additional position would not be posted, and his needs would then be met by the Special Education aides at Lewisburg Elementary as they have been in the past. There are currently three autism mentors at Lewisburg Elementary.

Discussion

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 (2000); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6. "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 Resources, 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.

The first issue to address is Respondent's argument concerning standing. "To have standing to pursue a grievance, the grievant must allege and prove a personal stake in the outcome, which consists of some harm to [her] own employment situation or some other injury-in-fact." Farley v. W. Va. Parkways Economic Dev. and Tourism Auth., Docket No.96-PEDTA-204 (Feb. 21, 1997). See Shobe v. Latimer, 162 W. Va. 779, 253 S.E.2d 54 (1979); Cremeans v. Bd. of Trustees, Docket No. 96-BOT-099 (Dec. 30, 1996). With the information presented at hearing, the undersigned Administrative Law Judge cannot tell how Grievant's employment might be affected by a requirement to post another aide position. It does appear the effect would be slight, if any, and it is possible Grievant would not meet the requirements for the posting, but this is uncertain. Accordingly, the undersigned Administrative Law Judge finds Grievant does have standing to pursue this grievance.

On the merits of the grievance, this Grievance Board has previously ruled volunteers can be used to perform a variety of duties. Carr v. Tucker County Bd. of Educ., Docket No. 01-47-243 (Sept. 24, 2001); Dempsey v. Fayette County Bd. of Educ., Docket No. 98-10- 357 (Dec. 8, 1998); Moody v. Marion County Bd. of Educ., Docket No. 93-24-401 (Apr. 29, 1994), aff'd Circuit Court of Kanawha County, Civil Action No. 94-AA-117 (Oct. 7, 1994). In Moody, the board of education permitted volunteers to construct a deck outside a school's science building. The maintenance employees grieved, arguing that, because the work performed was that of a “Carpenter," their classification, they should have received the assignment as part of their regular duties or as an extra-duty assignment. The Administrative Law Judge held there was nothing in the law which

prohibited a board of education from accepting volunteer services from members of the community to complete a project which if undertaken by the Board would have been assigned to service personnel. Further, the administrative law judge found that "service personnel employees may not compel a board of education to assign them any given project as part of their regular duties or as an extra-duty assignment when the work can be completed with volunteer labor[,] andthe service employees are not deprived of their regular work time or wages as a result." Id. See Carr, supra.

As noted by the Board, in this particular case no service employee lost any regular work time or wages as a result of the volunteer labor. See Moody, supra. The evidence was clearly presented that if the volunteer was not there, M.S. would then return to the prior service he received from the aides that are currently serving at Lewisburg Elementary. There would be no need to post a position. No evidence demonstrated M.S.'s IEP required him to have an aide with him one-on-one. If this were the case, the aide would have to be provided by GCBOE.

Without further evidence, it must be assumed M.S.'s parents wish to provide him with additional assistance during the school day to increase the benefit he receives from his studies. It is true, not all parents would have the resources to provide this type of assistance to their children. However, this factor does not make it illegal for M.S. to receive this extra assistance, nor does it mean when parents wish to have non-required assistance for their disabled student, that GCBOE must fill a need not required by the IEP.

Additionally, W. Va. Code § 18A-4-8b requires boards of education to post all position vacancies for existing or newly created positions, and boards of education have the discretionary authority to make assignments of various duties to already hired employees so long as it does not abuse its discretion. See Skeens v. Logan County Bd. of Educ., Docket No. 93-22-093 (Sept. 20, 1993). It would follow that "if a board of education may make assignments of duties to service personnel without establishing a

newly created position[,] then it certainly may allow volunteers to perform such an assignment without violating the posting requirements of W. Va. Code § 18A-4-8b." Willcoxen v. Mason County Bd. of Educ., Docket No. 93-26-199 (Sept. 29, 1993). Here there was no position created. Based upon the facts of this case, it is determined that the Board did not abuse its discretion in giving approval for M.S. to have a volunteer assist him with his learning activities. See Carr, supra.

Further, W. Va. Code §18A-4-8b does not prohibit parents or other volunteers from working to improve the facilities and/or education programs in the schools. The undersigned Administrative Law Judge takes administrative notice that it is public policy in the State of West Virginia, as stated in W. Va. Code §18-5A-1&2, to "provide opportunities for the involvement of the school community in the operation of the local schools and to support local initiatives to improve school performance" and to "promote innovations and improvements in the environment for teaching and learning at the school [and may include programs and policies] to (1) encourage the involvement of parents in their child's educational process and in the schools;. . . (4) encourage school volunteer programs and mentorship programs; and (5) foster utilization of the school facilities and grounds for public community activities." To accept Grievant's position would go against an important factor in school success, parental involvement in the schools, and would prohibit volunteers from performing any work that falls within a service personnel category. Moody, supra. Volunteerism is in the best interest of the community, the schools, and the children. Id. Here, it is clearly a benefit for an autistic child to receive additional services not mandated by his IEP.

Grievant makes much of the fact that a substitute was called when the volunteer was absent. This argument is without merit. It is clear the calling of a substitute was amistake. This mistake does not mandate the hiring of a full-time employee to fill the position of a volunteer. See Peters v. Kanawha County Bd. of Educ., Docket No. 20-88-168 (Dec. 28, 1988). Accord, Pugh v. Hancock County Bd. of Educ., Docket No. 95-15-

128 (June 5, 1995); Chilton v. Kanawha County Bd. of Educ., Docket No. 89-20-114 (Aug. 7, 1989); Crowder v. Kanawha County Bd. of Educ., Docket No. 20-86-307-1 (June 25, 1987); Fisher v. Mercer County Bd. of Educ., Docket No. 27-86-112 (July 25, 1986).

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. 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 (2000); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6. "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 Resources, 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. "To have standing to pursue a grievance, the grievant must allege and prove a personal stake in the outcome, which consists of some harm to [her] own employment situation or some other injury-in-fact." Farley v. W. Va. Parkways Economic Dev. andTourism Auth., Docket No. 96-PEDTA-204 (Feb. 21, 1997). See Shobe v. Latimer, 162 W. Va. 779, 253 S.E.2d 54 (1979); Cremeans v. Bd. of Trustees, Docket No. 96-BOT-099 (Dec. 30, 1996).

3. "Service personnel employees may not compel a board of education to assign them any given project as part of their regular duties or as an extra-duty assignment when the work can be completed with volunteer labor and the service employees are not

deprived of their regular work time or wages as a result." Moody v. Marion County Bd. of Educ., Docket No. 93-24-401 (Apr. 29, 1994), aff'd Circuit Court of Kanawha County, Civil Action No. 94-AA-117 (Oct. 7, 1994). See Carr v. Tucker County Bd. of Educ., Docket No. 01-47-243 (Sept. 24, 2001).

4. There is nothing in the law which prohibits a board of education from accepting volunteer services from members of the community or the services of volunteers paid for by parents. See Willcoxen v. Mason County Bd. of Educ., Docket No. 93-26-199 (Sept. 29, 1993).

5. Grievant has failed to prove by a preponderance of the evidence that the Board is prohibited from accepting volunteer services. Moody, supra.

6. Grievant has failed to prove the Board violated W. Va. Code §18A-4-8b in not creating and posting a new position for which she could have applied. Further, she has not proven that the Board abused its discretion in any manner with relation to the facts of the particular case. Moody, supra.

Accordingly, this grievance is **DENIED**.

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

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: October 12, 2001

Footnote: 1

The first Statement of Grievance cited a number of other concerns. These were discussed at the Level II hearing, and apparently resolved, as they were not addressed in the Statement of Grievance filed at Level IV.

Footnote: 2

Originally, the tape of the Level IV proceedings was lost, and another hearing was scheduled. The tape was found on September 20, 2001.

Footnote: 3

Grievant was represented by Attorney John Roush from the West Virginia School Service Personnel Association, and Respondent was represented by Attorney Erwin Conrad.

Footnote: 4

No one was clear as to who paid for the services of the volunteer. It was clear that GCBOE had no role in the payment or hiring of the volunteer, and viewed Ms. Brubecker as a volunteer at Lewisburg Elementary.

Footnote: 5

In actuality, it appears another aide was pulled to work one-on-one with M.S., and the substitute filled this aide's regular duties.