SHARON K. THOMAN,

Grievant,

v. **Docket No. 03-15-031**

HANCOCK COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Sharon K. Thoman (Grievant), employed by the Hancock County Board of Education (HCBE) as an Aide, filed a level one grievance on October 30, 2002, in which she alleged violations of W. Va. Code §§ 18A-2-7, 18-29-2, 18A-4-8, and 18A-4-8(c) occurred when she was directed to provide services to a special education student. For relief, Grievant seeks reinstatement to her original position, and removal of the one-on-one aide responsibilities. The grievance was denied at levels one and two. Grievant elected to bypass consideration at level three, as is permitted by W. Va. Code § 18-29-4(c), and advanced her appeal to level four on January 31, 2003. A level four hearing was conducted in the Grievance Board's Wheeling office on April 4, 2003. Grievant was represented by John E. Roush, Esq., of West Virginia School Service Personnel Association, and HCBE was represented by William T. Fahey, Esq. The matter became mature for decision upon receipt of Grievant's proposed findings of fact and conclusions of law on April 23, 2003.

The following facts are derived from the evidence made part of the record at levels two and four.

Findings of Fact

1. Grievant has been employed by HCBE as an Aide III, assigned to the Kindergarten class at Allison Elementary School, at all times pertinent to this grievance. 2. In September 2002, a special needs student was mainstreamed into the Kindergarten class for music, physical education, library, and lunch. Music, library, and physical education are taught for one-half hour per week, and lunch is approximately twenty-five minutes daily.

3. The child in question is a five year old male student who is non-verbal, and has been classified as moderately impaired. The student's Individual Education Plan (IEP) requires nothing more than general supervision during the times he is mainstreamed.

4. Supervising this child leaves Grievant with less time to complete other work, such as copying

papers. Grievant has not received a lower evaluation, or other discipline, for failing to properly perform her duties.

5. The special education aide who is assigned to the student during the remainder of the school day is responsible for other special education students during the time he is in the Kindergarten classroom.

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); 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 argues that her assignment has been changed, resulting in a loss of her prior position, without her consent, in violation of W. Va. Code §§ 18A-4-8a and 18A-4-8b, and without the necessary transfer process set forth in W. Va. Code § 18A-2-7. Grievant further asserts that requiring her to perform the duties of a special education aideconstitutes discrimination and favoritism. HCBE responds that it is complying with a federal mandate to mainstream special needs children, the student in question requires only adult supervision while in the Kindergarten classroom, and Grievant is not working outside her classification or assignment.

The facts of this matter are remarkably similar to those in Moore v. Mercer County Board of Education, Docket No. 01-27-558 (Feb. 20, 2002). (See footnote 1) Ms. Moore was assigned to a general classroom, and was later made responsible for a special education student. She also characterized the change as a "transfer," triggering the notice requirements of W.Va. Code § 18A-2-7, and a violation of W. Va. Code § 18A-4-8a(7), which prevents Respondent from changing her assignment without her consent. The Grievance Board determined there was no violation of Code § 18A-4-8a(7), which is inapplicable to the particular duties of an employees, and simply prevents any changes to work hours to avoid overtime compensation:

No service employee may have his or her daily work schedule changed during the school year without the employee's written consent and the employee's work hours may not be changed to prevent the payment of time and one-half wages or the employment of another employee.

It was also determined in Moore that a minimal change in assignment does not constitute a

violation of W.Va. Code § 18A-2-7(a), which states in part: "[A]n employee shall be notified in writing by the superintendent on or before the first Monday in April if he [or she] is being considered for transfer or to be transferred." It was noted that the action constituted a minimal change in assignment, and did not amount to a transfer. Although Grievant testified that she lacks training to serve the needs of the special education student, the evidence establishes that none is required. His IEP requires only adult supervision, and Grievant stated that for the most part, “I just watch him.” Grievant expressed concern that the student requires her full attention during the enrichment classes, to the extent that she must move his limbs in physical education, and that she can no longer complete her other duties, such as copying papers for the teacher, during these classes. Grievant also opined that there is a safety factor since the student has a tendency to wander away. Grievant's concern is that he must be closely watched at lunch, while she assists the remaining students opening milk cartons, etc.

While Grievant clearly does not want the added responsibility of the student, she now has the same daily schedule, the same working hours, is in the same school, and at the same grade level, as she did the prior year. This minimal change in no way falls within the meaning of "transfer" as used in W. Va. Code § 18A-2-7(a), and does not trigger the notification requirement of that section. See Tolliver v. Mingo County Bd. of Educ., Docket No. 95-29-475 (May 31, 1996); McClain v. Hancock County Bd. of Educ., Docket No. 96-15-114 (June 27, 1996).

For the same reasons stated above, HCBE did not violate W. Va. Code § 18A-4- 8b(c), which states:

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

Grievant continues to hold the same position at Allison Elementary School, i.e., Kindergarten aide. Discrimination is defined by W. Va. Code §18-29-2(m) as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." W. Va. Code §18-29-2(o) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." In order to establish a prima facie case of discrimination or favoritism, a grievant must establish the following:

(a)that they are similarly situated, in a pertinent way, to one or more other employee(s);

(b)that they have, to their detriment, been treated by their employer in a manner that the other employee(s)has/have not, in a significant particular; and,

(c)that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Once the grievant establish a prima facie case of discrimination/favoritism, the burden shifts to the employer to demonstrate a legitimate, nondiscriminatory reason to substantiate its actions. Thereafter, grievant may show that the offered reasons are pretextual. Deal v. Mason County Bd. of Educ., Docket No. 96-26-106 (Aug. 30, 1996). See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 179 W. Va. 53, 365 S.E.2d 251 (1986); Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995).

Grievant has established a prima facie case of discrimination/favoritism by showing that she is required to supervise a special education student in the general classroom whileanother aide is not, and that she has less time to complete other duties. Grievant did not agree to this change in writing. However, HCBE has provided a legitimate, nondiscriminatory reason for its action, i.e., the aide assigned to the special education classroom works with other students during those times the Kindergarten student is in the general classroom. Grievant has not argued that this reason is pretextual.

In conclusion, Grievant holds the classification title of “Aide III,” defined by W. Va. Code § 18A-4-8 as:

those personnel referred to in the 'Aide I' classification who hold a high school diploma or a general education development certificate and have completed six semester hours of college credit at an institution of higher education or are employed as an aide in a special education program and have one year's experience as an aide in special education.

Grievant has worked as an aide in special education, although she indicated it was on a bus. In any event, she is not being required to work outside her classification, and while the mainstreaming of a special needs students is an additional responsibility for her, it has not altered her assignment.

Consistent with the foregoing, the following conclusions of law are made.

Conclusions of Law

1. In a non-disciplinary matter, Grievant have the burden of proving their claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6. 2. W. Va. Code § 18A-4-8a(7) does not prevent a change in a service employee's general duties.

3. Grievant has failed to prove that she has been prohibited frorm retaining the same position, in violation of W. Va. Code § 18A-4-8b(c).

4. Grievant has not met her burden of proving that the change in her job assignment for the 2001-2002 school year was a transfer within the meaning of W. Va. Code § 18A-2-7(a), thereby triggering the notification requirement of that section.

5. Discrimination is defined by W. Va. Code §18-29-2(m) as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees."

6. W. Va. Code §18-29-2(o) defines favoritism as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees."

7. In order to establish a prima facie case of discrimination or favoritism, grievant must establish the following:

(a)that they are similarly situated, in a pertinent way, to one or more other employee(s);

(b)that they have, to their detriment, been treated by their employer in a manner that the other employee(s)has/have not, in a significant particular; and,

(c)that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s) and were not agreed to by the grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). 8. Grievant has established a prima facie case of discrimination/favoritism; however, HCBE provided a legitimate, nondiscriminatory reason for the action, which Grievant did not argue was pretextual.

Accordingly, the grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Hancock 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

DATE: MAY 27, 2003 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

This decision was affirmed by the Kanawha County Circuit Court, and the West Virginia Supreme Court of Appeals declined to review the matter.