JANICE BENNETT,

Grievant,

v. **Docket No. 05-42-396**

RANDOLPH COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Janice Bennett ("Grievant") initiated this grievance on July 20, 2005, alleging her aide position should not have been posted as itinerant, and seeks removal of the itinerant designation from her position. After denials at the lower levels, Grievant appealed to level four on October 28, 2005. A hearing was held in Elkins, West Virginia, on February 27, 2006, at which Grievant was represented by counsel, John E. Roush of the School Service Personnel Association, and Respondent was represented by Kimberly S. Croyle, Esquire. This matter became mature for consideration upon receipt of the parties' fact/law proposals on March 21, 2006.

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 an aide, specifically a paraprofessional, for numerous years. (See footnote 1) 2. In the spring of 2005, Grievant was placed on the transfer list, due to elimination of the program to which she was assigned.

3. On May 5, 2005, Respondent posted vacancies for several special education aide positions, which were designated as itinerant.

4. Grievant bid upon and was placed in one of the itinerant positions, which was at Elkins Middle School.

5. During the 2004-2005 school year, Respondent's officials decided to post all special education aides as itinerant, so that, if a student left a particular school to go to another, his or her

aide could be required to move with the child. This would avoid the need to hire a new aide at the school to which the child transferred, and eliminate the problem of having an extra aide at the child's former school.

6. During the spring and summer of 2005, some special education aide positions were not posted as itinerant, but those positions were reposted with the itinerant designation.

Discussion

This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven 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 contends that the designation of her position as itinerant was both discriminatory and retaliatory for her previous grievance activities. A grievant must establish a case of discrimination, as defined by W. Va. Code § 18- 29-2(m), by showing:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Board of Education v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corrections*, Docket No. 04-CORR-278 (2005); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (2004).

Although in this case Grievant contends that discrimination occurred when other special education aide positions were not posted as itinerant, this is simply not borne out by the evidence. Respondent admitted that some positions were erroneously posted as itinerant, but those positions were reposted with the correct designation. It is simply untrue that Grievant's position was “singled out” for different

treatment. In fact, the posting which contained the position in which Grievant was ultimately placed also contained postings for four other itinerant aide positions. Accordingly, Grievant has not been treated differently from similarly situated employees, and she has failed to prove discrimination occurred.

As to Grievant's claim of retaliation, W. Va. Code §18-29-2(p) defines “reprisal” as “the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it.” A grievant claiming retaliation may establish a *prima facie* case of reprisal by establishing:

> (1) that she engaged in protected activity, e.g., filing a grievance;
>
> (2) that she 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.

Crookshanks v. Wood County Bd. of Educ., Docket No. 02-54-289 (2002)*; Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (1995). *See Frank's Shoe Store v. W. Va. Human Rights Comm'n,* 179 W. Va. 53, 365 S.E.2d 251 (1986); *Fareydoon-Nezhad v. W. Va. Bd. of Trustees/Marshall Univ.*, Docket No. 94-BOT- 088 (1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 89-26-56 (1989). The record in this case contains absolutely no discussion of Grievant's previous grievances or when they occurred. Accordingly, it is impossible for her to establish a *prima facie* case of retaliation under these circumstances. However, even if there were evidence that grievances were filed in close proximity to Grievant's transfer, Respondent has more than established that it was an overall goal to establish special education aides as itinerant, so it has provided ample evidence that its decision was not the result of any retaliatory motive toward Grievant.

In addition, it must be noted that this Grievance Board has repeatedly upheld a board of education's right to designate special education positions as itinerant. As stated in *Davisson v. Lewis*

County Board of Education, Docket No. 02-21-209 (Nov. 13, 2002), "a board of education . . . has the discretion to designate an aide position as itinerant when it is posted; employees who bid upon and are awarded such positions may, accordingly, be moved to accommodate the students' needs. *Vance v. Jefferson County Bd. of Educ.*,Docket No. 02-19-030 (March 28, 2002); [*Bailey v. Raleigh County Bd. of Educ.*, Docket No. 97-41-495 (Apr. 20, 1998)]." As revealed by Grievant's testimony, she knew the position she bid upon was itinerant and chose to accept it as such. She has established no entitlement to have the itinerant designation removed from her position.

The following conclusions of law are consistent with the foregoing.

Conclusions of Law

1. In a non-disciplinary grievance, Grievant bears the burden of proving her allegations 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. A grievant must establish a case of discrimination, as defined by W. Va. Code § 18-29-2(m), by showing:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
>
> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
>
> (c) that the difference in treatment was not agreed to in writing by the employee.

Board of Education v. White, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corrections*, Docket No. 04-CORR-278 (2005); *Frymier v. Glenville State College*, Docket No. 03-HE-217R (2004).

3. A grievant claiming retaliation may establish a *prima facie* case of reprisal by establishing:

> (1) that she engaged in protected activity, e.g., filing a grievance;

(2) that she 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.

Crookshanks v. Wood County Bd. of Educ., Docket No. 02-54-289 (2002)*; Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (1995). *See Frank's Shoe Store v. W. Va. Human Rights Comm'n,* 179 W. Va. 53, 365 S.E.2d 251 (1986); *Fareydoon-Nezhad v. W. Va. Bd. of Trustees/Marshall Univ.*, Docket No. 94-BOT- 088 (1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 89-26-56 (1989).

4. Grievant has failed to prove by a preponderance of the evidence that either discrimination or reprisal occurred in this case.

5. "[A] board of education . . . has the discretion to designate an aide position as itinerant when it is posted; employees who bid upon and are awarded such positions may, accordingly, be moved to accommodate the students' needs. *Vance v. Jefferson County Bd. of Educ.*, Docket No. 02-19-030 (March 28, 2002); [*Bailey v. Raleigh County Bd. of Educ.*, Docket No. 97-41-495 (Apr. 20, 1998)]." *Davisson v. Lewis County Bd. of Educ.*, Docket No. 02-21-209 (Nov. 13, 2002).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Randolph 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: April 12, 2006

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

It was not specified in the record exactly how long Grievant has been employed.