THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

CHRISTA RIBAS, et al.,

Grievants,

v.

Docket No. 07-30-119

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Christa Ribas, Rita Massullo, and Lori Haines ("Grievants") appealed this grievance to level four after denials at the lower levels on June 27, 2007. Grievants are all classroom teachers assigned to various schools. Their Statement of Grievance reads as follows:

> Grievants were hired by Monongalia County Board of Education (MCBOE) as regular education Pre-K teachers or Preschool Special Needs teachers. These grievants are being required to perform regular education Pre-K responsibilities and Preschool Special Needs responsibilities/duties simultaneously. This action is arbitrary and capricious, discriminatory, a violation of West Virginia Code 18A-4-7a, and a violation of state board policies 2419 and 5202, and designed to suit the needs of the county and not the needs of the students.

Grievant's Statement of Relief Sought provides:

> The grievants seek to only be assigned the job responsibilities/duties associated with one, but not both, of either the regular education Pre-K teacher or Preschool Special Needs teacher; to be made whole; and any other relief that the hearing examiner deems appropriate.

By letter dated January 22, 2008, the parties agreed to submit the grievance for decision on the lower level record. Grievant was represented by Frank Caputo, AFT-West Virginia/AFL-CIO. Respondent was represented by Gregory W. Bailey, Esquire. Thismatter became mature for consideration upon receipt of the parties' findings of fact and conclusions of law proposals on March 3, 2008.

Summary

Grievants are certified to teach Pre-K Regular Education and/or Pre-K Special Education. Grievants complain that they are being required to perform dual roles as a regular and special education teacher, simultaneously, regardless of how the position for which they were hired was posted. They further assert that Respondent's requirement that Pre-K teachers must perform dual roles as special educators and Pre-K regular educators simultaneously is discriminatory, arbitrary and capricious, a violation of § 18A-4-7a, and a violation of federal and state regulations.

Respondent counters that Grievants are not required to provide services to students outside their areas of certification. West Virginia Board of Education Policy provides that Preschool Special Needs Teachers, holding certificates endorsed for preschool special needs may be assigned to serve regular pre-kindergarten classrooms. The authority of teachers holding certificates endorsed for preschool special needs to serve non-disabled students is unique among special education teachers. Grievants failed to demonstrate that they are similarly situated to other regular education teachers. The Grievants failed to meet their burden of proof. In addition, the relief sought by Grievants in the nature of exclusive, segregated, teaching assignments is not permitted by West Virginia Board of Education policy. The grievance is denied.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant Ribas is assigned to Brookhaven Elementary School as a Preschool teacher. Grievant Ribas has 20 students assigned to her classroom. An aide is assigned to Grievant Ribas' classroom. One of these students has an Individualized Education Plan (“IEP”).

2. Grievant Haines is assigned to Skyview Elementary School as a Preschool teacher. Grievant Haines has 12 students assigned to her classroom. Five of the students receive special education

and related services. Two aides are assigned to Grievant Haines' classroom. The position held by Grievant Haines was posted on May 9, 2007, as a “Teacher, Pre-school special needs/Pre-School.”

3. Grievant Massullo is assigned to Riverside Elementary School as a Preschool teacher. Grievant Massullo has 19 students assigned to her classroom. One aide is assigned to Grievant Massullo's classroom. Four of these students receive special education and related services.

4. Services provided by special education teachers include, but are not limited to, implementing all aspects of the creative curriculum, implementing all aspects of the head start performance standards, being the teacher of record who develops, implements, and evaluates IEPs for students with special needs.

5. West Virginia Board of Education Policy 5202 provides that Preschool Special Needs Teachers, holding certificates endorsed for preschool special needs, preschool handicapped or developmentally delayed may be assigned to serve regular pre- kindergarten classrooms. The authority of teachers holding certificates endorsed for preschool special needs serving non-disabled students is unique among special educationteachers. No other teachers with certificates endorsed for special needs are authorized to serve non-disabled students.

6. Patricia Benedum, Director of Student Services and Exceptional Student Education, established it was common for special education students to be a part of the regular classroom. Ms. Benedum pointed out that, according to controlling law, special education students must be placed in the least restrictive classroom setting, and with collaboration from special education educators.

Discussion

In non-disciplinary matters, a Grievant bears the burden of proving her allegations by a preponderance of the evidence. W. Va. Code § 18-29-6. (See footnote 1) "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 Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievants assert they were hired by Respondent as regular education Pre-K teachers or Preschool Special Needs teachers. Grievants are being required to perform regular education Pre-K responsibilities and Preschool Special Needs responsibilities/duties simultaneously. They contend this action is arbitrary and capricious,discriminatory, a violation of W. Va. Code § 18A-4-7a, and a violation of federal and state regulations. Respondent counters that they are not in violation of the

West Virginia Code, or any State Board of Education policies relating to Pre-K teachers.

The relevant facts in this grievance are not in dispute. Grievants Ribas and Massullo were hired as Pre-K regular education teachers; however, they hold a certification in Preschool Special Needs. In addition to their regular education Pre-K duties, Respondent requires them to perform duties normally assigned to special education teachers because they also have a special needs certification. Grievant Haines, hired as a special education teacher, is required to provide services as both a regular education teacher and a special education teacher.

County boards of education have substantial discretion in matters relating hiring, assignment, transfer and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interest of the schools, and in a manner which is not arbitrary and capricious. *State ex rel. Melchiori v. Bd. of Educ.*, 188 W. Va. 575, 425 S.E.2d 251 (1992). Accordingly, the standard of review for a county board of education's decision is whether it was arbitrary and capricious or an abuse of discretion. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE- 081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*,Docket No. 93-HHR- 322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

While more than somewhat tedious, it is necessary for the undersigned to recite some education policies because it does give the grievance meaningful context. West Virginia Board of Education Policy 2419 provides in part:

> Placement Decisions
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> In determining an appropriate placement for a student with an exceptionality in the LRE [least restrictive environment], the IEP Team must consider the student's needs and the services available to meet those needs. The continuum of services for school-

age students is described in subsection A below. The services of preschool students are described in Section B. Regardless of placement, the student must be given access to the general education curriculum unless the IEP Team determines it to be inappropriate.

B. Placement Options for Students Ages Three Through Five

Early Childhood Program _ The student is attending an early childhood program and receives specially designed instruction either in the early childhood environment or in another community setting. The early childhood programs include at least 50% students without disabilities and include, but are not limited to:

Head Start;

Kindergarten;

Reverse mainstream classrooms;

Private preschools;

Preschool classes offered to an eligible pre-kindergarten

population by the public school system; and

Group child care.

Services provided by special education teachers include, but are not limited to, implementing all aspects of the creative curriculum, implementing all aspects of the head start performance standards, and being the teacher of record who develops, implements and evaluates IEPs for students with special needs. Policy 2525 contains specific provisions that promote an inclusive environment for special needs preschool students:

12.1. County plans will outline the county's process for providing fully inclusive early childhood classrooms with appropriate supports for children with identified special education needs. Proximity does not guarantee inclusion.

12.2. Children with identified special needs must be served in the least restrictive environment which includes utilizing approved participating partners in WV Pre-k.

12.4. The IEP placement determination identifies the setting where the IEP will be implemented. Placement decisions must be made consistent with 34 CFR §300.552

> that requires: 12.4.1. the student's placement decision is made by the student's IEP Committee; 12.4.2. the placement be in the least restrictive environment based on and consistent with the IEP; 12.4.3. that unless the student's IEP requires some other setting, the child be educated in the early childhood settings where the child would have received services if he/she had not been disabled and as close as possible to his/her home school.
>
> 12.5. Placement in separate settings designed for students with disabilities should only be used when a child's IEP cannot be implemented in a less restrictive environment as determined by the IEP team and documented through multiple formal and informal assessment process.

The special needs preschool students who are assigned to Grievants' classrooms do not have IEPs that require placements in other than a regular education setting. An IEP is mandated by the Individuals with Disabilities Education Act (IDEA). An IEP must be tailored to the individual's student's needs as identified by the evaluation process, and must help teachers and related service providers understand the student's disability andhow the disability affects the learning process. An IEP dictates the level and qualifications of school personnel required to provide special education. Grievants offered no evidence that any of the special education students served by them were deprived of educational services as a result of any deficiency in the number of school personnel available to meet the terms of their IEPs. In addition, the caseload limits relative to the special needs students served by Grievants have not been exceeded. (See footnote 2)

Grievants are not required to provide services to students outside their areas of certification. West Virginia Board of Education Policy 5202 provides that Preschool Special Needs Teachers, holding certificates endorsed for preschool special needs, may be assigned to serve regular pre-kindergarten classrooms. (See footnote 3) The authority of teachers holding certificates endorsed for preschool special needs to serve students without a disability is unique among special education teachers. No other teachers with certificates endorsed for special needs are authorized, by virtue of such special needs endorsements, to serve students without a disability. As noted in the Findings of Facts, Grievant Haines applied for a Preschool special needs/Preschool position at Skyview Elementary School; accordingly, she fails to state a claim upon which relief can be granted. The Procedural Rules of the Grievance Board state, "[a] grievance may be dismissed, in the discretion ofthe administrative law judge, if no claim upon which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested." 156 C.S.R. 1 § 6.11.

In asserting a claim of discrimination, Grievants seek to compare themselves to regular education teachers in other elementary school grade levels who hold certificates endorsed for special needs instruction. They point out that such regular education teachers are not required to provide direct special education services to special needs students who may be assigned to their classrooms. The West Virginia Supreme Court of Appeals has recently clarified that, in order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must prove:

(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.

Frymier v. Higher Education Policy Comm., 221 W. Va. 306, 655 S.E.2d 52 (2007); *See Bd. of Educ. v. White*, 216 W. Va. 242, 605 S.E.2d 814 (2004); *Chaddock v. Div. of Corr.*, Docket No. 04-CORR-278 (2005). In *Frymier*, the Court acknowledged what this Board's cases have consistently held, i.e., that the elements of discrimination and favoritism are essentially identical. *Frymier v. Glenville State College*, Docket No. 03-HE-217R (Nov. 16, 2004); *Kincaid v. Div. of Corr.*, Docket No. 98-CORR-144 (Nov. 23, 1998); *Prince v. Wayne County Bd. of Educ.*, Docket No. 90-50-281 (Jan. 28, 1990). “[T]he crux of such claims is that the complainant was treated differently than similarly situated employees[.]” *White, supra*. It is clear that Grievants are not similarly situated to the regular education teachers in other elementary school grade levels. W. Va. Code . 18-5-18a provides for the assignment of students to regular education teachers based upon teacher-pupil ratio limits. These limits do not contemplate that regular elementary school teachers be given the additional responsibility to serve as special education teachers. This is in contrast to the dual responsibility of special needs preschool teachers. As previously noted, special needs preschool students are required to be served in classrooms that have at least 50% of students that are not disabled. Special needs preschool teachers have been specifically authorized by Policy 5202 to serve non-disabled preschool students. Preschool classes have lower staff-pupil ratios, and must follow Policy 2419 caseload requirements in classes that serve special needs students. No evidence was offered regarding regular education teachers, the specific special needs endorsements held by such teachers, and the level of special education services that may be required for individual students

assigned to their classrooms. With this limited evidence no discrimination has been proven.

Grievants have failed to meet their burden of proof. Grievants failed to establish by a preponderance of the evidence a violation of any law, policy, rule or regulation. The relief sought by Grievants in the nature of exclusive, segregated, teaching assignments is not required or even permitted by Policy 2419. Grievants have made no showing that the Local Education Agency has failed to meet the requirements of the IEPs for the students assigned to Grievants' classrooms.

The following Conclusions of Law support the decision reached.

Conclusion of Law

1. In non-disciplinary matters, a Grievant bears the burden of proving her allegations by a preponderance of the evidence. "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 Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. County boards of education have substantial discretion in matters relating hiring, assignment, transfer and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interest of the schools, and in a manner which is not arbitrary and capricious. *State ex rel. Melchiori v. Bd. of Educ.*, 188 W. Va. 575, 425 S.E.2d 251 (1992).

3. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, andin disregard of facts and circumstances of the case." *Eads, supra* (*citing Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

4. The West Virginia Supreme Court of Appeals has recently clarified that, in order to establish either a discrimination or favoritism claim asserted under the grievance statutes, an employee must

prove:

(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.

Frymier v. Higher Education Policy Comm., 221 W. Va. 306, 655 S.E.2d 52 (2007).

5. The Respondent's assignment of special needs students to Grievants' classrooms was not arbitrary and capricious or an abuse of discretion. Grievants failed to establish by a preponderance of the evidence a violation of any law, policy, rule or regulation. In addition, Grievants failed to establish that Respondent engaged in any discrimination or preferential treatment.

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 county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. *See* W. Va. Code § 29-6A-7 (See footnote 1). Neither the West Virginia Public 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 ofthe 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 properly transmitted to the appropriate circuit court.

Date: July 30, 2008

Ronald L. Reece

Administrative Law Judge

Footnote: 1

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1

to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.

Footnote: 2

Policy 2419 provides for the permissible number of eligible children per session. For special education programs an assignment of no more than eight eligible children per session with an aide for a maximum caseload of sixteen is mandated. The policy also provides for an assignment of no more than ten children per session with two aides for a maximum caseload of twenty.

Footnote: 3

Policy 5202, Section 18.14.