WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

JANICE BENNETT,

Grievant,

v. **Docket No. 07-42-351**

RANDOLPH COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Janice Bennett ("Grievant") initiated this proceeding on June 14, 2007, alleging that the Randolph County Board of Education ("the BOE") improperly posted three positions as Aide/LPN, which should have posted only as aide positions. She seeks reposting of the positions, along with back pay and benefits. After denials at the lower levels, this grievance was appealed to level four of the grievance procedure on August 27, 2007. A hearing was held in Elkins, West Virginia, on January 28, 2008. Grievant was represented by John E. Roush, Esquire, and the BOE was represented by counsel, Gregory W. Bailey. This grievance became mature for consideration upon receipt of the parties' fact/law proposals on February 20, 2008.

Synopsis

Grievant alleged that, in the spring of 2007, three positions were incorrectly posted as Aide/LPN for the upcoming school year. The evidence established that each of the LPN positions was necessary in order to serve the needs of diabetic students. Grievant is not an LPN and was,

therefore, not qualified to serve in any of the positions. In addition, shewas not transferred for the 2007-2008 school year, so she had no standing to challenge the transfers of other aides. She argued that aides had been displaced in order to create vacancies for the LPN positions, in violation of newly-enacted W. Va. Code 18A-4-8(p), but the evidence established that this did not occur. Grievant has failed to establish the violation of any statute, and the grievance must be 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 is employed by the BOE as an Aide IV/Paraprofessional and Computer Operator.

2. Grievant was not transferred in the spring of 2007 for the upcoming school year. At that time, she was assigned to a position at Elkins Middle School and successfully applied for a position at Coalton Elementary School for the 2007-2008 school year.

3. On May 22, 2007, the BOE posted vacancies for Aide/LPN (Licensed Practical Nurse) positions, as follows:

Aide II/LPN, Itinerant _ Third Ward School and Elkins Middle School

ECE [Kindergarten] Aide II/LPN, Itinerant _ Jennings Randolph Elementary

Aide II/LPN (Bus/Classroom), Itinerant _ Elkins Middle School

4. The above postings were the result of a meeting which occurred in early May, during which all of the county's school nurses discussed the increasing numbers of diabetic students, along with the increasing severity of their conditions, at the schools in question.

5. The administration of insulin to diabetic students is encompassed within West Virginia Board of Education Policy 2422.7's definition of “Specialized Health Care Procedures” which are required to be performed by licensed medical personnel. 6. Prior to the 2007-2008 school year, an Aide/LPN was already assigned to Elkins Middle School to assist a “brittle” diabetic student whose insulin must be monitored throughout the day. This student has an insulin pump which must be programmed at various times to adjust his insulin levels, and the student is unable to perform these tasks without assistance.

7. In addition to the student discussed immediately above, there were five additional diabetic

students at Elkins Middle School with varying needs as to assistance and monitoring of their conditions, for the 2007-2008 school year.

8. At Third Ward School, for the 2007-2008 school year, a diabetic kindergarten student and a diabetic first grade student needed assistance with monitoring and administering their insulin, along monitoring with their food intake.

9. At Jennings Randolph Elementary, a newly-diagnosed diabetic first-grader needed constant assistance with monitoring and administering his insulin and food intake for the 2007-2008 school year.

10. When the Aide/LPNs are not actively involved in administering to the needs of the diabetic students, they perform traditional aide duties.

11. The Aide/LPN positions were posted and filled after the spring 2007 transfers and reductions-in-force had occurred; thus, no aides were removed from their positions in order to create vacancies for the Aide/LPNs.

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).

Although a classification definition for Licensed Practical Nurse did not exist within the school service personnel statutes prior to 2007, the Supreme Court of Appeals had previously determined that a board of education acted within its discretion in requiring a nursing license for aides assigned to diabetic students. In *Board of Education v. Scott*, 217 W. Va. 128, 617 S.E.2d 478 (2005), the Court stated that “providing the students with a single aide who could attend to both their educational and medical needs was in the students' best interests[.]” Therefore, adding the nursing license as a qualification for the position was deemed appropriate, and the Court acknowledged that these types of students have specific needs that call for a uniquely qualified aide.

Effective June 8, 2007, the West Virginia Legislature amended W. Va. Code 18A-4- 8(i) by adding a classification definition for “licensed practical nurse,” meaning “a nurse, licensed by the [state], employed to work in a public school under the supervision of aschool nurse.” In addition, this

statute was further amended with the addition of the following language: “Any person employed in an aide position on the effective date of this section may not be transferred or subject to a reduction in force for the purpose of creating a vacancy for the employment of a licensed practical nurse.” W. Va. Code 18A-4-8(p). It is this provision upon which Grievant relies as the basis of most of her argument in this case.

While Grievant contends that the provision cited immediately above was violated here, the evidence simply does not support such a conclusion. First, all of the proposed transfers and reductions for the upcoming school year had already been implemented in March, long before the three Aide/LPN positions were posted. Although Grievant contends that this was somehow a farce, and the BOE somehow manipulated the system in order to create vacancies for the LPN jobs, there is no evidence that this occurred. Second, the details of any aide transfers or reductions in force that occurred were not introduced into evidence, so it is impossible to conclude whether or not any of them were unnecessary or motivated by illegal factors. Finally, since Grievant was not transferred or reduced in force in the spring of 2007, she does not have standing to challenge the BOE's actions regarding the employment status of other aides. The Grievance Board has frequently ruled that without some allegation of personal injury, a grievant is without standing to pursue a grievance. *Lyons v. Wood County Bd. of Educ*., Docket No. 89-54-601 (Feb. 28, 1990).

It is well-recognized that county boards of education have substantial discretion in matters related to hiring, assignment, transfer, and promotion of school personnel. However, that discretion must be tempered in a manner that is reasonably exercised, in the best interest of the schools, and in a manner which is not arbitrary and capricious. *Syl.Pt. 3, Dillon v. Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986). 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.2d1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind*, Docket No. 96-DOE-081 (Oct. 16., 1996). While a searching inquiry into the facts is required to determine if an action is arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of the board of education. *See generally Harrison v. Ginsberg*, 169 W. Va. 162, 286 S.E.2d 276, 283 (1982).

The need for each of the Aide/LPN positions at issue was thoroughly explained in this case. Grievant does not dispute the need for a licensed nurse to administer insulin, as established by state policy. Due to the increasing numbers of diabetic students at the schools at issue, along with their various needs for assistance in administering their insulin and monitoring their conditions, the BOE acted appropriately in establishing two additional LPN positions for the 2007-2008 school year. Even in the absence of a designated class title for LPNs, boards of education have the undisputed authority to employ aides who are also licenses nurses, when it is necessary to do so as a result of particular students' medical conditions. *See Scott, supra*. These positions were necessary to meet the needs of the students, which is every board of education's utmost priority, and the evidence does not establish any violation of the BOE's ample discretion in such matters.

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. 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.

2. County boards of education have substantial discretion in matters related to hiring, assignment, transfer, and promotion of school personnel. However, that discretion must be tempered in a manner that is reasonably exercised, in the best interest of the schools, and in a manner which is not arbitrary and capricious. *Syl. Pt. 3, Dillon v. Bd. of Educ.*, 177 W. Va. 145, 351 S.E.2d 58 (1986).

3. A board of education may require that an aide possess a nursing license when it is necessary to administer to the medical needs of particular students. *See Bd. of Educ. v. Scott*, 217 W. Va. 128, 617 S.E.2d 478 (2005).

4. Grievant has failed to establish by a preponderance of the evidence that Respondent violated any statute, rule or policy, abused its discretion, or acted in an arbitrary and capricious manner.

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 (repealed, *See Footnote 1, supra)*. 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 of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil actionnumber so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: March 26, 2008

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DENISE M. SPATAFORE

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.