WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KRISTY SISLER,
Grievant,

v. **Docket No. 2008-1284-PocED**

POCAHONTAS COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Kristy Sisler ("Grievant") initiated this grievance on March 3, 2008, alleging she should have been given first opportunity for a position at Pocahontas County High School ("PCHS") for the 2008-2009 school year, rather than being asked to sign an agreement to be assigned to Marlinton Elementary School ("Marlinton"). The grievance was denied at level one on April 22, 2008. A mediation held at level two on July 7, 2008, was unsuccessful. After appeal to level three, a hearing was held in Elkins, West Virginia, on November 10, 2008, and via telephone, pursuant to agreement of the parties, on November 14, 2008. Grievant was represented by Ben Barkey of the West Virginia Education Association, and Respondent was represented by counsel, Gregory Bailey. Fact/law proposals were submitted by both parties, dated December 12, 2008.

Synopsis

Grievant is employed by Respondent as an itinerant special education and autism teacher. In early 2008, due to anticipated needs for special education students and a plan to cluster elementary autism services at Marlinton Elementary, Grievant was asked to sign an agreement to be assigned as itinerant autism teacher at Marlinton for the 2008-2009

school year. Grievant had been assigned to an autistic student and worked in a half-time position as itinerant autism teacher at PCHS in 2007-2008, but there was to be no need for autistic services at PCHS for 2008-2009.

Because of Respondent's ample discretion in personnel matters, Grievant's status as an itinerant employee, and her voluntary agreement to the Marlinton assignment for the 2008-2009 school year, this grievance must be denied.

Findings of Fact

1. Grievant has been employed by Respondent as a special education teacher since 2005. She is certified in Elementary Education, along with BD, LD, MI[1] and autism, with Master's degrees in Special Education and Autism.

2. Since the beginning of her employment, Grievant has been the only teacher in Pocahontas County with a certification in autism.

3. During the 2007-2008 school year, Grievant served in an itinerant autism teacher position, assigned half-time to PCHS and half-time to Marlinton. At PCHS, Grievant worked with one autistic student, and she taught several autistic students at Marlinton.

4. In the spring of 2008, special education administrators decided that, due to increasing numbers of autistic elementary students, those services would be clustered at Marlinton for all autistic students in the county for the upcoming school year.

5. Because Grievant was the only certified autism teacher, the special education director asked Grievant if she would voluntarily agree to be assigned full-time as the autism

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[1]Behavioral Disorders, Learning Disabled, and Mentally Impaired.

teacher at Marlinton for 2008-2009. It was anticipated there would no longer be a need for an autism teacher at PCHS for the upcoming school year.[2]

6. On February 28, 2008, Grievant signed a "Consent to Change," stating that she agreed to a change in her assignment from itinerant teacher of autism for PCHS/Marlinton to itinerant teacher of autism for Marlinton, effective for the 2008-2009 school year.

7. If Grievant had not executed the Consent to Change, she would have been placed on transfer for the upcoming 2008-2009 school year; she signed the agreement in order to be assured of where she would be assigned for the next year.

8. Prior to the beginning of the 2008-2009 school year, Grievant successfully bid on a different position, at Green Bank Middle School, where she currently teaches.

9. The Pocahontas County Board of Education did not ultimately approve the creation of an autism center at Marlinton, and the individual who was placed in the position after Grievant travels to various schools to teach autistic students.

10. Another special education teacher who served in a half-time position at PCHS during 2007-2008 was asked to agree to be assigned full-time there for the 2008-2009 school year. There was a continued need for special education services there for the upcoming school year, but not for an autism teacher.

Discussion

Because this grievance does not involve a disciplinary matter, Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the

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[2]There are currently no autism teachers at PCHS and apparently no need for such services.

Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990); *See 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). "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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant contends that she should have been allowed to remain at PCHS full-time for the 2008-2009 school year, rather than being asked to agree to be assigned to Marlinton. Because the other half-time special education teacher at PCHS was allowed the option to stay there and had less seniority than Grievant, she believes this was unfair and demonstrated that there was a need for her to remain at PCHS for 2008-2009. Grievant says she only signed the agreement regarding the change in assignment to prevent being placed on transfer.

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).

As recently noted by this Grievance Board in *Sharp v. Jackson County Board of Education*, Docket No. 07-08-361 (Feb. 26, 2008), " it is well established that a board of education has ample discretion in assessing how to best serve the needs of its special needs students." In that case, the board of education's decision to reduce two itinerant special education teacher positions into one position, due to reduced need for services, was upheld as appropriate. The grievant was properly notified of her reduction in force, pursuant to the provisions of West Virginia Code § 18A-4-7a, and she was returned to a previous position, also pursuant to the provisions of that statute.

The situation in the instant grievance is quite similar to that which occurred in *Learmonth v. Fayette County Board of Education*, Docket No. 03-10-200 (Aug. 20, 2003), in which a special education teacher was transferred, because the school to which she was assigned needed only one special education teacher for the upcoming school year, but with autism certification which the grievant did not have. The following discussion from *Learmonth* is pertinent to this case:

> Boards of education are not required by law to base transfer decisions on seniority, or to consider seniority as a factor in making transfer decisions.

> Transfer decisions "are based on the needs of the school, as decided in good faith by the superintendent and the board. *Hawkins v. Tyler County Bd. of Educ.*, 166 W. Va. 363, 275 S.E.2d 592 (1979) and *Post [v. Harrison County Bd. of Educ.*, Docket No. 89-17-355 (Feb. 20, 1990)]. *See Jochum v. Ohio County Bd. of Educ.*, Docket No. 91-35-396 (Jan. 31, 1992)." *Stewart, et al., v. Kanawha County Bd. of Educ.*, Docket No. 96-20-370 (Jan. 31, 1997). Classroom teachers have no vested right to be assigned to a particular school in the county. *Hawkins, supra*. W. Va. Code § 18A-2-7 "grants broad discretion to a superintendent, and gives him the authority to transfer school personnel subject only to the approval of the board. *Post* [*supra*]." *Stewart, supra*.

Obviously, in the instant case, Grievant was not actually transferred, but Respondent anticipated the needs of the upcoming school year would require it, and it offered Grievant the opportunity to voluntarily agree to an assignment. As Respondent has pointed out, signing the agreement constituted a waiver of any rights Grievant would have under the transfer provisions. *Butcher v. Jackson County Bd. of Educ.*, Docket No. 97-18-458 (Apr. 13, 1998); *See Thomas v. Wetzel County Bd. of Educ.*, Docket No. 96-52-268 (Oct. 10, 1996).

Nevertheless, Respondent would have acted within its discretion if it had placed Grievant on transfer in the spring of 2008. As discussed in *Learmonth, supra*, boards of education are required in the spring of each year to make decisions regarding personnel assignments based upon the *anticipated* needs for the upcoming school year. In this case, an autism teacher was not needed at PCHS for 2008-2009, and Respondent's plan at that time, although it did not ultimately come to fruition, was to provide all autism services at Marlinton. Because Grievant was the only certified autism teacher in the county, it was Respondent's obligation to assign her pursuant to its anticipated needs for the 2008-2009 school year.

Also pertinent to the instant case is Grievant's status as an itinerant teacher. "[A] board of education . . . has the discretion to designate a . . . 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); *See also Bennett v. Randolph County Bd. of Educ.*, Docket No. 05-42-396 (April 12, 2006). Therefore, because of her itinerant status, Respondent could have changed Grievant's assignment without transfer or a consent agreement, in order to best serve the students in need of her particular certification and skills. As Respondent has noted, the agreement was given to Grievant as a courtesy, so she could voluntarily participate in the decision to reassign her, but there was no obligation on the board of education's part to allow her any say in the decision.

Finally, Grievant argues that, pursuant to the provisions of West Virginia Code § 18A-4-8b, which requires county boards to post "all job vacancies of established existing or newly created positions," a full-time special education teaching position at PCHS should have been posted. However, Grievant is mistaken in her assertion that there was a vacant full-time position at PCHS. Previously, Grievant and another special education teacher, Jessica Dean, each held one full-time position that was split between two schools. When the special education needs of the school system changed and assignments were adjusted to meet the needs of the schools, both remained in full-time positions. Grievant was reassigned from her assignments as half-time at PCHS and half-time at Marlinton to a full-time assignment at Marlinton. Ms. Dean, who had been half-time at PCHS and half-time

at Green Bank Elementary, became full-time at PCHS, and a less senior teacher at Green Bank Elementary was reduced in force. Under this scenario, both Grievant and Ms. Dean remained in full-time positions as they had the previous school year, so no "vacancy" occurred. Both employees agreed to and were allowed to retain their full-time status, but were reconfigured as to physical assignments. Therefore, Respondent was not obligated to post a full-time special education vacancy for PCHS, because there was no new or vacant position.

Accordingly, Grievant has failed to establish any abuse of Respondent's discretion in personnel matters or that its actions were arbitrary and capricious. Decisions were made to address the anticipated needs of the special education students in the county, and Grievant's itinerant status allowed her employer to assign her as needed. Moreover, Grievant voluntarily agreed to her assignment for the 2008-2009 school year.

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990); *See 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).

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. "[I]t is well established that a board of education has ample discretion in assessing how to best serve the needs of its special needs students." *Sharp v. Jackson County Board of Education*, Docket No. 07-08-361 (Feb. 26, 2008).

4. Classroom teachers have no vested right to be assigned to a particular school in the county. *Hawkins v. Tyler County Bd. of Educ.*, 166 W. Va. 363, 275 S.E.2d 592 (1979).

5. "[A] board of education . . . has the discretion to designate a . . . 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); *See also Bennett v. Randolph County Bd. of Educ.*, Docket No. 05-42-396 (April 12, 2006).

6. An employee's voluntary execution of an agreement to accept a particular assignment for the upcoming school year constitutes a waiver of any rights provided under the statutory transfer provisions. *Butcher v. Jackson County Bd. of Educ.*, Docket No. 97-18-458 (Apr. 13, 1998); *See Thomas v. Wetzel County Bd. of Educ.*, Docket No. 96-52-268 (Oct. 10, 1996).

7. Grievant was an itinerant employee and agreed in writing to be moved to a different assignment for the 2008-2009 school year; no abuse of the board of education's

discretion in personnel matters occurred, and Respondent's actions were not arbitrary and capricious.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: January 16, 2009

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DENISE M. SPATAFORE
Administrative Law Judge