WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

SIDNEE FARR
Grievant,

v. **Docket No. 2008-1439-WooED**

WOOD COUNTY BOARD OF EDUCATION,
Respondent.

D E C I S I O N

Grievant, Sidnee Farr, filed this grievance on April 8, 2008, against Respondent, Wood County Board of Education ("WCBOE"), alleging violation of W. VA. CODE §§18A-4-8b and 18A-4-8g on behalf of the Respondent. Grievant, a teacher's aide, contends that Respondent, to her detriment, improperly gave preference to classroom aides with paraprofessional certification during a recent reduction in force action. Grievant requested as relief that the action taken by Respondent in selecting her for a reduction in force be rescinded, and that she be placed back into her current position.

The parties mutually agreed to waive the lower levels of the grievance procedure and proceed directly to level three. A level three hearing was held before the undersigned Administrative Law Judge on July 9, 2008, in the Grievance Board's Charleston office. The Grievant was represented by Bruce W. Boston, WVEA, and Rosemary Jenkins, AFT-West Virginia/AFL-CIO. Respondent was represented by Dean Furner, Esquire. On July 8, 2008, John Everett Roush, Esquire, of the West Virginia School Service Personnel Association, filed a Motion for Leave to File Amicus Curiae Brief in this matter. The motion was granted with no objection from the parties. The mailing deadline for the submission of memorandums, proposed findings of fact and conclusions of law documents submitted

by the parties was August 8, 2008. This case became mature for decision on January 8, 2009, the date that the complete record of the case was received by this Board.

Synopsis

With regard to the 2008-2009 school year of Wood County Schools, Respondent conducted a reduction in force ("RIF") in the "aide" classification of service personnel. In determining what positions would be RIFed, a conscious effort was made (preference given) to retain individuals with paraprofessional certification, over those who merely had aide certification. As a result of Respondent's actions, Grievant was RIFed, even though she had more seniority than a significant number of paraprofessional aides.

WEST VIRGINIA CODE clearly provides that the paraprofessional classification title does not stand alone as a classification category. The paraprofessional classification title is one of the class titles that comprise the aide classification category. Applicable W. VA. CODE provides that seniority is the basis for determining which employees are terminated and which are retained in a reduction in force action. When a RIF action is conducted, generally, the least senior employees within the classification category are the employees who are terminated and placed on the preferred recall list.

Unless the aide positions under review *require* the additional qualifications/skills of a paraprofessional for the successful performance of the job, it is improper to give retention preference to classroom aides with paraprofessional certification during a RIF of the aide classification. Generally, the particular classification title held by an employee within a classification category is not a factor during a reduction in force. Accordingly, this grievance is granted.

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

Findings of Fact

1. Grievant, Sidnee Farr, was employed by Wood County Board of Education during the 2007-2008 school year as a Teacher's Aide at Parkersburg High School.[1]

2. Grievant is not currently certified as a paraprofessional but has taken courses toward achieving that certification. Grievant is a service personnel employee of Respondent (behavior disorder aide).

3. Pursuant to WEST VIRGINIA CODE, each year, each county receives preliminary computations of public school support programs service personnel data which indicates how many service personnel will be paid for by the State. Any employees hired or retained over the State allotment must be funded by some other means.

4. The State Aid formula and the number of employees were reflected in the Board of Education minutes dated January 22, 2008, where the staffing goals for 2008-09 were approved by Respondent. By unanimous vote, Respondent approved the staffing goals for service personnel to be 590.192.

5. For the 2008-09 school year, Wood County was over the number of service employees paid for by the State. Wood County Schools had an overage of 16.6 School Service Personnel according to the preliminary computations for the 2008-2009 school year.

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[1] Grievant has held several positions in Wood County including two years as a Behavior Disorder Aide, and three years as a one-on-one aide serving a student in a wheelchair. Prior to her employment as a teacher's aide, Grievant was employed as a cook.

6. On January 22, 2008, Respondent directed its administration to bring the professional and service personnel staff in line with the number of positions funded through the State Aid formula.

7. Respondent's primary task, at that point in time, was to determine which jobs could be eliminated in order to comply with the State Aid formula (16.6 service personnel employees). In order to determine the positions to eliminate, Respondent obtained information and data from the various schools in the county, attempting to determine those employees who could be reduced in force while still providing quality education to the students in Wood County.

8. Respondent's administration determined that it would need fewer aides for 2008-2009 than were under contract in the 2007-2008 school year.

9. The administration initiated a reduction in force in the teacher's aide classification category for the 2008-2009 school year.[2]

10. Meetings were held with service personnel on February 4 and February 25, 2008, to discuss who would be effected by the proposed reduction in force and transfers.

11. In determining what positions would be RIFed, the administration implemented a preference for keeping individuals with a paraprofessional certification, over those who merely had an aide certification.

12. The requisite training and educational requirements to obtain a paraprofessional certificate is greater than the training needed to obtain aide certification.

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[2] A reduction in force is a process effected and governed by numerous rules, regulations and various applicable WEST VIRGINIA CODE. *See* W. VA. CODE §§ 18A-2-8a, 18A-2-6, 18A-4-8b and 18A-4-8g.

The paraprofessional certificate requires 36 semester hours of college credit. The classes that are set forth under West Virginia law in order to obtain paraprofessional certification are specifically tailored to give the person, who assists the preschool or kindergarten teacher, essential skills which will help children of the appropriate age group be more apt to master many of the skills that they will need when they begin first grade.

13. Granting preference to "Paraprofessional aides" is not part of Wood County Schools Policies.[3] Wood County Board of Education Policy 4119.1-Reduction in Force and Recall Policy – Service Personnel.

14. As part of the reduction in force action, Grievant and a number of other aides were notified that they would be recommended for termination. Grievant and four other teachers' aides requested a hearing before the board of education.

15. Respondent scheduled and conducted reduction in force/termination hearings on March 13, 2008.

16. Respondent approved the termination of Grievant as part of the reduction in force.

17. Respondent retained several employees for the 2008-2009 school year who held the multiclassification title of Paraprofessional/Aide who were less senior in the aide

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[3] In conjunction with applicable WEST VIRGINIA CODE, Wood County Board of Education Policy 4119.1-Reduction in Force and Recall Policy – Service Personnel outlines the procedure for the reduction in force of service personnel in Wood County. (Resp. Ex. 9). Said policy does NOT address a preference of paraprofessional aides during a reduction in force. Reportedly, Respondent began the practice approximately eight years ago, 2001.

classification category than Grievant. The parties do not agree on the specific number; however, the number was somewhere between three and forty-nine employees.[4]

Discussion

In that this is not a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). "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). Where the evidence equally supports both sides, the employee has not met her burden. *Id.*

Respondent conducted a reduction in force in the aide classification for the 2008-2009 school year of Wood County. In determining what positions would be reduced in force, there was a conscious effort (preference given) to retain service personnel employees with a paraprofessional certification, over those who merely had an aide

[4]The exact number of paraprofessional aides retained (not placed on the RIF list), with less seniority than Grievant, is not established with reliable specificity by the record. However, it is clear that the circumstance occurred.

certification.[5] Grievant maintains Respondent's actions were in violation of applicable rules, regulations and statutes which govern a reduction in force actions.

Relevant to this discussion, it may be helpful to note that; "Aide I" means those personnel selected and trained for teacher-aide classifications such as monitor aide, clerical aide, classroom aide or general aides. W. VA. CODE § 18A-4-8(i)(8). Aides II, III and IV are all essentially identical to the Aide I, but require more education, training or experience.[6]

> "Paraprofessional" means a person certified pursuant to [W. VA. CODE § 18A-3-2a] to perform duties in a support capacity including, but not limited to, facilitating in the instruction and direct or indirect supervision of pupils under the direction of a principal, a teacher or another designated professional educator . . ..

W. VA. CODE § 18A-4-8(i)(66)

> A paraprofessional certificate may be issued to a person who has completed thirty-six semester hours of post-secondary education or its equivalent in subjects directly related to performance of the job, as approved by the state board, and can demonstrate the proficiencies to perform duties as required of a paraprofessional as defined in [W. VA. CODE § 18A-4-8].

W. VA. CODE § 18A-3-2a(B)(3)

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[5] Respondent maintains one of the basic foundations for giving paraprofessionals preference in hiring and reductions in force is to put a more highly trained individual in the classroom to assist the teacher. Respondent, in defense of its actions, acknowledges that an aide without a paraprofessional certificate makes valuable contributions to the classroom; however contends seniority does not, in and of itself, make an aide better than a paraprofessional. The undersigned notes it was not established that the aide positions relevant to this grievance *required* the additional qualifications/skills of paraprofessionals exclusively for the successful performance of the positions' duties.

[6] Generally speaking, an Aide I works with children. If the employee has a GED or high school diploma, the employee is classified as an Aide II and receives a higher rate of pay. If the employee also has six hours of college credit, he/she is classified as an Aide III and receives an even higher pay grade. If the employee has sixteen hours of college credit, he/she is classified as an Aide IV with an even higher pay grade. Finally, if the employee acquires thirty-six hours of college credit, he/she is a Paraprofessional and again receives a still higher pay grade. The differences between Aide I, Aide II, Aide III, Aide IV and Paraprofessional are differences in degree.

The paraprofessional classification title is one of the seven class titles that comprise the aide classification category.[7] Paraprofessional, autism mentor and Braille or sign language specialist class titles are included in the same classification category as aides. W. VA. CODE § 18A-4-8b(d)(2)(C). Thus, *all paraprofessionals are aides, but not all aides are paraprofessionals*. Any aide who becomes employed as a paraprofessional holds a multiclassification status that includes both aide and paraprofessional titles. W. VA. CODE § 18A-4-8(i)(66)(B).

> Multiclassified school service personnel: (1) do not belong to a separate classification category, but are employees of each category contained within their multiclassification titles; (2) are subject to a reduction in force in any individual job category, based on seniority accumulation within that category; and (3) in the event of a reduction in force, remain in the employ of the county board of education with any categories that are subject to the reduction in force deleted from their multiclassification titles.

Cornell v. Putnam County Bd. of Educ. Docket No. 03-40-111 (June 26, 2003) *citing Taylor-Hurley v. Mingo County Bd. of Educ.,* 209 W. Va. 780, 551 S.E.2d 702 (2001).

Respondent does not deny that it sought to retain paraprofessionals. Assistant Superintendent, Lawrence Hasbargen testified at the RIF hearing, "If a person has a paraprofessional certification, they are not considered the same as a person who has an aide classification." Respondent contends that having a person with the additional paraprofessional qualifications is of benefit to the classroom teacher and to the students in the classroom.[8] Although this may be true, current code language applicable to a

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[7] The other class titles are Aide I, Aide II, Aide III, Aide IV, Autism Mentor, and Braille or Sign Language Specialist.

[8] There are new federal guidelines such as the No Child Left Behind Act, and state guidelines, which require students to achieve at a higher level than expected of children in the past. Respondent strongly infers that having a person with these additional

reduction in force action does not acknowledge this factor as a consideration. A school service person who holds a multiclassification title accrues seniority in each classification category of employment. A multiclassification service person is subject to reduction in force in any category of employment contained within his or her multiclassification title, based upon the seniority accumulated within that category of employment. W. VA. CODE § 18A-4-8b(i).

W. VA. CODE § 18A-4-8b(h) provides that seniority is the basis of determining which employees are terminated and which are retained in a reduction in force. The least senior employees within the classification category are terminated and placed on the preferred recall list. W. VA. CODE §18A-4-8b(j). Seniority is utilized as the criterion in conducting a reduction in force and is based upon "the length of time the employee has been employed by the county board of education within a particular job classification." W. VA. CODE § 18A-4-8b(i).

Respondent contends a paraprofessional has a different classification title than Grievant. If this were a different type of case, such as a uniformity case, that might matter;[9] however, this case is not a uniformity case, but one involving a reduction in force. W. VA. CODE § 18A-4-8g(e) states, "The particular classification title held by a service person within the classification category *may not be considered when implementing a reduction in force.*"(Emphasis added).

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paraprofessional qualifications is a benefit to the classroom teacher and to the students in the classroom when it comes to developing the skills they need to achieve these tasks, many of which were not formerly expected of students. This inference did not establish that the aide positions relevant to this grievance *exclusively required* paraprofessionals for the successful performance of the positions' duties.

[9] See *Flint v. Board of Education*, 207 W. Va. 251, 531 S.E.2d 76 (1999).

While Respondent maintains it acted with rational purpose and with the goal of increasing the educational quality and skills of the employee servicing county's students, its actions must be reviewed in the context of applicable controlling statute. The undersigned finds the circumstance which would compel and/or justify preferential retention of paraprofessional aides has not been established in the facts of this case. Paraprofessionals and Grievant are in the aide classification category. Grievant and the paraprofessionals have, by their service in their particular classification titles, earned the same kind of seniority, i.e., aide seniority. A reduction in force in the aide classification category, based on seniority, must include all aides including paraprofessionals. Grievant has more seniority than a significant number of paraprofessionals. Consequently, a reduction in force in the aide classification category cannot legally result in Grievant's termination while still retaining all paraprofessional aides.

During the course of the instant grievance, two specific cases were cited in opposition to the analysis given above. These cases are distinguishable from the case at hand. First, *McDonald v. Wood County Board of Education*, Docket No. 03-54-285 (Jan. 13, 2005), though it dealt with the paraprofessional classification title, it primarily involved the filling of a job rather than a reduction in force (selection as opposed to termination). In that case, this Grievance Board held that a Board of Education could give preference to paraprofessionals over aides in the hiring process under certain circumstances. The process for filling a job involves three criteria, i.e., seniority, evaluation and qualification. The process of a reduction in force, by contrast, involves a single criterion, i.e., seniority. Consequently, one may simply disregard *McDonald* as inapplicable to the current case, as it relates to a different process with different rules.

The other case is *Taylor v. Pocahontas County Board of Education*, Docket No. 05-38-213 (Oct. 14, 2005). This case is of interest, and gives insight, but is distinguished, given the nature of the services and the specialized needs of an autistic student provided for by an autism mentor. As discussed in the decision, the autistic student in the case needed services from an autism mentor (not just an aide), thus the need for a particular position would remain unchanged. It would be inappropriate and would not achieve the goal of reducing the number of aides to RIF the autism mentor, because the autistic student remained and continued to need services from a certified autism mentor.[10] Therefore, it was held that when a board must reduce the total number of aides, it should not include multiclassified aide/autism mentors who are working in autism mentor positions. The special needs' circumstances of *Taylor* are not present in the instant case. It was not established that the aide positions relevant to this grievance required paraprofessionals exclusively to satisfy the positions' duties.

Respondent conducted a reduction in force in the aide classification. Respondent's actions resulted in Grievant being identified as an individual to be RIFed while a significant number of paraprofessional, multiclassified aides, with less seniority than Grievant (allegedly forty-nine) were not.[11] The WCBOE did not RIF any of its paraprofessional

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[10] An autism mentor has specialized training for dealing specifically with autistic children. It does not simply require additional college courses. The autism mentor deals with children with a different type of need. To become an autism mentor one also needs two years of experience working with autistic children. There is no similar experience requirement when going from aide IV to paraprofessional. Further, the legislature has also placed restrictions on the mobility of autism mentors that it does not place on paraprofessionals or employees holding the aide I, II, III, or IV classification. See W. VA. CODE § 18A-5-8(g).

[11] Transfers and the preferred recall list, coupled with the passage of time, affect the precise number. The exact number is not readily established to any degree of certainty.

aides. Nor was it established that these aide positions *uniquely required* the additional qualifications/skills of a paraprofessional for the successful performance of the positions' duties. The language of W. VA. CODE § 18A-4-8b(d)(2)(C) clearly provides that the paraprofessional classification title does not stand alone as a classification category. The inescapable truth is that the paraprofessional/multiclassified classification is not exempt from review during a reduction in force action, and the rules outlined by WEST VIRGINIA CODE must be followed.

The undersigned finds that unless the aide job in discussion *requires* the additional qualifications/skills of a paraprofessional for the successful performance of the job, it is improper to intentionally give retention preference to classroom aides with paraprofessional certification during a reduction in force of the aide classification. Accordingly, when the objective is to reduce the overall number of aides, it would be appropriate to include aides working as paraprofessionals when evaluating the seniority of the employees at issue. Therefore, Grievant would be entitled to keep her aide position over a less senior paraprofessional.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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-

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Nevertheless, paraprofessional aides, with less seniority than Grievant, were not identified for reduction in force. Testimony of various witnesses and position statements of the parties quantify three to forty-nine paraprofessionals.

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). Where the evidence equally supports both sides, the employee has not met her burden. *Id.*

2. The Paraprofessional classification title is a part of the aide classification category. W. VA. CODE § 18A-4-8b(d)(2)(C). Paraprofessional, autism mentor and Braille or sign language specialist class titles shall be included in the same classification category as aides. W. VA. CODE § 18A-4-8b.

3. Any aide who becomes employed as a paraprofessional shall hold a multiclassification status that includes both aide and paraprofessional titles. W. VA. CODE § 18A-4-8(i)(66)(B).

4. Multiclassified school service personnel: (1) do not belong to a separate classification category, but are employees of each category contained within their multiclassification titles; (2) are subject to a reduction in force in any individual job category, based on seniority accumulation within that category; and (3) in the event of a reduction in force, remain in the employ of the county board of education with any categories that are subject to the reduction in force deleted from their multiclassification titles." *Cornell v. Putnam County Bd. of Educ.* Docket No. 03-40-111 (June 26, 2003) *citing Taylor-Hurley v. Mingo County Bd. of Educ.,* 209 W. Va. 780, 551 S.E.2d 702 (2001).

5. Reductions in force are based solely upon seniority within the classification category with the least senior employees within the classification category being released and the more senior retained. W. VA. CODE § 18A-4-8b(h) & (j). All decisions by county

boards concerning reduction of service personnel shall be made on the basis of seniority. W. VA. CODE § 18A-4-8b(h).

Accordingly, this grievance is **GRANTED**. When the objective is to reduce the overall number of aides, in determining which aides will be reduced in force, it is appropriate to include aides working as paraprofessionals when evaluating the seniority of the employees at issue. Grievant is entitled to be evaluated for the reduction in force action based upon her seniority within the classification. Unless the aide position in discussion requires a paraprofessional (explicitly for the successful performance of the job), Grievant is entitled to keep her aide position over least senior paraprofessional aides.

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 WEST VIRGINIA 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: June 18, 2009

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Landon R. Brown
Administrative Law Judge