THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

MARY KATHERINE DALESIO,
Grievant,

v. **Docket No. 2011-0601-HanED**

HANCOCK COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Mary Katherine Dalesio, filed this grievance against her employer, Hancock County Board of Education, on October 13, 2010, contending that she "is certified as an Autism Mentor, provides services to an autistic student. Grievant contends that she is entitled to the classification of Austism Mentor and the accompanying pay and benefits. Grievant alleges a violation of W. Va. Code 18A-4-8." For relief Grievant seeks "reclassification to Autism Mentor/Aide with compensation for lost wages with interest and all benefits, pecuniary and nonpecuniary, retroactive to the maximum extent permitted by law."

This grievance was denied at level one on November 29, 2010, following a conference. Grievant appealed to level two, and a mediation session was conducted on December 22, 2010. Appeal to level three was perfected on January 7, 2011, and a level three hearing was conducted by the undersigned Administrative Law Judge on May 12, 2011, at the Grievance Board's Westover office. Grievant appeared in person and by her counsel, John Everett Roush, West Virginia School Service Personnel Association. Respondent appeared by its counsel, William T. Fahey, Assistant Prosecuting Attorney,

County of Hancock. This matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on June 17, 2011.

Synopsis

Grievant is employed by the Respondent in the aide classification category. Grievant argues that she met all the policy requirements to qualify as an autism mentor; however, Respondent failed to meet its statutory obligation to reclassify Grievant to the title of autism mentor. Grievant has met her burden of proof by a preponderance of the evidence and established that Respondent neglected its statutory obligation to reclassify Grievant to the autism mentor title. In addition, Grievant has proven by preponderance of the evidence that she has worked with an autistic student since the beginning of the 2010 school year, thereby entitling her to compensation appropriate to that classification title.

The following findings of fact are based upon the record developed at level three.

Findings of Fact

1. Grievant is employed by the Hancock Board of Education in the aide classification category.

2. It is undisputed that Grievant is certified as an autism mentor.

3. Grievant currently works with a student with the exceptionality of autism. The student has a higher than normal IQ. The student has an Individual Education Plan ("IEP") that requires positive behavioral reinforcement, adult supervision, and the availability of visualization resources.

4. This student is in Grievant's kindergarten classroom at Weirton Heights Elementary School for the full day. The student does not have an aide assigned to work with him other than Grievant.

5. Respondent's practice is to only provide an autism mentor to students whose IEP indicates a need for an autism aide.

6. The student in Grievant's classroom has been diagnosed with autism; however, his IEP does not require an autism mentor.

7. Grievant is required to redirect the student on occasions when he gets fixated on a particular subject. This tendency to fixate increased as the 2010-2011 school year progressed. Grievant works with the student to meet his IEP needs and provides services to address the spectrum of autism particular to this student.

Discussion

As this grievance does not involve 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 Board 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). In other words, "[t]he 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 makes clear that she does not assert that every autistic student must have an autism mentor assigned to that particular student. However, under the statutory language, every aide who both works with an autistic student and is certified as an autism mentor is entitled to hold that classification and receive the compensation appropriate to that classification title. Respondent argues that to provide an autism mentor to students who have traits or characteristics of autism but do not require an autism mentor under their IEP would require Respondent to provide autism mentors to all similarly situated students. Due to this scenario resulting in a perceived economic hardship, Respondent's practice is to provide an autism mentor to students whose IEP indicates a need for an autism mentor.

Grievant points out to the undersigned that the burden of correctly classifying employees is on the board of education. A board of education is required to "review each service person's job classification annually and shall reclassify all service persons as required by the job classification." W. VA. CODE § 18A-4-8(l). In addition, an autism mentor means "a person who works with autistic students and who meets standards and experience to be determined by the State Board." W. VA. CODE § 18A-4-8(i)(14). To qualify as an autism mentor, an employee must be qualified to serve as an Aide III, be physically able to work with autistic students, have two years of experience working with autistic students, and have fifteen hours of training in the area of working with autistic students. West Virginia Department of Education Policy No. 5314.01.

Respondent presented an economic hardship argument, and asserted that they were forced to exercise a certain amount of conjecture when determining assignment of

autism mentors due to the lack of any meaningful guidance from the state department of education. Respondent submitted, without any supporting authority, the proposition that "the classification of autism mentor is meant to supplement the pay of those teachers [aides] who deal with autistic students which either demonstrate extreme violence or tendencies to run away."[1] The result being that if the student's IEP did not call for an autism mentor, then none was provided. While the undersigned recognizes the conundrum presented by the absence of any clarification from the state department of education, the controlling statutory language is clear and unambiguous.

It is undisputed that Grievant is certified under state policy as an autism mentor. The record established that Grievant works with a student at Weirton Heights Elementary School with the exceptionality of autism. Grievant has proven by a preponderance of the evidence that Respondent neglected its statutory obligation to reclassify Grievant to the autism mentor. In addition, Grievant has proven by preponderance of the evidence that she worked with an autistic student and met the statutory definition set out above for autism mentor. Therefore, Grievant is entitled to both the classification title and the classification paygrade.[2] The record of this case established that Grievant would be entitled to the autism mentor classification and compensation retroactive to September 1, 2010, the date she began working with the autistic student following certification.

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[1]Respondent's Proposals, page 4.

[2]When there is a change in classification or when a service person meets the requirements of an advanced classification, his or her salary shall be made to comply with the requirements of this article and any county salary schedule in excess of the minimum requirements of this article, based upon the service person's advanced classification and allowable years of employment. W. VA. CODE § 18A-4-8(g).

The following conclusions of law support the decision reached.

Conclusions of Law

1. As this grievance does not involve 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 Board 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).

2. School personnel laws and regulations must be strictly construed and in favor of the employee(s) that they are designed to protect. *Morgan v. Pizzino*, 256 S.E.2d 592 (W. Va. 1979).

3. Grievant has proven by a preponderance of the evidence that Respondent violated W. VA. CODE § 18A-4-8(l) and W. VA. CODE § 18A-4-8(g) when it failed to reclassify Grievant to the classification title of autism mentor after she had met the qualifications of that position.

4. Grievant has proven by preponderance of the evidence that she worked with an autistic student and otherwise met the statutory definition of W. VA. CODE § 18A-4-8(i)(14). Grievant is entitled to both the classification title and the classification paygrade. W. VA. CODE § 18A-4-8(g).

Accordingly, this grievance is **GRANTED**.

Respondent is **ORDERED** to reclassify Grievant to autism mentor with an effective date of September 1, 2010. Respondent is further **ORDERED** to pay Grievant the difference between her pay as an aide and the salary she would have earned as an autism

mentor retroactive to September 1, 2010, the time that Grievant began working with an autistic student. Grievant is entitled to back pay with interest, benefits, and seniority as an autism mentor retroactive to September 1, 2010.

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: July 28, 2011

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Ronald L. Reece
Administrative Law Judge