THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

SARA SUTTON,
Grievant,

v. **Docket No. 2010-1480-HanED**

HANCOCK COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant Sara Sutton filed this grievance against her employer Hancock County Board of Education on April 6, 2010, contending that "she has been qualified as an Autism mentor and has been performed [sic] the duties of that classification for five years. Respondent has not recognized her qualification for the classification and has not compensated her for the classification. Grievant alleges a violation of W. Va. Code 18A-4-8 & 18A-4-8a and WVBOE policy No. 5314.01." For relief Grievant seeks "recognition of her qualification as an Autism Mentor, reclassification to that classification, and compensation for lost wages to the extent allowed by law."

This grievance was denied at level one on May 11, 2010, following a conference. Grievant appealed to level two, and a mediation session was conducted on August 16, 2010. Appeal to level three was perfected on August 27, 2010, and a level three hearing was conducted by the undersigned Administrative Law Judge on December 21, 2010, 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 January 24, 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 on May 12, 2008; 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. Under the facts of this case, Grievant did not establish that she was entitled to back pay.

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. Over the past few years Grievant has worked toward classification as an Autism Mentor.

2. The West Virginia Department of Education, by letter dated June 9, 2008, certified through its executive director that Grievant had met the requirements of the staff development program related to autism; on April 21, 2008, Grievant successfully completed the autism mentor physical fitness assessment; and by letter dated March 15, 2010, A.T. Allison Elementary School's special education teacher verified Grievant's experience of working with autistic students.

3. Grievant has the following work experience with autistic children:

August 2004 to November 2004

August 2006 to December 2006

August 2007 to June 2009

3. Grievant achieved the necessary two years of experience working with autistic students at the end of the 2009 school year.

4. It is undisputed that Respondent recognizes Grievant's qualifications to be an autism mentor; however, it failed to classify Grievant as an autism mentor.

5. Since achieving certification as an autism mentor the Grievant failed to bid on any position in that classification title that have been available.

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).

Respondent argues that the requirements of Policy 5314.01 were not met by Grievant until March 15, 2010, the time that Grievant's work with autistic students was documented by a special education teacher at her school. Grievant argues that the applicable law places the responsibility of correctly classifying employees on the boards of education. The Respondent organized and provided much of the training that Grievant needed to certify as an autism mentor, was or should have been aware that Grievant was working with autistic students, and met the other policy requirements to be classified as an autism mentor. Nevertheless, Respondent neglected to reclassify Grievant to autism mentor on May 12, 2008.[1]

Grievant is correct in pointing out that 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's position is that the policy requires that the experience be gained by working with students with an IEP designation as autistic, or, in the alternative, that the March 15, 2010, special education teacher's letter somehow "certified" Grievant's

[1]On this date Grievant completed the "Sensory Integration and Autism" training session provided by Respondent. *See* Grievant's Exhibit 1.

experience of working with autistic students "under the supervision of a special education teacher."[2] This argument is flawed because the policy does not specify either of those requirements. As noted above, all the policy requires is two years of experience working with autistic students. In addition, the Grievance Board has previously ruled that the policy does not require that the experience be gained by working with students with an IEP designation. *See Carr v. Tucker County Bd. of Educ.*, Docket No. 06-47-376 (May 7, 2007). However, the Grievance Board in *Simmons v. Randolph County Bd. of Educ.*, Docket 96-42-385 (Nov. 26, 1997) ruled that based in part on an interpretation by the State Superintendent of Schools "a year of experience, pursuant to W. VA. CODE § 18A-4-8, shall mean one hundred thirty-three days of employment in any one school year."[3]

The record in this matter demonstrates, by a preponderance of the evidence, that Grievant gained the necessary experience in working with autistic students following the 2007-2008 and 2008-2009 school years. Based upon the reasoning in *Simmons*, *supra.*, the undersigned is not persuaded to use Grievant's proposed qualification date of May 12, 2008, because the 2004 and 2006 years which she relied upon were shorter than the required one hundred thirty-three days of employment. Therefore, Grievant met all the necessary qualifications to be an autism mentor on June 1, 2009. Respondent neglected its statutory obligation to reclassify Grievant to the autism mentor in June 2009.[4] The

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[2]Respondent's proposals at page 2.

[3]*See generally Eaves v. Wayne County Bd. of Educ.*, Docket No. 2009-0372-WayED (April 16, 2010).

[4]When an employee meets the requirement of an advance classification title, the board of education is required to reclassify the employee and to bring the employees salary and benefits into line with the advanced classification. W. VA. CODE § 18A-4-8(g).

record also established that since achieving certification as an autism mentor the Grievant failed to bid on any position in that classification title that may have been available.

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. 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.

3. 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).

4. Grievant has proven by a preponderance of the evidence that Respondent's actions in 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.

Accordingly, this grievance is **GRANTED**, in part, and **DENIED**, in part. Respondent is **ORDERED** to reclassify Grievant to autism mentor with an effective date of June 1, 2009. Grievant's request for back pay 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: March 30, 2011

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Ronald L. Reece
Administrative Law Judge