THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BRIAN CASTEEL,
Grievant,

v. **Docket No. 2018-0317-WayED**

WAYNE COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Brian Casteel, is employed by Respondent, Wayne County Board of Education. On August 31, 2017, Grievant filed this grievance against Respondent stating,

> Thursday August 24, 2017, grievant was informed he was being moved from a special needs classroom to an Autism Classroom. He was sent for one and a half hours of training. The grievant has not had the required number of training to work with Autistic student[s] in accordance with West Virginia Board of Education Policy (5314.01). In addition, this violated the seniority and RIF and Transfer rights of the grievant in accordance with 18A-4-8b.

For relief, Grievant seeks "[t]o be restored to his original position of Aide II in the special needs classroom."

Following the level one conference, held on an unspecified date, a level one decision was rendered on November 29, 2017, denying the grievance. Grievant appealed to level two on December 7, 2017. Following unsuccessful mediation, Grievant appealed to level three of the grievance process on June 13, 2018. A level three hearing was held on September 6, 2018, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievant was represented by Rod Stapler, Staff Representative, West Virginia School Service Personnel Association. Respondent was represented by counsel, Leslie K. Tyree, Esquire. This matter became mature for

decision on October 9, 2018, upon final receipt of Grievant's written Proposed Findings of Fact and Conclusions of Law.[1]

Synopsis

Grievant is employed by Respondent as an itinerant Special Education Aide II. Grievant protested his transfer from a special education classroom to an autism classroom seeking only to be reinstated to his original classroom. However, since the filing of the grievance, Grievant was transferred from the autism classroom to a different special education classroom. Grievant still sought to be returned to his original classroom but attempted to amend his relief sought during the level three hearing to include back pay for working out of his classification. Respondent would clearly be prejudiced by allowing Grievant to orally amend his requested relief during the level three hearing. Therefore, Grievant's attempt to amend his requested relief must be denied, which renders that portion of his claim moot. Grievant is not entitled to be returned to his original classroom as his position is itinerant and he received the proper notice required under the statute to be transferred. Accordingly, the grievance is denied.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

[1] Although Respondent had attempted to file Proposed Findings of Fact Conclusions of Law when they were due, the Grievance Board did not receive the same. Respondent provided a copy of its Proposed Findings of Fact Conclusions of Law by email on November 7, 2018. Grievant's representative did not respond to Grievance Board staff inquiry whether he received the Proposed Findings of Fact Conclusions of Law timely or if he objected to their consideration. Therefore, Respondent's Proposed Findings of Fact Conclusions of Law have been considered.

Findings of Fact

1. Grievant is employed by Respondent as an itinerant Special Education Aide II.

2. Grievant previously served as an aide at Lavalette Elementary School in a special education classroom.

3. For the 2017-2018 school year, Grievant was moved from his previously-assigned special education classroom to the Autism Unit of Lavalette Elementary School where he served as an aide to a class comprised of only autistic students.

4. By letter delivered to Grievant by certified mail on July 30, 2018, Grievant was notified he would serve as a special education aide at Wayne Middle School for the 2018 – 2019 school year.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*. "'County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious.' Syl. pt. 3, *Dillon v. Wyoming County Board of*

Education, 177 W. Va. 145, 351 S.E.2d 58 (1986)." Syl. Pt. 2, *Baker v. Bd. of Educ.*, 207 W. Va. 513, 534 S.E.2d 378 (2000).

Grievant argues his transfer from a special education classroom to an autism classroom was in violation of law and policy. Grievant argues he is entitled to be reinstated to his original position and to be awarded back pay for working out of his classification. Respondent argues it had discretion to transfer Grievant due to student needs and his itinerant status.

Grievant's protest of the original move from the special education classroom to the autism classroom is moot as Grievant has now been transferred from the autism classroom to a different special education classroom. "Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues]." *Burkhammer v. Dep't of Health & Human Res*., Docket No. 03-HHR-073 (May 30, 2003) (citing *Pridemore v. Dep't of Health & Human Res*., Docket No. 95-HHR-561 (Sept. 30, 1996)). When it is not possible for any actual relief to be granted, any ruling issued by the Grievance Board would merely be an advisory opinion. *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 02-AA-87 (Aug. 14, 2003); *Spence v. Div. of Natural Res.*, Docket No. 2010-0149-CONS (Oct. 29, 2009). The Grievance Board does not issue advisory opinions. *Priest v. Kanawha Cnty. Bd. of Educ*., Docket No. 00-20-144 (Aug. 15, 2000); *Biggerstaff v. Mingo Cnty. Bd. of Educ.*, Docket No. 02-29-384D (Mar. 24, 2003), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 03-AA-55 (Feb. 10, 2005); *Mitias v. Pub. Serv. Comm'n*, Docket No. 05-PSC-107R (Sept. 22, 2010), *aff'd*, Kanawha Cnty. Cir. Ct. Civil

Action No. 10-AA-185 (Sept. 11, 2012). "Relief which entails declarations that one party or the other was right or wrong, but provides no substantive, practical consequences for either party, is illusory, and unavailable from the [Grievance Board]. *Miraglia v. Ohio County Bd. of Educ*., Docket No. 92-35-270 (Feb. 19, 1993).

Grievant argues the issue is not moot because he seeks back pay for working out of his classification. However, Grievant only asserted entitlement to back pay as relief during the level three hearing and in his *Proposed Findings of Fact Conclusions of Law*. The relief sought in all three of Grievant's forms was only "[t]o be restored to his original position of Aide II in the special needs classroom."

The Code sets forth the requirements for filing the initial grievance claim as follows:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing . . . .

W. VA. CODE § 6C-2-4(a)(1). The Code has no specific requirement for what the level two and level three appeals are to contain. "Within ten days of receiving an adverse written decision at level one, the grievant shall file a written request for mediation, private mediation or private arbitration." W. VA. CODE § 6C-2-4(b)(1). "Within ten days of receiving a written report stating that level two was unsuccessful, the grievant may file a written appeal with the employer and the board requesting a level three hearing on the grievance." W. VA. CODE § 6C-2-4(c)(1).

> Neither the Grievance Board's procedural rules nor the Code address the amendment of grievance claims. Further, although the Code refers to level three as an "appeal," the administrative law judge does not review the propriety of the level one decision, but rather considers the claim completely anew. As neither the procedural rules nor the Code specifically prohibit "amendment" of a claim between levels, the question then becomes whether Respondent would be prejudiced by allowing the [amendment].

Goodson, et al. v. Fayette County Bd. of Educ., Docket No. 2014-1654-CONS (Nov. 12, 2015). Respondent would clearly be prejudiced by allowing Grievant to orally amend his requested relief during the level three hearing. Grievant had three opportunities to state the relief he requested in his grievance filings at level one, two, and three. Grievant would have also had the opportunity to request to amend his relief requested prior to the level three hearing. Raising the issue only during the hearing did not provide Respondent adequate notice to respond to the relief, which would render an issue Respondent believed to be moot viable once again, and would subject Respondent to financial liability. Therefore, Grievant's attempt to amend his requested relief must be denied, which renders that portion of his claim moot.

Although Grievant has now been transferred from the autism classroom back to a special education classroom, he asserts he is entitled to be returned to his original special education classroom at Lavalette Elementary. Grievant's position is itinerant.

> Itinerant status means a service person who does not have a fixed work site and may be involuntarily reassigned to another work site. A service person is considered to hold itinerant status if he or she has bid upon a position posted as itinerant or has agreed to accept this status. A county board may establish positions with itinerant status only within the aide and autism mentor classification categories and only when the job duties involve exceptional students. A service person with itinerant status may be assigned to a different work site upon written notice ten days prior to the

> reassignment without the consent of the employee and without posting the vacancy. A service person with itinerant status may be involuntarily reassigned no more than twice during the school year. At the conclusion of each school year, the county board shall post and fill, pursuant to section eight-b of this article, all positions that have been filled without posting by a service person with itinerant status. A service person who is assigned to a beginning and ending work site and travels at the expense of the county board to other work sites during the daily schedule, is not considered to hold itinerant status.

W.VA. CODE § 18A-4-8(r). "A position posted as itinerant may, appropriately, be moved to accommodate the students' needs." *Stover v. Logan County Bd. of Educ*., Docket No. 2010-1051-LOGED (Dec. 13, 2010), ***aff'd***, Kanawha Cnty. Cir. Ct. Civil Action No. 11-AA-11 (Jan. 18, 2011). *See also Savage v. Preston County Bd. of Educ*., Docket No. 2015-1527-PreED (Apr. 11, 2016); *Bennett v. Randolph County Bd. of Educ.*, Docket No. 05-42-396 (April 12, 2006); *Bailey v. Raleigh County Bd. of Educ.*, Docket No. 97-41-495 (April 20, 1998), Kanawha Cnty. Cir. Ct. Civil Action No. 98-AA-70 (Oct. 14, 1999), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 000514 (May 24, 2000). Therefore, Grievant is not entitled to be returned to Lavalette Elementary as his position is itinerant and he received the proper notice required under the statute.

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 his grievance by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17,

1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the burden has not been met. *Id*.

2. "Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues]." *Burkhammer v. Dep't of Health & Human Res*., Docket No. 03-HHR-073 (May 30, 2003) (citing *Pridemore v. Dep't of Health & Human Res*., Docket No. 95-HHR-561 (Sept. 30, 1996)).

3. When it is not possible for any actual relief to be granted, any ruling issued by the Grievance Board would merely be an advisory opinion. *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 02-AA-87 (Aug. 14, 2003); *Spence v. Div. of Natural Res.*, Docket No. 2010-0149-CONS (Oct. 29, 2009).

4. The Grievance Board does not issue advisory opinions. *Priest v. Kanawha Cnty. Bd. of Educ*., Docket No. 00-20-144 (Aug. 15, 2000); *Biggerstaff v. Mingo Cnty. Bd. of Educ.*, Docket No. 02-29-384D (Mar. 24, 2003), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 03-AA-55 (Feb. 10, 2005); *Mitias v. Pub. Serv. Comm'n*, Docket No. 05-PSC-107R (Sept. 22, 2010), *aff'd*, Kanawha Cnty. Cir. Ct. Civil Action No. 10-AA-185 (Sept. 11, 2012).

5. "Relief which entails declarations that one party or the other was right or wrong, but provides no substantive, practical consequences for either party, is illusory, and unavailable from the [Grievance Board]. *Miraglia v. Ohio County Bd. of Educ*., Docket No. 92-35-270 (Feb. 19, 1993).

6. The Code sets forth the requirements for filing the initial grievance claim as follows:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing . . . .

W. VA. CODE § 6C-2-4(a)(1). The Code has no specific requirement for what the level two and level three appeals are to contain. "Within ten days of receiving an adverse written decision at level one, the grievant shall file a written request for mediation, private mediation or private arbitration." W. VA. CODE § 6C-2-4(b)(1). "Within ten days of receiving a written report stating that level two was unsuccessful, the grievant may file a written appeal with the employer and the board requesting a level three hearing on the grievance." W. VA. CODE § 6C-2-4(c)(1).

7. "Neither the Grievance Board's procedural rules nor the Code address the amendment of grievance claims. Further, although the Code refers to level three as an 'appeal,' the administrative law judge does not review the propriety of the level one decision, but rather considers the claim completely anew. As neither the procedural rules nor the Code specifically prohibit "amendment" of a claim between levels, the question then becomes whether Respondent would be prejudiced by allowing the [amendment]. *Goodson, et al. v. Fayette County Bd. of Educ.*, Docket No. 2014-1654-CONS (Nov. 12, 2015).

8. Respondent would clearly be prejudiced by allowing Grievant to orally amend his requested relief during the level three hearing. Therefore, Grievant's attempt to amend his requested relief must be denied, which renders that portion of his claim moot.

9. Grievant's position is itinerant:

> Itinerant status means a service person who does not have a fixed work site and may be involuntarily reassigned to another work site. A service person is considered to hold itinerant status if he or she has bid upon a position posted as itinerant or has agreed to accept this status. A county board may establish positions with itinerant status only within the aide and autism mentor classification categories and only when the job duties involve exceptional students. A service person with itinerant status may be assigned to a different work site upon written notice ten days prior to the reassignment without the consent of the employee and without posting the vacancy. A service person with itinerant status may be involuntarily reassigned no more than twice during the school year. At the conclusion of each school year, the county board shall post and fill, pursuant to section eight-b of this article, all positions that have been filled without posting by a service person with itinerant status. A service person who is assigned to a beginning and ending work site and travels at the expense of the county board to other work sites during the daily schedule, is not considered to hold itinerant status.

W.VA. CODE § 18A-4-8(r).

10. "A position posted as itinerant may, appropriately, be moved to accommodate the students' needs." *Stover v. Logan County Bd. of Educ*., Docket No. 2010-1051-LOGED (Dec. 13, 2010), ***aff'd***, Kanawha Cnty. Cir. Ct. Civil Action No. 11-AA-11 (Jan. 18, 2011). *See also Savage v. Preston County Bd. of Educ*., Docket No. 2015-1527-PreED (Apr. 11, 2016); *Bennett v. Randolph County Bd. of Educ.*, Docket No. 05-42-396 (April 12, 2006); *Bailey v. Raleigh County Bd. of Educ.*, Docket No. 97-

41-495 (April 20, 1998), Kanawha Cnty. Cir. Ct. Civil Action No. 98-AA-70 (Oct. 14, 1999), *appeal refused*, W.Va. Sup. Ct. App. Docket No. 000514 (May 24, 2000).

11. Grievant is not entitled to be returned to his original classroom as his position is itinerant and he received the proper notice required under the statute to be transferred.

Accordingly, the 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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: November 21, 2018

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Billie Thacker Catlett
Chief Administrative Law Judge