SHARON L. BAILEY,

Grievant,

v. **Docket No. 97-41-495**

RALEIGH COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

On September 18, 1997, Sharon L. Bailey (Grievant) filed this grievance in accordance with W. Va. Code §§ 18-29-1, et seq., alleging that Respondent Raleigh County Board of Education (RCBE) violated W. Va. Code §§ 18A-2-7 and 18A-4-8a when she was reassigned from Beckley-Stratton Junior High School to Shady Spring Junior High School, shortly after the start of the 1997-98 school year. At Level I, Grievant's supervisor did not have authority to resolve the grievance. Accordingly, the matter was elevated to Level II where an evidentiary hearing was conducted on October 20, 1997. A Level II decision denying the grievance was issued by Charlotte Hutchens, the Superintendent's designee, on October 31, 1997. Grievant elected to waive Level III, as permitted by W. Va. Code § 18-29-4(c), and appealed to Level IV on November 12, 1997. Thereafter, the parties agreed to submit the matter for decision on the record developed at Level II, and agreed to a briefing schedule. For administrative reasons, this matter was subsequentlyreassigned to the undersigned and became mature for decision on February 17, 1998, following receipt of the parties' proposed findings. (See footnote 1)

There is no significant dispute between the parties regarding the essential facts in this matter. Accordingly, the following Findings of Fact pertinent to resolution of this grievance have been determined based upon a preponderance of the credible testimonial and documentary evidence contained in the transcript of the Level II hearing.

FINDINGS OF FACT

1. Grievant is employed by Respondent Raleigh County Board of Education (RCBE) as an

Aide, a school service personnel position. During the 1996-97 school year, Grievant was assigned to Sophia-Soak Creek Elementary School.

2. In the spring of 1997, Grievant received timely notice of transfer from that position. Grievant did not contest her transfer and was placed on the transfer list as unassigned for the 1997-98 school year.

3. Grievant subsequently bid upon and received an assignment for the 1997-98 school year as one of four Special Education Aides at RCBE's Beckley-Stratton Junior High School (B-SJHS). The posting for those positions included the following statement: “These positions are **'Itinerant'** with the Home School for 1997-98 listed.” Adm Ex 9 at L II (emphasis in original).

4. At the time Grievant was selected for assignment to B-SJHS, a new consolidated school, the school building was still under construction. The new buildingremained under construction at the beginning of the school year, so the 7th and 8th grade students assigned to B-SJHS attended classes at Beckley Junior High while the 9th grade students went to Stratton Junior High.

5. Approximately two weeks after the beginning of the 1997-98 school year, the parents of a special education student assigned to B-SJHS elected to return their child to the school nearest their home, Shady Springs Junior High School (SSJHS). The unfinished B-SJHS building was all on one level, and would have accommodated the student's orthopedic limitations. However, the student was required to go up and down stairs at Beckley Junior High School.

6. As a result of the special education student returning to SSJHS, RCBE required no more than three Special Education Aides at B-SJHS. However, an additional Special Education Aide was needed at SSJHS to assist the student. Grievant was selected to follow the student to SSJHS, because she was the least senior Special Education Aide at B-SJHS.

7. After being reassigned to SSJHS, Grievant successfully bid on another Aide position at Stratton Elementary School, posted on September 4, 1997. See Adm Ex 9. After working in that position for a brief period, Grievant bid on and accepted an Aide position at Crescent Elementary School, effective October 20, 1997. Grievant also applied for the vacancy created when she left SSJHS. Although Grievant was selected for that position, she indicated that she would decline the position, and remain at Crescent Elementary. 8. As of October 21, 1997, the special education caseload at B-SJHS required no more than three Special Education Aides. See Adm Ex 10. However, RCBE had not reduced the number of Special Education Aides on a county-wide basis.

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. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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). See W. Va. Code § 18-29-6.

Respondent argues that Grievant waived her right to grieve her reassignment when she applied for the position at SSJHS. Any claim that an employee is barred from pursuing a grievance due to some action, or failure to act, subsequent to the grievable event, is an affirmative defense, and the employer has the burden of proving such a defense by a preponderance of the evidence. See Ray v. Cabell County Bd. of Educ., Docket No. 96- 06-343 (Feb. 21, 1997); Lowry v. W. Va. Dept. of Educ., Docket No. 96-DOE-130 (Dec. 26, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

Grievant has not waived her right to grieve her reassignment. Grievant complains that she was not allowed to remain at B-SJHS in the position for which she successfully bid. Grievant is not complaining about the specific position she was assigned at SSJHS. Her complaint is more generic, and suggests that reassignment, without appropriate statutory notice, or her written consent, to any position other than the Aide job she held in a particular teacher's classroom at B-SJHS violates her rights as a school service employee. By making application for other positions, seeking to obtain the best jobavailable commensurate with her seniority, Grievant did not waive any right to pursue her grievance, or otherwise convert her contentions into a moot issue.

Grievant argues that RCBE violated W. Va. Code § 18A-2-7 by transferring her from B-SJHS to SSJHS without proper notice and a hearing. Grievant further suggests that RCBE disregarded her right under W. Va. Code § 18A-4-8a(7) to maintain the “work schedule” established for her at B-SJHS at the beginning of the 1997-98 school year. W. Va. Code § 18A-4-8a(7) provides:

> No service employee shall have his or her daily work schedule changed during the school year without such employee's written consent, and such employee's required daily work hours shall not be changed to prevent the payment of time and one-half wages or the employment of another employee.

Grievant also argues that W. Va. Code § 18-20-1 specifically prohibits the reassignment of Special

Education Aides during the school year as follows:

> The regular classroom teacher shall be entitled to the following when placing a student with exceptional needs into an integrated classroom when the student's individualized education program requires an adjustment in either the curriculum, instruction or service to be provided by the regular classroom teacher.
>
> (5) Assistance from persons trained or certified to deal with a student's exceptional needs whenever such assistance is part of the student's individualized education program as necessary to promote accomplishment of the program's goals and objectives: Provided, That aides in the area of special education cannot be reassigned to more than one school without the employee's consent.

This Grievance Board recently held that nothing in W. Va. Code §§ 18A-2-7, 18-20- 1c, or 18A-4-8a prohibits a county board of education from transferring a school service employee in the Aide classification to an "itinerant" position. Conrad v. Nicholas County Bd. Of Educ., Docket No. 97-34-388 (Jan. 12, 1988). Conrad further held that W. Va.Code 18-20-1c(5) only prohibits a Special Education Aide from being assigned to more than one school at a time, not to a second or subsequent school during the school year.

In the instant matter, Grievant bid upon a position that was clearly posted as "itinerant." Grievant was thereafter moved to another school because only three Special Education Aides were needed at her location, and her services were needed at the other school to accommodate the special education student. In these circumstances, Conrad compels a determination that there was no violation of any of the Code provisions relied upon by Grievant.

Grievant argues that Conrad is in error and should be overruled. This Grievance Board adheres to the doctrine of stare decisis (See footnote 2) in adjudicating grievances that come before it. Chafin v. W. Va. Dept. of Health & Human Resources, Docket No. 92-HHR-132 (Jul. 24, 1992), citing Dailey v. Bechtel Corp., 157 W. Va. 1023, 207 S.E.2d 169 (1974). This adherence is founded upon a determination that the employees and employers, whose relationships are regulated by this agency, are best guided in their actions by a system that provides for predictability, while retaining the discretion necessary to effectuate the purposes of the statutes applied. Consistent with this approach, this Grievance Board follows precedents established by the Supreme Court of Appeals of West Virginia as the law of this jurisdiction. Likewise, prior decisions of this Grievance Board are followedunless a reasoned determination is made that the prior decision was clearly in error. Belcher

v. W. Va. Dept. of Transp., Docket No. 94-DOH-341 (Apr. 27, 1995).

No aspect of the present grievance establishes a compelling reason to overturn this Grievance Board's decision in Conrad. Indeed, the facts in this matter bolster RCBE's justification for posting the Special Education Aide positions at B-SJHS as "itinerant," as well as this Board's rationale in Conrad. The itinerant character of working with special education students is inherent in the positions of those teachers and service personnel who work closely with such students. See Sipple v. Mingo County Bd. of Educ., Docket No. 95-23-421 (Mar. 27, 1996); Taylor v. Monongalia County Bd. of Educ., Docket No. 92- 30-314 (Nov. 30, 1992). See also Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995); Titus v. Wood County Bd. of Educ., Docket No. 92-54-023 (Apr. 30, 1992). Adoption of Grievant's position in this matter would require RCBE to return her to B-SJHS, even though there is no need for a fourth Special Education Aide at that location. As noted in Conrad, Grievant would have to be paid for a job she no longer performs, while RCBE would have to replace her at SSJHS with a substitute, until the purported "vacancy" could be filled in accordance with W. Va. Code § 18A-4-8b. There is no provision in the Code which requires such an absurd result. Likewise, the statutes relied upon by Grievant do not restrict RCBE's authority to designate the position Grievant obtained at B-SJHS as itinerant. Therefore, RCBE's decision to reassign Grievant to SSJHS was proper. See Conrad, supra.

In addition to the foregoing discussion, the following Conclusions of Law are appropriate in this matter.

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, the grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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). See W. Va. Code § 18-29-6.

2. Nothing in W. Va. Code §§ 18-20-1c, 18A-4-8a, or 18A-2-7 prohibits a county board of education from designating a Special Education Aide position as "itinerant." See Conrad v. Nicholas County Bd. of Educ., Docket No. 97-34-388 (Jan. 12, 1998).

3. Grievant's reassignment, as an itinerant Special Education Aide, from one school to another, based upon a shift in the special education student population that occurred shortly after the start of

the 1997-98 school year, was not made in violation of W. Va. Code §§ 18-20-1c, 18A-4-8a, 18A-2-7, nor was it otherwise improper. See Conrad, supra; Sipple v. Mingo County Bd. of Educ., Docket No. 95-23-421 (Mar. 27, 1996).

Accordingly, this Grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Raleigh County, and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: April 20, 1998

Footnote: 1

Both parties were represented by counsel, Grievant by John Roush of the West Virginia School Service Personnel Association, and Respondent by Erwin Conrad of Conrad Law Offices.

Footnote: 2

Literally, "to stand by things decided." This is the doctrine that when a court has laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle and apply it to all future cases, where the facts are substantially the same. Black's Law Dictionary 1577 (Revised 4th Ed. 1968). See W. Va. Dept. of Admin. v. W. Va. Dept. of Health & Human Resources, 192 W. Va. 202, 205, 451 S.E.2d 768, 771 (1994).