NANCY K. CONRAD,

Grievant,

v. **DOCKET NO. 97-34-388**

NICHOLAS COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

This grievance was filed by Grievant Nancy K. Conrad on or about June 6, 1997, against Respondent Nicholas County Board of Education ("NBOE"), alleging:

> Grievant, a regularly-employed teacher's aide, was recommended and approved for transfer for the purpose of designating Grievant as an "itinerant" teacher's aide. Grievant alleges a violation of West Virginia Code §[§] 18A-2-7, 18A-2-5 (See footnote 1) , 18A-4- 8a, & 18-20-1c and requests the removal of the "itinerant" designation from her employment status.

The following Findings of Fact necessary to the Decision reached, are made based upon the evidence presented at the Level II hearing. (See footnote 2)

Findings of Fact

1. Grievant is employed by NBOE as a special education aide, and works with special education students. During the 1996-97 school year she worked with two students at Richwood Junior High School. As of the date of the Level II hearing in July 1997, NBOE had not determined with which student or students she would be working during the 1997-98 school year.

2. In February 1997, Superintendent William K. Grizzell notified Grievant he was recommending that she be considered for transfer. The letter stated:

> Since you are assigned primarily to one special education student or a limited number of special education students; and recognizing the possibility of student(s) transferring to another school(s), I will recommend that your location be changed from a school assignment to itinerant. This itinerant assignment will only be utilized should the student(s) you are assigned to change locations.

Grievant's transfer to an itinerant special education aide assignment was approved by NBOE on April 28, 1997.

3. NBOE has 11 special education aides, and all of them were transferred and placed in itinerant assignments.

4. Over the last three years, NBOE has had at least one incident per year of a special education student leaving the school he or she was attending after the beginning of the school year. Two of the aides involved were no longer needed at the school, but refused to move. This wasted resources which could have been used for other special education students.

Discussion

Grievant bears the burden of proving the allegations of her grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar. 28, 1996). Grievant argues, first, that NBOE's designation of Grievant as itinerant is not permitted by W. Va.Code § 18A-2-7, because Grievant must be assigned to a work location at least by the beginning of the school year. She argued NBOE's action eliminates Grievant's statutory protection from being transferred during a school year without her consent. (See footnote 3)

Grievant cited the following language from Surber v. Mingo County Bd. of Educ., Docket No. 96-29-015 (Dec. 30, 1996), in support of her argument:

> Further, it is apparent that any notice of transfer must necessarily expire at some point during the identified school year. Arguably, since employees must be assigned to some work location at the beginning of the school year, the notice must be fulfilled, if at all, at that time. It is at least reasonable for employees who have been reassigned to their previous schools at the beginning of the school year to assume that the reasons given in their notices of transfer did not materialize and that they are no longer targeted for a move to another location.

This statement was not a ruling on an issue in the case, but was in relation to mitigation of Grievant's punishment for insubordination. More importantly, it does not say that an employee cannot be assigned to an itinerant position, but that the transfer notice expires at the beginning of the new school year, and if the employee has not been placed in a new position, but rather, is returned to hersame position at the beginning of the school year, she cannot later be transferred to another position pursuant to the transfer notice given the previous school year. In this case, Grievant has already been told she will be assigned as an itinerant special education aide.

Grievant's argument, if accepted, would prevent a school board from ever designating an employee as itinerant. While neither party placed any evidence in the record regarding the designation of other types of employees as itinerant, the undersigned is aware from other grievances,

and will take notice, that school boards do designate employees as itinerant, and it is apparently useful to school systems to be able to use this designation. The undersigned is accordingly hesitant to read W. Va. Code § 18A-2-7 so broadly as Grievant suggests, given the evidence presented in this case. Nothing in that Code Section specifically states that employees cannot be designated as itinerant. Grievant was notified she was being transferred from her position, that she was subject to being moved from a particular building if the student to whom she was assigned moved to another school or no longer needed her services, and the reason for this. This meets the requirements of W. Va. Code § 18A-2-7.

Second, Grievant points out that W. Va. Code § 18-20-1(c) specifically provides, among other things:

> (5) . . . Provided, That aides in the area of special education cannot be reassigned to more than one school without the employee's consent.

Grievant also points out that W. Va. Code § 18A-4-8a "prohibits county boards of education from changing the work schedules of school employees during the school year without the employee's written consent." Grievant's Proposed Findings. Grievant argues when these statutes are read in parimateria, they evidence a legislative intent to prevent an employee from being moved from one location to another after the beginning of the school year.

NBOE's explanation of this provision is that Code § 18-20-1(c), when read in its entirety, was designed, not to benefit aides, but to assure that a teacher receiving a special education student into her classroom has what she needs to provide the environment and instruction needed by the child. NBOE further stated that this provision does not prevent the assignment of an aide such as Grievant to an itinerant position under these circumstances, as she would not be assigned to serve in more than one school at a time during the school year.

The meaning of the above-quoted provision is not clear. The language of the statute appears to mean that an aide cannot be assigned after the start of the school year ("reassigned"), to two or more schools. Applied to the facts at hand, NBOE has not violated the provisions of this statute. It assigned Grievant to an itinerant position before the beginning of the school year, and no evidence was presented that she would be assigned to serve at more than one school at a time. That is, she is assigned to report to one school so long as the student to whom she is assigned remains at that school, and if the student transfers to another school, she may be moved with him or her to the new

location. NBOE may not assign Grievant to serve at two or more schools at the same time, and there is no evidence that this has been or will be done.

Special education aides are in a unique setting. As Grievant explained it, she is not really assigned to a location, but to a particular child who happens to attend a particular school. She noted that when a child with whom she was working at Richwood High School graduated, she knew she would have to be reassigned to another student, and began watching the postings. If a child to whom she is assigned moves to another school, and NBOE cannot move Grievant with the child, NBOEwill have to hire another aide to assist the child, while it continues to pay Grievant for a job she no longer performs. In this case, NBOE was responding to this unusual situation by placing Grievant on notice that she was assigned to the child, not to the school which the child happened to attend, and if that child no longer needed her services, she would be assigned to assist another child who needed her help. It appears that NBOE could not otherwise require Grievant to move with the child. Surber, supra, and Surber v. Mingo County Bd. of Educ., Docket No. 89-29-662 (Jan. 31, 1990). But cf., Sipple v. Mingo County Bd. of Educ., Docket No. 95-29-487 (Mar. 27, 1996) (where the Administrative Law Judge stated, "[bus] aides who assist special education students commuting to and from school on school-provided transportation, are assigned duties of an itinerant nature." It was determined that a special education aide could be reassigned to another bus run after the school year had begun when the special education student to whom she was originally assigned was not going to be riding a school bus.).

Finally, "[c]ounty boards of education have broad discretion in personnel matters, including transfers, but must exercise that discretion in a manner which is not arbitrary or capricious." Dodson v. McDowell County Bd. of Educ., Docket No. 93-33-243 (Feb. 15, 1994). See Dillon v. Bd. of Educ. of County of Wyoming, 351 S.E.2d 58 (W. Va. 1986). The undersigned cannot find NBOE's action to be arbitrary and capricious. Rather, it is a reasonable response to the situation, an efficient use of limited public resources, in the best interests of the schools, and is not violative of W. Va. Code §§ 18-20-1c, 18A-2-7, 18A-2-5, or 18A-4-8a.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The burden of proof is upon Grievant to prove the elements of her grievance by a

preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (March 28, 1996).

2. "County boards of education have broad discretion in personnel matters, including transfers, but must exercise that discretion in a manner which is not arbitrary or capricious." Dodson v. McDowell County Bd. of Educ., Docket No. 93-33-243 (Feb. 15, 1994). See Dillon v. Bd. of Educ. of County of Wyoming, 351 S.E.2d 58 (W. Va. 1986).

3. Grievant failed to prove that the Nicholas County Board of Education abused its broad discretion or acted in an arbitrary and capricious manner when it transferred her to the position of itinerant aide, serving the needs of particular special education students, rather than being assigned to a particular location.

4. The Nicholas County Board of Education did not violate W. Va. Code §§ 18-20-1c, 18A-2-7, 18A-2-5, or 18A-4-8a under facts of this case.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Nicholas 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.

BRENDA L. GOULD

Administrative Law Judge

Dated: January 12, 1998

Footnote: 1

This statutory provision deals with employee contracts. It appears that Grievant is citing this provision only insofar as her contract provides the basis for her challenge of the other cited provisions.

Footnote: 2

Grievant's immediate supervisor advised Grievant on June 9, 1997, that he was unable to grant the relief requested. She

appealed to Level II, where a hearing was held on July 9, 1997. The grievance was denied at Level II on August 18, 1997. NBOE waived Level III, and Grievant appealed to Level IV on August 26, 1997. The parties agreed to submit this matter for decision based upon the Level II record. This grievance became mature for decision on October 7, 1997, upon receipt of the last of the parties' written arguments, and was subsequently transferred to the undersigned for administrative reasons.

Footnote: 3

W. Va. Code § 18A-2-7 provides, in pertinent part: "an employee shall be notified in writing by the superintendent on or before the first Monday in April if he is being considered for transfer or to be transferred . . .. Any teacher or employee who desires to protest such proposed transfer may request in writing a statement of the reasons for the proposed transfer. Such statement of reasons shall be delivered to the teacher or employee within ten days of the receipt of the request. Within ten days of the receipt of the statement of the reasons, the teacher or employee may make written demand upon the superintendent for a hearing on the proposed transfer before the county board of education. The hearing on the proposed transfer shall be held on or before the first Monday in May . . .. At the hearing, the reasons for the proposed transfer must be shown.

The superintendent at a meeting of the board on or before the first Monday in May shall furnish in writing to the board a list of teachers and other employees to be considered for transfer and subsequent assignment for the next ensuing school year . . .. The list of those recommended for transfer shall be included in the minute record of such meeting and all those so listed shall be notified in writing, which notice shall be delivered in writing, by certified mail, return receipt requested, to such persons' last known addresses within ten days following said board meeting, of their having been so recommended for transfer and subsequent assignment and the reasons therefor."