CHARLOTTE SCOTT and

JUDY CHEWNING,

Grievants,

v. **Docket No. 01-42-071**

RANDOLPH COUNTY BOARD

OF EDUCATION,

Respondent,

and

MELINDA WHITE,

Intervenor.

DECISION

Charlotte Scott and Judy Chewning ("Grievants") initiated separate grievances on December 20, 2000, alleging an Aide position at Coalton School should not have been posted as requiring an LPN license. They seek as relief to either be placed in the position, or, if the position is determined to have been improperly classified, reposting of the position. The grievances were denied at level one and consolidated for a hearing at level two, held on January 31, 2001. At that time, Melinda White, the successful applicant, was granted Intervenor status. The grievances were denied in a level two decision dated February 19, 2001. Level three consideration was bypassed, and Grievants filed a level four appeal on February 28, 2001. A level four hearing was held in the Grievance Board's office in Elkins, West Virginia, on May 15, 2001. Grievant Scott was represented by counsel, John E. Roush of the School Service Personnel Association; Grievant Chewning represented herself; Intervenor was represented by Mary Linn of WVEA; and Responidentwas represented by counsel, Kimberly S. Croyle. This matter became mature for consideration upon receipt of the parties' fact/law proposals on June 13, 2001.

The following findings of fact are made from a preponderance of the evidence of record, submitted at levels two and four.

Findings of Fact

1. Grievants are employed as Aides by Respondent Randolph County Board of Education ("RCBOE").

2. During the fall of 2000, both Grievants were on preferred recall status.

3. At the beginning of the 2000-2001 school year, two students were enrolled at Coalton Elementary School, one in the fifth grade and one in the third grade. Both students were considered "brittle diabetics", meaning that their blood sugar is not controlled and fluctuates easily. One student was on an insulin pump and the other received insulin injections.

4. Margaret McFarland, school nurse and Health Care Program Specialist for RCBOE, determined that the two students needed constant assistance from a licensed health care professional, in order to administer insulin and to monitor their conditions throughout the day. After reviewing the students' conditions, their medical records, and consultation with the special education director, it was determined that an aide was not qualified to meet the students' medical needs.

5. RCBOE employs three county school nurses to serve all its schools. The nurses "float" back and forth between schools, as needed.

6. Pursuant to Ms. McFarland's recommendation, on October 27, 2000, Respondent posted a vacancy for an Aide II, but required that the successful applicant belicensed as a Licensed Practical Nurse ("LPN"). The position was posted in this fashion, because the students needed constant medical monitoring, along with assistance with their academic needs. The students had been home-schooled and were consequently not academically proficient for their grade levels.

7. Grievants applied for the position, but neither had an LPN license. The position was awarded to Intervenor, an LPN who had not previously been employed by RCBOE. Upon being selected for the position, Intervenor took and passed the Aide competency test.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State

Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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.

Grievants contend that the duties of this particular position could have been performed by an aide, or, in the alternative, the position should have been posted as a professional nursing job. In that case, Intervenor would not be classified as an aide and would not have been placed in a vacant aide position, while Grievants and others in the aide classification remained on preferred recall status. Grievants are also concerned that a position which quite possibly should have been for an LPN only has been improperly classified as an aide position, entitling Intervenor to seniority as an aide and the opportunity to bid upon other aide positions. Respondent counters that, while W. Va. Code § 18A-4-8b requires school boards to fill positions based upon seniority, qualifications, and past evaluations, the West Virginia Supreme Court has recently recognized that consideration may be given to job-related factors, such as superior qualifications, and passing of a competency test or seniority are not necessarily the determining factors when choosing candidates for service personnel positions. See Hancock County Bd. of Educ. v. Hawken, ___ W. Va. ___, W. Va. Sup. Ct. No. 25818 (1999). Accordingly, Respondent contends that it simply “expanded” the minimum qualifications by requiring an LPN licensure in order to meet the needs of the students involved.

Respondent's point is well taken, and it is well-established that county boards of education have substantial discretion in matters relating to the hiring, transfer, and assignment of school personnel, provided that discretion is not exercised arbitrarily or capriciously and is exercised in the best interests of the schools. Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986). However, the current situation cannot be characterized as a simple “expansion of qualifications,” due to the following statute governing the performance of “specialized health procedures:”

> Any person employed as a school nurse shall be a registered professional nurse properly licensed by the West Virginia board of examiners for registered professional nurses . . . .
>
> Specialized health procedures that require the skill, knowledge and judgment of a licensed health professional, shall be performed only by school nurses, other licensed school health care providers as provided for in this section, (See footnote 1) or school employees who have been trained and retrainedevery two years who are subject to the supervision and approval by school nurses. After assessing the health status of the individual student, a school nurse, in collaboration with the student's physician,

> parents and in some instances an individualized education program team, may delegate certain health care procedures to a school employee who shall be trained pursuant to this section, considered competent, have consultation, and be monitored or supervised by the school nurse[.] . . . For the purposes of this section "specialized health procedures" means, but is not limited to, catheterization, suctioning of tracheostomy, naso-gastric tube feeding or gastrostomy tube feeding. "School employee" means "teachers" . . . and "aides" . . . .

W. Va. Code § 18-5-22.

Ms. McFarland adamantly testified that an aide or teacher simply could not be trained to monitor the conditions of these two students and administer their insulin. Indeed, this Grievance Board has previously held that the administration of injections is a "specialized health procedure" pursuant to the provisions of this statute, which must be performed either by a school nurse or a properly trained teacher or aide. Elliott v. Randolph County Bd. of Educ., Docket No. 98-42-305 (March 11, 1999). Therefore, whether administered by injections or by pump, it is clear that the administration of insulin to these two students would fall within the provisions of the statute.

Accordingly, since the two students at issue required specialized health procedures on a daily basis, Respondent had two choices: provide daily care by a school nurse (an RN), or train an aide or teacher to perform the necessary procedures. As noted above, Ms. McFarland was quite clear in her testimony that these were simply not duties which could be performed by a layperson with training. Intervenor explained that she must constantly monitor the conditions of the students in order to assess warning signs of low or high blood sugar, and take action accordingly. Therefore, it would appear that RCBOE has already made the determination that the care needed by these children could only be provided by a licensed health professional. Pursuant to the provisions of W. Va. Code § 18-5-22, this means that they could choose from a school nurse or the students' physician, since RCBOE has not contracted for services from a public health department. The statute is quite clear in the requirement that school nurses must be registered nurses, not licensed practical nurses. In addition, adding an LPN licensure requirement to an aide's qualifications obviously circumvents the statute's requirement that health procedures be administered by an RN or by a "trained" aide. This certainly does not contemplate that the aide's training would consist of a medical license.

Respondent had two choices when faced with meeting the needs of these two diabetic students. It either had to provide services from a school nurse, licensed as an RN, or it had to train an aide or teacher to provide the care needed. Since it has already been determined by RCBOE officials that

the students could not be cared for by a trained aide, it had no choice but to provide for care by an RN. Care by an LPN is simply not permitted by the provisions of the statute. Accordingly, Respondent erred in awarding the position to Intervenor.

The remaining question is how the position should have been posted. W. Va. Code §18A-4-8 places a burden on county boards of education to see that the duties of a particular service position coincide with the classification and paygrade to which it is assigned. Robinson v. Nicholas County Bd. of Educ., Docket No. 93-34-197 (Mar. 25, 1994). Simply stated, the statute requires the board to call the position what it is. Gosnell v. Raleigh County Bd. of Educ., Docket No. 94-41-112 (Apr. 21, 1995). The evidence inthis case indicates that Respondent actually needed two employees to meet these students' needs: a nurse to care for them medically and an aide to assist them academically. Although Ms. McFarland testified that there are only three school nurses employed in the county, and none of them is assigned to one school, Respondent may want to reassess the possibility of assigning one of its nurses to Coalton Elementary School to serve these students. If that is not feasible, it must post a position for another RN, who will be assigned to work only with these two students. In addition, Respondent should have posted an aide position to work with the students academically. Since the position was posted as an aide requiring an LPN license, all qualified applicants have not been given the opportunity to apply for it, requiring reposting.

The following conclusions of law support the decision reached.

Conclusions of Law

1. In non-disciplinary matters, Grievants have the burden of proving their claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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. Specialized health procedures that require the skill, knowledge and judgment of a licensed health professional, shall be performed only by registered school nurses or aides or teachers who have been trained and retrained every two years who are subject to the supervision and approval by school nurses. W. Va. Code § 18-5-22. 3. The monitoring and administration of insulin is a specialized health procedure pursuant to the provisions of W. Va. Code § 18-5-22. See Elliott v.

Randolph County Bd. of Educ., Docket No. 98-42-305 (March 11, 1999).

4. Respondent violated the provisions of W. Va. Code § 18-5-22 by posting the position at issue as an aide requiring an LPN license and by placing Intervenor in the position.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to either assign a school nurse to the students in question or post a registered nurse position, as discussed in this Decision. In addition, Respondent is **ORDERED** to repost the aide position without the licensure requirement; if it is determined that either Grievant should have been the successful applicant at the time of the original posting, she shall be granted retroactive seniority, benefits, and wages, with interest at the statutory rate.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Randolph 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. 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: July 27, 2001 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

The only other "licensed health professionals" mentioned in the statute are the student's physician and employees of a public health department, with which a county board may contract for services in lieu of hiring registered nurses.