THELMA DAVISSON, et al.,

Grievants,

v. **Docket No. 02-21-209**

LEWIS COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievants, (See footnote 1) employed by the Lewis County Board of Education ("LCBOE") as Special Education Aides, initiated a grievance on April 25, 2002, protesting the termination of their contracts and reissuance of new contracts, designating their positions as itinerant. They seek to have the itinerant status removed from their contracts. Grievants' supervisors were without authority to grant relief at level one. A level two hearing was held on June 10, 2002, (See footnote 2) followed by a decision denying the grievance dated July 9, 2002. Level three consideration was bypassed, and Grievants appealed to level four on July 18, 2002. In lieu of a level four hearing, the parties agreed to have a decision made based upon the record developed below, supplemented by stipulations of fact and written fact/law proposals, which were submitted by October 21, 2002. Grievants were represented by counsel, John E. Roush, and Respondent was represented by counsel, Harry M. Rubenstein.

The following stipulations of fact have been agreed upon by the parties.

Findings of Fact

1. Grievants are employed by LCBOE as aides in special education programs at various schools throughout the county.

2. All aide positions in Lewis County are mandated by the needs of particular children as expressed in their IEPs and on the number of students in various classrooms or programs.

3. By letter dated February 21, 2002, Grievants, except those noted in Finding of Fact No. 4,

were notified that the superintendent would recommend them for termination and reemployment with the addition of the label “itinerant” to their contracts of employment.

4. Grievants Riffle, Grose, and Turner applied for special education aide vacancies during the 2001-2002 school year, which positions were posted as itinerant. Their contracts of employment label the positions as itinerant. They were not notified of termination and reemployment as were the remaining grievants.

5. Grievants were provided a termination hearing before LCBOE on March 14, 2002, at which they were represented by counsel. After hearing evidence, the Board voted to terminate Grievants' contracts and reissue them, labeling their positions as “itinerant special education aide.”

6. On June 3, 2002, LCBOE approved a policy prohibiting the movement of itinerant aides from one school to another during the school year and restricting any movement of aides within a given school to instances where good cause is demonstrated.

7. LCBOE has seen a steady increase in special education students over the past several years. 8. As of the end of the 2001-2002 school year, no specific circumstances had prevented the delivery of services to special education students or necessitated the hiring of additional aides, due to the aides' lack of itinerant status.

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 their terminations and reissuance of their contracts as itinerant violated numerous statutory rights of service employees. They further argue that LCBOE has failed to justify the need to make them itinerant employees. Respondent counters that, with an ever-increasing special education population, it needs the flexibility of itinerant aides to deal with schedule changes and other needed alterations in employees' assignments in order to meet the needs of the students.

W. Va. Code § 18A-2-6 provides that, once an employee has obtained continuing contract status, that contract can only be terminated “with written notice, stating cause or causes, to the employee . .

. before the first day of April [of the current school year]." That statute further provides the employee with the right to a hearing before the board before final action is taken regarding the termination. Clearly, this statute was followed with regard to the terminations of Grievants' contracts. However, although this procedure of terminating existing contracts and replacing them with new ones was approved by theSupreme Court of Appeals in Lucion v. McDowell County Board of Education, 191 W. Va. 399, 446 S.E.2d 487 (1994), the Court further stated:

> If a board of education decides to reduce the employment terms for particular jobs, the board must first terminate the existing contracts by following the procedures of W. Va. Code § 18A-2-6 . . . and second **fill the job vacancies by following the procedures and requirements of W. Va. Code § 18A-4-8b**. In either case, a board of education must 'make decisions affecting promotion and filling of any service personnel positions of employment or jobs . . . on the basis of seniority, qualifications and evaluation of past service.'

(Emphasis added.)

In the instant case, the evidence clearly shows that LCBOE merely replaced Grievants' old contracts with new ones containing the word "itinerant," and the "new" positions were not posted or filled pursuant to the statutory requirements and those enunciated in Lucion, supra. The proper and perhaps preferable method for accomplishing what LCBOE attempted here would have been to transfer Grievants to itinerant positions, pursuant to W. Va. Code § 18A-2-7, which, like W. Va. Code § 18A-2-6, requires that the employee being considered for transfer be notified in writing by the first Monday in April and entitles the employee to a hearing on the reasons for the proposed transfer.

This Grievance Board has repeatedly held that boards of education, with proper notice and hearing, are entitled to transfer special education aides to itinerant positions. Bailey v. Raleigh County Bd. of Educ., Docket No. 97-41-495 (Apr. 20, 1998); Conrad v. Nicholas County Bd. of Educ., Docket No. 97-34-388 (Jan. 12, 1998). In fact, as enunciated by the administrative law judge in Conrad, supra, these aides are often in the unique position of being assigned to a particular child, and the designation of them asitinerant allows the board of education to require the aide to move with the child to another class, or even another school, as needed. This has been deemed an efficient use of public resources and in the best interests of the schools. Id. As noted in Bailey, supra, "[t]he itinerant character of working with special education students is inherent in the positions of [these employees]." (Citations omitted.) Similarly, it has been held that a board of education also has the discretion to designate an aide position as itinerant when it is posted; employees who bid upon and

are awarded such positions may, accordingly, be moved to accommodate the students' needs. Vance v. Jefferson County Bd. of Educ., Docket No. 02-19-030 (March 28, 2002); See Bailey, supra. This would certainly preclude any claim by Grievants Riffle, Grose, and Turner that they should be relieved of their itinerant status.

However, as to the remaining grievants, Respondent clearly failed to follow proper procedures to accomplish its goal of transferring these aides to itinerant positions. Accordingly, their grievances must be granted, and LCBOE is directed to return them to their previous status, removing the term "itinerant" from their employment contracts. The following conclusions of law support the decision reached.

Conclusions of Law

1. 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. "If a board of education decides to reduce the employment terms for particular jobs, the board must first terminate the existing contracts by following the procedures of W. Va. Code § 18A-2-6 . . . and second fill the job vacancies by following the procedures and requirements of W. Va. Code § 18A-4-8b. In either case, a board of education must 'make decisions affecting promotion and filling of any service personnel positions of employment or jobs . . . on the basis of seniority, qualifications and evaluation of past service.'" Lucion v. McDowell County Board of Education, 191 W. Va. 399, 446 S.E.2d 487 (1994).

3. Boards of education, with notice and hearing, are entitled to transfer special education aides to itinerant positions. Bailey v. Raleigh County Bd. of Educ., Docket No. 97-41-495 (Apr. 20, 1998); Conrad v. Nicholas County Bd. of Educ., Docket No. 97-34-388 (Jan. 12, 1998).

4. A board of education is permitted to designate and post special education aide positions as itinerant. Vance v. Jefferson County Bd. of Educ., Docket No. 02-19-030 (March 28, 2002).

5. Respondent's termination and reissuance of Grievants' contracts did not comply with the provisions of W. Va. Code § 18A-4-8b.

Accordingly, as to Grievants Riffle, Grose and Turner, this grievance is **DENIED**. As to Grievants Davisson, Smith, Losh, Coffield, Johnson, Simon, Determan, Bleigh,Jerden, Stalnaker and Johns, this grievance is **GRANTED**, and Respondent is directed to remove itinerant status from their employment contracts.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Lewis 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: November 13, 2002 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievants are Thelma Davisson, Patricia Smith, Karen Losh, Melinda Kim Coffield, Debra Darlene Johnson, Gina Simon, Carolyn Determan, Sharon Bleigh, Sharon Jerden, Sayrann Stalnaker, Evelyn Riffle, Eileen Johns, Pamela Grose, and Kimberly Turner.

Footnote: 2

Due to technical problems, the level two hearing could not be transcribed. However, at level four, the parties provided agreed stipulations to the facts established at that hearing.