JOEL SIZEMORE,

Grievant,

v. Docket No. 04-05-320

BROOKE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Joel Sizemore ("Grievant"), employed by the Brooke County Board of Education ("BCBE") as a substitute aide, filed a level one grievance on May 18, 2004, in which he alleged violations of W. Va. Code §§ 18A-4-8b, 18A-4-8g, and West Virginia State Board of Education Policy 5314.01, when he was not hired as an Autism Mentor. (See footnote 1) **For relief, Grievant requests instatement with back pay and interest, benefits, and regular employment seniority. The grievance was denied at levels one and two. Grievant elected to bypass consideration at level three, as is permitted by W. Va. Code § 18-29-4(c), and advanced his claim to level four on August 20, 2004. An evidentiary hearing was conducted in the Grievance Board's Wheeling office on October 25, 2004. Grievant was represented by John E. Roush, Esq., of the West Virginia School Service Personnel Association, and BCBE was represented by David F. Cross, Brooke County Assistant Prosecuting Attorney. The grievance became mature for decision upon receipt of Grievant's proposed findings of fact and conclusions of law on November 16, 2004. BCBE elected not to file post-hearing proposals.**

The following facts have been derived from the record developed at levels two and four.

Findings of Fact

1. Grievant was initially employed by BCBE as a substitute teacher's aide on April 8, 1999. He worked in this classification until January 14, 2004, when he became a substitute custodian. Grievant transferred back to the substitute aide classification on May 10, 2004. His total work experience as an aide consists of the following:

1998-99	**6.5 days**
1999-00	**31. 5 days**
2000-01	**64 days**

2001-02 97 days

2002-03 40 days

Grievant had accumulated 411.5 days of substitute seniority effective April 15, 2004.

2. While working as a substitute aide, Grievant worked intermittently with autistic students. During the 2002-2003 school year Grievant was assigned to special education classes approximately two-thirds of the days he worked. During the 2002-2003 and 2003- 2004 school years, he worked primarily with behaviorally disordered students, but had some interaction with autistic students while performing his duties as a supervisory aide.

3. Grievant completed two Autism Mentor Training Workshops (24 hours) and a training session in the Picture Exchange Communication System (PECS) (6 hours) at the Autism Training Center at Marshall University in June 1999.

4. Grievant had successfully completed 12 hours at Salem College in Summer 1967, but neglected to make BCBE administrators aware of this fact at the time of selection.

5. BCBE posted a position for Autism Mentor at Wellsburg Primary School on April 15, 2004. Qualifications for the position included a high school diploma, or equivalent, the qualifications listed in W. Va. Code § 18A-4-8, for the classification of AideIII, successful completion of a staff development program related to autism as determined by the State Department of Education ("SDOE"), physical ability and stamina to perform duties and ensure student safety.

6. The qualifications for Aide III set forth in W. Va. Code § 18A-4-8 include a diploma or GED, the completion of six semester hours of college credit, or are employed as an aide in a special education program and have one year of experience as an aide in special education.

7. SDOE Policy 5314.01 establishes the mandatory standards for Autism Mentor as: (1) meet the qualifications of Aide III (2) successful completion of the staff development program; (3) two years of successful experience working with autistic students; and, (4) physical ability and stamina.

8. Two regularly employed aides, and three substitute aides, including Grievant, applied for the position of Autism Mentor. None of the applicants met the qualifications for the position.

9. Vivian Barlow, the most senior of the two regularly employed aides, was awarded the

position on April 26, 2004. Ms. Barlow has worked for BCBE as a substitute Cook from 1996-2000, and as a regularly employed cook from April 2000 through June 2003, when she transferred to a position of Supervisory Aide II, assigned to the Mentally Severe Classroom at Brooke High School's special education program. Ms. Barlow had no experience working with autistic students, and had not completed the staff development program required by the SDOE. She completed the training in June 2004.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his claim by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); 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.

Grievant argues that he was more qualified than the successful applicant for the position of autism mentor because he met the qualifications of Aide III, had completed the staff development required by the SDOE, and he possessed the physical stamina to work with the children and ensure their safety. As to experience working with autistic children, Grievant asserts that he has worked with several different autistic children over the six school years that he has served as a substitute aide, and substantially, if not completely, meets the two years experience requirement. Grievant compares himself to the successful applicant, noting that she had not completed the staff development requirements, did not have any experience working with autistic students, had not completed any college hours, and had not completed the requisite one year of experience in a special education environment.

BCBE argues that because none of the applicants met all the qualifications for the position, it properly selected the most senior regular employee, in compliance with the W. Va. Code § 18A-4-8b provision that applicants be considered in a certain order, with regular employees to be considered first. BCBE asserts that Grievant was not more qualified than the successful applicant because at the time of selection he had not made administrators aware of his college credits, and he had less regular and substitute seniority. Grievant has failed to prove that he is entitled to the position of Autism Mentor. First, he did not make administrators aware of his college credits at the time the selection was made. Second,

Grievant lacks the requisite experience. Grievant is correct that 133 days qualifies as one year of experience for pay purposes, and if this measure of years of experience is applied he has earned 3.09 years seniority as a substitute aide. He is also correct in his calculation that there are 180 instructional days in a school year which would be the equivalent of 2.28 years of seniority. Nevertheless, Grievant lacks two years of successful experience working with autistic students. Given the factual situation in this case, Grievant has failed to prove that BCBE's decision to award the position to the most senior regular employee was in violation of W. Va. Code § 18A-4-8b or SDOE Policy.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his claim by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2004); 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. Grievant failed to prove that BCBE acted in violation of W. Va. Code § 18A-4- 8b, or SDOE Policy, when he was not selected for the position of Autism Mentor.

Accordingly, the grievance is DENIED. Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Brooke County. Any 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: DECEMBER 16, 2004

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

.Because Grievant did not address the alleged violation of W. Va. Code § 18A-4-8g, which addresses the determination of seniority for service personnel, at level two or level four, this claim is deemed to be abandoned.