AIDA MEREDITH,

Grievant,

v. **Docket No. 03-30-249**

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent,

and

BETTY ANDERSON,

Intervenor.

D E C I S I O N

Aida Meredith ("Grievant"), employed by the Monongalia County Board of Education ("MCBE") as an Aide, filed a level one grievance on July 3, 2003, in which she alleged "LPN hired to do aide job for child who rides without nurse during school year." For relief, Grievant requests instatement with back pay, interest, and benefits, including seniority. Grievant's immediate supervisor lacked authority to grant the requested relief at level one. The grievance was denied following an evidentiary hearing at level two, and Grievant elected to bypass consideration at level three, advancing her appeal to level four on August 14, 2003. (See footnote 1) **A level four hearing was conducted on December 11, 2003, at which time Grievant was represented by John E. Roush, Esq., of the West Virginia School Service Personnel Association, and MCBE was represented by Kelly J. Kimble, Esq., of Kay Casto & Chaney. The matter became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on January 20, 2004.**

The following facts are undisputed.

Findings of Fact

1. Grievant has been employed by MCBE for twenty-seven years, and has held the classification of Aide at all times pertinent to this grievance.

2. On or about May 28, 2003, MCBE posted a position for an Extended School Year ("ESY") Summer Bus LPN/Aide. The position was to serve seven special needs students,

including Student X, while being transported to the summer education program at Mountainview Elementary School.

3. An LPN was requested for this position based upon physician orders that Student X was to have a nurse accompany her on the bus. This student, a six year old, had undergone a heart transplant in 1999, and had continued to suffer multiple complications since that time. In addition to experiencing some symptoms of rejection of the transplanted organ, the student has been diagnosed with reflux, partial paralysis of the diaphragm, seizure disorder, hiatal hernia, and hypertension. She is fed by a gastrointestinal tube, is given medications, and her vital signs are monitored by the school nurse during the day.

4. Because Student X has only a five to seven minute bus ride during the regular school year, a nurse is not required to travel with her. The location of the summer program resulted in the student traveling a greater distance over a substantially longer period of time. Based upon the advanced level of care required by Student X, an individual was needed who could not only monitor her condition, but could respond to emergency needs, and make an informed medical decision when it was necessary to call 911.

5. Grievant is not a licensed LPN, and did not apply for the position, which was awarded to Intervenor who has been employed by MCBE as an LPN/Aide for eight years. 6. MCBE determined that it was unnecessary to assign a second Aide to the run.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance 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. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993).

Grievant argues that a board of education may not impose the requirement that an applicant for an aide position possess licensure as an LPN, and as the most senior aide, she was entitled to the position. Respondent asserts that medical training was required to meet

the needs of the position.

Specialized health care procedures, such as those required in this matter, may be administered only by certain individuals identified in West Virginia Code § 18-5-22 (d): Specialized health procedures that require the skill, knowledge and judgment of a licensed health professional, may be performed only by school nurses, other licensed school health care providers as provided for in this section, or school employees who have been trained and retrained every 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 betrained pursuant to this section, considered competent, have consultation with, and be monitored or supervised by the school nurse: Provided, That nothing in this section prohibits any school employee from providing specialized health procedures or any other prudent action to aid any person who is in acute physical distress or requires emergency assistance. 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", as defined in section one, article one of this chapter and "aides", as defined in section eight, article four, chapter eighteen-a of this code. Commencing with the school year beginning on the first day of July, two thousand two, "school employee" also means "secretary I", "secretary II" and "secretary III", as defined in section eight, article four, chapter eighteen-a of this code: Provided, however, That a "secretary I", "secretary II" and "secretary III" shall be limited to the dispensing of medications.

W. Va. Code § 18A-1-1 provides for the employment of school nurses, and requires them to be licensed registered, professional nurses (RNs). While Code § 18-5-22(d) refers to "licensed health professional," there is no statutory provision for employment of LPNs. Accordingly, the Grievance Board has previously held that "[a]dding an LPN licensure requirement to an aide's qualifications circumvents the statute's requirement that health procedures be administered by an RN or by a 'trained' aide." Scott/Chewning v. Randolph County Bd. of Educ., Docket No. 01-42-071 (July 27, 2001). Therefore, Respondent had two choices

regarding the special needs students. It either had to provide services from a licensed RN, or it had to train an aide to provide the care needed. Respondent's Director of Special Education, DeEdra Lundeen, testified at level four that a trained aide would simply not be qualified to provide the level of medical supervision and care that the student required, per her physician's orders. Since it has already been determined by MCBE officials that the student could not be cared for by a trained aide, it had no choice but toprovide 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. Since MCBE also determined that an Aide would not be necessary in addition to the RN, Grievant's request for relief cannot be granted. **(See footnote 2)**

The following conclusions of law support the decision reached.

Conclusions of Law

1. In non-disciplinary matters, Grievant has the burden of proving her 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 (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, aides, teachers, or secretaries, 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. 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, the grievance is GRANTED, and MCBE Ordered to post the position, if it exists, in 2004, in compliance with this decision. All other relief is DENIED. Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia 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: FEBRUARY 18, 2004

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1 ***Grievant's level four appeal cited violations of W. Va. Code §§ 18-5-39, 18A-4- 8, 18A-4-8b, 18A-4-8e, and 18A-4-8g, occurred when an Aide position was posted with the requirement of LPN certification. However, Grievant did not address Sections 18A- 4-8e, or 18A-4-8g, and those allegations are deemed abandoned.***

Footnote: 2

[3]Although the RN would not hold the Aide classification, she would be competent to provide care for all the special needs children, making an additional position unnecessary.