VICKY ROLES,

Grievant,

v. **Docket No. 03-41-175**

RALEIGH COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Vicky Roles ("Grievant") initiated this proceeding on May 6, 2003, challenging her transfer at the conclusion of the 2002-2003 school year. She seeks rescission of the transfer as relief. The grievance was denied at level one on May 6, 2003, and at level two on June 16, 2003. Level three consideration was waived, and Grievant appealed to level four on June 23, 2003. After several continuances, a level four hearing was held in the Grievance Board's office in Beckley, West Virginia, on March 4, 2004. Grievant was represented by counsel, John E. Roush, and Respondent was represented by counsel, Kathryn Reed Bayless. This matter became mature for consideration upon receipt of the parties' fact/law proposals on April 8, 2004.

The following findings of fact are made based upon a preponderance of the credible evidence of record.

Findings of Fact

1. Grievant has been regularly employed by Respondent as a special education aide since December 14, 1994.

2. Grievant's initial assignment was as a "multicategorical" aide at Bradley Elementary School, and she was assigned to the special education program in that school. 3. Shortly after Grievant's employment began, she was assigned to work one- on-one with a kindergarten student who had cerebral palsy. However, he had no mental impairments, and he was educated in a regular classroom at all times. Grievant assisted with all of his physical and educational needs, including

assistance with using a laptop computer for his assignments. (See footnote 1) When the student was absent, which he sometimes was for extended time periods, (See footnote 2) Grievant assisted in the special education department.

4. Grievant continued to work directly with the same student throughout his elementary education. When the student transferred to Beckley-Stratton Junior High School, Grievant was transferred with him for the 2001-2002 school year. Grievant did not object to being transferred with the student.

5. In May of 2002, Respondent was informed that the student to whom Grievant had been assigned would be moving out of the area and would not return for the 2002- 2003 school year.

6. Because it was too late to give the required notice of a transfer, Respondent allowed Grievant to remain at Beckley-Stratton and assigned her various duties within the special education department for the 2002-2003 school year. Because another aide had resigned early in the school year, there was actually a need for an additional aide at the school. 7. Respondent has a county policy which requires that, when the number of aides at a particular school is reduced, the least senior aide in the particular program area is to be placed on transfer. The program areas are defined as Kindergarten, Special Education, Title I Remedial, and Transportation.

8. There were two aides with less seniority than Grievant in the special education program at Beckley-Stratton. These aides were not assigned to a student in a one-on-one situation. Although assigned to assist particular students with restroom trips and ambulation, they were not responsible for providing one student with all of their attention throughout the entirety of each school day.

9. Because she was the only special education aide at Beckley-Stratton who was assigned as a one-on-one aide and her student had left the school, Grievant was placed on the transfer list in the spring of 2003.

10. It has been Respondent's practice to treat aides who are assigned one-on- one as being in a different position than special education aides who only provide partial assistance to a particular student.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her 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.

Transfers of school service personnel are governed by W. Va. Code § 18A-2-7, which provides, in pertinent part: The superintendent, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter. . ..

"[T]he statutes which govern the employment of school personnel do not mandate seniority-based transfers. Moreover, teachers, and other school personnel, have no 'vested right' to be assigned to a particular school. See State ex rel. Hawkins v. Tyler County Bd. of Ed., 275 S.E.2d 908, 912 (W. Va. 1980)." Perry, et al., v. Fayette County Bd. of Educ., Docket No. 96-10-205 (July 25, 1996). Watts v. Lincoln County Bd. of Educ., Docket No. 98-22-348 (Nov. 30, 1998); Eckenrode v. Kanawha County Bd. of Educ., Docket No. 96-20-302 (Jan. 22, 1997). "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). Transfer decisions .are based on the needs of the school, as decided in good faith by the superintendent and the board. [Hawkins, supra] and Post [v. Harrison County Bd. of Educ., Docket No. 89-17-355 (Feb. 20, 1990)]. See Jochum v. Ohio County Bd. of Educ., Docket No. 91-35-396 (Jan. 31, 1992).. Stewart, et al., v. Kanawha County Bd. of Educ., Docket No. 96-20-370 (Jan. 31).

The evaluation of a personnel decision under the arbitrary and capricious standard entails close examination of the process used to make the decision. Considerable deference must be afforded the professional judgment of those who made the decision. Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648 (1995). Baird v. Kanawha County Bd. of Educ., Docket No. 95-20-445 (Sept. 16, 1996). .In applying the 'arbitrary and capricious' standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that decisionand whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, supra, at 286.. Hill and Cyrus v.

Kanawha County Bd. of Educ., Docket No. 96-20-362 (Jan. 30, 1997).

Respondent's policy of categorizing its aides into program areas for the purpose of making transfer decisions has been upheld by this Grievance Board as a reasonable measure. Wood v. Raleigh County Bd. of Educ., Docket No. 01-41-398 (Aug. 24, 2001). Accordingly, the only question in the instant case is whether or not Respondent has acted arbitrarily and capriciously in treating one-on-one aides as a separate category of special education aides when transfer decisions are necessary. Respondent contends that it has acted reasonably, in compliance with its past practice, and that it was required to transfer Grievant, as she was the least senior one-on-one special education aide.

Also in support of its “categorization” of one-on-one aides, Respondent points to its practice of traditionally transferring such aides with their students, when the student moves to a different school within the county. While this is admirable and does indeed provide consistency to special needs children, it does not necessarily justify Respondent's apparent deviation from the written policy it has adopted regarding the categorization of aides for transfer. As Grievant has argued, it is well settled that .[a]n administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs.. Syl. Pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977). Here, while the policy specifically defines the program areas into which aides are to be divided for consideration,Respondent has created an artificial “subcategory” of one-on-one special education aides who are to be considered separately for transfer purposes.

While the undersigned is well aware of a board of education's substantial discretion in transfer matters, Respondent's action in this case was arbitrary and capricious. If not for the specific policy which Respondent has adopted, Grievant's transfer after the departure of her assigned student would have been a reasonable decision. However, Respondent is bound by the terms of its policy, which does not provide for “subcategories” within the program areas to which aides are assigned. Therefore, as Grievant was not the least senior special education aide at Beckley-Stratton Junior High School in the spring of 2003, she should not have been transferred.

The following conclusions of law support the decision reached.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving her 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.

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 W. Va. Code § 18A-2-7.

3. .In applying the 'arbitrary and capricious' standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were consideredin reaching that decision and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, supra, at 286.. Hill and Cyrus v. Kanawha County Bd. of Educ., Docket No. 96-20-362 (Jan. 30, 1997).

4. .An administrative body must abide by the remedies and procedures it properly establishes to conduct its affairs.. Syl. Pt. 1, Powell v. Brown, 160 W. Va. 723, 238 S.E.2d 220 (1977).

5. Respondent's decision to transfer Grievant was arbitrary and capricious and in violation of its policy regarding the transfer of aides during a reduction in force, because she was not the least senior aide in her assigned program area.

Accordingly, this grievance is **GRANTED**, and Respondent is **ORDERED** to reinstate Grievant to her assignment at Beckley-Stratton Junior High School as a special education aide, with any applicable back pay and/or benefits.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Raleigh 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 GrievanceBoard. 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: April 23, 2004 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

This student was also in the gifted program and did not need assistance with his actual school work.

Footnote: 2

Apparently, the student's family took him to Europe for therapy and education periodically.