ELLEN McDONALD,

Grievant,

v. **DOCKET NO. 03-54-285**

WOOD COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

In a grievance filed June 3, 2003, Ellen McDonald challenged "the past and present way the posting of aide jobs containing the word 'Paraprofessional' are handled in Wood County." As relief, she seeks to have all Paraprofessional jobs posted as Aide II, Aide III or Aide IV.

The grievance was denied at levels one and two, and level three was waived. A level four hearing was held January 27, 2004, at the Grievance Board's Charleston office, where Grievant was represented by counsel, John Roush of the WVSSPA, and the Wood County Board of Education (Respondent) was represented by counsel, Dean Furner, of Spilman Thomas & Battle, PLLC. The parties agreed to submit their proposed Findings of Fact and Conclusions of Law by March 3, 2004, whereupon the matter became mature for decision.

Based on a preponderance of the evidence contained in the record and adduced at the level four hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant has been employed by Respondent as a special education classroom aide since September, 2000. For the 2002-2003 school year, she was assigned to Jefferson Elementary School. She does not hold a Paraprofessional certificate.

2. Since May of 2001, Respondent has posted all kindergarten and pre- kindergarten Aide positions as requiring Paraprofessional certification. No policy mandates this requirement.

3. On or about May 2, 2003, Respondent posted two such positions at Lubeck Elementary School, multi-classified as "Aide II, III or IV/Paraprofessional." Grievant's Exhibit No. 1. At the same time, Respondent posted seven other Aide positions without the Paraprofessional requirement, and two others requiring Paraprofessional classification. Grievant applied for both Lubeck positions.

4. Grievant was not selected for either position; both were filled by applicants having less seniority than Grievant, but who had Paraprofessional certification.

5. Grievant has a high school diploma, but has zero college credit hours. Respondent will pay any employee's tuition, up to $600 per year, to attend college classes. 6. To obtain Paraprofessional certification, a person must complete 36 college credit hours in specific areas of instruction.

7. If no Paraprofessionals apply for a position like the ones Grievant applied for, then the most senior applicant is asked if he or she will pursue Paraprofessional certification, and if so, that applicant is placed in the position while he or she works on the certification.

8. Respondent obtained a limited amount of grant money with which to train Aides to be Paraprofessionals through a special program at West Virginia University -Parkersburg (WVU-P). Facing a shortage of Paraprofessionals in preschool and kindergarten classes, it limited the program to Aides working in those classrooms. Grievant was not working in either type of classroom, and was denied the opportunity to participate.

DISCUSSION

This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. Grievant contends Respondent's practice of posting and filing Aide positions with the requirement that the applicant possess Paraprofessional certification is improper.

One of Grievant's arguments is that the posting for the positions she applied for requires either an aide or a paraprofessional certification, not both. Respondent counters that the postings in question conform to past practice well-known to Grievant, and require both Aide and Paraprofessional certification for a multi-classified position. On the posting, under the heading, “Classification,” it says “Aide II, III or IV/Paraprofessional.” Grievant's Exhibit No. 1.

Grievant contends the virgule preceding Paraprofessional should be read as an “or.” While

technically correct, one cannot ignore both context and the express intention of Respondent, who created the posting. In context, the "/" cannot reasonably be read as anything other than "and." Had it been used properly, the posting would have read "Aide II/II/IV and Paraprofessional." As it was written, however, the comma and the word "or" are used to mean "or," so it would not make semasiological sense to assume the "/" was thrown in as a third symbol for the same meaning. Also, Assistant Superintendent Lawrence Hasbargen testified that these positions required Paraprofessional certification, and it is the duties of the position that determine certification requirements, not the posting itself. Grievant also contends the posting of these positions with the requirement of a Paraprofessional certification violates W. Va. Code § 18A-4-8b(g), which states in part, "Job postings may not require criteria which are not necessary for the successful performance of the job and may not be written with the intent to favor a specific applicant." Respondent maintains that the Paraprofessional certification is required because the duties and responsibilities of the Aides in these positions are more complex than those of a general classroom Aide. Since the added responsibilities are beyond those encompassed by the Aide classification, Paraprofessional certification is required. The added complexity is a requirement of the federal No Child Left Behind (NCLB) Act (See footnote 1) , which requires Highly Qualified Paraprofessionals for schools like Lubeck that receive Title I funding.

In that Act, "Paraprofessional" is defined as "an individual who is employed in a preschool, elementary school, or secondary school under the supervision of a certified or licensed teacher, including individuals employed in language instruction educational programs, special education, and migrant education." 20 U.S.C. 7011 § 3301(12). In the same Act, a "Highly Qualified Paraprofessional" is "a paraprofessional who has not less than 2 years of -- (A) experience in a classroom; and (B) postsecondary education or demonstrated competence in a field or academic subject for which there is a significant shortage of qualified teachers." 20 U.S.C. 6602 § 2101(4). Grievant meets both of these definitions. However, to receive certification as a Paraprofessional in West Virginia, a person must meet a higher standard, and under West Virginia Law, Grievant only meets the requirements for Aide certification. Since the position requires West Virginia certification, it is the requirements for that certification Grievant must meet, not the requirements underthe NCLB Act that qualify her for a title of "Paraprofessional" under a definition not referenced in the posting.

"'Aide I' means those personnel selected and trained for teacher-aide classifications such as

monitor aide, clerical aide, classroom aide or general aide." W. Va. Code § 18A-4- 8(i)(8). Aides II, III and IV are all essentially identical to the Aide I, but require more education, training or experience.

> "Paraprofessional" means a person certified pursuant to [W. Va. Code § 18A- 3-2a] to perform duties in a support capacity including, but not limited to, facilitating in the instruction and direct or indirect supervision of pupils under the direction of a principal, a teacher or another designated professional educator[.]

W. Va. Code § 18A-4-8(i)(65).

> A paraprofessional certificate may be issued to a person who has completed thirty-six semester hours of post-secondary education or its equivalent in subjects directly related to performance of the job, as approved by the state board, and can demonstrate the proficiencies to perform duties as required of a paraprofessional as defined in [W. Va. Code § 18A-4-8].

W. Va. Code § 18A-3-1a(3).

Although Grievant's duties would likely better fit the classification definition for Paraprofessional found in W. Va. Code, she does not meet the educational requirements to obtain her Paraprofessional certificate. The plain meaning of the Paraprofessional definition encompasses the duties and responsibilities Respondent intends for the positions it posted, so the requirement is not arbitrary, as Grievant suggests. "County boards of education have substantial discretion in matters . . . involving curricular programs and qualifications and placement of personnel implementing those programs." Cowen v. Harrison County Bd. of Educ., 465 S.E.2d 648, 195 W. Va. 377 (1995). Lastly, Grievant claims she was discriminated against, presumably when she was not permitted to attend the Paraprofessional Studies Program at WVU-P. Had she been able to attend, she would likely have qualified for the required Paraprofessional certification and been the most senior applicant for one of the jobs in question. "W. Va. Code § 18-29-2(m) defines 'discrimination' as 'any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.'" Hogsett, et al., v. Wayne County Bd. of Educ., Docket No. 01-50-056 (Apr. 5, 2001). In order to establish a claim of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievants must show:

> (a) that they are similarly situated, in a pertinent way, to one or more other employee(s);

(b) that they have, to their detriment, been treated by their employer in a manner that the other employee(s) has/have not, in a significant particular; and

(c) that such differences were unrelated to actual job responsibilities of the Grievants and/or the other employee(s) and were not agreed to by the Grievants in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievant has failed to show she was similarly situated to the Aides who were permitted to attend the WVU-P program. Respondent had a limited amount of funds with which to send Aides to the program and chose to send only Aides then working in preschool and kindergarten, because it needed to increase the number of paraprofessionals there in order to meet NCLB guidelines. Grievant was not working in either of those grades, so she was not able to be involved in the program. Grievant did not identify any Aide that did attend the WVU-P program who was, like her, not in a preschool or kindergarten classroom.

CONCLUSIONS OF LAW

1. This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. “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). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

2. “County boards of education have substantial discretion in matters . . . involving curricular programs and qualifications and placement of personnel implementing those programs.” Cowen v. Harrison County Bd. of Educ., 465 S.E.2d 648, 195 W. Va. 377 (1995).

3. A position for which Paraprofessional certification is needed requires that the candidate meet the requirements of W. Va. Code § 18A-4-8(i)(65), and not the definition of “Paraprofessional” or “Highly Qualified Paraprofessional” contained in the NCLB Act.

4. “W. Va. Code § 18-29-2(m) defines 'discrimination' as 'any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or

agreed to in writing by the employees.'" Hogsett, et al., v. Wayne County Bd. of Educ., Docket No. 01-50-056 (Apr. 5, 2001).

5. In order to establish a claim of discrimination, an employee must establish a *prima facie* case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievants must show:

> (a) that they are similarly situated, in a pertinent way, to one or more other employee(s);
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> (b) that they have, to their detriment, been treated by their employer in a manner that the other employee(s) has/have not, in a significant particular; and
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> (c) that such differences were unrelated to actual job responsibilities of the Grievants and/or the other employee(s) and were not agreed to by the Grievants in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

6. Grievant did not establish a *prima facie* discrimination claim because she dod not establish that she was similarly situated to Preschool and Kindergarten Aides who were permitted to attend the WVU-P program.

For the foregoing reasons, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Wood 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: March 26, 2004

M. Paul Marteney

Administrative Law Judge

Footnote: 1

20 U.S.C. 6301, et seq.; Public Law 107-110 (Jan. 8, 2002).