BEVERLY INTERDONATO,

Grievant,

v.

WOOD COUNTY BOARD

OF EDUCATION, **DOCKET NO. 03-54-275**

Respondent,

and

KAREN WOLFE,

Intervenor.

DECISION

On April 3, 2003, Grievant filed a grievance against the Wood County Board of Education, Respondent, claiming: “Grievant, a Preschool Special Needs teacher at Jefferson Elementary Center, was recently notified that she was being placed on [t]ransfer. The Grievant claims that it was arbitrary and capricious to transfer her because a non- certified Preschool Special Needs teacher was not placed on transfer.”

As relief, “Grievant requests that she be reinstated to her position as a Preschool Special Needs teacher at Jefferson Elementary Center.”

The other teacher Grievant referred to, Karen Wolfe, joined as Intervenor at level two. Having been denied at levels one and two, level three was waived and a level four hearing was convened in the Grievance Board's Charleston office on June 29, 2004. At that time, the parties agreed no additional evidence needed to be introduced, and that the mattercould be submitted on the record developed below. Grievant was represented at level one by Chris Barr of the West Virginia Federation of Teachers, at level two by counsel, Basil R. Legg, Jr., and at level four by counsel, Pat C. Fragile and Stacey Daniel-Fragile. Intervenor was represented by Rosemary Jenkins of the West

Virginia Federation of Teachers. Respondent was represented by counsel, Howard E. Seufer, Jr. The matter became mature for decision on July 19, 2004, the deadline for submission of the parties' proposed findings of fact and conclusions of law.

Based on a preponderance of the evidence contained in the record, I find the following material facts have been proven:

FINDINGS OF FACT

1. At the time this grievance was filed, Grievant was regularly employed by Respondent as a preschool special needs teacher at Jefferson Elementary Center ("Jefferson").

2. Intervenor and Jamie Sayre were similarly employed at Jefferson.

3. Yvonne Santin is Respondent's Director of Special Education. She made the determination that at Jefferson, the number of preschool special needs classrooms, and likewise the number of teachers, needed to be reduced from three to two for the 2003-2004 school year. This decision is not contested.

4. Grievant had less seniority than either Intervenor or Ms. Sayre.

5. Grievant's teaching certification is endorsed for preschool handicap (See footnote 1) pre-K.

6. Intervenor's teaching certification is endorsed for mental retardation (See footnote 2) K-12, with an authorization for mental retardation one grade below. 7. During the 2002-2003 school year, some of Intervenor's students were categorized with special needs other than mental retardation. Intervenor taught them that year even though she was not certified to do so.

8. After notifying Grievant that she would be transferred due to the reduction in force, Respondent changed the special needs categorizations of Intervenor's four students to match her mental retardation certification. Respondent did so without reevaluating the needs of the students, and explained the need for the change to the students' parents as a simple paperwork correction. It did so with the admitted intent of matching the student's needs label with Intervenor's certification.

9. For the 2003-2004 school year, all of Intervenor's students were classified as mentally impaired.

10. Wood County Board of Education Policy 4119 (Grievant's Exhibit No. 4), implements W. Va. Code § 18-9A-4's requirement for an alternate procedure to a reduction in force, and was applied in justifying Grievant's transfer. The policy requires the least senior employee in a grade level or

certification area to be the one reassigned.

11. Grievant was determined to be the least senior preschool special education teacher. She was originally slated to “bump” into a preschool special needs position at Gihon Elementary School, but turned down that assignment. Grievant subsequently applied for a posted position and is now teaching at Franklin Elementary School.

12. A 1991 opinion of Mary Nunn, West Virginia Board of Education Assistant Director of Special Education, states in pertinent part:

> [C]ounty school districts will still have the option of serving preschool children noncategorically or categorically. Non categorical programs must be taught by professional educators certified in preschool handicapped. Categorical programs must be taught by persons certified in the specific disability area being taught. In the latter case, it is the categorical endorsement, not the K-12, that qualifies a certified special education teacher to teach preschool children with disabilities.

Grievant's Exhibit No. 3.

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 argues that, under Respondent's own policy, when a reduction in force is necessary, both seniority and certification should be considered, with certification trumping seniority. Under this view, Grievant contends she should have been retained and Intervenor transferred out, even though Intervenor is more senior.

Under W. Va. Department of Education Policy 2419 (126 W. Va. C.S.R. 16), a teacher certified in preschool handicap may serve any student with an identified area of exceptionality except speech, but a teacher certified in mental retardation can only serve students with that particular exceptionality. Grievant's certification is endorsed for preschool handicap, while Intervenor's is endorsed for preschool mental retardation. The issue, then, is whether Respondent had a need for a preschool handicap teacher or whether a preschool mental retardation teacher would do.

Given Grievant's contention that Intervenor is not certified to teach the students now in her class, the fact that she taught outside her classification during the 2002-2003 school year is not relevant. Similarly, the status of the students during the 2002-2003 school year is not relevant. As Respondent

points out, all of Intervenor's students for the 2003-2004 school year are classified as mentally retarded, which matches Intervenor's teaching authorization. At first blush, therefore, Grievant's position has no merit. However,Respondent's position that all of the students in Intervenor's classroom are properly matched with her certification is an absolute fiction.

Respondent, knowing the proper procedure for categorizing special education students according to their actual disabilities, overtly ignored this procedure and admittedly re-labeled the students for the express purpose of making them match their teacher's certification. The distinction is therefore arbitrary and is contrary to West Virginia Board of Education Policy 2419, which requires a full, multidisciplinary evaluation of the student's needs before the student is placed in a specialized program to provide for those needs. The Grievance Board has no jurisdiction over the eligibility categorization of the students, and cannot therefore order the students to be restored to their proper special needs categories. However, for the purposes of this decision, the re-labeling will be disregarded as illegal. Therefore, given that the categorization of the students resides not in the label Respondent arbitrarily and self-servingly applied, but in the actual disability of the student as measured under proper diagnostic guidelines, Intervenor's students are not all mentally retarded. (See footnote 3)

That factual determination, having been made, changes the qualification of Intervenor to serve the students under her present teaching certification. This brings Policy 4119 into play. Given that there is still a need in the classroom to which Intervenor was assigned for a preschool special needs teacher, Respondent should not have transferred a teacher so certified in favor of one who was not.

Respondent argues that a 1991 opinion of the West Virginia Department of Education allows it to use a teacher certified in mental retardation to teach students with other mental impairments, but that interpretation of the opinion does not withstand scrutiny. The letter referred to, Grievant's Exhibit No. 3, does not address this issue, but instead allows county boards of education to establish categorized or non-categorized classrooms. However, it still requires students to be taught by appropriately certified instructors. Intervenor is not an appropriate instructor for a child who is not mentally retarded; therefor, her current teaching assignment is out of compliance.

The following Conclusions of Law support this decision:

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 Res.*, 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. West Virginia Board of Education Policy 5202 requires a special education teacher to hold special education specialization consistent with her student's primary disability. 126 W. Va. C. S. R. 136.

3. West Virginia Board of Education Policy 2419 requires “a full and individual multidisciplinary evaluation of the student's educational needs . . . before any action is taken with respect to the initial placement of an exceptional student in a program providing special education and related services.” 126 W. Va. C. S. R 16 § 3. A determination that a student is mentally impaired requires an evaluation to show the student is functioning at a general intellectual level between 70% and 75% on a scale with a mean of 100%. 4. Respondent failed to properly evaluate the students whose special education requirements were initially determined to be preschool special needs, before it determined they were mentally impaired.

5. The students Respondent re-labeled as mentally impaired in order to match Intervenor's certification are not actually mentally impaired as that term is defined by Policy 2419.

6. Intervenor is not qualified to teach students who are not mentally impaired, but Grievant is.

For the foregoing reasons, this grievance is **GRANTED**. Respondent is **ORDERED** to reinstate Grievant as a preschool special needs teacher at Jefferson Elementary Center. Further Respondent is urged to reconsider its arbitrary and improper relabeling of those students whose status was changed to accommodate Intervenor's certification area.

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: July 23, 2004 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

The terms "preschool special needs" and "preschool handicap"are used interchangeably.

Footnote: 2

The terms "mentally retarded," "mentally impaired" and "MMI" are used interchangeably throughout the testimony.

Footnote: 3

It should be noted that there is no evidence Intervenor had any part in Respondent's improper acts, even though they were undertaken for her benefit.