HOLLY TAYLOR,

Grievant,

v. **Docket No. 05-38-213**

POCAHONTAS COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Holly Taylor ("Grievant") initiated this proceeding on April 22, 2005, alleging she should not have been reduced in force ("RIF'd") at the conclusion of the 2004-2005 school year. The record does not reflect what proceedings occurred at level one. A level two hearing was held on June 9, 2005, but the record does not contain a level two decision. Level three consideration was bypassed, and Grievant appealed to level four on June 23, 2005. A hearing was held in Elkins, West Virginia, on September 9, 2005. Grievant was represented by counsel, John E. Roush, and Respondent was represented by counsel, Gregory W. Bailey. This matter became mature for consideration upon receipt of the parties' fact/law proposals on October 3, 2005.

The following material facts have been proven by a preponderance of the evidence of record.

Findings of Fact

1. Grievant has been employed by Respondent as a regular aide since December 10, 2003.

2. During the 2004-2005 school year, Grievant was a half-time aide at Marlinton Elementary Preschool.

3. When Grievant began her employment, she and two other aides shared the same seniority date. Pursuant to a random drawing procedure, Grievant became the most senior, Nichole Dilley was the next most senior, and Susan Carr was the least senior of the three.

4. In August of 2004, due to her experience and training with autistic students, Ms. Carr became multiclassified as an aide/autism mentor. She was assigned to a specific autistic student for

the entire 2004-2005 school year.

5. In the spring of 2005, Respondent determined that it would be necessary to impose a RIF in the aide classification for the upcoming school year.

6. Because Grievant was working only as an aide, and Ms. Carr was needed to continue working with the autistic student, Grievant was RIF'd from her position. (See footnote 1)

7. As of the end of the 2004-2005 school year, Grievant had received autism mentor training, but she had never worked in that classification.

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 (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's basic argument is that “an aide is an aide,” so Ms. Carr should have been RIF'd instead of her, due to Ms. Carr's lesser seniority in the aide classification. Grievant bases her contention, in part, upon the following portions of W. Va. Code § 18A-4-8b:

> (d) Paraprofessional, autism mentor and braille or sign language specialist class titles shall be included in the same classification category as aides.

> (j) If a county board is required to reduce the number of employees within a particular job classification, the employee with the least amount of seniority within that classification or grades of classification shall be properly released and employed in a different grade of that classification if there is a job vacancy; Provided, That if there is no job vacancy for employment within the classification or grades of classification, he or she shall be employed in any other job classification which he or she previously held with the county board if there is a vacancy and shall retain any seniority accrued in the job classification or grade of classification.

Also of importance to the outcome of this grievance is the following portion of W. Va. Code § 18A-4-8:

> (14) 'Autism mentor' means personnel who work with autistic students and who meet standards and experience to be determined by the state board: Provided, That if any employee has held or holds an aide title and becomes employed as an autism mentor, the employee shall hold a multiclassification status that includes aide and autism

mentor titles, in accordance with section eight-b of this article.

As pointed out by Respondent, it appears that, by enacting this provision, the legislature intended for any aide who becomes employed as an autism mentor to maintain a multiclassified title, regardless of his or her job duties. An additional statutory provision applicable to this situation is W. Va. Code § 18A-4-8g(i), which provides, in part, that multiclassified employees accrue seniority in each classification they hold and can be subject to RIF in any category of their multiclassification. Importantly, that provision also states that, when such a RIF occurs, the employee retains employment in any othercategory of employment they hold, and the RIF'd classification is deleted from the employee's contract. Therefore, the question is whether or not the legislature intended to exclude autism mentors from this provision, thus requiring that these employees always maintain their multiclassified status and prohibiting deletion of the “aide” classification from their titles during a RIF.

The West Virginia Supreme Court of Appeals has attempted to clarify the seniority rights of these employees by holding, "[m]ulticlassified school service personnel: (1) do not belong to a separate classification category, but are employees of each category contained within their multiclassification titles; (2) are subject to a reduction in force in any individual job category, based on seniority accumulation within that category; and (3) in the event of a reduction in force, remain in the employ of the county board of education with any categories that are subject to the reduction in force deleted from their multiclassification titles." Cornell v. Putnam County Bd. of Educ., Docket No. 03-40-111 (June 26, 2003), citing Taylor-Hurley v. Mingo County Bd. of Educ., 209 W. Va. 780, 551 S.E.2d 702 (2001).

As applied to the situation presented in the instant case, the inescapable conclusion is that a multiclassified aide/autism mentor is not exempt from this rule and may be RIF'd in either category of employment, because there is no specific statutory exemption for them. Clearly, the legislature's intent in automatically making new autism mentors multiclassified was to offer them some job security during the RIF process.

As applied to Ms. Carr and the instant situation, it is obvious that, as the least senior aide, she would have been subject to a RIF in the aide classification before Grievant, and would have been eligible for continued employment in any job vacancy in the autism mentor classification. However, as

argued by Respondent, it is Ms. Carr's right to continueemployment as an autism mentor that presents the problem here: the reduction in personnel was necessary in the aide classification, and Ms. Carr's autistic student continued to need services from an autism mentor, thus the need for her particular position would remain unchanged. Thus, RIFing Ms. Carr would not achieve the desired objective of reducing the number of aides employed by Respondent.

In order to make the appropriate decision in this case, Respondent sought an opinion from the State Superintendent of Schools. In his initial opinion, along with an updated opinion based upon additional information, the Superintendent opined that employees classified as aide/autism mentor must be exempt from the requirement that multiclassified employees are subject to reduction in each of their classifications. While the basis for the Superintendent's opinion is clearly contrary to the undersigned's conclusion that there is no such exemption, and it cannot be implied from reading of the statutes, the undersigned does share the Superintendent's concern that it would seem inappropriate to release the employee who is currently working as an autism mentor, thus interrupting the continuity of services so important to these special children.

As noted in Riffle v. Webster County Board of Education, Docket No. 04-51-122 (July 30, 2004), while “an autism mentor is an aide, an aide is not necessarily an autism mentor.” In that case, it was held that it was appropriate for a board of education to award an aide/autism mentor position to an applicant who had more seniority as an autism mentor, even though the grievant had far more regular seniority in the aide classification. It was noted that the particular situation, as with the situation presented here, was not specifically addressed by statute, requiring that it be reviewed pursuant to the arbitrary and capricious standard. Cornell, supra; Wellman v. Mercer County Bd. of Educ., Docket No.95-27-327 (Nov. 30, 1995). Generally, a board of education's action is arbitrary and capricious if it did not rely on factors that were intended to be considered, entirely ignored important aspects of the problem, explained its decision in a manner contrary to the evidence before it, or reached a decision that is so implausible that it cannot be ascribed to a difference of view. Bedford County Memorial Hosp. v. Health and Human Serv., 769 F.2d 1017 (4th Cir. 1985).

Pursuant to this standard, the undersigned finds that it was not arbitrary and capricious for Respondent to RIF the least senior aide, instead of the least senior aide/autism mentor, when it was the aide classification which needed reduction. Because aides who take autism mentor positions automatically become multiclassified, while still being included within the aide classification category,

they are uniquely situated in a RIF situation. Moreover, as noted in Riffle, supra, while not all aides are autism mentors, all autism mentors are automatically aides. Accordingly, when the objective of a RIF is to reduce the overall number of aides, it would be inappropriate to include aides working as autism mentors when evaluating the relative seniority of the employees at issue. Conversely, it there is a reduced need for autism mentors, then it would be appropriate for a board of education to RIF the aide/autism mentor with the lowest seniority.

In accordance with this Decision, the following conclusions of law are made.

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 (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. "Multiclassified school service personnel: (1) do not belong to a separate classification category, but are employees of each category contained within their multiclassification titles; (2) are subject to a reduction in force in any individual job category, based on seniority accumulation within that category; and (3) in the event of a reduction in force, remain in the employ of the county board of education with any categories that are subject to the reduction in force deleted from their multiclassification titles." Cornell v. Putnam County Bd. of Educ., Docket No. 03-40-111 (June 26, 2003), citing Taylor-Hurley v. Mingo County Bd. of Educ., 209 W. Va. 780, 551 S.E.2d 702 (2001).

3. Paraprofessional, autism mentor and braille or sign language specialist class titles shall be included in the same classification category as aides. W. Va. Code § 18A-4- 8b.

4. Any aide who becomes employed as an autism mentor becomes multiclassified as an aide/autism mentor, pursuant to the provisions of W. Va. Code § 18A-4-8.

5. When it becomes necessary for a board of education to reduce the number of aides in its employ, it should not include multiclassified aide/autism mentors who are currently employed in autism mentor positions, in the reduction in force. See Riffle v. Webster County Board of Education, Docket No. 04-51-122 (July 30, 2004). 6. It was not arbitrary and capricious for Respondent to subject Grievant to a reduction in force when it sought to reduce the number of aides in its employ,

rather than reducing the position of an aide/autism mentor who was assigned to an autistic student.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Pocahontas 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: October 14, 2005

_____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

The parties did not make issue of Ms. Dilley's position with regard to this RIF, so it is assumed that it did not come into play with regard to the issues in this grievance.