THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

TENIA MARIE ESLICK,
Grievant,

v. **DOCKET NO. 2011-0303-WayED**

WAYNE COUNTY BOARD OF EDUCATION,
Respondent, and

MARY RENEA PERTEE,
Intervenor.

DECISION

Grievant, Tenia Marie Eslick, filed a grievance against her employer, the Wayne County Board of Education, on September 9, 2010. The statement of grievance reads:

> Grievant contends that the Respondent violated W. Va. Code 18A-4-8b, 18A-4-8g & W. Va. BOE Policy 5314.01 by filling a posted Autism Mentor/Itinerant Aide position at Lavalette Elementary School with a less senior applicant.

As relief Grievant sought, "(a) instatement into the position at Lavalette Elementary School; (b) compensation for lost wages with interest; and (c) all benefits, pecuniary and nonpecuniary, retroactive to the date Mary Muncy[1] was employed in the position at Lavalette Elementary School."

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[1] Intervenor is also known as Mary Renea Muncy.

A hearing was held at level one on October 11, 2010,[2] and a level one decision denying the grievance was issued on October 20, 2010. Grievant appealed to level two on October 29, 2010, and a mediation session was held on March 23, 2011. Grievant appealed to level three on April 7, 2011, and Mary Renea Pertee was granted Intervenor status on May 16, 2011. A level three was held before Administrative Law Judge Carrie H. LeFevre, on August 16, 2011, at the Grievance Board's Charleston office. Grievant was represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association, Respondent was represented by David A. Lycan, Esquire, and Intervenor was represented by Sandra Pertee. This matter became mature for decision on September 19, 2011, on receipt of the last of the parties' proposed findings of fact and conclusions of law. This mater was reassigned to the undersigned Administrative Law Judge for administrative reasons on December 13, 2011.

Synopsis

Intervenor was placed in a posted Autism Mentor/Itinerant Aide position rather than Grievant, because she had met all the requirements to be qualified as an Autism Mentor, while Grievant had not. Grievant did not dispute that Intervenor had met all the requirements to be an Autism Mentor, but argued that Intervenor was not qualified to be an Autism Mentor, because the State Department of Education had not issued any certificate or other verification that she had met all the requirements to be an Autism

[2] The record does not contain a transcript of the level one hearing, although it is unclear why Respondent failed to provide a transcript of the hearing as it is required by statute to do. Counsel for Grievant stated at the level three hearing that he would put on all his evidence again at level three, and he saw no need to have the level one hearing transcribed. Neither Respondent nor Intervenor commented on this issue.

Mentor. Grievant failed to demonstrate that there is any statutory or regulatory requirement that the State Department of Education issue a certificate or other verification that a person has met all the requirements to be qualified as an Autism Mentor.

The following Findings of Fact are properly made from the record developed at level three.

Findings of Fact

1. Grievant is employed by the Wayne County Board of Education ("WBOE") as a substitute Aide. Her substitute seniority date is January 28, 2002.

2. On August 24, 2010, WBOE posted an Autism Mentor/Itinerant Aide position for Lavalette Elementary School.

3. The qualifications for an Autism Mentor are:

a. meet the qualifications of an Aide III;

b. successful completion of a staff development program related to autism;

c. two years of successful experience working with autistic students; and,

d. physical ability and stamina necessary to complete all job tasks.[3]

4. Grievant applied for the position, as did 20 other employees, including Intervenor, Mary Renea Pertee, and Tammy Williamson. Intervenor was placed in the position.

5. Prior to being placed in the posted Autism Mentor position, Intervenor had been a substitute Aide. Intervenor's substitute seniority date is September 22, 2003, making her less senior than Grievant.

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[3] These are the minimum mandatory standards established for this position by the State Department of Education and are found at 126 C.S.R. 146A § 3.

6. Intervenor had completed the training required to perform the duties of an Autism Mentor as of the date of the posting, and met the requirements for an Aide III.

7. As of August 9, 2010, Intervenor had acquired two years of experience working with autistic students. Grievant had not acquired two years of experience working with autistic students.

8. Intervenor met all the requirements to be qualified as an Autism Mentor. Grievant had not met all the requirements to be qualified as an Autism Mentor.

9. Ms. Williamson was employed by WBOE as a regular employee in the Aide classification. She has not met all the requirements to be an Autism Mentor.

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 Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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). "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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant argued she should have been placed in the posted Autism Mentor position because she had more seniority than the successful applicant. She did not dispute that Intervenor had met all the requirements to be an Autism Mentor, while she had not.

Rather, Grievant argued that, because the State Department of Education had not issued Intervenor any type of certificate or other verification that Intervenor had completed the requirements to be an Autism Mentor, Intervenor was not qualified for the position. If such were the case, then the selection should have been based on seniority.

WEST VIRGINIA CODE § 18A-4-8b(a) provides that a board of education is required to "make decisions affecting . . . the filling of any service personnel positions . . . on the basis of seniority, qualifications and evaluation of past service." The same statute defines "qualifications" as meaning that "the applicant holds the classification title in his or her category of employment . . . and shall be given first opportunity for . . . filling vacancies." This CODE SECTION then states in section (b) that applicants are to be considered in the order set forth, with regularly employed service personnel considered first, and substitute service personnel considered fifth in the list.[4]

WEST VIRGINIA CODE § 18A-4-8(l)(14) defines Autism Mentor as "a person who works with autistic students and who *meets standards and experience to be determined by the State Board.* A person who has held or holds an aide title and becomes employed as an autism mentor shall hold a multiclassification status that includes both aide and autism mentor titles, in accordance with section eight-b [§ 18A-4-8b] of this article." (Emphasis added.) This statute says nothing about any certification from the State Department of Education. It talks about the standards and experience for the classification

[4] Were the selection based on seniority alone, the only regular employee applicant would have been entitled to placement in the position, not Grievant. The applicable statute requires that the most senior regular employee applicant be placed in the position if there is no qualified applicant. The undersigned has no authority to ignore the statute and skip over the most senior regular employee and place Grievant in the position simply because she is the one who chose to file a grievance.

being determined by the State Board of Education. It says only that the employee must meet these standards, which Intervenor did.

The parties also placed into the record a Memorandum dated May 5, 2006, from Mary E. Nunn, Assistant Director, apparently with the State Department of Education, outlining the "Qualifications and Process" to be placed in the Autism Mentor classification, and the Legislative Rule dealing with Autism Mentors, 126 Code of State Regulations 146A (Policy 5314.01), both of which discuss the training, experience, and physical requirements for qualification as an Autism Mentor. Neither the Memorandum nor the Regulations make any mention whatsoever of any certification or even verification by the State Department of Education, and Grievant did not point to any statute, regulation, or policy which indicates that any such certification or verification requirement exists. Rather, Grievant seemed to pull this requirement out of thin air.

The only evidence which supports Grievant's assertion in any form is a letter dated after the level three hearing, and submitted post-hearing as Joint Exhibit 3. That letter dated August 24, 2011, from Pat Homberg, Executive Director, Office of Special Programs, West Virginia Department of Education, states that verification of the successful completion of a staff development program related to autism (required training) "must be submitted through the West Virginia Department of Education." The letter goes on to state that Ms. Homberg's office has verified that Intervenor had met the Autism training requirements. First, the undersigned does not read this letter to state that a person must obtain verification from the State Department of Education before he or she can be said to have met the requirements to be an Autism Mentor. Second, even were the undersigned to read this letter to say that such verification must be obtained, there is

nothing in the record which supports a finding that the letter accurately reflects a requirement adopted by the State Department of Education, or that Ms. Homberg has any authority to make this a requirement, and no testimony was presented on this issue. Grievant did not demonstrate that any certificate or verification from the State Department of Education is a prerequisite to meeting the requirements to be an Autism Mentor.[5] Intervenor was qualified for the Autism Mentor position, while Grievant was not. Intervenor was properly placed in the posted Autism Mentor position.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. 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 Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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). "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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

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[5] Grievant cited to *Sage v. Hancock County Board of Education,* Docket No. 92-15-385 (1993), in support of her argument that some verification or certification from the State Department of Education had to be obtained before Intervenor was fully qualified as an Autism Mentor. *Sage*, however, involved a bus operator. Bus operators are indeed issued a certification by the State Department of Education before they are qualified for a position as a bus operator. That case has no application here.

2. WEST VIRGINIA CODE § 18A-4-8b provides that the selection of an employee to fill a posted position is to be made based upon seniority, qualifications and evaluation of past service.

3. There is no statutory or regulatory requirement that the State Department of Education issue a certificate or other verification that a person has met the requirements to be an Autism Mentor, before that person is qualified to be an Autism Mentor.

4. Respondent placed the only qualified applicant in the Autism Mentor position, as is required by statute.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: January 12, 2012