THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DEBRA L. LAWTON,
Grievant,

v. **DOCKET NO. 2012-0743-HanED**

HANCOCK COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Debra L. Lawton, filed a grievance against her employer, the Hancock County Board of Education, on January 17, 2012. The statement of grievance reads:

> Grievant asserts that she is qualified for certification as an autism mentor and is working with autistic students. Grievant contends that she is entitled to reclassification as an autism mentor pursuant to W. Va. Code 18A-4-8. Grievant also asserts favoritism & discrimination in violation of W. Va. Code 18A-4-5b & 6C-2-2.

As relief Grievant sought, "addition of the autism mentor classification to her contract and compensation for all lost wages to the maximum extent permitted by law with interest."

A hearing was held at level one on January 23, 2012, and a level one decision denying the grievance was issued on February 27, 2012. Grievant appealed to level two on March 15, 2012, and a mediation session was held on July 12, 2012. Grievant appealed to level three on July 19, 2012. A level three hearing was held before the undersigned Administrative Law Judge on December 5, 2012, at the Grievance Board's Westover office. Grievant was represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association, and Respondent was represented by Wiliam T.

Fahey, Esquire, Assistant Prosecuting Attorney. This matter became mature for decision on January 7, 2013, the deadline for submission of proposed findings of fact and conclusions of law.

Synopsis

Grievant is employed as an Aide III, and is assigned to ride a bus which transports special education students. As a bus aide, Grievant assists the students in boarding and exiting the bus, helps them get into their seats and fasten seatbelts, monitors the behavior of the students while they are on the bus and takes steps to control inappropriate behavior and to try to calm them down, and assists the students with issues they encounter while on the bus. Some of the students riding the bus are autistic. Grievant does not assist the students on the bus with any learning activities. Grievant has met the training and physical requirements to be classified as an autism mentor, and has acquired 292 days of experience working with autistic students, which is sufficient to meet the two year experience requirement. Grievant is fully qualified to be an autism mentor, and should be classified and paid as such when she is working with autistic students. Grievant is not serving as an autism mentor in her role as a bus aide, and cannot be paid as such. Grievant did work as an autism mentor for 14 days during the summer of 2012, and is entitled to backpay, with interest, for those 14 days.

The following Findings of Fact are properly made from the record developed at levels one and three.

Findings of Fact

1. Grievant has been employed by the Hancock County Board of Education ("HBOE") as an Aide III for approximately 20 years, and has been assigned for 9 years to ride a bus transporting special education students to and from school.

2. Grievant does not assist any of the students riding the bus with school work, nor does she engage in any learning activities with the students. Grievant's role is to assist the students in boarding and exiting the bus, help them get into their seats and fasten seatbelts, assist the students with issues they encounter while on the bus, and monitor the behavior of the students while they are on the bus and take steps to control inappropriate behavior so that they remain in their seats, and do not injure themselves or others, or create chaos, including using cards with pictures to communicate with them and calm them, and talking and singing to them to try to calm them down.

3. Some of the special education students riding the bus to which Grievant is assigned are autistic, and this has been the case for several years. Each of these autistic students has an Individual Education Plan ("IEP"). None of the IEPs for these students requires an autism mentor to be assigned to ride the school bus with the child, and Grievant does not participate in the IEP meetings for any of the students riding the bus to which she is assigned.

4. Grievant has had autistic students exhibit behavior on the bus during transportation which has caused her to call on her autism mentor training in order to calm the student, and students have, at times become violent while riding the bus, placing Grievant in a difficult position in attempting to control the situation by herself, while keeping the other students calm.

5. Grievant has taken it upon herself to make it a practice to contact teachers prior to arriving at the school to let them know when a student is experiencing behavior problems on the bus so the teacher will be ready to deal with the problem when the student arrives at school. The teachers find this to be helpful, and they likewise contact Grievant at the end of the school day to advise her of any problems students are having which may cause behavior issues on the bus, and they offer suggestions on how to discourage the students from acting out on the bus when they are having behavior issues. None of the teachers directs Grievant's work.

6. Grievant has completed the training required to be classified as an autism mentor, and has passed the required physical examination.

7. Grievant has 292 days of experience working with autistic children.

8. HBOE adopted an Autism Mentor policy statement in October 2007. That policy statement states that, in order to be classified as an autism mentor, the employee must have "[t]wo school years of experience working with student(s) with autism in an *instructional classroom setting.*" (Emphasis added.) HBOE views a school year as 200 days.

9. Grievant does not work in an instructional classroom setting, and is not supervised by a teacher. Her supervisor is the Transportation Director.

10. During the 2010-2011 school year, one autistic student was having such frequent outbursts that his IEP was changed to add the requirement that an Aide be assigned to him while he was riding the school bus. The autism mentor assigned to this child at school agreed to ride the bus with him, and was paid as an autism mentor while riding the bus.

11. Grievant has not bid on any posted autism mentor positions, nor does she wish to work in a classroom setting with autistic students.

12. Grievant has worked with autistic students in the classroom during summer sessions, and has received experience credit toward her autism mentor certification for this work. She worked 14 days with one or more autistic students during the summer of 2012, and received experience credit for those 14 days, but was not paid as 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).[1]

Grievant argued that she met all the requirements to be classified as an autism mentor, and that she was working as an autism mentor on the special education bus. Respondent agreed that Grievant met all the requirements to be classified as an autism mentor except the experience requirement. Respondent argued that Grievant was

[1] Respondent raised a timeliness defense at level one. This argument was not pursued at the level three hearing or in the post-hearing written argument, and is deemed abandoned.

required to have 400 days of experience working with autistic students before she could be classified as an autism mentor. Respondent also argued that Grievant was not working as an autism mentor when she was riding the school bus, because she was not working with students in a classroom setting under the supervision of a teacher.

An autism mentor is defined as "a person who *works with* autistic students and who meets standards and experience to be determined by the State Board." W. VA. CODE § 18A-4-8(l)(14). (Emphasis added.) To qualify as an autism mentor, an employee must be qualified to serve as an Aide III, be physically able to work with autistic students, have two years of experience working with autistic students, and have fifteen hours of training in the area of working with autistic students. West Virginia Department of Education Policy No. 5314.01. An Aide III means:

> a service person referred to in the "Aide I" classification who holds a high school diploma or a general educational development certificate; and
> (A) Has completed six semester hours of college credit at an institution of higher education; or
> (B) Is employed as an aide in a special education program and has one year's experience as an aide in special education;

With regard to the two year experience requirement, Department of Education Policy No. 5314.01 offers no guidance as to how many hours or days equal two years. "[T]he Grievance Board in *Simmons v. Randolph County Bd. of Educ.*, Docket 96-42-385 (Nov. 26, 1997) ruled that based in part on an interpretation by the State Superintendent of Schools 'a year of experience, pursuant to W. VA. CODE § 18A-4-8, shall mean one hundred thirty-three days of employment in any one school year.'[2]" *Sutton v. Hancock*

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[2]*See generally Eaves v. Wayne County Bd. of Educ.*, Docket No. 2009-0372-WayED (April 16, 2010).

County Bd. of Educ., Docket No. 2010-1480-HanED (Mar. 30, 2011); *aff'd*, Cir. Ct. of Kanawha County, Civil Action No. 11-AA-64 (Nov. 28, 2011).

This Grievance Board has made clear to this Respondent that 133 days equals one year of experience when determining whether an employee has met the experience requirement to be classified as an autism mentor. Two years would be 266 days. Grievant has 292 days of experience, and she had acquired 266 days prior to the summer of 2012, when there is no question that she was working with one or more autistic students. Grievant has met **all** the requirements necessary to be classified as an autism mentor, and she should have been paid as such during the summer of 2012, when she worked 14 days with one or more autistic students.

As to whether Grievant is performing the duties of an autism mentor in her capacity as an Aide III assigned to a special education bus, the undersigned concludes that she is not. The applicable statute offers no guidance on what qualifies as "working with" an autistic student. HBOE's Autism Mentor policy statement indicates that an autism mentor works in an "instructional classroom setting," and that monitoring student behaviors on a school bus is not equivalent to "working with" the student.

"'Personnel actions of a county board of education which are not encompassed by statute are reviewed against the 'arbitrary and capricious' standard . . . .' *Cornell v. Putnam County Bd. of Educ.*, Docket No. 03-40-111 (June 26, 2003); *Wellman v. Mercer County Bd. of Educ.*, Docket No. 95-27-327 (Nov. 30, 1995)." *Carr v. Tucker County Bd. of Educ.*, Docket No. 06-47-376 (May 7, 2007). "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or

reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind,* Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil,* 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (*citing Arlington Hosp. v. Schweiker,* 547 F. Supp. 670 (E.D. Va. 1982)).

The undersigned finds HBOE's interpretation of the meaning of the words "works with autistic students" to be reasonable. An Aide in the classroom not only accompanies students and helps control behavior problems, but also assists the student in learning activities, or "works with" the student. While Grievant may try to calm a student who is having behavior issues, she does not work with the student in learning activities, nor does she work with the student on a daily basis in an effort to improve the student's behavior. What she does is more accurately characterized as taking measures designed to control inappropriate behavior when it manifests itself, and assisting the student in boarding and exiting the bus and getting the student seated. Grievant is not working as an autism mentor when riding the school bus with special education students.

Grievant pointed out that in one instance HBOE has assigned autism mentor status to an Aide who was riding the bus. HBOE pointed out that this was an isolated instance,

which was different because the IEP of the student required that he or she be assigned a personal Aide while riding the bus due to the frequent outbursts. Certainly there is a difference between being assigned to monitor and control the behavior of several special education students and one student, but the work this Aide was doing was no different than that of Grievant. While the IEP may have required an Aide be assigned just to this student, this Aide was not working with the student on learning activities any more than Grievant is working with the students. It would appear then, based on the record before the undersigned and the statutory definition, that this one Aide should not have been given autism mentor status and pay for riding the bus. Since this was an isolated, unique instance and is not HBOE's standard practice, this aberration is insufficient to justify a finding that Grievant's work on the bus also equates to work as an autism mentor.

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).

2. An autism mentor is defined as "a person who *works with* autistic students and who meets standards and experience to be determined by the State Board." W. VA. CODE § 18A-4-8(l)(14). (Emphasis added.)

3. To qualify as an autism mentor, an employee must be qualified to serve as an Aide III, be physically able to work with autistic students, have two years of experience working with autistic students, and have fifteen hours of training in the area of working with autistic students. West Virginia Department of Education Policy No. 5314.01.

4. "[T]he Grievance Board in *Simmons v. Randolph County Bd. of Educ.*, Docket 96-42-385 (Nov. 26, 1997) ruled that based in part on an interpretation by the State Superintendent of Schools 'a year of experience, pursuant to W. VA. CODE § 18A-4-8, shall mean one hundred thirty-three days of employment in any one school year.'[3]" *Sutton v. Hancock County Bd. of Educ.*, Docket No. 2010-1480-HanED (Mar. 30, 2011); *aff'd*, Cir. Ct. of Kanawha County, Civil Action No. 11-AA-64 (Nov. 28, 2011).

5. Grievant has met all the requirements to be classified as an autism mentor, and she had met these requirements prior to the summer of 2012.

6. "'Personnel actions of a county board of education which are not encompassed by statute are reviewed against the 'arbitrary and capricious' standard . . ..' *Cornell v. Putnam County Bd. of Educ.*, Docket No. 03-40-111 (June 26, 2003); *Wellman v. Mercer County Bd. of Educ.*, Docket No. 95-27-327 (Nov. 30, 1995)." *Carr v. Tucker County Bd. of Educ.*, Docket No. 06-47-376 (May 7, 2007).

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[3]*See generally Eaves v. Wayne County Bd. of Educ.*, Docket No. 2009-0372-WayED (April 16, 2010).

7. "Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. *See Bedford County Memorial Hosp. v. Health and Human Serv.*, 769 F.2d 1017 (4th Cir. 1985); *Yokum v. W. Va. Schools for the Deaf and the Blind,* Docket No. 96-DOE-081 (Oct. 16, 1996)." *Trimboli v. Dep't of Health and Human Res.*, Docket No. 93-HHR-322 (June 27, 1997). Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable. *State ex rel. Eads v. Duncil,* 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (*citing Arlington Hosp. v. Schweiker,* 547 F. Supp. 670 (E.D. Va. 1982)).

8. Respondent's decision that an Aide on a bus is not working as an autism mentor is a reasonable interpretation of the statute.

9. Grievant is not working as an autism mentor in her capacity as an Aide III on a special education bus.

Accordingly, this grievance is **GRANTED IN PART, AND DENIED IN PART.** Respondent is **ORDERED** to correct its records to reflect that Grievant has met all the requirements to be classified as an autism mentor, and to pay her backpay, with interest, for the 14 days she worked as an autism mentor during the summer of 2012, as though she were classified as an autism mentor.

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 24, 2013