THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

EVELYN DOLIN,

Grievant,

v. **Docket No. 2012-0355-GreED**

GREENBRIER COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Evelyn Dolin, filed this grievance against her employer, Respondent, Greenbrier County Board of Education, dated September 30, 2011, stating as follows: "[g]rievant asserts that she is entitled to the addition of the classification of Autism Mentor to her contract and receipt of the compensation that comes with that classification title. (Grievant is certified as an Autism Mentor and works with an autistic child.) Grievant asserts a violation of W. Va. Code 18A-4-8." As relief sought, "Grievant seeks reclassification by the addition of the class title of Autism Mentor with compensation for lost wages with interest to the maximum extent permitted by law."

A Level One conference was held on October 12, 2011, and denied by decision issued October 27, 2011.[1] A Level Two mediation was conducted on February 13, 2012. The Level Three appeal was perfected on February 27, 2012. A Level Three hearing was held on July 10, 2012, before the undersigned Administrative Law Judge at the Raleigh County Commission on Aging in Beckley, West Virginia. Grievant appeared

[1] This decision states that the grievance was "granted based only upon the following condition being met: 1. Confirmation that the limitations that Dr. Debra Sams had earlier indicated would not prevent Ms. Dolin from serving student B.F. as an Autism Mentor in the case she would need to restrain, lift or pursue student B.F." Despite its wording, the parties do not dispute that the level one decision was a denial of the grievance.

in person and by counsel, John E. Roush, Esq., WVSSPA. Respondent appeared by counsel, Erwin Conrad, Esq., Conrad & Conrad, PLLC. This matter became mature for decision on August 14, 2012, upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is employed by Respondent as an Aide III. Near the beginning of the 2011-2012 school year, her principal assigned her to work with an autistic student. However, Respondent did not reclassify Grievant as an autism mentor. Grievant argues that she met all the policy requirements to qualify as an autism mentor during the time she was assigned to the student. Respondent does not dispute Grievant has the training and experience required to qualify as an autism mentor. However, Respondent asserts that Grievant does not meet the physical ability and stamina requirement. Grievant proved by a preponderance of the evidence that she worked with an autistic student and met the statutory definition of autism mentor, thereby entitling her to that classification title and pay grade, for the time she was assigned to that student. Therefore, this grievance is GRANTED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant, Evelyn Dolin, is employed by Respondent at White Sulphur Springs Elementary School as an Aide III.

2. Grievant has two years of successful experience working with autistic students.

3. Grievant has successfully completed a staff development program related to autism as determined by the State Department of Education.

4. In the past, Grievant has served as an autism mentor and held that classification.

5. At the beginning of the 2011-2012 school year, Grievant was assigned to work as an Aide in the "severe profound" room.

6. Soon after the school year began, Grievant tendered a letter from her doctor to her Principal which stated that Grievant was unable to lift greater than 20-30 pounds and unable to get down on her knees.[2]

7. Because of the restrictions specified in the doctor's letter, Principal Ann Smith changed Grievant's work assignment, removing her from the "severe profound" room, and assigning her to work with student B.F., a kindergarten student with the exceptionality of autism.[3]

8. Grievant attended classes with B.F., sitting with him and directing him in order to keep him on task.

9. Grievant worked with B.F. throughout the 2011-2012 school year in this manner with no problems.[4]

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

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[2] *See*, August 29, 2011, letter from Debra Sams, D.O., Joint Exhibit 4.

[3] **Error! Main Document Only.**It is the practice of the Grievance Board to refer to students by their initials only in decisions. Also, the parties did not identify the date Grievant was first assigned to B.F.

[4] The parties did not identify the last day of Grievant's assignment to B.F.

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). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.,* Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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 asserts that she is entitled to hold the classification of autism mentor and receive the compensation appropriate to that classification title during the time she worked with B.F. Respondent argues that Grievant lacks the "physical ability and stamina necessary to complete all the job tasks, including tasks insuring students' safety," one of the four standards required to receive pay as an autism mentor; therefore, she should not be classified as an autism mentor.

WEST VIRGINIA CODE § 18A-4-8(i)(14) states,

> (i)(14) Autism mentor means 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.

W. VA. CODE § 18A-4-8(i)(14). Further, to qualify as an autism mentor, an employee must meet the following standards: meet the qualifications of "Aide III" as delineated in W. VA. CODE § 18A-4-8; successful completion of a staff development program related to autism as determined by the State Department of Education; two years of successful experience working with autistic students; and, physical ability and stamina necessary to complete all job tasks, including tasks related to ensuring student safety. *See,* West Virginia Department of Education Policy No. 5314.01. School personnel laws and regulations must be strictly construed and in favor of the employees that they were designed to protect. *Morgan v. Pizzino*, 256 S.E.2d 592 (W. Va. 1979).

It is undisputed that Grievant worked one-on-one with B.F. from near the beginning of the 2011-2012 school year until its end. Neither party disputes the work Grievant performed, and that there were no problems with her performance of her duties. Respondent does not dispute that Grievant meets the training and experience standards for receiving pay as an autism mentor. Respondent simply argues that the restrictions placed on Grievant's activities by her doctor in August 2011 prohibit her from meeting the physical ability and stamina standard listed in West Virginia State Board of Education Policy 5314.01. Respondent, therefore, asserts that Grievant should not be classified as an autism mentor, or be paid as such, for the time she was assigned to B.F. Respondent's argument completely ignores the fact that Grievant already performed the work and that she was physically able to do so.

Principal Smith assigned Grievant to work with B.F., a student with the exceptionality of autism, in response to receiving the letter from Grievant's doctor which specified her physical restrictions. Grievant was physically able to perform, and did so

perform, her duties with regard to B.F. Further, it is undisputed that Grievant has the necessary training and experience to qualify as an autism mentor. Grievant has proved by a preponderance of the evidence that she worked with an autistic student and met the statutory definition set out above for autism mentor. Therefore, Grievant is entitled to both the classification title and the classification pay grade as an autism mentor for the time she was assigned to B.F.

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).

2. School personnel laws and regulations must be strictly construed and in favor of the employees that they were designed to protect. *Morgan v. Pizzino*, 256 S.E.2d 592 (W. Va. 1979).

3. "Autism mentor means 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(i)(14).

4. To qualify as an autism mentor, an employee must be qualified to serve as an Aide III as delineated in W. VA. CODE § 18A-4-8, have successfully completed a staff development program related to autism as determined by the State Department of

Education, have two years of successful experience working with autistic students, and have the physical ability and stamina necessary to complete all job tasks, including tasks related to ensuring student safety. *See,* West Virginia Department of Education Policy No. 5314.01.

5. Grievant has proven by a preponderance of the evidence that she worked with an autistic student and that she met the qualifications of an autism mentor during the time she was assigned to work with B.F. Grievant is entitled to both the classification title and the classification pay grade of autism mentor from the time she was assigned to work with B.F. until the last day she was so assigned.

Accordingly, this Grievance is **GRANTED**.

Respondent is **ORDERED** to reclassify Grievant to autism mentor effective on the first date of her assignment to B.F. through the last day she was assigned to B.F. Respondent is further **ORDERED** to pay Grievant the difference between her pay as an Aide III and the salary she would have earned as an autism mentor retroactive to the first day of her assignment to B.F. until the last day she was assigned to B.F., plus interest, benefits, and seniority as an autism mentor for this specified time period.

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 Civil Action number should be

included so that the certified record can be properly filed with the circuit court. *See also,* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

DATE: January 24, 2013.

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Carrie H. LeFevre
Administrative Law Judge