MARVIN DIXON and DAVID JOHNSON,

Grievants,

v. Docket No. 01-31-599

MONROE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievants, Marvin Dixon and David Johnson, filed this grievance against their employer, the Monroe County Board of Education ("MCBOE") on October 10, 2001. The Statement of Grievance alleges:

> **Violation of State of West Virginia School Law Chapter 18A-4-7a[.] Failure to post positions. Failing to post dance position at James Monroe High[.] Failing to post art position Mt. View Elementary/Middle School.**
>
> **Relief Sought: Jobs to be posted in accordance with W.V. Code 18a-4-7a (sic)[.]**

This grievance was denied at Level I, and the Level II Hearing Examiner found Grievants did not have standing to pursue this grievance. Grievants filed to Level IV on December 6, 2001. On January 15, 2002, Respondent filed a Motion to Dismiss for failure to file to Level IV in a timely manner, and a pre-hearing conference on this issue was held on January 16, 2002. The Motion was denied on that day. At the request of the parties, the Level IV hearing scheduled for January 22, 2002, was canceled, and the parties agreed to submit the case on the record developed below. (See footnote 1) **This case became mature for decisionon February 8, 2002, after receipt of the parties' proposed findings of fact and conclusions of law.** (See footnote 2)

Issues and Arguments

Grievants assert two positions have been filled without posting. Respondent makes two

arguments. One, Grievants do not have standing to contest the filling of the positions as they are not qualified to fill them. Two, since the positions at issue are not even half- time and offer no benefits, they may be filled without posting.

After a detailed review of the meager record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievants are employed as full-time teachers at James Monroe High School. Grievant Dixon is certified in English/Language Arts 5-12. Grievant Johnson is certified in Physical Education K-12, General Science 7-12, and Biology 7-12.

2. Electives in Fine Arts are a required part of a high school's curriculum. By the 1998-1999 school year, high schools were required to have one level of student achievement in dance, and by 2001-2002, high schools were required to have four sequential levels of student achievement in dance. 126 C.S.R. Series 42 at 6.4.1, Chart VI.

3. Broad goals for a grade ten dance course include: identifying and demonstrating movement elements and skills in performing dance; understandingchoreographic principles, processes, and structures; understanding dance as a way to communicate meaning; applying and demonstrating critical and creative thinking skills in dance; demonstrating and understanding dance in various cultures and historical periods; making connections between dance and healthful living; and making connections between dance and other disciplines. (See footnote 3) **126 C.S.R. Series 44 at 4.4, Policy 2520.**

4. For the 2001 - 2002 school year, Julie Richardson was hired, without posting, to teach dance for one period a day, from 9:20 a.m. to 10:08 a.m. at James Monroe High School. Ms. Richardson is not a certified teacher, but has expertise in the field of dance. This course meets the Fine Arts requirement.

5. For the 2001 - 2002 school year, Shana Bennett, a certified elementary teacher on the substitute list, was hired, without posting, to teach art to elementary students for three class periods a day for a total of 1½ hours a day. Because Ms. Bennett is a certified elementary teacher, she is certified to teach art to elementary students.

6. These positions do not offer any benefits or seniority.

7. Grievants are not certified in dance or art. (See footnote 4)

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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 (2000); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6. "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 Resources, 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.

Because standing is an affirmative defense, it will be the first issue to address. A finding on this issue would resolve the grievance because Grievants could not pursue the grievance. When the employer asserts an affirmative defense, it must be established by a preponderance of the evidence. See Lewis v. Kanawha County Bd. of Educ., Docket No. 97-20-554 (May 27, 1998); Lowry v. W. Va. Dep't of Educ., Docket No. 96-DOE-130 (Dec. 26, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). See generally Payne v. Mason County Bd. of Educ., Docket No. 96-26-047 (Nov. 27, 1996); Trickett v. Preston County Bd. of Educ., Docket No. 95-39-413 (May 8, 1996).

The Grievance Board has previously addressed the issue of standing and stated, "[s]tanding, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy." Wagner v. Hardy County Bd. of Educ., Docket No. 95-16-504 (Feb. 23, 1996); See Jarrell v. Raleigh County Bd. of Educ., Docket No.95-41-479 (July 8, 1996). When an individual is not personally harmed, there is no cognizable grievance. Long v. Kanawha County Bd. of Educ., Docket No. 00-20-308 (Mar. 29, 2001); Cremeans v. Board of Trustees, Docket No. 96-BOT-099 (Dec. 30, 1996); Pomphrey v. Monroe County Bd. of Educ., Docket No. 94-31-183 (July 1, 1994); Mills v. W. Va. Dep't of Transp., Docket No. 92-DOH-053 (Apr. 24, 1992). In order to have a personal stake in the outcome, a grievant must have been harmed or suffered damages. Farley v. W. Va. Parkway Auth., Docket No. 96-PEDTA-204 (Feb.

21, 1997). It is necessary for a grievant to "allege an injury in fact, either economic or otherwise, which is the result of the challenged action and shows that the interest [he seeks] to protect by way of the institution of legal proceedings is arguably within the zone of interests protected by the statute, regulation or constitutional guarantee which is the basis for the lawsuit." Shobe v. Latimer, 162 W. Va. 779, 253 S.E.2d 54 (1979). The Grievance Board has frequently ruled that without some allegation of personal injury, a grievant is without standing to pursue this grievance. Lyons v. Wood County Bd. of Educ., Docket No. 89-54-601 (Feb. 28, 1990).

Additionally, this Grievance Board has repeatedly ruled that employees who are not qualified for a position do not have standing to grieve their non-selection or the selection process. Mullins v. Kanawha County Bd. of Educ., Docket No. 94-20-364 (Dec. 29, 1994). See also Weaver v. Mason County Bd. of Educ., Docket No. 94-26-028 (Oct. 25, 1994); Pomphrey, supra. Grievants presented no evidence they were qualified or certified for the position in question. See Mason v. Div. of Highways/Dep't of Transp., Docket No. 00-DOH- 345 (Mar. 28, 2001). Grievants do not have standing to grieve the filling and posting ofthese positions on a personal injury basis as they were not qualified to fill them, and they have not been personally harmed.

However, the issue should not end there. W. Va. Code § 18A-4-7a(o)(2001) states, in pertinent part: "Openings in established, existing or newly created position shall be processed as follows: (1) Boards shall be required to post and date notices . . . so as to ensure that the largest possible pool of qualified applicants may apply. . . ."

The prior language of this Code Section stated "[b]oards shall be required to post and date notices of all openings in established, existing or newly created position in conspicuous working places for all professional personnel to observe. . . ." (Emphasis Added.)

Although the language has changed somewhat in this section, and "all" has been removed, the undersigned Administrative Law Judge still finds that this Code Section requires that all vacancies are to be posted. In this case, it is important to note that the actions taken by Respondent in the filling of the two positions violated the mandates of W. Va. Code § 18A-4-7a.

While Grievants do not have standing based on personal injury, they do, in this specific

incidence, have an interest in this violation of the statute which directly affects their workplace and the education of students. Shobe, supra indicates a third party may have standing to pursue an issue without a personal injury, if the interest to be protected is "arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question." W. Va. Code § 18A-4-7a requires posting so that the position can be filled from "the largest possible pool of qualified applicants. . . ." WhileGrievants are not certified, neither is Ms. Richardson, and while Ms. Bennett is certified, there may very well be other certified teachers who would be more qualified than she. Certainly the filling of positions with the most qualified teachers is the interest to be protected by the above-cited statute. Therefore, Grievants have standing within these limited guidelines. Shobe, supra. Since it is clear the statute was violated, the position must be posted.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their 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 (2000); Toney v. Lincoln County Bd. of Educ., Docket No. 99-22-046 (Apr. 23, 1999); Bowen v. Kanawha County Bd. of Educ., Docket No. 99-20-039 (Mar. 30, 1999); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code § 18-29-6. "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 Resources, 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. "Standing, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy." Wagner v. Hardy County Bd. of Educ., Docket No. 95-16-504 (Feb. 23, 1996); See Jarrell v. Raleigh County Bd. of Educ., Docket No. 95-41-479 (July 8, 1996). In order to have a personal stake in the outcome, Grievantsmust have been harmed or suffered damages. Farley v. W. Va. Parkway Auth., Docket No. 96-PEDTA-204 (Feb. 21, 1997). It is necessary for a grievant to "allege an injury in fact, either economic or

otherwise, which is the result of the challenged action and shows that the interest [they seek] to protect by way of the institution of legal proceedings is arguably within the zone of interests protected by the statute, regulation or constitutional guarantee which is the basis for the lawsuit." Shobe v. Latimer, 162 W. Va. 779, 253 S.E.2d 54 (1979). Without some allegation of personal injury, a grievant is without standing to pursue this grievance. Lyons v. Wood County Bd. of Educ., Docket No. 89-54-601 (Feb. 28, 1990).

3. This Grievance Board has repeatedly ruled that employees who are not qualified for a position do not have standing to grieve their non-selection or the selection process. Mullins v. Kanawha County Bd. of Educ., Docket No. 94-20-364 (Dec. 29, 1994). See also Weaver v. Mason County Bd. of Educ., Docket No. 94-26-028 (Oct. 25, 1994); Pomphrey v. Monroe County Bd. of Educ., Docket No. 94-31-183 (July 1, 1994).

4. Grievants do not have standing to grieve the failure to post these positions on a personal injury basis, as they are not qualified to fill them, and they have not been personally harmed. Mason v. Div. of Highways/Dep't of Transp., Docket No. 00-DOH-345 (Mar. 28, 2001); Mullins, supra.

5. W. Va. Code § 18A-4-7a(o) requires that all positions be posted, and this statute was violated by Respondent.

6. A third party may have standing to pursue an issue without a personal injury, if the interest to be protected is "arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question." Shobe, supra. 7. In this specific incident where there is a clear violation of a school related statute, Grievants have standing to pursue this grievance.

Accordingly, this grievance is GRANTED. Respondent is directed to post the positions at issue and to fill then in accordance with the law.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monroe 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.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: February 28, 2002

Footnote: 1

The record developed below is exceedingly limited. Grievants did not appear at the Level II hearing, and the only evidence presented at that hearing was that the positions were not posted. The Level II Decision and the proposed Findings of Fact and Conclusions of Law of both parties cite numerous facts which are not in evidence. The undersigned Administrative Law Judge has made her Findings of Fact based on these proposals when the information was listed in all three documents.

Footnote: 2

Grievants were represented by Representative John Estep from the West Virginia Federation of Teachers, and Respondent was represented by Attorney Greg Bailey of Bowles Rice McDavid Graff & Love.

Footnote: 3

The new Instructional Goals and Objectives are to be in place by March 2003.

Footnote: 4

In his Level IV proposals, Grievant Johnson asserted he was certified to teach dance because he is certified in Physical Education. Because no evidence was presented to support this contention, this statement cannot be accepted as true. Additionally, a review of the materials on the State Department of Education web site indicate dance is a Fine Arts elective requiring a detail understanding of dance and its history and principles.