TAMMY LOUDIN,

Grievant,

v. **Docket No. 05-11-126**

GILMER COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Tammy Loudin ("Grievant") initiated this grievance on January 10, 2005, contesting the Gilmer County Board of Education's ("BOE") decision to place a Community Work Experience Program ("CWEP") participant in a cook position at Sand Fork Elementary School. She seeks as relief to be placed in a half-time cook position or any other service personnel position for which she is qualified. After a denial at level one, a level two hearing was conducted on February 16, 2005. The grievance was denied by decision dated March 7, 2005. Level three consideration was waived, and Grievant appealed to level four on April 14, 2005. A hearing was held in the Grievance Board's office in Elkins, West Virginia, on June 17, 2005. Grievant was represented by counsel, John E. Roush, and Respondent was represented by counsel, Kimberly S. Croyle. This grievance became mature for consideration upon receipt of the parties' fact/law proposals on July 19, 2005.

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

Findings of Fact

1. During the 2003-2004 school year, Grievant was employed by the BOE as a half-time cook at Troy Elementary School. 2. In March of 2004, Grievant and the other half-time elementary school cooks (at Sand Fork Elementary and Normantown Elementary School) were reduced in force due to a lack of need, caused by reduced enrollment.

3. For the 2004-2005 school year, Grievant was placed on the preferred recall list, and she also served as a substitute cook.

4. The CWEP is a “welfare-to-work” program, by which public assistance recipients are provided with work experience and the opportunity to “earn” the benefits they receive. CWEP participants do not receive wages or benefits from the agencies to which they are assigned.

5. Carrie Wildman, a CWEP participant, was placed at Sand Fork Elementary school to assist in the cafeteria on approximately December 13, 2004. At that time, there was only one cook working in the cafeteria, who could not handle the work alone.

6. No vacancy was posted for a cook at Sand Fork Elementary School during the 2004-2005 school year.

7. Ms. Wildman was required to obtain a “food handler” card in order to assist with cafeteria duties.

8. At some time prior to the end of the 2004-2005 school year, the full-time cook at Sand Fork Elementary School requested that Ms. Wildman be removed from her job assisting in the cafeteria. As a result, Ms. Wildman was placed in a custodial position.

9. The record contains no information regarding the seniority of the cooks in Gilmer County who were reduced in force, including Grievant.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her claims 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.

The gist of Grievant's claim is that there clearly was a need for additional elementary school cooks in the fall of 2004, and Respondent was not permitted to place a CWEP worker in a position which rightfully belonged to a BOE employee. She seeks to be placed in a half-time cook position at either Sand Fork or Troy Elementary, or a custodial position, with back pay to the date that Ms. Wildman was placed at Sand Fork. Respondent counters that, because Ms. Wildman was not paid by the BOE and did not have any contract with the BOE, no employee rights have been infringed. It also contends that there was no “vacancy” for a half-time cook at Sand Fork.

The Grievance Board has previously addressed the propriety of a board of education's use of “volunteer” workers, who assist in the school system without compensation or placement in any

school personnel position. In Osborne v. Greenbrier County Board of Education, Docket No. 01-13-035 (2001), a board of education allowed the parents of an autistic child to provide the child with a personal aide to accompany him throughout each school day, without cost to the board. In that case, the child did not legally qualify for a one-on-one aide, and, in the absence of the aide provided by his parents, he would have been assisted by existing staff at the school. However, the key issue in such cases is whether any “service employee lost any regular work time or wages as a result of the volunteer labor.” Osborne, supra. If not, then volunteer workers arepermitted. See also Carr v. Tucker County Bd. of Educ., Docket No. 01-47-243 (Sept. 24, 2001); Dempsey v. Fayette County Bd. of Educ., Docket No. 98-10- 357 (Dec. 8, 1998); Moody v. Marion County Bd. of Educ., Docket No. 93-24-401 (Apr. 29, 1994), aff'd Circuit Court of Kanawha County, Civil Action No. 94-AA-117 (Oct. 7, 1994).

W. Va. Code § 18A-4-8b requires boards of education to post all position vacancies for existing or newly created positions, and boards of education have the discretionary authority to make assignments of various duties to already hired employees so long as it does not abuse its discretion. See Skeens v. Logan County Bd. of Educ., Docket No. 93- 22-093 (Sept. 20, 1993). It would follow that "if a board of education may make assignments of duties to service personnel without establishing a newly created position[,] then it certainly may allow volunteers to perform such an assignment without violating the posting requirements of W. Va. Code § 18A-4-8b." Willcoxen v. Mason County Bd. of Educ., Docket No. 93-26-199 (Sept. 29, 1993).

In the instant case, it is unclear whether or not an actual “position” existed for a cook at Sand Fork Elementary. The CWEP helper was not placed at the school until December of 2004, and she was no longer there by the end of the school year. The evidence does not address what led to the request for assistance in the cafeteria there, what type of assistance she provided, or why she was relieved of those duties. It was stated by the superintendent that the full-time cook at that school “requested that the CWEP worker be removed,” but there was no explanation as to why. Accordingly, the undersigned has insufficient evidence to conclude that an actual half-time or full-time position existed for a cook at that school during the 2004-2005 school year. Nevertheless, even if there was a cook's position at Sand Fork that should have been filled by a regular employee, Grievant has failed to prove entitlement to the relief requested. Grievant had previously been employed at Troy Elementary School as a half- time cook, not Sand Fork, where the CWEP worker was placed.

Moreover, Grievant has provided no comparison of her seniority vis-a-vis the other cooks on preferred recall, which is information easily obtained from the BOE. If there had been a need for a cook at Sand Fork, that vacancy would have been posted, and the successful applicant would have been selected based upon seniority, qualifications and evaluations, pursuant to W. Va. Code § 18A-4-8b. "When the relief sought by a [g]rievant is speculative or premature, or otherwise legally insufficient, [the] claim must be denied." Lyons v. Wood County Bd. of Educ., Docket No. 89-54-601 (Feb. 28, 1990); See Flowers v. Monongalia County Bd. of Educ., Docket No. 04-30-381 (Feb. 9, 2005); Clark v. Putnam County Bd. of Educ., Docket No. 97-40-313 (April 30, 1998).

The following conclusions of law support this Decision.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving her claims 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. A board of education may accept services from volunteers, so long as “no service employee lost any regular work time or wages as a result of the volunteer labor.” Osborne v. Greenbrier County Board of Education, Docket No. 01-13-035 (2001); See also Carr v. Tucker County Bd. of Educ., Docket No. 01-47-243 (Sept. 24, 2001); Dempsey v. Fayette County Bd. of Educ., Docket No. 98-10-357 (Dec. 8, 1998); Moody v. Marion County Bd. of Educ., Docket No. 93-24-401 (Apr. 29, 1994), aff'd Circuit Court of Kanawha County, Civil Action No. 94-AA-117 (Oct. 7, 1994).

3. W. Va. Code § 18A-4-8b requires boards of education to post all position vacancies for existing or newly created positions, and boards of education have the discretionary authority to make assignments of various duties to already hired employees so long as it does not abuse its discretion. See Skeens v. Logan County Bd. of Educ., Docket No. 93-22-093 (Sept. 20, 1993).

4. "When the relief sought by a [g]rievant is speculative or premature, or otherwise legally insufficient, [the] claim must be denied." Lyons v. Wood County Bd. of Educ., Docket No. 89-54-601 (Feb. 28, 1990); See Flowers v. Monongalia County Bd. of Educ., Docket No. 04-30-381 (Feb. 9, 2005); Clark v. Putnam County Bd. of Educ., Docket No. 97-40-313 (April 30, 1998).

5. Grievant has failed to establish that there was a cook vacancy at Sand Fork Elementary School, and has also failed to prove that she was entitled to placement in the position, if it had existed.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Gilmer County. Any such appeal must be filed within thirty (30) daysof 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: August 5, 2005

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DENISE M. SPATAFORE

Administrative Law Judge