MELISSA DAVIS,

Grievant,

v. **Docket No. 04-43-329**

RITCHIE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Melissa Davis ("Grievant"), employed as a teacher by the Ritchie County Board of Education ("RCBE"), filed a level one grievance on May 26, 2004, in which she alleged a violation of W. Va. Code §18A-4-7a occurred when two individuals were employed as co- Directors of the Project APPLE program, when only one position had been advertised. For relief, Grievant requested the appointments be rescinded, and both positions be posted. Additionally, Grievant requests the salary she would have earned if the disposition of the grievance extends beyond the employment period of the positions.

After the grievance was denied at levels one and two, appeal was made to level four on September 3, 2004. Bruce Boston, Grievant's West Virginia Education Association Consultant, and RCBE counsel Howard E. Seufer, Jr., agreed that the grievance could be submitted for decision based upon the lower-level record. The parties submitted proposed findings of fact and conclusions of law in November 2004, and the grievance was reassigned to the undersigned Administrative Law Judge on January 20, 2005.

The following facts have been derived from a preponderance of the credible evidence made part of the record at level two.

Findings of Fact

1. Grievant has been employed by RCBE as a teacher of Title I Reading and Math at all times pertinent to this grievance. 2. In March 2004, RCBE posted a vacancy for the extra-curricular position of Project APPLE Director. (See footnote 1) The Director is a twelve month employee, and is responsible for a fourteen-day Summer Academy and the After- and Before-School Programs. (See footnote 2) The desired qualifications included a professional teaching license and at least five years of experience. Annual compensation for the Director is $4,000.00.

3. Grievant discussed her possible application for the position with RCBE Superintendent, Dr. Richard Butler. The fact that she lacked the preferred years of experience was addressed, and Dr. Butler encouraged her to apply anyway since no applications had been received. Grievant did not apply for the position.

4. Some recruitment was necessary to fill the Director position. At its regular meeting on April 12, 2004, employed Tanya Barker and Karen Prim, who agreed to accept the position as co-Directors. Both Ms. Barker and Ms. Prim met all the qualifications for the position which they divided, including the salary, equally.

5. Grievant was employed by RCBE as a teacher for the Summer Academy, for which she was compensated $2,016.00.

Discussion

Grievant argues that she was denied the opportunity to apply for a position of co- Director. RCBE asserts that it was duty-bound to fill the position from among the qualified employees who applied, and it did not have the option of re-posting to give Grievant the opportunity to change her mind. RCBE further asserts that there was no abuse of its discretion, and that Grievant does not have standing to grieve the decision since she did not apply for the position. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her claim 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.

"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, 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). Without some allegation of personal injury, Grievant is without

standing to pursue this grievance. Lyons v. Wood County Bd. of Educ., Docket No. 89-54-601 (Feb. 28, 1990). Because Grievant's complaint is that the positions were not properly posted, and that she would have applied had they been, she has standing in this matter.

W. Va. Code § 18A-4-7a states in pertinent part:(o) Openings in established, existing or newly created positions shall be processed as follows:

(1) Boards shall be required to post and date notices which shall be subject to the following:

(A) The notices shall be posted in conspicuous working places for all professional personnel to observe for at least five working days;

(B) The notice shall be posted within twenty working days of the position openings and shall include the job description;

(C) Any special criteria or skills that are required by the position shall be specifically stated in the job description and directly related to the performance of the job;

(D) Postings for vacancies made pursuant to this section shall be written so as to ensure that the largest possible pool of qualified applicants may apply; and

(E) Job postings may not require criteria which are not necessary for the successful performance of the job and may not be written with the intent to favor a specific applicant;

Grievant asserts that this provision was violated when it hired co-directors for a posting advertising one position. Grievant specifically notes that this provision states that any special criteria or skills that are required, must be stated in the job description, and that postings are to be drafted to ensure the largest possible pool of qualified applicants may apply. Grievant additionally cites RCBE Policy GBEE, which requires postings of all openings in established, existing or newly created positions. Grievant's assertion that when it was determined that two employees could share the position, RCBE was required to post two positions, is not supported by the evidence. To the contrary, one position was posted, and one position was filled. Grievant had every opportunity to apply, and was encouraged to apply, by the Superintendent, but elected notto do so. The sole reason the position was awarded to two individuals, was because no one individual was interested in being the Director. Grievant now, in effect, has simply changed her mind and wants another opportunity to apply. Under these circumstances there was no violation of W. Va. Code § 18A-4-7a.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following

formal conclusions of law.

Conclusions of Law

1. "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).

2. Grievant has standing to pursue this issue.

3. Grievant has the burden of proving her claim 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.

4. Grievant failed to prove that RCBE acted in violation of W. Va. Code § 18A-4- 7a when one position was filled with two employees who agreed to share the responsibilities and the salary.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Ritchie 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: FEBRUARY 16, 2005

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1 *APPLE is the acronym for Activities Promoting Positive Learning Experiences.*

Footnote: 2 *The Director's duties for these programs are minimal according to Dr. Butler.*