THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

MATTHEW MILLS and

PATRICIA MILLS

Grievants,

v. DOCKET NO. 06-50-415

WAYNE COUNTY

BOARD OF EDUCATION,

Respondent.

DISMISSAL ORDER

Grievants filed this grievance on August 22, 2006. The original statement of grievance was quite lengthy and contained much argument. The undersigned requested Grievants provide the parties with a short, concise statement. On January 8, 2007, Grievants' filed a short statement of grievance which alleges:

In the school year 2005-2006, Wayne County employed certain professional personnel in positions they termed “permanent substitutes.” For the most part, these positions began at the start of the 2005-2006 school year and ended at the close of school for that same year. As these positions were found by ALJ Marteney to be materially identical to regular full-time teaching positions, we are grieving Wayne County's failure to RIF these positions and hire for the 2006-2007 school year with the preferential recall list that these RIF's would have created. This failure by Wayne County caused the entire hiring process for the 2006-2007 school year to be fatally flawed. One part of the fatal flaw is that RESA personnel who bid on positions were not considered for the positions they bid on [sic]. We are also grieving the failure of Wayne County to at least include us on the substitute list for the 2006- 2007 school year.

Their relief sought is for Wayne County to follow state hiring practices for the 2006-2007 school year; for Wayne County to rectify errors that have occurred; and for Grievants to be paid a full salary for the 2006-2007 school year, full benefits, experience and seniority. This grievance was denied at the lower levels, with the Level II hearing officer finding that, at the time this grievance was filed, Grievants did not have standing, as they were not employees. The undersigned held a phone conference and requested parties submit written arguments on whether Grievants had standing. Both parties complied and arguments on this issue were filed on February 2, 2007. Based on a preponderance of the evidence, I find the following material facts have been proven:

Findings of Fact

1. Grievants have been employed by Respondent for the school years 2003- 2004, 2004-2005, and 2005-2006.

2. Both Mr. Mills and Mrs. Mills were employed as day-to-day substitutes under separate one year employment contracts.

3. The terms of the employment contracts for both Grievants states: “This contract shall terminate at the end of the school year designated above. Unless granted by Board policy, the Substitute Teacher has no substantive or procedural rights [sic] re- employment.”

4. Grievants' contracts terminated at the end of the 2005-2006 school year.

5. Grievants were not put on the substitute list for the 2006-2007 school year.

6. Grievants filed this grievance on August 22, 2006.

Discussion

Standing is an affirmative defense. If Grievants do not have standing, they 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). Respondent asserts Grievants do not have standing to pursue this grievance because they were not employees at the time they filed this grievance. Grievants argue they did not suffer harm or incur actual damages until after the last regular board meeting in August 2006.

W. Va. Code § 18-29-2 states in part the following:

(a) “Grievance” means nay claim by one or more affected employees of the governing boards of higher education, state board of education, county boards of education, regional educational service agencies and mulit-county vocational centers alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination, any discriminatory or otherwise aggrieved application of unwritten policies or practices of the board; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective classroom instruction, job performance or the health and safety of students or employees.

(c) “Employee” means any person hired as a temporary, probationary or permanent employee by an institution either full or part time. A substitute is considered an employee only on matters related to

days worked for an institution or when there is a violation, misapplication or misinterpretation of a statute, policy, rule, regulation or written agreement relating to such substitute.

Grievants employment was terminated at the end of the 2005-2006 school year. The Grievance Board has held "W. Va. Code § 18-29-1 provides that the purpose of the statutory grievance procedure is to allow education employees and their employer to reach solutions to problems which arise within the scope of their respective employment relationships." Farley v. Morgan County Bd. Of Educ., Docket No. 01-32-615D, (April 30, 2002). By mutually agreed upon contractual terms, Grievants employment relationship ended at the conclusion of the 2005-2006 school year. Therefore, in August 2006,Grievants no longer had standing to file a grievance under this statutory procedure. See Malcolm v. Monongalia County Bd. of Educ., Docket No. 01-30-593 (Feb. 28, 2002).

Grievants assert:

At any time during the summer of 2006, the Wayne County Board could have had an epiphany and corrected the problems they had created by not following statute and Grievance Board decisions. The last chance for this to have occurred was the board meeting prior to the start of the 2006-2007 school year. This grievance was filed within a week of the last regular board meeting before the start of the 2006-2007 school year. Filing this grievance any earlier, would have been anticipating a breach that was not absolute and unequivocal.

The undersigned finds this argument disingenuous. The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Seifert v. Hancock County Bd. of Educ., Docket No. 02-15-079 (July 17, 2002); See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989).

Grievants believe there was no actual damage until the first day they were not allowed to work in the 2006-2007 school year. However, Grievants were aware of the circumstances giving rise to their alleged actual damage months before this grievance was filed. To assert they were waiting for Respondent to have an "epiphany" and correct problems perceived by Grievants is completely without merit.

Grievants were no longer employees when they filed their grievance, and therefore, they do not have standing to pursue this grievance.

Conclusions of Law

1. Standing is an affirmative defense. If Grievants do not have standing,they 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).

2. 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).

3. 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, regulationor 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). 4. "W. Va. Code § 18-29-1 provides that the purpose of the statutory grievance procedure is to allow education employees and their employer to reach solutions to problems which arise within the scope of their respective employment relationships." Farley v. Morgan County Bd. Of Educ., Docket No. 01-32-615D, (April 30, 2002).

5. Grievants employment by Respondent ended at the conclusion of the 2005-2006 school year.

6. Grievants were not employed at the time they filed this grievance, and therefore, they do not have standing.

Accordingly, this matter is **DISMISSED** and **STRICKEN** from the docket of this Grievance Board.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wayne County. Any such appeal must be filed within thirty 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 actionnumber so that the record can be prepared and properly transmitted to the appropriate circuit court.

DATE: March 5, 2007

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Wendy A. Campbell

Administrative Law Judge