THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

JUDY SANDERS,

Grievant,

v. **Docket No. 06-38-430**

Denise M. Spatafore

Administrative Law Judge

POCAHONTAS COUNTY

BOARD OF EDUCATION,

Respondent.

DECISION

Judy Sanders ("Grievant") appealed this grievance to level four after denials at all lower levels on November 16, 2006. She alleges that two postings for aide positions were confusing and requests as relief that they be reposted. A hearing was conducted in Elkins, West Virginia, on March 12, 2007. Grievant was represented by John Roush of the School Service Personnel Association, and Respondent was represented by counsel, Ashley Hardesty. This matter became mature for consideration upon receipt of the parties' fact/law proposals on April 9, 2007.

Synopsis

Grievant contends that two aide positions posted in September of 2006 were vague and confusing. Both were for itinerant special education aide, and one had the additional designation of Autism Mentor, with both having their primary locations designated as Marlinton Elementary School.

Once posted, Grievant inquired as to which specific students the postings applied and, after receiving a response from the Director of Special Education, decided not to apply for either one. Ultimately, only the Autism Mentor positionwas needed, but it applied to a different child than Grievant had allegedly been led to believe. Nevertheless, the postings were clear, and both positions were itinerant, meaning that their specific assignments could have changed at any time, which is legally permitted. Grievant failed to establish any injury as a result of the postings, and Respondent has proven that Grievant does not have standing to challenge them.

Findings of Fact

1. At all times pertinent to this grievance, Grievant was employed by Respondent as a classroom aide.

2. Grievant has completed some of the training for the Autism Mentor classification, but she is not yet classified in that capacity.

3. On August 29, 2006, Respondent posted a vacancy for Itinerant Special Education Classroom Aide/Bus Aide/Autism Mentor, with the primary location being Marlinton Elementary School.

4. Also on August 29, 2006, Respondent posted a vacancy for Itinerant Special Education Classroom Aide/Bus Aide, with the primary location being Marlinton Elementary School.

5. The two students to whom the posted aide positions would primarily apply are generally known by the employees in Pocahontas County.

6. Because she was familiar with the two students involved, and believed that one was more difficult than the other, Grievant telephoned the special education director, Michelle Jeffers, for clarification. 7. During the previous school year, L.K. (See footnote 1) had been served by an Autism Mentor, and R.M. had been served by a regular aide, and the positions were being filled in the same manner for the 2006-2007 school year.

8. In response to Grievant's inquiry, Ms. Jeffers did not name the students to whom which aide position would primarily apply, but stated that “it is the opposite of what you might think.” By this, she meant that R.M. was the more severely affected child, and one would assume he was assigned an Autism Mentor, but it was actually L.K. who was assigned the Autism Mentor.

9. Grievant misunderstood Ms. Jeffers, mistakenly assuming that the Autism Mentor position

was for R.M., and the aide position was for L.K. She did not apply for either position.

10. R.M. withdrew from school prior to the posted aide position being filled, so no one was hired to fill that vacancy.

11. Tabitha McCoy was the most senior, qualified applicant for the Autism Mentor position, and she was placed in the position.

12. If the Autism Mentor position were reposted, Grievant would not apply.

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 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. McDowellCounty Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). *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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Because standing is an affirmative defense, it will be the first issue to address. A finding on this issue would resolve the grievance because Grievant 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 a 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*. Grievant admits that she is not qualified for the Autism Mentor position, the only posting still at issue, and that she will not apply if it is reposted. Grievant does not have standing to grieve the filling and posting of these positions on a personal injury basis as she was not qualified to fill it, and she has not personally been harmed. *See Mason v. Div. of Highways/Dep't of Transp.*, Docket No. 00-DOH-345 (Mar. 28, 2001).

However, the inquiry does not end there. A grievant does have an interest in a statutory violation 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 beprotected 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." Arguably, if the posting in question did not fulfil the statutory requirement, Grievant would have standing to file an objection to it through the grievance process.

Nevertheless, the undersigned finds that Grievant has not, in fact, established any impropriety with regard to the Autism Mentor posting. As this Grievance Board has recognized in the past, boards of education are legally authorized to post special education aide positions as itinerant, in order to

provide flexibility in moving those personnel where needed, especially in cases where the student moves to a new school or leaves the system entirely. *See Bennett v. Randolph County Bd. of Educ.*, Docket No. 05-42-396 (April 12, 2006). Moreover, it was held in *Vance v. Jefferson County Board of Education*, Docket No. 02-19-030R (Nov. 20, 2002), that the grievant did not have standing to grieve itinerant aide postings on the basis that the "particulars of the position" were not sufficiently identified, and she did not want to be transferred from the position's initial location. It was stated in that decision:

> In the instant case, it is clear that notwithstanding the rather broad allegation that she could not understand the particulars of the itinerant positions, Grievant's only concern is the possibility that she may be transferred. The postings include a job description which provides a listing of responsibilities, performance standards, and the initial site location. There is no doubt the assignment is for an Aide in the Special Education program. While it understandable that Grievant would want to bid on a more desirable position, and the itinerant designation is not desirable to her, she has not suffered any injury, and lacks standing.

Vance, supra. Similarly, in the instant case, the posting is quite specific that the position will be assigned to work with an autistic student at Marlinton Elementary School and ride the bus with that student. Absent the identity of the specific student, to which Grievant has no legal entitlement in a job posting, the posting is quite clear as to job duties, qualifications and work location. Accordingly, Grievant lacks standing to challenge this posting, and she has failed to establish that it was legally improper.

The following conclusions of law support this decision.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving her 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 (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. "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). 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. 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 v. Latimer*, 162 W. Va. 779, 253 S.E.2d 54 (1979).

4. "[A] board of education . . . has the discretion to designate an aide position as itinerant when it is posted; employees who bid upon and are awarded such positions may, accordingly, be moved to accommodate the students' needs. *Vance v. Jefferson County Bd. of Educ.*, Docket No. 02-19-030 (March 28, 2002); *Bailey v. Raleigh County Bd. of Educ.*, Docket No. 97-41-495 (Apr. 20, 1998)." *Davisson v. Lewis County Bd. of Educ.*, Docket No. 02-21-209 (Nov. 13, 2002); *See also Bennett v. Randolph County Bd. of Educ.*, Docket No. 05-42-396 (April 12, 2006).

5. Grievant lacks standing to pursue this grievance, because she is not qualified for the position in question, and she has failed to establish that the posting was legally improper.

Accordingly, this grievance is **DENIED**.

This decision is final upon the parties and is enforceable in the Circuit Court of Kanawha County. Any party may appeal this decision to the Circuit Court of Kanawha County within thirty days of receipt of the decision. This decision is not automatically stayed pending the outcome of the appeal. W. Va. Code § 6C-2-5(c). 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.

Date: May 10, 2007

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Consistent with previous practice of this Grievance Board, minor students will be identified only by their initials.