WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

JUDE McCONNELL,

Grievant,

v. **Docket No. 07-01-390**

BARBOUR COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Jude McConnell ("Grievant") initiated this proceeding May 17, 2007, challenging his non-selection for the position of Energy Educator/Manager, posted by RESA VII. After denials at the lower levels, Grievant appealed to the Grievance Board on August 27, 2007. A level four hearing was held in Elkins, West Virginia, on January 25, 2008. Grievant was represented by Frank Caputo of the American Federation of Teachers, and Respondent was represented by counsel, Gregory W. Bailey. This matter became mature for consideration upon receipt of the parties' post-hearing submissions on February 19, 2008.

Synopsis

Grievant, a teacher employed by the Barbour County Board of Education, challenged his non-selection for the position of Energy Educator/Manager for RESA VII. The statutory selection criteria applicable to county boards of education are not applicable to RESA, and the decision regarding who to hire for this position was made by RESA VII's director, albeit with input from the board of education. This grievance challenges a decision which was not made by Respondent and was not

within its authority to make; therefore, it is not a grievable matter. The grievance is denied. Based upon a detailed review of the record in its entirety, the undersigned makes the following findings of fact:

Findings of Fact

1. Grievant has been employed by Respondent Barbour County Board of Education ("the BOE") as a teacher for 31 years.

2. In December of 2006, the position of Part-Time Energy Educator/Manager was posted by RESA VII. The purpose of the position was to work with a private energy contractor in monitoring the school system's energy consumption, in an effort to reduce costs. The recipient of the services to be provided was the BOE, pursuant to an energy savings contract between the BOE and Energy Education, Incorporated ("EEI"). The posting listed several qualifications, which had been determined by the RESA VII Director. The position was posted as a 12-month position for an annual stipend of $16,500.

3. Enacted by the legislature in 1972, W. Va. Code § 18-2-26 authorized the State Board of Education to establish multi-county regional educational service agencies ("RESAs") to provide high quality, cost effective education programs and services to students and school systems within their regions. Barbour County is located in RESA Region VII.

4. Applicants for the Energy Educator position were interviewed by a committee which included two BOE administrators and a representative from EEI. A RESA administrator was also to be involved in the interviews, but could not attend. The BOE's contract with EEI specified that EEI would have significant input into the selection of the Energy Educator/Manager. 5. The committee interviewed Grievant and another applicant, and the other applicant, also a BOE employee, was recommended by the committee for the position. The committee members made their recommendation to the RESA VII director, who made the final decision.

6. Although the BOE provided funding for the energy contract in question, the administration of that contract and all services provided pursuant thereto were entrusted to RESA.

Discussion

In non-disciplinary matters, a grievant bears the burden of proving his allegations by a

preponderance of the evidence. W. Va. Code § 18-29-6. (See footnote 1) "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 Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant contends that the successful applicant did not meet the qualifications in the RESA posting and believes that he is entitled to placement in the Energy Educator/Manager position. She contends that, as the funding source for the energy contract, the BOE was obligated to ensure that the most qualified applicant was hired,based upon the criteria contained in W. Va. Code § 18A-4-7a. Respondent counters that the qualifications and supervision of the successful applicant for this position were entirely at RESA's discretion, and this is a matter beyond the BOE's jurisdiction or authority.

As noted by Respondent, the BOE took no action and made no decision regarding the selection of the successful applicant for this position. Therefore, Grievant is challenging a decision which was not made by his employer. As recently discussed in *Rainey v. Division of Motor Vehicles*, Docket No. 2008-0278-DOT (Mar. 11, 2008), an employee may not use the grievance procedure to challenge actions which were not taken by his or her employer. As established by statute, any matter in which authority to act is not vested with the state department, board, commission or agency utilizing the services of the grievant is not grievable. *Brining v. Div. of Corrections*, Docket No. 05-CORR-284 (Dec. 7, 2005); *See Smith v. Dep't of Health and Human Res.*, Docket No. 05-HHR-218 (Aug. 5, 2005).

As to Grievant's contention that the provisions of W. Va. Code § 18A-4-7a were not followed in this instance, that statute applies when “a county board of education” hires professional personnel. The Grievance Board has long-recognized that "[t]he various statutes under Section 18A of the West Virginia Code governing the contract and procedural rights of county board of education employees do not apply to employees of the several state Regional Education Services Agencies." *St. Clair v. RESA-V*, Docket No. RESA-88-186 (Apr. 27, 1990). *See R.H.S. v. RESA IV,* Docket No. 96-RESA-348 (Mar. 31, 1997); *Sark v. RESA IV*, Docket No. 89-RESA-131 (Aug. 30, 1989). Despite Grievant's arguments to the contrary, RESA VII made the decision as to who would be hired to fill this position, albeit with input from the BOE and EEI. However, the final decision was RESA's, and the successful applicant became an employee of RESA VII once hired. Accordingly, as a BOE employee,

Grievant cannot use the grievance process to challenge a decision made by RESA regarding a position within its employ, and this grievance states a claim upon which relief cannot be granted. *See Rainey, supra*.

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. In non-disciplinary matters, a grievant bears the burden of proving his allegations by a preponderance of the evidence. W. Va. Code § 18-29-6.

2. As established by statute, any matter in which authority to act is not vested with the state department, board, commission or agency utilizing the services of the grievant is not grievable. *Brining v. Div. of Corrections*, Docket No. 05-CORR-284 (Dec. 7, 2005); *See Smith v. Dep't of Health and Human Res.*, Docket No. 05-HHR-218 (Aug. 5, 2005).

3. "The various statutes under Section 18A of the West Virginia Code governing the contract and procedural rights of county board of education employees do not apply to employees of the several state Regional Education Services Agencies." *St. Clair v. RESA-V*, Docket No. RESA-88-186 (Apr. 27, 1990). *See R.H.S. v. RESA IV,* Docket No. 96-RESA-348 (Mar. 31, 1997); *Sark v. RESA IV*, Docket No. 89-RESA-131 (Aug. 30, 1989).

4. This grievance states a claim upon which relief cannot be granted. Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Barbour County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7 (repealed, *See Footnote 1, supra)*. 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. 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: March 11, 2008

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.