THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

WILHEMINA GOINS,

Grievant,

v.

Docket No. 07-41-113

RALEIGH COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Wilhemina Goins, filed this grievance against the Raleigh County Board of Education ("Board") on January 19, 2007. Her Statement of Grievance reads as follows:

> I am filing this grievance regarding an extra curricular secretary position that should have been posted for any secretary in the county or central office to apply for and take care of the duties. This position should have been posted months ago. The person filing this position has less seniority than myself and was paid a monthly supplement of about $800.00. Today 01/22/07 the extra curricular position was posted with a supplement of $150.00 per month. This is discrimination and favoritism (18-29-2 m and o, also 18A-4-8B e, f, g, h, and s).
>
> I fell [sic] I should have been given the opportunity to apply for this position and given a fair chance to do the job as well as to have a computer and printer in my home to work on the extra curricular items as my co-worker was given.
>
> Also, beginning July 30, 2006, the regulations changed for overtime as well as the forms to be used. A co-worker has, as of December 2006, been able to use the old form and not comply with the new county policies. (SEE ATTACHMENTS)

Relief Sought:

The same compensation that was paid and given to my co-worker.

After denials at the lower levels, Grievant appealed to level four on April 4, 2007. A Level Four hearing was conducted before the undersigned on February 6, 2008, at the Grievance Board's hearing room in Beckley, West Virginia. Grievant was represented byJohn Everett Roush, Esq. Respondent was represented by Gregory W. Bailey, Esq. The matter became mature for decision on March 14, 2008, upon receipt of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant is employed by the Board as a Payroll Supervisor/Secretary 3/Accountant 3. In the fall of 2005, Judy Chapman, a Secretary 3 employed in Respondent's central office, began performing record keeping duties for the staff development counsel. Ms. Chapman was provided with a computer and printer to use at home to perform the work. Ms. Chapman was compensated for her time working on this project. Grievant learned of this assignment and initiated a grievance. Grievant seeks a monetary award for the time Ms. Chapman performed the assignment under the theory that she would have been the successful applicant for the position had it been posted in 2005.

The position formerly performed by Ms. Chapman was posted on January 22, 2007, and filled by an employee more senior than Grievant. The Board failed to post the extracurricular assignment in a timely manner. Nevertheless, once the position was posted, the relief sought by Grievant on this issue was provided. An extracurricular position involving the duties in question was posted, and filled by a more senior employee holding the secretary classification. In addition, Grievant failed to prove by a preponderance that she would have received an extracurricular contract for performing staff development support had such a position been posted in 2005.

After thorough review of the record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed as a Payroll Supervisor/ Secretary 3/Accountant 3 by the Board. She works in the Payroll Department of Raleigh County Schools.

2. Judith Chapman, a Secretary 3 working with federal programs at the Board's central office,

began performing the assignment of recording staff development attendance for the Board in the Fall of 2005.

3. Because federal funds were used to support the Fall 2005 staff development programs for Raleigh County, Ms. Chapman performed that data entry as part of her duties as Secretary 3 for the Federal Programs Director.

4. At some time after completing the data entry for the federally funded staff development sessions, Ms. Chapman began entering attendance data for all the staff development sessions regardless of the source of funding.

5. The Director of Federal Programs became concerned that federal funds, which may only be expended on federal programs, were being used on programs other than federally funded programs. At that point, Ms. Chapman began performing these duties outside her scheduled workday. She was compensated for this work through overtime payments from separate funds. The duties were still performed in the Federal Programs office, using computers in that office.

6. The Director of Federal Programs once again became concerned due to the belief that the federal programs' computers were obtaining too much county data. The Staff Development Councils agreed to acquire a computer for the purpose of entering and storing this data. 7. Ms. Chapman used the computer and a printer at home to perform the work for the staff development duties.

8. Beginning in August 2006, Ms. Chapman was compensated for her time working on the project by way of a monthly supplement of around eight hundred dollars.

9. Grievant became aware of the overtime supplemental payments to Ms. Chapman in early January 2007 while verifying checks issued by the Board. Grievant recognized the account codes as those associated with staff development. She questioned the purpose of the supplemental payments, and initiated a grievance.

10. On January 22, 2007, the Board posted a vacancy for the position formerly performed by Ms. Chapman. A monthly supplement of one hundred and fifty dollars was advertised for the position.

11. Eleven regularly employed service personnel with “secretary” in their job classification applied for this extracurricular position. Two of those individuals were more senior as secretaries than Grievant. The most senior applicant declined to accept the position. The second most senior applicant accepted the position.

12. Grievant is more senior than Judith Chapman. Grievant is sixteenth overall on the secretary

seniority list for Raleigh County.

Discussion

In non-disciplinary matters, a Grievant bears the burden of proving her 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).

Extracurricular assignments are addressed at W. Va. Code § 18A-4-16, which provides, in pertinent part:

> (1) The assignment of teachers and service personnel to extracurricular assignments shall be made only by mutual agreement of the employee and the superintendent, or designated representative, subject to board approval. Extracurricular duties shall mean, but not be limited to, any activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis: Provided, That all school service personnel assignments shall be considered extracurricular assignments, except such assignments as are considered either regular positions, as provided by section eight [§ 18A-4-8] of this article, or extra-duty assignments, as provided by section eight-b [§ 18A-4-8b] of this article.
>
> * * *
>
> (5) The board shall fill extracurricular school service personnel assignments and vacancies in accordance with section eight-b [§ 18A-4-8b] of this article . . .

Seniority rights for school personnel are addressed at W. Va. Code § 18A-4-8b, which provides, in pertinent part:

> (a) A county board shall make decisions affecting promotions and the filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight [§ 18A-4-8] of this article, on the basis of seniority, qualifications and past service.
>
> * * *
>
> (g) County boards shall post and date notices of all job vacancies of established existing or newly created positions in conspicuous places for all school service personnel to observe for at least five working days.

Grievant acknowledges that a number of her issues have been fully addressed at the lower levels. The posting of the extracurricular position in question on January 22, 2007, moots Grievant's assertion that the Board violated § 18A-4-8b. This issue was conceded by Grievant at Level II. Level II transcript, p. 33. Although the use of the old forms for requesting overtime compensation was improper, this did not affect the actual compensation received by Ms. Chapman. The position was posted and filled by an employee with more seniority than Grievant. In addition, given that another employee now occupies the position, Grievant no longer has standing to raise the question whether the successful applicant should receive the same compensation as Ms. Chapman. *See Wagner v. Hardy County Bd. of Educ*., Docket No. 95-16-504 (Feb. 23, 1996); *Jarrell v. Raleigh County Bd. of Educ*., Docket No. 95-41-479 (July 8, 1996).

The only question presented to the undersigned is whether Grievant is entitled to any monetary award for the time period that Ms. Chapman performed the work of the position, and received compensation associated with the work that Grievant might have performed. The Grievance Board has previously ruled that in situations similar to thepresent case, “it is simply too speculative to assume that all of the more senior employees would have declined the overtime if it had been offered to them.” *Sutphin v. Boone County Bd. of Educ.*, Docket No. 04-03-261 (Dec. 21, 2004). The Administrative Law Judge in that case noting that a number of regular employees with greater seniority than Grievant would have been eligible to perform the work in question on an overtime basis, and held that Grievant failed to prove his claim for damages.

Grievant testified that, in the event the extracurricular position had been posted earlier, she would have only been entitled to the position if Ms. Green had not applied for the position. Level II transcript, p. 32. The fact that Ms. Green made application for the position at the time it was posted causes one to think that she may have been interested in the position had it been posted earlier. Speculation that Ms. Green would have forgone an opportunity to take the extracurricular position does not satisfy Grievant's proof requirements.

Grievant is sixteenth on the seniority list in Raleigh County. Therefore, up to fifteen more senior secretary classification employees would have been offered the position. It is too speculative to assume that all of the more senior employees would have declined the overtime position if it had been offered to them. “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 also Jennings v. Wyoming County Bd. of Educ.*, Docket No. 05-55-462 (May 18, 2006).

Grievant concedes that she cannot establish that she would have received the position if it had been posted in the fall of 2005. At the same time, Grievant asserts thatthe Board cannot prove that she would not have been the successful applicant if the job had been posted prior to January 2007. This conclusion does not satisfy Grievant's burden of proving that she would have been the successful candidate for the extracurricular assignment. For all the reasons set out above, Grievant failed to prove by a preponderance that she would have received an extracurricular contract for performing staff development support had such a position been posted.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. In non-disciplinary matters, a Grievant bears the burden of proving her allegations by a preponderance of the evidence. 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 and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. The Grievance Board has previously ruled that in situations similar to the present case, "it is simply too speculative to assume that all of the more senior employees would have declined the overtime if it had been offered to them." *Sutphin v. Boone County Bd. of Educ.*, Docket No. 04-03-261 (Dec. 21, 2004).

3. "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. Bd. 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).

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 also Jennings v. Wyoming County Bd. of Educ.*, Docket No. 05-55-462 (May 18, 2006).

5. Grievant failed to prove by a preponderance that she would have received an extracurricular contract for performing staff development support had such a position been posted.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. *See* W. Va. Code § 18-29-7 (repealed, *See Footnote 1, supra)*. Neither the West 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: May 30, 2008

_____

Ronald L. Reece

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.