THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

MARILYN COOK,

Grievant,

v. **Docket No. 07-23-160**

LOGAN COUNTY BOARD OF EDUCATION

Respondent.

DISMISSAL ORDER

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This grievance was filed by Grievant Marilyn Cook against her employer, the Logan County Board of Education ("LCBE"), on October 6, 2006. The statement of grievance alleges that "Grievant is entitled to kindergarten position at Man Central K-8 under 18A-4- 7(a)." Grievant asserts discrimination, contending that other professional employees have been allowed to transfer into professional positions after the beginning of the instructional term, while she was not. As relief, Grievant, who was teaching first grade, sought to be placed in a kindergarten teaching position.

The grievance was denied at level one of the grievance procedure on October 6, 2006. Grievant appealed to level two, where an undated decision signed by the level two Evaluator denied the grievance. Level three consideration was bypassed, and Grievant appealed to level four on May 7, 2007. Due to legislative changes affecting the grievance procedure and the Grievance Board, a level four hearing was not held until March 17, 2008, in the Grievance Board's office in Charleston, West Virginia.

On March 11, 2008, Respondent filed a Motion to Dismiss the grievance, on the grounds that no relief can be granted, in that it is impossible to go back and give Grievant the 2006 job (which has since been eliminated through a reduction in force (RIF)), andthere is no economic loss. Thus

Respondent asserts this matter is an exercise in futility. Grievant opposed this motion. At the hearing on March 17, 2008, the undersigned Administrative Law Judge heard argument regarding the motion and further gave leave for Grievant's representative to brief the issue of plausible relief. (See footnote 1) Grievant is represented by William B. McGinley, Esquire, of the West Virginia Education Association and Respondent is represented by its counsel Leslie K. Tyree, Esquire. The case in chief was tabled (essentially placed in abeyance) pending a ruling on the motion.

Synopsis

Grievant, employed as a first grade teacher during the 2006-2007 school year, was not selected for a kindergarten teaching position at the Logan County elementary school in which she was employed. Grievant alleges that she was denied the position as a result of discriminatory actions by agents of the Respondent Board of Education. Nevertheless, while Grievant was pursing her grievance, Respondent reduced the number of kindergarten rooms at Grievant's school from three to two (RIF not connected to instant matter), eliminating the teaching position sought by Grievant. The remaining two kindergarten teaching positions are occupied by individuals with more seniority than Grievant. Throughout the course of events Grievant retained her first grade teacher position and was duly compensated. There is no economic difference in salary for Grievant between the two positions. Respondent filed a motion to dismiss the grievance. There is no economic loss and the position in contention is no longer in existence. In that the Grievance Board is incapable of turning back time to the 2006-2007 school year to allow Grievant to teach kindergarten rather than first grade, the motion, among other contentions, avers that there is no remedy that the Grievance Board can award Grievant.

The Grievance Board does not issue advisory opinions. While the Grievant has expressed a legitimate grievance, whose merits have not been litigated, there is no relief that can be granted in the circumstances of this case. The Grievance Board has consistently refused to deal with issues when the relief sought is speculative or otherwise legally insufficient. “A grievance may be dismissed, in the discretion of the administrative law judge, if no claim upon which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested.” Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 6.11(2007). (See footnote 2) There is no identifiable lawful relief that can be granted to Grievant in the circumstances of this case, by this Grievance

Board, therefore the motion to dismiss is GRANTED. For purposes of ruling on the Motion to Dismiss, the following facts are accepted as true.

Findings of Fact

1. In 2006, Grievant Cook was employed as a first grade teacher at Mann Central K-8, operated by the Logan County Board of Education, Respondent.

2. Grievant filed a grievance on October 6, 2006, alleging that she was discriminated against by the Board's failure to place her in a kindergarten position available at that time.

3. The kindergarten position at issue was not posted until after the school year had begun.

4. Respondent refused to transfer Grievant to the kindergarten position after the employment term began, citing *West Virginia Code §18A-4-7a.*

5. The grievance process commenced. Level one and level two decisions denied the grievance. Level three consideration was bypassed, and Grievant appealed to level four on May 7, 2007.

6. After the 2006-2007 school year, Respondent reduced the number of kindergarten rooms at Man Central K-8 from three to two. This reduction in force was necessitated by enrollment levels. The RIF process was a separate and wholly distinct action. There is no evidence or speculation that this RIF was related to the instant grievance.

7. The RIF of a kindergarten position at Man Central K-8 eliminated the teaching position sought by Grievant. Further, the remaining two kindergarten teaching positions were occupied by individuals with more seniority than Grievant.

8. There is no difference in salary for Grievant between the first grade teacher and the kindergarten teaching position.

9. Throughout the course of all relevant events Grievant retained her first grade teacher position and was duly compensated.

Discussion

Pursuant to the Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 156-1-6 6.11 (2007), “[a] grievance may be dismissed, in the discretion of the administrative law judge, if no claim upon which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested.” [Previously codified at W. Va. 156 C.S.R. 1 § 4.12 (2004).]

The immediate issue before the undersigned is Respondent's Motion to Dismiss. Respondent maintains that in 2008, given that the position in discussion has been subject to a reduction in force, there is simply no remedy available to award Grievant regarding this 2006 grievance. The burden of proof is on Respondent to demonstrate by a preponderance of the evidence that the motion should be granted. *Mathis v. Monroe County Bd. of Educ.,* Docket No. 2008-1127-MnrED (Mar. 28, 2008); *Robinson v. W. Va. Univ.*, Docket No. 06-HE-416 (Mar. 31, 2008); *Goodall/Phillips v. Workforce W. Va.*, Docket No. 06-WWV-246 (Aug. 30, 2007). A preponderance of the evidence is evidence of greater weight, or evidence which is more convincing than that offered in opposition to it. *Hunt v. W. Va. Bureau of Employment Programs*, Docket No. 97-BEP-412 (Dec. 31, 1997); *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). Respondent avers that (1) the Grievance Board is incapable of turning back time to the 2006 school year to allow the Grievant to teach kindergarten, rather than first grade; (2) this Board lacks authority to create a position for Grievant which the school system has deemed unnecessary, and (3) Grievant has sustained no monetary damages. Grievant continued to teach school in the same building with a one-year difference in grade level. Respondent maintains that to proceed with this grievance would be an exercise in futility.

The Grievance Board does not issue advisory opinions. *Dooley v. Dep't of Transp*., Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ.*, Docket No. 91-35-229/239 (Nov. 27, 1991). *Priest v. Kanawha County Bd. of Educ.*, Docket No. 00-20-144 (Aug. 15, 2000). Also See Public Employees Grievance Board Procedural Rules 156 C.S.R. 1 § 6.20 (2007) formerly codified at W. Va. 156 C.S.R. 1 § 4.22 (2004). The Grievance Board has continuously refused to deal with issues when the relief sought is “speculative or premature, or otherwise legally insufficient.” *Stepp v. Dep't. of Trans./Div. of Highways,* Docket No. 06-DOH-215 (Oct 27, 2006) citing *Dooley v. Dep't. of Trans./Div. of Highways*, Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ.*, Docket No. 91-35-229/239 (Nov. 27, 1991). Typically, a Grievant must show “an injury-in-fact, economic or otherwise” to have what “constitutes a matter cognizable under the grievance statute.” *Lyons v. Wood County Bd. of Educ.*, Docket No. 89-54-601 (Feb. 28, 1990); *Dunleavy v. Kanawha County Bd. of Educ.*, Docket No. 20-87-102-1 (June 30, 1987).

Grievant is opposed to dismissing this grievance. Acknowledging the desire for a decision on the

merits, counsel for Grievant maintains that to dismiss this grievance at thisjuncture is improper. In that the teaching position originally requested as relief is no longer in existence (RIF), it is believed Grievant seeks some form of equitable relief. Counsel argues that administrative law judges are empowered with broad discretion; as long as the remedy does not violate applicable statutory or constitutional provisions, an ALJ is free to fashion fair and equitable remedies to make a grievant whole. The actions an administrative law judge may take to fashion an equitable remedy are discussed in W. Va. Code § 18-29-5(b), and this Code Section states:

> (b) **Hearing examiners may** consolidate grievances, allocate costs among the parties in accordance with section eight [§ 18-29-8] of this article, subpoena witnesses and documents in accordance with the provisions of section one [§§ 29A-5-1], article five, chapter twenty-nine-a of this code, **provide relief as is determined fair and equitable in accordance with the provisions of this article, and exercise other powers as provides for the effective resolution of grievances not inconsistent with any rules of the board or the provisions of this article.** (Emphasis added.)

Thus while it is true that an ALJ does possess some discretion to fashion relief, the Grievance Board is not permitted to simply create positions for a state-funded school system. The state board of education maintains very clear regulations regarding staffing and expenditure of school funds. This Grievance Board is not empowered to create a position that has been deemed unneeded by the school system. The possibility of bumping a less senior kindergarten teacher at Man Central is not a viable option.

In the circumstance of this case, the undersigned is unable to identify a remedy that could be lawfully awarded if the Grievant were to prevail upon the facts alleged. Further, the undersigned is not convinced that Grievant has presented justification for an exception to the rule that the Grievance Board will not issue advisory opinions. “[R]elief which entails declarations that one party or the other was right or wrong, but provides no substantive,practical consequences for either party, is illusory, and unavailable from the [Grievance Board]. *Miraglia v. Ohio County Bd. of Educ.,* Docket No. 92-35-270 (Feb. 19, 1993). *De minimis* relief is also unavailable. *Carney v. W.Va. Div. of Rehab. Services*, Docket No. VR-88-055 (Mar. 28, 1989).” *Baker v. Bd. of Directors*, Docket No. 97-BOD-265 (Oct. 8, 1997).

While the circumstances of this case are regrettable, due to no fault of the parties, there is no viable remedy that this Grievance Board could legally award Grievant. Accordingly, while Grievant properly identified a grievance in 2006, it is apparent in the facts of this case that no relief is readily

available in 2008. After the 2006-2007 school year, Respondent reduced the number of kindergarten rooms at Man Central K-8 from three to two. This reduction in force eliminated the teaching position sought by Grievant. Further, the remaining two kindergarten teaching positions were occupied by individuals with more seniority than Grievant, eradicating bumping options. No monetary loss was suffered by Grievant. This grievance and this matter will be dismissed from the Grievance Board's docket.

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. When the issue is a respondent's Motion to Dismiss, the burden of proof is on the respondent to demonstrate this Motion to Dismiss should be granted by a preponderance of the evidence. *Mathis v. Monroe County Bd. of Educ.,* Docket No. 2008- 1127-MnrED (Mar. 28, 2008); *Robinson v. W. Va. Univ.*, Docket No. 06-HE-416 (Mar. 31, 2008); *Goodall/Phillips v. Workforce W. Va.*, Docket No. 06-WWV-246 (Aug. 30, 2007). 2. "A grievance may be dismissed, in the discretion of the administrative law judge, if no claim upon which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested." W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 § 6.11 (2007). [Previously codified 156 C.S.R. 1 § 4.12 (2004)].

3. The Grievance Board does not issue advisory opinions. *Dooley v. Dep't of Transp*., Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ.*, Docket No. 91-35-229/239 (Nov. 27, 1991). *Priest v. Kanawha County Bd. of Educ.*, Docket No. 00-20-144 (Aug. 15, 2000). Also See Public Employees Grievance Board Procedural Rules 156 C.S.R. 1 § 6.20 (2007) formerly 156 C.S.R. 1 § 4.22 (2004).

4. The Grievance Board has continuously refused to deal with issues when the relief sought is "speculative or premature, or otherwise legally insufficient." *Stepp v. Dep't. of Trans./Div. of Highways,* Docket No. 06-DOH-215 (Oct 27, 2006) citing *Dooley v. Dep't. of Trans./Div. of Highways*, Docket No. 94-DOH-255 (Nov. 30, 1994); *Pascoli & Kriner v. Ohio County Bd. of Educ.*, Docket No. 91-35-229/239 (Nov. 27, 1991). Typically, a Grievant must show "an injury-in-fact, economic or otherwise" to have what "constitutes a matter cognizable under the grievance statute." *Lyons v. Wood County Bd. of Educ.*, Docket No. 89-54-601 (Feb. 28, 1990); *Dunleavy v. Kanawha County Bd. of*

Educ., Docket No. 20-87-102-1 (June 30, 1987).

5. There is no viable remedy that the Grievance Board is empowered to award Grievant in the circumstances of this case. While Grievant may have properly identified a grievance claim in 2006, it is apparent that no relief is readily available in 2008.

Accordingly, this grievance is **DISMISSED** from the docket of the Grievance Board at Level 4.

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) (but see Executive Order No. 2-07, May 8, 2007). 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.

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Landon R. Brown

Administrative Law Judge

Date:___ June 13, 2008

Footnote: 1

In the event that Grievant were to prevail, what if any relief could the Grievance Board properly award to this Grievant, given the circumstances of the case? Grievant's counsel filed a brief on April 11, 2008. By correspondence dated May 22, 2008, Respondent declined the option to file a brief.

Footnote: 2

Previously codified as 156 C.S.R. 1 § 4.12 (2004). Procedural Rules, 156 C.S.R. 1 § 6.11 (2007) is nearly identical to former § 4.12 (2004). In 2007, the Legislature 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. The Public Employees Grievance Board adopted new Procedural Rules which became effective December 27, 2007, after this grievance commenced but prior to the instant motion. Thus while this grievance would be decided pursuant to former statutes the applicable procedural rules are the W. Va. Public Employees Grievance Board Procedural Rules, 156 C.S.R. 1 et seq. (2007).