THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

RICHARD BARBER,

Grievant,

v.

Docket No. 2008-0001-MerEd

MERCER COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Richard Barber ("Grievant") appealed this grievance to level three on February 19, 2008, after denial at level one, and an unsuccessful mediation at level two. He grieves his non-selection for the position of "Special Education Inclusion Teacher/Strategist" and requests placement into that position at Montcalm High School. A level three hearing was conducted in Beckley , West Virginia, on April 16, 2008. Grievant was represented by Ben Barkey, WV Education Association. Respondent was represented by John H. Shott, Esquire. This matter became mature for consideration upon receipt of the parties' fact/law proposals on May 19, 2008.

Summary

Mercer County Board of Education ("Respondent") posted a job opening for a new position entitled "Special Education Inclusion Teacher/Strategist" at each of its four high schools on August 23, 2006. Grievant was one of the applicants for the position during this initial posting period. Grievant was interviewed for the position on September 19, 2006, but did not meet the minimum qualifications specified in the job posting. None of the other applicants met the minimum qualifications in the job posting, and the position was not filled. Respondent posted this position again on or about January 18, 2007. Grievant did not apply for the position during that posting period.

One of the fully certified applicants wasplaced in the position on May 22, 2007. Grievant filed this grievance on July 3, 2007. Grievant complains that after his interview in September 2006 that, in the process of checking on the status of filling the position, he was informed by the personnel director that the position would not be filled. Nevertheless, the subsequent posting for the unfilled position was made pursuant to W. Va. Code § 18A-4-7a. It is undisputed that Grievant did not possess the necessary qualifications for the position that he is seeking. The 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. This grievance is DENIED.

The following Findings of Fact are made based upon a preponderance of the evidence presented at levels one and three.

Findings of Fact

1. At all times pertinent to this grievance, Grievant was employed as a special education teacher by the Respondent.

2. Respondent posted a job opening for a new position entitled “Special Education Inclusion Teacher/Strategist” at each of its four high schools on or about April 25, 2006. This position required a valid teaching certificate with proper endorsements in LD/BD/MI, (See footnote 1) and a Masters Degree in special education. The position was designed to be both a classroom teacher, and to advise the other classroom teachers on student inclusion.

3. No applicants who satisfied the certification requirements applied for the Montcalm High School position, and the position was not filled. 4. Respondent posted the Montcalm High School position again on May 24, 2006, July 14, 2006, and July 26, 2006. No applicants who satisfied the certification requirements applied for the position.

5. Respondent posted the position at Montcalm High School again on or about August 23, 2006. Grievant was one of the applicants for the position during the posting period.

6. Grievant was interviewed for the position on September 19, 2006. Grievant did not meet the minimum qualifications specified in the job posting because he was not certified in BD.

7. None of the other applicants met the minimum qualifications specified in the job posting. The position was not filled.

8. Respondent posted this Montcalm High School position once again on or about January 18,

2007.

9. Grievant did not apply for the position after it was posted on January 18, 2007. One of the fully certified applicants was placed in the position on May 22, 2007.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Bd. 156 C.S.R. 1 . 3 (2008); *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). “The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is morelikely true than not.” *Leichliter v. W. Va. Dep't of Health & Human Res.*, Docket No. 92- HHR-486 (May 17, 1993).

The Respondent raises the issue of whether Grievant has standing to grieve this candidate's selection. 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). Grievant does not dispute that he failed to apply for the “Special Education Inclusion Teacher/Strategist” position after it was posted on January 18, 2007. Under this set of facts, it is clear that Grievant does not have a personal stake in the filling of this position.

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 he is not qualified for the “Special Education Inclusion Teacher/Strategist” position, the only posting at issue. Grievant does not have standing to grieve the filling and posting of these positions on a personal injury basis as he was not qualified to fill it, and he has not personally been harmed. *See Mason v. Div. of Highways/Dep't of Transp.*, Docket No. 00-DOH-345 (Mar. 28, 2001).

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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).

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. Grievant lacks standing to pursue this grievance because he failed to apply for the position, and was not qualified for the position in question.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. *See* W. Va. Code § 6C-2-5. 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 ofthe appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

Date: August 26, 2008

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Ronald L. Reece

Administrative Law Judge

Footnote: 1 *Learning Disabled, Behavior Disordered, Mentally Impaired.*