THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

JANE ROBINSON,

Grievant,

v. **Docket No. 07-10-371**

FAYETTE COUNTY BOARD OF EDUCATION,

Respondent.

Grievant Jane Robinson, employed by the Fayette County Board of Education ("Respondent" or "BOE") as a teacher at Valley High School, grieves the change in her teaching assignment from sixth grade math to an assignment which added eighth grade math, and required more class preparation time than had the sixth-grade-only assignment. Her statement of grievance, signed by her representative, Ben Barkey, WVEA ODS, on April 19, 2007, was: "WV § 18A-4-7a & 18A-2-7 Grievant and other staff are being asked to teach different grade levels next year to facilitate a transfer and to aide [sic] in the creation of a new position that should be posted." As relief, she sought "[p]lacement in to old position of 6th grade math. No requests to cover portions of old positions so that new positions can be created without posting."

A Level Two (See footnote 1) hearing was held on May 24, 2007, and resulted in a decision on July 6, 2007, denying the grievance. Although the grievance form which is part of the recordsets forth June 12, 2007, as the date the grievance was appealed to Level Three, correspondence dated July 19, 2007, from Erwin L. Conrad, Esq., who has represented the Respondent throughout these proceedings, to Mr. Barkey states that the BOE received notice of the Grievant's appeal to Level Three on July 14, 2007. (The latter date is more consistent with the issuance of the Level Two decision on July 6.) Mr. Conrad's correspondence advised that at a July 19, 2007, meeting, the BOE had upheld the denial of the grievance at Level Three.

The Grievant's appeal to Level Four, dated July 23, 2007, was received in this Board's office on July 25, 2007. Due to legislation which took effect July 1, 2007, amending the grievance statutes and reorganizing the Grievance Board, *see* footnote 1, the Level Four hearing was not scheduled until January 29, 2008, when it was convened by the undersigned at the Board's Beckley hearing room. The parties were represented at the hearing by the persons named above. The case became mature for decision on February 19, 2008, the deadline for submission of the parties' proposed findings of fact and conclusions of law.

Summary

In January 2007, the Office of Educational Performance Audits of the State Board of Education ("OEPA") concluded in an audit that several classes at Valley High School in Fayette County, where Grievant teaches, were being taught by teachers who were not properly certified in the subject matter. Because Grievant possessed a certificate to teach one of the subjects in one of the grade levels involved, Respondent reassigned her to teach it. This required the Grievant to teach an eighth grade class, instead of theexclusively sixth grade classes she had been teaching, which she preferred, and it required an additional class preparation.

The Grievant appeared to argue below that the changes to her schedule were substantial, and that they entitled her to the notice and hearing to which a transferred teacher has a right. However, at Level Four she argues instead that her schedule changes were caused by changes made to another teacher's schedule. She contends that the changes to the other teacher's schedule amounted to the creation of a new position, and that Respondent violated the law by not posting it. The Grievant's evidence and argument do not define or describe the new position she contends should have been posted, and she has not established how the failure to post led to the injury of which she complains, which is her assignment to teach 8th grade math. Even if the Respondent should have posted a new position (which the Grievant failed to prove), for the Grievant to have standing to grieve the failure to post, she would have to prove that it caused the injury of which she complains. This she failed to do. Grievance **DENIED**.

After thorough review of the record, the undersigned finds the following facts:

Findings of Fact

1 1. The Grievant was employed at Valley High School as a teacher of Math 6-8 (mathematics, Sixth through Eighth Grades) effective for the 2005-2006 school year, having transferred from Gauley Bridge High School, where she began teaching in 1978. The Grievant transferred when the Gauley Bridge school closed.

2 2. Among other teaching certificates, the Grievant holds a permanent certificate to teach Mathematics for Grades 7 through 9, as well as a "Permanent Authorization Art. . . PK-AD." Joint Ex. 2, p. 3.

3 3. When the Grievant arrived at Valley High School, she was assigned to teach Sixth Grade Math, a favorite subject and a favorite grade.

4 4. During the period relevant to this grievance, Valley High School was being "reconfigured" (the term used by Bryan Parsons, Respondent's Personnel Director), as a result of having absorbed students from Gauley Bridge High School, and for other reasons.

5 5. During a period of reconfiguration, there is an environment of uncertainty, and planning presents a greater challenge than when a school is more settled. During a reconfiguration, having multi-subjects certified teachers on staff gives the administration additional flexibility to assure that classes are covered.

6 6. On May 26, 2006, Respondent posted a vacancy for a "Teacher _ Multi Subject K-8." Resp. Ex. 2. That position was filled by Drema D. Bodkin.

7 7. Multi-subjects certified teachers are not eligible to teach certain classes in Grades Seven and Eight, including Math. W. Va. CSR § 126-136-18.6 (2008) (W. Va. Dept. of Ed. Policy 5202).

8 8. In April or May of 2006, OEPA commenced an audit of Fayette County Schools, including Valley High School.

9 9. In January 2007, OEPA circulated a draft audit report which "flagged" several classes being taught at Valley by teachers not certified to teach the subject matter being taught. Joint Ex. 2, at p. 6.

10 10. Among the classes flagged was the Eighth Grade Math class taught by Ms. Bodkin, because she held only a multi-subjects certification.

11 11. In an effort to comply with the result of the OEPA audit, Respondent'sadministrative staff scheduled the Grievant to teach Eighth Grade Math in the 2007-2008 school year, in addition to

having her continue to teach Sixth Grade Math.

12 12. The Grievant's schedule changed 25% as a result of the Eighth Grade Math assignment, as the Grievant testified. The Grievant has additional preparation time as a result of the new schedule.

Discussion

Burden of Proof

Because this is not a disciplinary case, the Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2007); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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); recognized in *State v. Miller*; 194 W. Va. 3, 459 S.E.2d 114 (1995) (*see* Section II of opinion).

Constructive Transfer of the Grievant

In the lower level proceedings, the Grievant appeared to contend that her assignment to teach at the 8th grade level was a substantial change in her schedule, which should have required the Respondent to provide notice and an opportunity for hearing, as in the case of transfers:

> [A]n employee shall be notified in writing by the superintendent on or before the first Monday in April if he is being considered for transfer or to be transferred. . . . Any teacher or employee who desires to protest such proposed transfer may request in writing a statement of the reasons for the proposed transfer. . . . Within ten days of the receipt of the statement of the reasons, the teacher . . . may make written demand . . . for a hearing . . .before the county board of education. . . .

W. Va. Code § 18A-2-7 (2008). However, by the time of the Level Four hearing the Grievant had abandoned that theory. Her proposed findings and conclusions do not refer to it. In any event, the Grievant's schedule change was not a constructive transfer because the change was not in fact substantial. That is the showing the Grievance Board's cases have required:

> The primary inquiry is necessarily whether or not changes in schedules are so substantial that a teacher has been essentially transferred from one position to another. In general, the relocation of a teacher from one school to another, or substantially altering a teacher's subject matter assignment constitutes a transfer as

> contemplated by W. Va. Code §18A-2- 7. *Reed v. Mason County Bd. of Educ.*, Docket No. 92-26-050 (Mar. 31, 1992); *Pansmith v. Taylor County Bd. of Educ.,* Docket No. 46-86-057 (Aug. 4, 1986).

Zirk v. James Rumsey Tech. Inst., Docket No. 99-MCVTC-341 (Feb. 29, 2000).

In this case, the Grievant was assigned to teach a class, 8th grade math, for which she possessed the requisite certification. She continued to teach a 6th grade math class, her preferred grade, and she incurred some additional preparation time to teach the new 8th grade class. Other than the additional preparation time, the primary difference in the new assignment was the grade level; the subject area remained the same.

The Grievant is a career teacher who had already been required to adjust to leaving the school at which she taught for many years for a brand new one. While it is understandable that she would prefer to teach her favorite grade, such relatively modest changes in a teacher's schedule are insufficient under Grievance Board precedent to establish entitlement to notice and hearing. In order to invoke that procedure in cases other than actual transfers, the "changes in schedules [must be] so substantial that ateacher has been essentially transferred from one position to another," *Zirk, supra*. The Grievant cannot make that showing on the facts of this case and abandoned that legal theory at Level Four.

Assertion of Purported Grievances of Third Parties

So at the Level Four hearing, and in her proposed findings and conclusions submitted afterward, the Grievant argues instead that changes to Drema D. Bodkin's schedule (and to that of one other teacher) led to the Grievant's 8th grade assignment, to which she now objects. The Grievant asks the undersigned to conclude that the changes to Ms. Bodkin's schedule were so extensive that they amounted to the creation of a new position, which should have been posted.

Even if Ms. Bodkin's schedule changes amounted to the creation of a new position, it is not clear on what legal basis Ms. Robinson can grieve those actions of the Respondent. To put it another way, it is not clear on what basis the Grievant can assert legal standing to make these claims. The Grievant argues that she should be entitled to grieve Ms. Bodkin's schedule changes, or the Respondent's failure to post (as a new position) the position which the Grievant claims resulted from Ms. Bodkin's schedule changes. The Grievant then argues that the undersigned should order as relief

that her schedule be adjusted back to 6th grade teaching only, the type of schedule she had before the OEPA audit-induced schedule changes.

> Standing, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy, and one person cannot prosecute a grievance on behalf of another person.

Crites v. Webster County Bd. of Educ., Docket No. 95-51-313 (Feb. 26, 1996). The Grievant cites *Shobe v. Latimer*, 162 W. Va. 779, 253 S.E.2d 54 (1979) for the propositionthat the Grievant has standing to grieve a change in another teacher's schedule. Because that decision was limited to construing standing under a specific statute, not relevant in grievances (the West Virginia Declaratory Judgments Act, W. Va. Code §§ 55-13-1 - 55- 13-16 (2008)), its applicability to grievances is not apparent to the undersigned. Nonetheless, the case has been cited in Grievance Board decisions in the past on the question of standing. Even if *Shobe* is applicable, however, it does not support the Grievant's claim that she has standing to grieve the events involving the other teacher, Ms. Bodkin.

The holding in *Shobe* was that a plaintiff has standing if the interest she seeks to protect "is arguably within the zone of interest to be protected or regulated by the statute . . . in question. [footnotes omitted, quoting C. Wright, *Handbook of the Law of Federal Courts* § 13 (3rd ed. 1976)]." In this case, the interests in question are protected or regulated by Grievance Board decisions regarding constructive transfer, and the law governing the posting of new positions; and the interests protected are those of school employees who are constructively transferred, or persons eligible to compete for posted, newly created positions. The Grievant is not such a person. The Grievant's interest is in not having her schedule change.

The Grievant's argument that she should be permitted to grieve what was done with Ms. Bodkin's schedule lacks an important element of the legal standing analysis: that the claimed wrong must have caused the violation which the Grievant alleges.

> Standing . . . is comprised of three elements: First, the party . . . must have suffered an "injury-in-fact" _ an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. <u>Second, there must be a causal connection[between] the injury and the conduct forming the basis of the lawsuit</u>. Third, it must be likely that the injury will be redressed through a favorable decision of the [tribunal].

Coleman v. Sopher, 194 W. Va. 90, 459 S.E.2d 367 (1995), at n. 6 [emphasis added]. As a matter of proof, the Grievant failed to demonstrate at hearing that her schedule change was caused either by

the hiring of Ms. Bodkin as a multi-subjects certified teacher (as her representative appeared to suggest during the hearing), or by the failure of the school administration to post Ms. Bodkin's duties as a new position. (See footnote 2) The Grievant asserts that had Ms. Bodkin's schedule not changed, hers would not have either. The proof at hearing was entirely inadequate to establish this as a matter of fact, by a preponderance of the evidence. The evidence was that there were numerous considerations, and administrative actions, which contributed to the schedule about which the Grievant complains. To single out one such action as causative of the Grievant's schedule change amounts to speculation, based on the evidence presented.

As a result, even if the statutes and decisional law on which the Grievant relies protected her schedule, which the undersigned concludes they do not, the Grievant lacks standing to assert her claim because she did not prove that her schedule change resulted from the violations she alleges.

The determination that the Grievant lacks standing is dispositive and requires that the grievance be **DENIED**.

Conclusions of Law

1 1. Because this is not a disciplinary case, the Grievant has the burden of proving her case by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2007); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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); recognized in *State v. Miller*; 194 W. Va. 3, 459 S.E.2d 114 (1995) (*see* Section II of opinion).

2 2. The change in the Grievant's schedule was not a constructive transfer because it was not substantial, which is the showing Grievance Board cases have required:

> The primary inquiry is necessarily whether or not changes in schedules are so substantial that a teacher has been essentially transferred from one position to another. In general, the relocation of a teacher from one school to another, or substantially altering a teacher's subject matter assignment constitutes a transfer as contemplated by W. Va. Code §18A-2- 7. *Reed v. Mason County Bd. of Educ.*, Docket No. 92-26-050 (Mar. 31, 1992); *Pansmith v. Taylor County Bd. of Educ.,* Docket No. 46-86-057 (Aug. 4, 1986).

Zirk v. James Rumsey Tech. Inst., Docket No. 99-MCVTC-341 (Feb. 29, 2000).

3 3. "Standing, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy, and one person cannot prosecute a grievance on behalf of another person." *Crites v. Webster County Bd. of Educ*., Docket No. 95-51-313 (Feb. 26, 1996).

4 4.

> Standing . . . is comprised of three elements: First, the party . . . must have suffered an "injury-in-fact" _ an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and notconjectural or hypothetical. Second, there must be a causal connection [between] the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the [tribunal].

Coleman v. Sopher, 194 W. Va. 90, 459 S.E.2d 367 (1995), at n. 6 [emphasis added]. The Grievant failed to prove by a preponderance of the evidence that her schedule change was caused either by the hiring of Ms. Bodkin as a multi-subjects certified teacher or by the failure of the school administration to post Ms. Bodkin's duties as a new position.

5 5. Even if the statutes and decisional law on which the Grievant relies protected her schedule from change, which the undersigned concludes they do not, the Grievant lacks standing to assert her claim because she did not prove that her schedule change resulted from the violations she alleges.

Accordingly, the 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. W. Va. Code § 29-6A-7 (2006) (repealed, *see* fn. 1 above). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and they should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) (2006) 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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Thomas J. Gillooly

Administrative Law Judge

Date: July 11, 2008

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.

Footnote: 2

The Grievant's evidence at hearing, and her proposed findings and conclusions submitted afterward, also failed to define or describe the new position she maintains resulted from the changes made to Ms. Bodkin's schedule.