THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

MARIA MARSICANO,
Grievant,

v. **Docket No. 2009-0500-MrnED**

MARION COUNTY BOARD OF EDUCATION,
Respondent.

DISMISSAL ORDER

Grievant Maria Marsicano filed a level one grievance on October 14, 2008, stating, "Marion County Schools failed to award Ms. Marsicano a teaching position even though she was on the preferred recall list, is highly qualified, and had seniority in the county in violation of WV Code § 18A-4-7a. Specifically, Ms. Marsciano properly and legally bid on 3 posted positions for a math teacher in grades 5-8 in August 2008. Marion County Schools failed to fill these positions until late in September and well after the beginning of the 2008-2009 school year. With the grievant having been offered no position in the county, and following attempts to obtain a teaching position, the grievant was forced to accept a teaching position with another school system or be unemployed. Ms. Marsicano never withdrew her bids on the 3 math positions, communicated to county administrators she wanted to continue to teach in Marion County, but was not contacted in regard to these positions prior to the beginning of the school year. It was only after the grievant accepted a teaching position outside of Marion County that the county filled said positions and well after the beginning of the school year. Ms. Marsicano should legally have been the successful applicant for one of these teaching positions. Although Ms. Marsicano is not an employee of Marion County Schools at the time of the filing of the grievance, she was

an employee and on the preferred recall list at the time she properly bid on these teaching positions and was wrongfully denied employment due her pursuant to state law and county policy."

Her stated relief sought is "that Marion County Schools be directed to comply with WV Code § 18A-47a [sic] in regard to filling employment vacancies. Ms. Marsicano also requests to be awarded a math teaching position in Marion County with all benefits and wages due her, including 10% interest, retroactive to the date of the violation in compliance with WV Code § 18A-4-7a. Should Ms. Marsicano determine it necessary to hire an attorney to represent her at any time during the grievance process, she also requests that Marion County Schools be liable for any court costs and reasonable attorney fees she incurs in the process in compliance with WV Code § 18A-4-7a."

This grievance was denied at level one on January 22, 2009. Grievant appealed to level two of the grievance procedure on February 2, 2009. Prior to the scheduling of a mediation session, Respondent filed a Motion to Dismiss on February 10, 2009. Grievant was given until April 10, 2009, to respond to this motion. Grievant appears by Susan Lattimer Adkins, WV Professional Educators Association. Respondent appears by Gregory W. Bailey, Esquire, Bowles Rice McDavid Graff & Love. This matter is mature for ruling on Respondent's Motion to Dismiss.

Synopsis

Grievant, a math teacher, was not hired for a math teaching position for which she bid in August 2008. Respondent asserted that Grievant was not an "employee" within the meaning of the grievance procedure, and so had no standing to dispute the posting and selection process by filing a grievance. Grievant was hired as a full-time employee of the

Harrison County Board of Education on August 5, 2008. Therefore, when she filed this grievance on October 14, 2008, she was no longer an employee of Respondent and does not have standing to avail herself of the grievance procedure. Grievant relies upon the provisions of WEST VIRGINIA CODE § 18A-2-2 relating to teachers on the preferred recall list being offered the opportunity for reemployment in a position for which she is qualified. However, that section does not apply to teachers who have accepted teaching positions elsewhere. This grievance is dismissed.

The following material facts are undisputed:

Findings of Fact

1. In August 2008, Respondent posted three positions for a math teacher in grades 5-8. Grievant bid on those positions.

2. Respondent did not fill these positions until September 2008, and after the beginning of the 2008-2009 school year.

3. Grievant became a full-time employee of the Harrison County Board of Education effective August 5, 2008.

4. Grievant filed this grievance on October 14, 2008.

Discussion

Respondent asserts that Grievant is not an "employee" within the meaning of WEST VIRGINIA CODE § 6C-2-2, and therefore has no standing to file a grievance. Grievant asserts that, since she was an employee of Respondent and on the preferred recall list at the time she bid on the positions, she has standing to challenge the selection process. 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).

Standing is a party's right to make a legal claim or seek judicial enforcement of a duty or right. BLACK'S LAW DICTIONARY (Eighth Edition 2004). 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 [she 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).

West Virginia Code § 6C-2-2(g) defines "employer" for the purposes of the grievance procedure, as follows:

> [A] state agency, department, board, commission, college, university, institution, State Board of Education, Department of Education, county board of education, regional educational service agency or multicounty vocational center, or agent thereof, **using the services of an employee** as defined in this section. (Emphasis added.)

In turn, the same statute, in subsection (e)(1), defines "[e]mployee" as "any person hired for permanent employment by an employer for a probationary, full- or part-time position." A "Grievance" is "a claim by an employee." W. VA. CODE § 6C-2-2(i). Only an employee may file a grievance. W. VA. CODE § 6C-2-2(a)(1).

Grievant's employment ended with Respondent on August 5, 2008, when she accepted employment with another county board of education. The Grievance Board has held that the grievance board statute "provides that the purpose of the statutory grievance procedure is to allow education employees and their employer to reach solutions to problems which arise within the scope of their respective employment relationships." *Fraley v. Morgan County Bd. of Educ.*, Docket No. 01-32-615D (April 30, 2002). By accepting employment with the Harrison County Board of Education, Grievant's employment relationship ended with Respondent at the conclusion of the 2007-2008 school year. Therefore, in October 2008, Grievant no longer had standing to file against the Respondent and the grievance procedure is only available to challenge the actions taken by a current employer. *Chang v. Berkeley County Bd. of Educ.*, Docket No. 2008-0174-BerED (April 28, 2008); *Mascaro v. Marion County Bd. of Educ.*, Docket No. 2008-0299-MrnED

Grievant does not dispute that she was not employed by Respondent at the time of filing her grievance seeking to challenge her non-selection. Grievant relies upon Marion County Schools Policy 3131, which mirrors the language of WEST VIRGINIA CODE § 18A-2-2 (c)(6). The statute provides, in pertinent part, the following:

> [i]n case of dismissal for lack of need, a dismissed teacher shall be placed upon a preferred list in the order of their length of service with that board. No teacher shall be employed by the board until each qualified teacher upon the preferred list, in order, has been offered the opportunity for reemployment in a position for which he or she is qualified, **not including a teacher who has accepted a teaching position elsewhere**." (Emphasis added).

The plain reading of this statute indicates that it does not apply to a teacher who has accepted a position elsewhere. As noted above, the undisputed facts of this grievance reflect that is what occurred.

Respondent has proven by a preponderance of the evidence that Grievant does not fall under the definition of "employee" contained in WEST VIRGINIA CODE §§ 6C-2-1 *et seq*, therefore, she has no standing to pursue her claim through the grievance procedure. Accordingly, this grievance must be dismissed.

The following conclusions of law support this ruling:

Conclusions of Law

1. 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).

2. Standing is a party's right to make a legal claim or seek judicial enforcement of a duty or right. BLACK'S LAW DICTIONARY (Eighth Edition 2004). 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 [she 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).

3. For the purposes of the grievance procedure, an "employer" is the "state agency, department, board, commission, college, university, institution, State Board of Education, Department of Education, county board of education, regional educational service agency or multicounty vocational center, or agent thereof, using the services of an employee." W. VA. CODE § 6C-2-2(g).

4. Grievant ended her employment relationship with Respondent on August 5, 2008, so she was no longer an employee when she initiated this grievance on October 14, 2008; thus, she lacks standing to pursue this grievance. *Mills v. Wayne County Bd. of Educ.*, Docket No. 06-50-415 (Mar. 5, 2007); *Chang v. Berkeley County Bd. of Educ.*, Docket No. 2008-0174-BerED (April 28, 2008).

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

This Order is final upon the parties and is enforceable in the Circuit Court of Kanawha County. 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 of the 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 (2008).

Date: April 23, 2009

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Ronald L. Reece
Administrative Law Judge