THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

RICKEY YOUNG,
Grievant,

v. **Docket No. 2008-1770-MarED**

MARSHALL COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant Rickey Young filed this grievance against his employer, Respondent Marshall County Board of Education, on June 13, 2008. His unedited Statement of Grievance reads as follows:

> The level I grievance stated, "Discrimination 6C-2-2(g). The reducing of contracts for 260 day custodians." Grievant also asserts a violation of West Virginia Code § 18A-4-5b. In particular, Grievant notes that a position that had formerly been a 260-day position at John Marshall High School was posted as a 220-day position. Grievant was interested in applying to fill the position, but was prevented from doing so without a catastrophic loss of salary. Grievant asserts that the duties and responsibilities of the position in question are "like" those of 260-day custodians at that school and other work sites throughout the county and that consequently, the contract term of this position should be uniform, i.e. 260-day with vacation benefit.
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> Relief Sought: The level I grievance form sought, "to keep all 260 day custodians in place or reduce all 260 day contracts back to 220 including administration [or professional positions]." Further, Grievant seeks reposting of the position in question as a 260-day position.

This grievance was denied at level one following a conference held on September 16, 2008. A level two mediation conducted on February 4, 2009 was unsuccessful. Grievant appealed to level three on February 19, 2009. A level three hearing was conducted before the undersigned Administrative Law Judge on May 18, 2009, at the Grievance Board's Westover office. Grievant appeared in person and by his counsel, John Everett Roush, WVSSPA. Respondent appeared by its counsel, Richard S. Boothby,

Bowles Rice McDavid Graff & Love LLP. This matter became mature for consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on June 25, 2009.

Synopsis

Grievant asserts that his status as a 260-day contract custodian, and Respondent's posting of vacated custodian positions at 220-day contract terms instead of 260-day contract terms, violates the statutory requirement that salaries be uniform throughout the county. He also claims discrimination. Respondent maintains that its decision on which vacated custodian positions were posted as 220-day contract terms was based on legitimate, need related criteria, and that it has not engaged in discrimination. Grievant lacks standing to challenge the employment terms of the position as he did not apply or bid for the position. The employment term of that custodian position did not affect Grievant in any way. Grievance denied.

After a thorough review of the record developed at level three, the undersigned makes the following Findings of Fact:

Findings of Fact

1. Grievant is employed by Respondent as a custodian on a 260-day contract and is assigned to Sherrard Elementary School.

2. Respondent posted a custodian position at John Marshall High School with a 220-day employment term. The position, prior to becoming vacant, had been held by an employee with a 260-day employment term.

3. After positions became vacant at John Marshall High School, the administration of the Respondent decided to post these positions as 220-day custodian positions.

4. Grievant did not bid on any of the 220-day positions.[1]

5. Assistant Superintendent Wayne Simms indicated that the vacated custodian positions were modified because much of the work for the summer time crews was related to waxing floors; however, the county is moving to rubber flooring that does not require waxing, and is considering installing a flooring system that requires waxing maintenance only every five years. In addition, some custodians with 260-day contracts were using vacation time during the summer months thereby making these employees unavailable to perform the type of work customarily performed while students are not at the facility. Finally, there is a greater need for custodians during the regular school day and after school than during the summer months.

6. Respondent has also modified other custodian contracts by increasing 200-day custodian to 220-day contracts in order to meet the cleaning needs of John Marshall High School.

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*

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[1]In fairness to Grievant, it should be noted that the elementary school in which he currently works will cease to exist as a result of consolidation at the end of the 2008-2009 school year. Grievant wanted to transfer to a school with long-term life expectancy, but he also wanted to maintain the 260-day contract.

Educ., Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he 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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant's primary argument is a custodian with a 220-day employment contract is similarly situated to and entitled to uniformity of benefits and salary of a custodian at the same school with a 260-day employment term with paid vacation. Grievant relies on W. VA. CODE § 18A-4-5b, which provides in part:

> The county board of education may establish salary schedules which shall be in excess of the state minimums fixed by this article.
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> These county schedules shall be uniform throughout the county with regard to any training classification, experience, years of employment, responsibility, duties, pupil participation, pupil enrollment, size of buildings, operation of equipment or other requirements. Further, uniformity shall apply to all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county.

County boards of education are required to provide uniform benefits and compensation only to similarly situated employees, meaning those who have "like classifications, ranks, assignments, duties and actual working days." *Bd. of Educ. v. Airhart*, 212 W. Va. 175, 569 S.E.2d 422 (2002); *Covert v. Putnam County Bd. of Educ.*,

Docket No. 99-40-463 (Feb. 29, 2000); *Stanley v. Hancock County Bd. of Educ.*, Docket No. 95-15-217 (Sept. 29, 1995). Grievants seeking to enforce the uniformity provisions must establish that their duties and assignments are like those of the employees to whom they are attempting to compare themselves. *Locket v. Fayette County Bd. of Educ.*, Docket No. 01-10-477 (Dec. 28, 2001); *Adkins v. Lincoln County Bd. of Educ.*, Docket No. 97-22-165 (Sept. 24, 1997).

Grievant makes the argument that "[t]he real question [issue] relates to the difference in the number of days that a 260-day employee actually works, after subtraction of extra holidays, personal leave, and paid vacation in comparison to the actual number of days that a 220-day works. This question has not yet been addressed directly. The number of days actually worked was alluded to as a factor in *Bair v. Ritchie County Board of Education*, Docket No. 01-43-575, in which a 230-day employee sought uniformity with 261 day employees. However, the deciding factor in *Bair* seemed to be a difference in the actual duties performed. It is unclear as to the importance of the difference in the actual duties." Through a series of calculations and an assumption or two, Grievant advances the theory that the 220-day employee actually works 92% of the days worked by a 260-day employee but is paid only 85% of the salary. Hence, a significant violation of the uniformity requirement set out above.[2]

Grievant does set out an intriguing argument in support of examining the contract term disparity under the uniformity statute; however, he ignores the fundamental legal

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[2]Grievant cites to *Board of Education v. Airhart*, 569 S.E.2d 422 (W. Va. 2002); *Durig v. Board of Education*, 599 S.E.2d 667 (W. Va. 2004); and *Flint v. Board of Education*, 531 S.E.2d 76 (W. Va. 1999).

requirement that he must possess standing to challenge the action of Respondent. Grievant's claim that he would have bid on and accepted the custodian position at John Marshall High School if it had carried a 260-day employment term does not satisfy the standing requirement. Respondent argued at level three that Grievant lacks standing to pursue this grievance because not only was he not affected in any way by the decision of the Board of Education, but he presented no evidence to even remotely indicate that he had any legitimate interest in bidding on the modified positions. The undersigned agrees.

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). Where a grievant does not apply for a vacant position he does not have a sufficient personal stake in the selection to hold standing to file a grievance contesting the selection or the propriety of the posting. *Barber v. Mercer County Bd. of Educ.,* Docket No. 2008-0001-MerED (Aug. 26, 2008); *Sanders v. Pocahontas County Bd. of Educ.*, Docket No. 06-38-430 (May 10, 2007). 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).

A general claim of unfairness or an employee's philosophical disagreement with a policy does not, in and of itself, constitute an injury sufficient to grant standing to grieve. *Jarrell v. Raleigh County Bd. of Educ.*, Docket No. 95-41-479 (July 8, 1996); *McDonald v.*

Hancock County Bd. of Educ., Docket No. 15-88-055-3 (Sept. 30, 1988). Even if the employer has misapplied a statute or its own policies, where the grievant is not personally harmed, there is no cognizable grievance. *Elliott v. Randolph County Bd. of Educ.*, Docket No. 98-42-304 (May 26, 1999).

In the instant case, Grievant does not dispute that he failed to apply for the position of "Custodian II/III" after it was posted by Respondent with a bid period beginning on May 22, 2008, and ending on May 29, 2008. Under this set of facts, it is clear that Grievant does not have a personal stake in the employment term of this position.[3] In fact, Grievant continues to work under a 260-day contract. To address the propriety of the contract terms for the 220-day position would effectively result in the issuance of a merely advisory opinion, and the Grievance Board has repeatedly refused to issue advisory opinions. *Fiser v. Dep't of Health & Human Res./Mildred Mitchell-Bateman Hosp.*, Docket No. 2008-1698-DHHR (Mar. 4, 2009); *Collins v. Dep't of Transp./Div. of Highways*, Docket No. 02-DOH-227/248 (Jan. 30, 2003).

The following Conclusions of law support the Decision reached:

Conclusions of Law

1. 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

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[3]Having no standing to challenge the action of Respondent effectively ends the need for further discussion on the issue raised by Grievant. The initial grievance form raised the claim of discrimination; however, no evidence or argument was offered to prove any elements of that claim. The Grievance Board has long held that elements or allegations of the grievance which are raised, but not pursued or developed will be considered abandoned. *Church v. McDowell County Bd. of Educ.*, Docket No. 33-87-214 (Nov. 30, 1987).

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).

2. Where a grievant does not apply for a vacant position he does not have a sufficient personal stake in the selection to hold standing to file a grievance contesting the selection or the propriety of the posting. *Barber v. Mercer County Bd. of Educ.,* Docket No. 2008-0001-MerED (Aug. 26, 2008); *Sanders v. Pocahontas County Bd. of Educ.*, Docket No. 06-38-430 (May 10, 2007). 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).

3. Grievant failed to establish any injury as a result of the posting of the 220-day custodian positions and had no standing to challenge the posting.

4. The Grievance Board does not issue advisory opinions. *Bragg v. Dep't of Health & Human Res.*, Docket No. 03-HHR-348 (May 28, 2004); 156 C.S.R. 1 § 6.21 (2008).

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *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: September 18, 2009

Ronald L. Reece
Administrative Law Judge