WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

ANTHONY PAUL DANIEL,
Grievant,

v. **Docket No. 2008-1762-FayED**

FAYETTE COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Anthony Paul Daniel ("Grievant") filed this grievance against his employer, Respondent Fayette County Board of Education ("BOE"), on June 11, 2008, claiming the BOE violated "18A-4-7a relating to job posting, filling of vacancies and preferred recall." As indicated by his amended request for relief, Grievant seeks "assurances that all vacancies (including ones like the position in question) be posted and the most qualified be selected for the position." Thereafter, on or about September 11, 2008, Grievant filed a motion for default. By Order entered February 29, 2009, the undersigned Administrative Law Judge ("ALJ") found that the BOE failed to timely render a Level One decision, and the Grievant prevailed by default.

On May 26, 2009, a default "remedy" hearing was conducted to determine if the Grievant was entitled to a remedy. Grievant appeared in person and through his representative, Sidney Fragale, AFT-West Virginia, and the BOE appeared by and through its counsel, Erwin L. Conrad, Esquire. After presentation of the evidence, the parties were afforded the opportunity to submit proposed findings of fact and conclusions of law on or before June 15, 2009, and this matter became mature for decision on this date. Both parties submitted proposed findings of fact and conclusions of law.

Synopsis

Grievant seeks to require the BOE to post positions in a particular fashion. However, Grievant did not apply for the position posting that led to the filing of this grievance. Grievant filed this grievance so this Board could clear up an issue of statutory interpretation. The West Virginia Public Employees Grievance Board does not issue advisory opinions. Accordingly, this grievance is **DENIED**.

Based upon a detailed review of the record in its entirety, the undersigned makes the following findings of fact:

Findings of Fact

1. Grievant is a Title I Teacher at Oak Hill Elementary School. He is also the Faculty Senate Chair of Oak Hill Elementary School.

2. On June 11, 2008, Grievant filed this matter claiming that the BOE violated "18A-4-7a relating to job posting, filling of vacancies and preferred recall." As relief, Grievant seeks "assurances that all vacancies (including ones like the position in question) be posted and the most qualified be selected for the position." Default Hearing, Joint Exhibit 6.

3. The BOE failed to timely render a Level One decision, and Grievant prevailed in this matter. *See Order Granting Default* (entered February 29, 2009).

4. The underlying grievance concerns the manner in which a Teacher-Elementary Education K-6 position was posted, taken down, and filled with an individual off a preferred recall list. *See* Remedy Hearing, Joint Exhibit 1, Testimony of Bryan Parsons.

5. Grievant did not apply for the position in question. Remedy Hearing, Testimony

of Anthony Paul Daniel.

6. Grievant does not seek the position in question. *Id*.

7. Grievant seeks clarification of the law. *Id.* Further, Grievant seeks that future positions be posted instead of filled from a preferred recall list. *Id*.

Discussion

By Order entered February 29, 2009, it was determined that the Grievant prevailed because the BOE failed to render a timely Level One decision. *See* W. VA. CODE § 6C-2-3(b)(1)(2007). Hence, the only issue to be addressed is whether the remedy requested by the Grievant is "contrary to law or contrary to proper and available remedies." W. VA. CODE § 6C-2-3(b)(2). *See also* 156 C.S.R. 1 § 7 (2008).

Respondent BOE has the burden of proving, by a preponderance of the evidence, that the remedy requested by the Grievant is contrary to law or contrary to proper and available remedies. *Dunlap v. W.Va. Dep't Envtl. Prot.*, Docket No., 2008-0808-DEP (Mar. 20, 2009). The 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).

The BOE has met its burden of proving that the remedy requested is "contrary to proper and available remedies." W. VA. CODE § 6C-2-3(b)(2). The Grievant does not seek a position or back pay. He has not applied for the position in question and is not interested in the position in question. Grievant merely asks this tribunal to issue an advisory opinion so that in the future, positions are posted and filled under WEST VIRGINIA CODE § 18A-4-7a instead of utilizing a preferred recall list. *See* Remedy Hearing, Testimony of Anthony Paul

Daniel.

This grievance board does not 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). Further, this tribunal has continuously refused to deal with substantive issues where the relief sought is "speculative or premature, or otherwise legally insufficient." *Dooley v. Dept. 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). Relief that seeks a proclamation that a legal interpretation is correct or incorrect, "but provides no substantive, practical consequences for either party, is illusory, and unavailable . . . ." *Miraglia v. Ohio County Bd. of Educ.*, Docket No. 92-35-270 (Feb. 19, 1993).[1] Grievant seeks an advisory opinion to an abstract controversy. Accordingly, this grievance must be denied.

The following conclusions of law are appropriate in this matter:

Conclusions of Law

1. In the "remedy" phase of a default hearing, a respondent has the burden of proving, by a preponderance of the evidence, that the remedies requested by the grievant are "contrary to law or contrary to proper and available remedies." W. VA. CODE § 6C-2-

[1] Pursuant to the Procedural Rules of the West Virginia Public Employees Grievance Board, 156 C.S.R. 1 § 6.11(2008), "[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*." (Emphasis added). The remedy requested in this grievance is wholly unavailable because this tribunal does not issue advisory opinions.

3(b)(2); *Dunlap v. W.Va. Dep't Envtl. Prot.*, Docket No., 2008-0808-DEP (Mar. 20, 2009).

2. The 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).

3. 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).

4. "[A]bstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues]." *Bragg v. Dep't of Health & Human Res.*, Docket No. 03-HHR-348 (May 28, 2004); *Burkhammer v. Dep't of Health & Human Res.*, Docket No. 03-HHR-073 (May 30, 2003).

5. The Respondent BOE has established, by a preponderance of the evidence, that the Grievant seeks a remedy "contrary to law" and "contrary to proper and available remedies" because Grievant seeks an advisory opinion. W. VA. CODE § 6C-2-3(b)(2).

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 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* 156 C.S.R. 1 § 6.19 (2008).

Date: July 13, 2009

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Mark Barney
Administrative Law Judge