THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DANIEL FROST,
Grievant,

v. **Docket No. 07-HE-349R**

BLUEFIELD STATE COLLEGE,
Respondent,

and

DIANA GIBSON,
Intervenor.

DECISION ON REMAND

This matter comes before the undersigned Administrative Law Judge upon remand from the Circuit Court of Kanawha County, by Order entered December 16, 2008, which orders that, "the Decision of the West Virginia Public Employees Grievance Board, dated June 13, 2008, is hereby **REVERSED** and this matter is **REMANDED** for an adjudication on the merits of Frost's grievance."

In the instant grievance, level one was bypassed by Grievant. Subsequently, a level two conference was conducted. At level two, no one representing the Respondent raised the issue of whether the grievance was timely filed. The grievance was denied at level two. Grievant appealed to level three. Respondent then raised the issue of whether or not the grievance was filed in a timely manner. The grievance was denied at level three. Grievant appealed, and Respondent maintained the grievance was not filed in a timely manner. The Decision in this grievance, issued by the undersigned, recognized the affirmative defense of timeliness raised by the Respondent, and denied the grievance on the basis that it was not timely filed.

Grievant appealed the level four decision to the Circuit Court of Kanawha County, and the remand followed. In reversing, the Circuit Court held, "[i]n drafting W.Va. Code § 29-6A-3(a)(2), the Legislature obviously made an inadvertent error by misusing the term 'hearing.' Although the statute, as written, states that the timeliness issue must be raised at or before a level two 'hearing,' the Legislature was clear in stating that the issue must be raised by level two. The Court agrees with Frost's assertion that it does not matter whether the event at level two is a 'hearing' or a 'conference' because the employer participates in the level two 'conference' and has an opportunity to raise the timeliness defense at that time. If the state employer fails to do so, then it has waived the right to assert the timeliness defense at a later date."

In compliance with the Order of the Circuit Court of Kanawha County, the undersigned reconsiders the final decision in the grievance based upon the merits of the case. The undersigned requested the parties notify the Grievance Board if, in light of the remand, they desired to present any additional evidence to address the merits of the grievance. All parties have responded that they desire to have the matter decided upon the record developed at the lower levels, and at the level four hearing conducted on January 31, 2008. This case became mature for decision on remand upon receipt of the last of the parties' responses indicating no desire to conduct any further level four proceedings on February 2, 2009.

Synopsis

In March of 2007, Clyde Harrison, Director of the Physical Plant at Bluefield State College, retired from that position. Instead of posting the position as a vacancy, the college continued to employ Mr. Harrison as Acting Director of the Physical Plant under a

contractual arrangement. On the days that Mr. Harrison is not present on campus, the Physical Plant is directed by Administrative Assistant, Sr., Ms. Diana Gibson. Grievant seeks the posting of the position of Director of the Physical Plant. This grievance is denied because Grievant lacks standing regarding the issue of the posting of the Director's position.

The undersigned, having carefully reviewed the record of the grievance, makes the following findings of facts relevant to the merits of the matter.

Findings of Fact

1. Grievant is employed at Bluefield State College ("BSC") as a Counselor 2, Pay Grade 17.

2. Grievant expressed to BSC an interest in the position of Director of the Physical Plant, upon the retirement of the Director, Clyde Harrison.

3. Mr. Harrison retired from BSC on March 1, 2007. At that time, Intervenor Diana Gibson held the position of Administrative Assistant, Senior, Pay Grade 17, in the Physical Plant at BSC. Ms. Gibson had previously served in the Physical Plant as Administrative Assistant, Pay Grade 15.

4. Instead of posting the position as a vacancy, BSC employed Mr. Harrison to continue in his role, but at a reduced rate of pay and at a reduced number of hours. This contractual arrangement between Mr. Harrison and BSC has saved the institution more than $32,000.00 a year.

5. BSC Board of Governors Policy No. 24 grants the President of BSC wide latitude in making personnel decisions, such as the re-employment of Mr. Harrison.

6. The duties for the position of the Director of Physical Plant include directing the administration of the physical plant maintenance and operations; directing the repair of facilities; directing an effective maintenance program; directing physical resources allocated to the physical plant; participating with the vice president and architects in developing long and short range capital improvements and building improvement programs; responsibility for fire safety and health code compliance; directing programs to reduce energy cost and consumption.

7. On the days that Mr. Harrison is not present on campus, the Physical Plant is directed by Intervenor Gibson. She has been fulfilling many of the Physical Plant Director's duties since assuming her current position, some ten years ago.

8. Grievant seeks the posting of the position of Director of the Physical Plant.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his claim by a preponderance of the evidence. *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). "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).[1]

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[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-

Grievant is challenging BSC's decision not to post the Director of the Physical Plant's position when Mr. Harrison retired. Grievant asserts that while the President has final authority and responsibility for personnel actions at the institution, such authority is not without limitation and when the exercise of that authority results in the violation of the requirements of policy itself, it is improper and subject to review. Grievant points to a violation of § 2.1 of Policy No. 42 of the Board of Governors, which provides in part, "all full time and part time regular vacancies will be solicited through advertising." BSC counters that Grievant lacks standing to challenge the decision because he has not demonstrated how he is harmed by the Director's position not being posted.

This Board has previously ruled that colleges and universities must develop a policy for posting of classified positions both internally and externally in order to provide employees adequate time to make application for positions. *Brumfield v. Higher Education Policy Comm'n/ Marshall University* Docket No. 02-HEPC-180 (Oct. 22, 2002). Bluefield State College has such a policy in place. Pursuant to § 2.1 of Policy No. 42 of the Board of Governors, "all full time and part time regular vacancies will be solicited through advertising." In fact, BSC does not dispute or attempt to hide the fact that a vacant classified position exists at the institution. Level Four Hrg. Tr. 67 (Jan. 31, 2008).

With that said, it should be noted, this matter involves the intermeshing of several rules and policies. The primary purpose of the classification system within the college and

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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.

university system is to maintain uniformity throughout the state with respect to work functions, job titles, and pay.[2] The undersigned takes administrative notice of Title 133, Series 8 of the C.S.R., relating to personnel administration pertaining to the Higher Education Policy Commission.

BSC Board of Governors' Policy No. 24 addresses, among other topics, the responsibilities of the President of BSC; section 3.1 indicates that the President has the general authority and responsibility for the institution and is further responsible for keeping the Board informed regarding the institution in a timely and appropriate manner. Grievant's level three exh. 10. This policy also provides that the President is charged with several specific responsibilities, including "developing a competent administrative organization and staff to insure effective and efficient management of the institution" and "maintaining lawful, equitable and efficient personnel programs, including appointment of qualified persons to the faculty and staff and promotion, retention, or dismissal for cause of the same, due regard for the best interest of the college." Policy 24 at 3.3.3 and 3.4.5. This policy provides that the President is given final authority and responsibility for personnel actions at the institution and the Board of Governors delegates all such authority.

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[2]The Mercer classification system is largely a "quantitative" system, in which the components of each job are evaluated using a point factor methodology. The focus in Mercer decisions issued by this Grievance Board is upon the point factors the grievant is challenging. *Zara, et al., v. Bd. of Trustees, W. Va. Univ.*, Docket No. 94-MBOT-817 (Dec. 12, 1995). While some "best fit" analysis of the definitions of the degree levels is involved in determining which degree level of a point factor should be assigned, where the position fits in the higher education classified employee hierarchy must also be evaluated. In addition, this system must, by statute, be uniform across all higher education institutions; therefore, the point factor degree levels are not assigned to the individual, but to the job title. *Burke, et al., v. Bd. of Directors, Fairmont State College*, Docket No. 94-MBOD-349 (Aug. 8, 1995).

The primary thrust of Grievant's argument is that, as a part time regular employee, the evidence establishes that Mr. Harrison was not hired in compliance with Board of Governor's Policy No. 42. While vacancies are typically posted, BSC aptly pointed out at level four that the evaluation of positions and salary is based on "existing economic, budgetary, and financial conditions." 133 C.S.R. 8 § 3.1. BSC, through Shelia Johnston, Vice President for Financial Administrative Affairs explained, "[t]he institution, because of legislation in recent years, has had some hardships related to funding and will continue to do that over the next time frame. I'm not sure how long that will be. In that process, as [sic] always been the case, we evaluate positions as they become vacant and so forth. That's not something new that we do." Level Four Hrg. Tr. 71 (Jan. 31, 2008). BSC's salary schedule is "subject to the availability of funds and shall only be implemented when new funds are specifically appropriated by the Legislature for funding . . ." 133 C.S.R. 8 § 3.2.

This set of facts presents the undersigned with something of a balancing test. Whether the scales tip on the side of ordering the position be posted pursuant to policy, or do the scales tip in favor of the side which would support a finding that this is a discretionary decision for which this Board has no authority to substitute its judgement. An interesting intellectual exercise in the realm of higher education; however, unnecessary within this set of facts because the Grievant lacks standing to challenge the decision not to post the position.

In support of his contention, Grievant questions the Intervenor's paygrade and responsibilities associated with extra responsibilities in performing duties at the Physical Plant that were over those of her classification. This argument is misplaced. 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 points out that the Intervenor has been called upon to assume additional duties outside the duties and responsibilities for the position of Administrative Assistant Senior. Although Grievant disagrees with the Intervenor's upgrade and her job duties, he has failed to show how he is affected by the same. Even if Respondent were to post the

Director position and Grievant was to apply for the position, Grievant has failed to establish that the Intervenor's Senior Administrative Assistant's duties or pay would adversely affect him.

Moreover, Grievant did not offer any direct evidence that he was qualified for the Director's position. 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). Accordingly, without some showing that Grievant was qualified for the Director's position, standing to challenge the decision not to post the position has not been established. Grievant cannot satisfy the standing requirement by arguing that another employee, Intervenor, is acting outside her assigned responsibilities and paygrade.

The following conclusions of law support the decision reached.

Conclusion of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his claim by a preponderance of the evidence. *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). "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).

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. 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).

4. Grievant lacks standing because he did not offer any direct evidence that he was qualified for the Director of the Physical Plant's position.

Accordingly, this 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. *See* W. VA. CODE § 29-6A-7 (See footnote 1). 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 appealing party must also provide the

Grievance Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: February 11, 2009

Ronald L. Reece
Administrative Law Judge