THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

CRYSTAL LEA CROSSLAND and
SUSAN HENDERSON CLOSSON,
Grievants,

v. **DOCKET NO. 2010-0840-CONS**

MARION COUNTY BOARD OF EDUCATION,
Respondent.

DISMISSAL ORDER

These grievances were filed by Grievants, Crystal Lea Crossland and Susan Henderson Closson, on August 6, 2009, against their employer, the Marion County Board of Education. The statement of grievance, as refined on the form filed at level three, reads:

> Grievants contend that the Respondent erred when it failed to post a 240-day secretarial position at North Marion High School and permitted the incumbent clerk/secretary to work additional days. Grievants allege a violation of West Virginia Code 18A-4-5b, 18A-4-8b, 18-5-39, & 6C-2-2 (discrimination/favoritism).

As relief Grievants seek:

> the posting of a 240-day secretarial position at North Marion High School or posting of a 20-day summer position or extracurricular assignment, and /or the restoration of uniformity among clerks/secretaries. In addition, Grievants seek payment of 15 days of salary & benefits for the summer of 2009.

A hearing was held at level one on November 13, 2009, and the grievance was denied at that level. Grievants appealed to level two on December 23, 2009, and a mediation session was held on March 10, 2010. Grievants appealed to level three on March 23, 2010. A level three hearing was held before the undersigned Administrative Law Judge on May 27, 2010, at the Grievance Board's Westover office. Grievant was

represented by John Everett Roush, Esquire, West Virginia School Service Personnel Association, and Respondent was represented by Stephen R. Brooks, Esquire, Flaherty Sensabaugh Bonasso PLLC. This matter became mature for decision on July 1, 2010, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievants are secretaries who have been allowed the opportunity to work four to six extra days beyond their employment contracts during the summer at their schools. During the summer of 2009, the Principal at North Marion High School asked that he be allowed to offer 20 days to the secretarial staff beyond their employment contracts, in order to get work completed which the secretaries had not been able to complete during their normal work hours. This request was approved for the summer of 2009 only. Secretaries are not required to work these extra days, and they are proposed and approved as needed. Only one secretary at North Marion agreed to work these "optional" days, and she worked 16 days, not 20. Grievants did not demonstrate that they were entitled to be given these extra hours of work, and any ruling that the hours should be posted or assigned by a seniority based rotation list in the future would be speculative, as the need for optional hours is determined each year based upon the needs of each school. No relief can be granted.

The following Findings of Fact are properly made from the record developed at levels one and three.

Findings of Fact

1. Grievant Crossland is employed by the Marion County Board of Education ("MBOE") as a secretary at East Fairmont High School. She works in the counseling

department, and does data entry into the computer system, which is commonly referred to as WVEIS.

2. Grievant Closson is employed by MBOE as a secretary at Fairmont Senior High School. She also enters data into WVEIS.

3. During the 2008-2009 school year, four secretaries were employed at North Marion High School by MBOE. Barbara Golden was employed as the main office secretary under a 240-day contract. Cathy White was the secretary for finance, and had a 240-day contract. Anita Besedich was employed under a 220-day contract as the secretary to the Assistant Principal, and Janet Knoll was employed under a 200-day contract as the WVEIS clerk, or counselor's secretary.

4. During the 2008-2009 school year, Ms. Golden bid on a position, and was awarded the position, and she vacated her secretarial position at North Marion in January 2009. MBOE personnel had previously determined that North Marion needed three secretaries, not four, and Ms. Golden's position was not filled after the end of the school year. Ms. Golden's position was filled by a substitute employee through the end of the school year in order to allow the Principal at North Marion time to study the remaining secretarial positions and properly distribute Ms. Golden's duties to the remaining staff.

5. Ms. Besedich was given most of Ms. Golden's duties, but her contract term was not altered. The contracts of Ms. Knoll and Ms. White were not altered either.

6. In Marion County, if the Principal of a school believes he needs additional secretarial help during the summer, he puts in a request with the Superintendent, who decides whether these "optional" days will be made available to the secretaries at the school. This decision is made each summer. Some summers, there may be no optional

days offered to secretaries, and the number of optional days may vary at each school from summer to summer. If optional days are made available, the secretaries are offered the opportunity to work more days than their contract terms, but no one is required to work extra days. The days to be worked are spread out throughout the summer, as needed, and there is no guarantee to the employee that he or she will actually work the number of optional days approved.

7. During the summer of 2009, both Grievants were offered the opportunity to work an additional five days each at their respective schools, because the Principals of their schools needed additional help, and both Grievants accepted this work.

8. During the summer of 2007, Grievant Crossland worked four and a half optional days, and during the summer of 2008, she worked six optional days.

9. The Principal of North Marion High School asked for 20 additional optional secretarial days during the summer of 2009, and his request was approved. All three secretaries at North Marion were offered the opportunity to work these days, as needed, but only Ms. Knoll opted to work during the summer. She worked an additional 16 days beyond her contract during the summer of 2009 at North Marion High School. Her duties over these 16 days were general secretarial duties.

10. The record does not reflect whether North Marion High School, or any other school in Marion County would offer any optional days for the summer of 2010.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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).

Grievants' first argument is that Respondent was required to post a 240-day secretarial position when Ms. Golden left North Marion, although at least one of the Grievants stated she was not sure whether she would bid on such a position if it was posted. As has been stated before, "[w]hen a position is vacated, it is within the board's discretion to determine whether or not the position is still needed, and, if not, to assign duties previously performed by that individual to qualified employees with their consent and without additional pay. *Richardson v. Putnam County Bd. of Educ.*, Docket No. 97-40-189 (Oct. 15, 1997)[(*aff'd* Putnam County Cir. Ct., Appeal No. 97-C-372 (June 29, 1998))]. Respondent had no obligation to post a vacancy for a position which no longer existed. *See Id*." *Vance v. Jefferson County Bd. of Educ.,* Docket No. 02-19-123 (Sept. 20, 2002). As of the end of the 2008-2009 school year, MBOE believed that the duties performed by Ms. Golden could be distributed among the remaining three secretaries. The Principal of North Marion recognized it was going to take him some period of time to determine how best to accomplish this task, and a substitute employee filled the position through the end of the school year. In addition, he requested 20 additional optional days just for the summer of 2009, during this transition, and this request was approved. There is nothing

in the record to indicate that the need for the additional secretarial position has continued into the 2009-2010 school year. MBOE was not required to post a vacant position which it no longer needed.

Grievants next argued that the 20 days should have been posted as a summer position, pursuant to W. VA. CODE § 18-5-39, and that it was a violation of the uniformity provisions of W. VA. CODE § 18A-4-5b. Grievants did not explain how the uniformity provisions would be applicable here, other than to say it is inappropriate for Ms. Knoll to work extra days. Grievants further alleged discrimination and favoritism.

Grievants have benefitted for more than one summer, including the summer of 2009, from the optional days offered to them by their respective Principals, and had no problem with the manner in which optional days were parceled out until this very same benefit was extended to Ms. Knoll. It should be pointed out that were the undersigned to find that the manner in which Marion County offers optional days is improper, this very same ruling would apply to the optional days which would be offered to Grievants at their schools as well.

However, the undersigned concludes that Grievants have requested relief which cannot be granted by the Grievance Board. The Procedural Rules of the W. Va. Public Employees Grievance Board provide that, "[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." 156 C.S.R. 1 § 156-1-6 6.11(2007). In instances where "it is not possible for any actual relief to be granted, any ruling issued by the undersigned regarding the question raised by this grievance would merely be an advisory opinion. 'This Grievance Board does not issue advisory opinions.

Dooley v. Dep't of Transp., 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).' *Priest v. Kanawha County Bd. of Educ.,* Docket No. 00-20-144 (Aug. 15, 2000)." *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002).

Grievants have requested as relief that each of them be paid for 15 days, representing the difference between the number of days offered to Ms. Knoll, and the number of optional days each of them worked.[1] First, both Grievants could not have been entitled to work an additional 15 days. There were only 20 days available, maximum, not 40, and only one or the other of the Grievants could work these days. Second, Grievants did not demonstrate that had the North Marion optional days been put out for bid in some fashion that they would have been entitled to these additional days. Grievants did not demonstrate that they were the most senior, qualified individuals. There is no way to determine who would have bid on these days, or who would have been selected. Finally, as to the relief that the days be posted in the future, there is no indication that any optional days will be approved for any school in the future, so this is speculative relief. However, were the undersigned to find that any optional days at North Marion would need to be posted or that a seniority based rotation list should be used to determine who would be allowed to work the additional days, which would seem to be appropriate given the pervasive statutory provisions governing school service personnel assignments, this ruling

[1] As it turned out, North Marion did not utilize all of its approved days. Ms. Knoll only worked 16 days, thereby reducing the number of days sought by Grievants under their formula to 11.

would not apply just to optional days for secretaries at North Marion. It would apply to *all* schools, including East Fairmont High School and Fairmont Senior High School.

The following Conclusions of Law support the Dismissal of this grievance.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *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. "When a position is vacated, it is within the board's discretion to determine whether or not the position is still needed, and, if not, to assign duties previously performed by that individual to qualified employees with their consent and without additional pay. *Richardson v. Putnam County Bd. of Educ.*, Docket No. 97-40-189 (Oct. 15, 1997)[(*aff'd* Putnam County Cir. Ct., Appeal No. 97-C-372 (June 29, 1998))]. Respondent had no obligation to post a vacancy for a position which no longer existed. *See Id*." *Vance v. Jefferson County Bd. of Educ.,* Docket No. 02-19-123 (Sept. 20, 2002).

3. "'This Grievance Board does not issue advisory opinions. *Dooley v. Dep't of Transp.,* 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).' *Priest v. Kanawha County Bd. of Educ.,* Docket No. 00-20-144 (Aug. 15, 2000)." *Smith v. Lewis County Bd. of Educ.*, Docket No. 02-21-028 (June 21, 2002).

4. Grievants have requested relief which is not available. When it is not possible for any actual relief to be granted, any ruling issued by the undersigned regarding the question raised by this grievance would merely be an advisory opinion.

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

Any party may appeal this Dismissal Order 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 appealing party must also provide the Board with the civil action number so that the certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: November 23, 2010