SALLIE JOHNSON and PATRICIA WRIGHT,

Grievants,

v. DOCKET NO. 98-20-072

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Sallie Johnson and Patricia Wright, Grievants, filed separate grievances against their employer, the Kanawha County Board of Education, Respondent, on November 3, 1997. Grievants allege that they were changed from Phase I/II of the "Professional Growth & Development" evaluation cycle to the "performance evaluation" cycle for the 1997-98 school year without just cause and in an arbitrary and capricious manner. They allege a violation of State Board of Education Policy 5310, Article 10, Section 10.3. Grievants ask to be taken off performance evaluation and returned to the Phase I/ Phase II evaluation process.

Grievants were denied relief at Level I on December 9, 1997. After being denied at Level II on March 9, 1998, Grievants elected to bypass consideration at Level III, as is permitted by W.Va. Code § 18A-29-4, and advanced their claims to Level IV.

On March 10, 1998, the Grievance Board received Grievants' appeal of the Level II decision. On March 19, 1998, the parties agreed to submit the grievance on the record as developed at Levels I and II of the grievance procedure and waive the Level IV hearing. On April 2, 1998, Administrative Law Judge Brenda Gould consolidated the twogrievances. The case originally became mature for decision on April 10, 1998, with receipt of the Grievant's proposed Findings of Fact and Conclusions of Law. For administrative reasons, the case was transferred to this Administrative Law Judge for decision on May 5, 1998. The decision was then held in abeyance at the request of the Grievants in order to give the parties a chance to resolve the issue voluntarily. On or about August 19, 1998, the Grievant's representative informed the Grievance Board that a settlement could not be reached and requested that a decision be issued.

The following findings of fact are appropriately derived from the record.

FINDINGS OF FACT

1. Grievant, Sallie Johnson, is employed as a special education resource room teacher at J.E. Robins Elementary School.

2. Prior to the start of the 1997-98 school year, Grievant Johnson was informed she would be teaching the same position (special education resource room) as she did the prior year.

3. Grievant, Patricia Wright, was informed prior to the start of the 1997-98 school year that she would be teaching a kindergarten class instead of the third grade class she taught the previous year. Grievant had previously taught kindergarten and was certified to teach grades K-6.

4. At the beginning of the 1997-98 school year, Beverly O'Cull, principal of J.E. Robins Elementary School informed her entire faculty that she was removing each of them from the Professional Growth and Development evaluation cycle (Phase I/II) and placing all of them on Performance Evaluation status.

5. Several teachers at the school objected to being placed on PerformanceEvaluation status. After discussions with her supervisor, Patricia Petty, Principal O'Cull then rescinded her decision to place the entire faculty in this status and placed approximately five (5) teachers into this status.

6. After hearing objections from some of the aforementioned five (5) teachers, Principal O'Cull rescinded her decision and placed only two (2) teachers, Grievants Wright and Johnson, on Performance Evaluation status for the 1997-98 school year.

7. Both Grievants have more than seven (7) years teaching experience and had been in Phase II of the evaluation process during the 1996-97 school year.

DISCUSSION

As a grievance about an employee's evaluation is not a disciplinary grievance, a grievant has the burden of proving her case by a preponderance of the evidence. Baker v. Fayette County Bd. of Educ., Docket No. 94-10-427 (Jan. 24, 1995).

State Board of Education Policy 5310, Article 10, Section 10.3 (126CSR142) essentially provides that:

> For employees beginning their seventh year, a two (2) year professional growth and development cycle will be utilized in lieu of the performance evaluation. The cycle will alternate between two (2) phases, phase I and phase II, provided; a) the employee's performance was rated satisfactory during the previous two consecutive evaluations, b) the employee develops a professional growth and development plan, and c) the employee remains in the same or similar position for two consecutive evaluations. If all provisos are not met, the employee shall receive one performance evaluation per year.

State Board of Education Policy 5310, Article 10, Sections 10.3, 10.3.1, and 10.3.2 (126CSR142) are fairly clear. A classroom teacher beginning their seventh (7) year of teaching is to be put on the Phase I/Phase II professional development cycle. The first yearof the cycle is Phase I. At the end of that first year, the "supervisor will recommend either that the employee continue to Phase II or return to the performance evaluation." Since both Grievants were in Phase II of the cycle during the 1996-97 school year, the option of returning to the performance evaluation was not available to Respondent.

Section 10.3.2 indicates that Phase II is solely a self-evaluation year with little or no input from a supervisor. The teacher self-evaluates the progress made and retains all records and data. Unlike the other two sections, there is no language in 10.3.2 which provides for a teacher to be returned to the performance evaluation. It seems clear that a teacher in Phase II of the professional growth and development cycle should be returned to Phase I the following year unless one of the three provisos of 10.3 is not met. 10.3 states that a teacher should remain on the Phase I/Phase II cycle unless they: 1) receive two consecutive unsatisfactory performance evaluations; 2) do not develop a professional growth and development plan; or 3) do not remain in the same or similar position. If any one of these three events occurs, the teacher shall then receive one written performance evaluation the following year. It appears that failure to meet one of these three requirements is the only way a teacher in Phase II of the cycle can be returned to a performance evaluation requirement the following school year.

The resolution of this grievance, however, essentially requires that the grievance either be denied, or the Grievants be given the relief they request. In the instant case, Grievants had sought to be returned to the Phase I cycle for the 1997-98 school year. The 1997-98 school year is now over and, in fact, the 1998-99 school year has begun, therefore, there is no additional relief available to them that could be granted by this Grievance Board. If for some reason the Grievants are again moved to performance evaluation from the Phase I/Phase II cycle, this decision would not preclude them from filing a grievance in the future. Because there is no remedy now available to Grievants through the grievance process, this grievance has become moot. As this Grievance Board has consistently held, relief which is speculative in nature, or if granted would result in a mere advisory opinion, is not available from the Grievance Board. Bryant v. Fayette County Bd. of Educ., Docket No. 91-10-297

(Mar. 13, 1992); Smith v. Lincoln County Bd. of Educ., Docket No. 89-22-714 (Feb. 22, 1990); Wilburn v. Kanawha County Bd. of Educ., Docket No. 20-88-089 (Aug. 29, 1988); Procedural Rules of the West Virginia Education & State Employees Grievance Bd. § 4.20 156 C.S.R. 1 (1996). Grievants have failed to state a cause of action upon which relief may be granted at this time.

CONCLUSIONS OF LAW

1. In a non-disciplinary matter, the burden of proof is upon the grievants to prove the elements of their grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar. 28, 1996).

2. Relief which is speculative in nature or if granted would result in a mere advisory opinion is not available from the Grievance Board. Bryant v. Fayette County Bd. of Educ., Docket No. 91-10-297 (Mar. 13, 1992); Smith v. Lincoln County Bd. of Educ., Docket No. 89-22-714 (Feb. 22, 1990); Wilburn v. Kanawha County Bd. of Educ., Docket No. 20-88-089 (Aug. 29, 1988); Procedural Rules of the West Virginia Education & State Employees Grievance Bd. § 4.20 156 C.S.R. 1 (1996).

Accordingly, this grievance is **DENIED**.

Any party may appeal this DECISION to the Circuit Court of Kanawha County andsuch appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

DATE: September 30, 1998

_____

RANDY K. MILLER

ADMINISTRATIVE LAW JUDGE