**JOSEPH KOCHALKA,**

**Grievant,**

**v.** **Docket No. 02-25-173**

**MARSHALL COUNTY BOARD OF EDUCATION,**

**Respondent.**

## D E C I S I O N

Grievant, Joseph Kochalka, employed by the Marshall County Board of Education (MCBE) as a teacher filed a grievance at level two on April 4, 2002, in which he alleged violations of W. Va. Code §§ 18A-2-2 and 18A-4-7a when his employment was terminated, and he was placed on the preferred recall list. (See footnote 1) For relief, Grievant requested that the termination be rescinded, and that he be reinstated as a full-time teacher of Spanish at John Marshall High School (JMHS). The grievance was denied by MCBE Superintendent David Wood at level two, and Grievant elected to bypass consideration at level three. Appeal was made to level four on July 11, 2002. A conference call was conducted with Grievant's WVEA representative Owens Brown, and MCBE counsel Howard E. Seufer, Jr., of Bowles Rice McDavid Graff and Love, at which time it was agreed to submit the grievance for decision on the lower-level record, supplemented with proposed findings of fact and conclusions of law filed on or before October 31, 2002.

The essential facts of this matter are undisputed and may be set forth as the following formal findings of fact.

### Findings of Fact

1. Grievant, a teacher with thirty-two years of experience and certified inSpanish and Social Studies (7 - 12), was employed by MCBE beginning with the 1999- 2000 school year as a teacher of Spanish at Union Junior High School (UJHS) and JMHS.

2. MCBE voted to close UJHS at the end of the 2001-2002 school year. Ninth grade students were to attend JMHS beginning with the 2002-2003 school year.

3. Teachers assigned to UJHS were transferred, or subject to a reduction in force if they did not have enough seniority to maintain a position with MCBE.

4. On March 15, 2002, Grievant was notified that the Superintendent would recommend his

employment be terminated. Following a hearing before MCBE on March 26, 2002, Grievant was advised that his employment was to be terminated at the end of the 2001-2002 school year, and his name placed on the preferred recall list.

5. On May 24, 2002, MCBE posted vacancies for two teachers of Spanish at JMHS. These positions were subsequently filled with teachers who were certified to teach Spanish and had greater seniority than Grievant.

6. As the result of a legal challenge to MCBE's decision to close UJHS, an Order staying the closing of the school was issued on June 18, 2002. UJHS was accordingly opened for the 2002-2003 school year; however, the ninth grade students were sent to JMHS as planned.

7. On June 27, 2002, MCBE rescinded Grievant's termination and restored him to his previous assignment as a teacher of Spanish at UJHS/JMHS.

8. Subsequently, Grievant applied for a position teaching Spanish at Moundsville Junior High School. MCBE approved his transfer on July 18, 2002, effective August 21, 2002.

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. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); 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). See W. Va. Code §18-29-6.

Grievant argues that the termination of his employment in March 2002 was improper since there remained a need for his services, as evidenced by the subsequent posting of two positions for teachers of Spanish. Grievant further argues that his position at JMHS should have been expanded to full-time without posting it as a new position, since it was simply a schedule adjustment adding similar duties. MCBE asserts that rescinding the termination renders the complaint moot. Grievant responds that the Order staying closure of UJHS has placed him in the precarious position of possibly being riffed again, he has not received the requested relief of being placed into one of the full-time Spanish positions at JMHS, and if the reduction in force was illegal he would have been placed into one of those positions.

Grievant's arguments regarding statutory violations became moot when the termination of his employment was rescinded by MCBE. While he may again be subject to a reduction in force, and his

employment terminated due to his relative lack of seniority, a rescinded termination in 2002 will have no bearing on any similar future actions. Under these circumstances, any ruling on the merits of this issue where no meaningful relief can be granted would constitute an inappropriate advisory opinion. See Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.20 (1996); Petty v. Kanawha County Bd. of Educ., Docket No. 00-20-154 (May 2, 2002); Owens v. LincolnCounty Bd. of Educ., Docket No. 97-22-121 (Feb. 11, 1998); Harrison v. Cabell County Bd. of Educ., 177 W. Va. 256, 351 S.E.2d 604 (1986); Miraglia v. Ohio County Bd. of Educ., Docket No. 92-35-270 (Feb. 19, 1993).

Because Grievant was placed into exactly the same assignment, i.e., at UJHS and JMHS, instatement into a full-time position at JMHS is an inappropriate measure of relief. In any event, there is no evidence that Grievant would have been selected for one of the JMHS positions had he not been subject to termination.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

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 of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); 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). See W. Va. Code §18-29-6.

2. Inasmuch as the termination of Grievant's employment was rescinded, placing him back in the same position held during the 2001-2002 school year, his challenge to the termination is now moot. See Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.20 (1996); Petty v. Kanawha County Bd. of Educ., Docket No. 00-20-154 (May 2, 2002); Owens v. Lincoln County Bd. of Educ., Docket No. 97-22-121 (Feb. 11, 1998); Harrison v. Cabell County Bd. of Educ., 177 W. Va. 256,351 S.E.2d 604 (1986); Miraglia v. Ohio County Bd. of Educ., Docket No. 92-35-270 (Feb. 19, 1993)

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Marshall County and such 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. 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 record can be prepared and properly transmitted to the appropriate circuit court.

Date: November 15, 2002 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

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*Footnote: 1*

*Grievant initially filed at level four; however, the parties agreed to remanding the matter to level two.*