VERA DRAIN,

Grievant,

v. Docket No. 03-30-050

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent,

and

CONNIE THARP,

Intervenor.

D E C I S I O N

Vera Drain (Grievant), employed by the Monongalia County Board of Education (MCBE) as an aide, filed a level one grievance on September 25, 2002, in which she alleged violations of W. Va. Code §§ 18A-4-8, 18A-4-16, and 18A-4-8b, when another employee was allowed to retain an extra-duty assignment as an aide after she had transferred to a bus operator position. For relief, Grievant request the extra-duty assignment be posted and filled. The grievance was denied at levels one and two. Grievant elected to bypass consideration at level three, as is permitted by W. Va. Code § 18-29-4(c), and advanced her appeal to level four on February 19, 2003. A level four hearing was conducted on April 2, 2003, at which time MCBE supplemented the record with exhibits. Grievant was represented by John E. Roush, Esq., of West Virginia School Service Personnel Association, and MCBE was represented by Kelly J. Kimble, Esq., of Kay Casto & Chaney. The matter became mature for decision upon receipt of the parties proposed findings of fact and conclusions of law on April 29, 2003.

The following facts are undisputed.

Findings of Fact

1. Grievant has been employed by MCBE since 1968, and has held theclassification title of Aide at all times pertinent to this grievance. In addition to her regular assignment, Grievant holds an extra-duty assignment, two hours per day, five days per week.

2. Connie Tharp was employed by MCBE as an Aide assigned to a bus prior to accepting a bus operator position for the 2002-2003 school year. While an Aide, Ms. Tharp additionally held an extra-duty assignment of one hour per day, four days per week.

3. After Ms. Tharp was awarded the position of bus operator, she retained the mid-day extra-duty Aide assignment.

4. Grievant's extra-duty assignment is more lucrative than that held by Ms. Tharp, and occurs at the same time, therefore Grievant cannot hold both assignments, and will not give up her current assignment.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her claim 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 extra-duty positions are linked to regular service personnel positions, and when an employee transfers from one distinct classification category to another, she is no longer eligible to retain extra-duty assignments from the abandoned classification. MCBE asserts that Intervenor must be allowed to retain the extra-duty assignment under W. Va. Code § 18A-4-16(6), which provides that "[a]n employee who was employed in any service personnel extracurricular assignment during the previousschool year shall have the option of retaining the assignment if it continues to exist in any succeeding school year." Absent any statutory language suggesting the employee forfeits her right of retention if she accepts a regular position in another classification category, MCBE argues that it was bound to allow Intervenor to keep it. Additionally, MCBE argues that because Grievant has no personal stake in the matter, she has no standing to pursue this grievance.

"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). In order to have a personal stake in the outcome, a grievant must have been harmed or suffered damages. The grievant "must 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). Without some allegation of personal injury, a grievant is without standing to pursue the grievance. McElroy v. Monongalia County Bd. of Educ., Docket No. 01-30- 020 (Sept. 17, 2001); Lyons v. Wood County Bd. of Educ., Docket No. 89-54-501 (Feb. 28, 1990). Beard v. Bd. of Directors/Shepherd College, Docket No. 99-BOD-268 (Apr. 27, 2000); Elliott v. Randolph County Bd. of Educ., Docket No. 98-42-304 (May 26, 1999); Farley v. W. Va. Parkways Econ. Dev. Auth., Docket No. 96-PEDTA-204 (Feb. 21, 1997).

A general claim of unfairness or an employee's philosophical disagreement with a policy does not, in and of itself, constitute an injury sufficient to grant standing to grieve. See Olson v. Bd. of Trustees/Marshall Univ., Docket No. 99-BOT-513 (Apr. 5, 2000), citingSkaff v. Pridemore, 200 W. Va. 700, 490 S.E.2d 787 (1997). See also, Smith v. W. Va. Parkways Econ. Dev. Auth., Docket No. 97-PEDTA-484 (Apr. 17, 1998); Farley, supra; Jarrell v. Raleigh County Bd. of Educ., Docket No. 95-41-479 (July 8, 1996); McDonald v. Hancock County Bd. of Educ., Docket No. 15-88-055-3 (Sept. 30, 1988). Even if the employer has misapplied a statute or its own policies, where the grievant is not personally harmed, there is no cognizable grievance. Elliott, supra; Farley, supra; Cremeans v. Bd. of Trustees/Marshall Univ., Docket No. 96-BOT-099 (Dec. 30, 1996); Pomphrey v. Monroe County Bd. of Educ., Docket No. 94-31-183 (July 1, 1994).

In the instant case, it is clear that while Grievant is the most senior Aide in the county, she already holds a mid-day, extra-duty assignment which is more lucrative than that of Intervenor. Because Grievant does not want the assignment in question, and has suffered no personal harm, she simply does not have standing to challenge the assignment. To address the propriety of Intervenor's retention of the assignment would effectively result in the issuance of a merely advisory opinion, and the Grievance Board has repeatedly refused to issue advisory opinions. Baker v. Bd. of Directors/Concord College, Docket No. 97-BOD-265 (Oct. 8, 1997); Wagner v. Hardy County Bd. of Educ., Docket No. 20-87-102-1 (Feb. 23, 1996); Bandy v. Summers County Bd. of Educ., Docket Nos. 91-45-468/92-45-065 (Feb. 16, 1994); Miraglia v. Ohio County Bd. of Educ., Docket No. 92-35-270 (Feb. 19, 1993); Adkins v. Lincoln

County Bd. of Educ., Docket No. 89-22-323 (Aug. 21, 1989). Accordingly, it is not possible to grant Grievant any relief in this case.

The following conclusions of law support the decision reached.

Conclusions of Law 1. In a non-disciplinary matter, Grievant has the burden of proving her claim 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. "Standing, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy." McElroy v. Monongalia County Bd. of Educ., Docket No. 01-30-020 (Sept. 17, 2001); Wagner v. Hardy County Bd. of Educ., Docket No. 95-16-504 (Feb. 23, 1996).

3. Grievant does not have standing to challenge the extra-duty assignment held by Intervenor, and she is not entitled to any relief in this grievance.

Accordingly, this grievance is DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Monongalia 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: MAY 27, 2003 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE