THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

MICHELE H. VESLEY,
Grievant,

v. **DOCKET NO. 2013-0651-MrnED**

MARION COUNTY BOARD OF EDUCATION,
Respondent.

DISMISSAL ORDER

Grievant, Michele H. Vesley, filed a grievance against her employer, the Marion County Board of Education, on October 10, 2012. The statement of grievance is quite lengthy, and generally contends that her seniority was not properly considered in the filling of posted Extended Day Aide assignments at Watson Elementary School, because another Aide had illegally acquired in-school seniority by being awarded these same assignments in prior years when the assignments were not posted. The statement of relief sought is likewise quite lengthy, and includes statements as to why Grievant believed the statutory requirements had been violated. The relevant portions of the statement of relief sought are "clarification on extra duty assignments that would also include Extended Day for Aides. . . . reinstated to the position that I bid on and restitution for the salary that was lost."

A hearing was held at level one on October 7, 2012, at which time Grievant stated that she was satisfied with the extended-day assignment she had received, and just wanted clarification of the legal issues regarding posting and seniority. A level one decision was issued on December 13, 2013, granting the grievance, finding that all positions must be posted. Respondent agreed to follow the findings of the grievance

evaluator at level one; however, Grievant believed that not all of her concerns had been addressed at level one, and she appealed to level two on or about January 2, 2013. A mediation session was held on May 9, 2013. Grievant appealed to level three on June 14, 2013, and a level three hearing was held before the undersigned Administrative Law Judge on July 30, 2013, at the Grievance Board's Westover, West Virginia Office. Grievant appeared *pro se*, and Respondent was represented by Stephen R. Brooks, Esquire, Flaherty, Sensabaugh & Bonasso, PLLC. The parties declined to submit written proposals, and this matter became mature for consideration at the conclusion of the level three hearing on July 30, 2013.

Synopsis

Grievant contends that extended-day assignments were not properly filled because an Aide with less seniority than she who had held an extended-day assignment the preceding year was allowed to retain the assignment, even though the assignment had not been posted the preceding three years. Grievant believes she should have had first choice of the assignments based on her seniority. However, Grievant was satisfied with the extended-day assignment she held for the school year, and simply seeks a legal ruling on the issue of seniority. Respondent moved that this matter be dismissed, asserting that Grievant was seeking an advisory opinion. No relief can be granted and this grievance is moot.

The following Findings of Fact are made based on record developed at levels one and three.

Findings of Fact

1. Grievant has been employed by the Marion County Board of Education ("MBOE") as an Aide for approximately 27 years. At the time this grievance was filed, she had been working at Watson School about three and a half years. Grievant's normal work hours are 9:00 a.m. to 3:00 p.m.

2. MBOE posted three special education extended-day assignments for classroom Aides at Watson Elementary School for the 2012-2013 school year only. Two of the assignments were for one hour a day, five days a week, for the entire school year. One of these two assignments was for 8:00 a.m. to 9:00 a.m., and the other was for 8:30 a.m. to 9:00 a.m. and 3:00 p.m. to 3:30 p.m. The third assignment was for one-half hour a day on Tuesdays and Wednesdays throughout the school year.

3. During the three-year period preceding the 2012-2013 school year, extended-day assignments had not been posted at Watson Elementary School.

4. Sherry Sestito has been employed as an Aide at Watson Elementary School for eight years, and she held an extended-day assignment at Watson Elementary School for all eight years. She was placed in an extended-day assignment for the 2004-2005 school year as a result of a posting. That assignment was from 8:15 a.m. to 9:00 a.m., five days a week. During the three years preceding the 2012-2013 school year, the extended-day assignment in which she served was not posted. The record does not reflect whether the assignment was posted from 2005 to 2009.

5. In the fall of 2012, Ms. Sestito and Grievant bid on the posted extended-day assignments at Watson Elementary School. Because Ms. Sestito had an extended-day

assignment the prior school year, she was given the first choice to retain one of the assignments. Grievant was given second choice of the assignments.

6. Grievant has more seniority in the Aide classification than Ms. Sestito.

7. Grievant was satisfied with the assignment she received, and did not wish to be placed in Ms. Sestito's assignment as a result of the grievance process.

Discussion

Grievant has pursued this grievance in order to obtain a ruling on whether her superior seniority over Ms. Sestito should have placed her ahead of Ms. Sestito in the awarding of the extended-day assignments, pointing to the fact that the assignments had not been posted the preceding three years. Respondent argued that this grievance should be dismissed as moot, as Grievant was not seeking to be placed in a different assignment, but was simply seeking an advisory opinion regarding how the law should be applied in this instance.

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).

> When there is no case in controversy, the Grievance Board will not issue advisory opinions. *Brackman v. Div. of Corr./Anthony Corr. Center,* Docket No. 02-CORR-104 (Feb. 20, 2003); *Gibb v. W. Va. Div. of Corr.*, Docket No. 98-CORR-152 (Sept. 30, 1998). In addition, the Grievance Board will not hear issues that are moot. "Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues]." *Bragg v. Dept. of Health & Human Res.,* Docket No. 03-HHR-348 (May 28, 2004); *Burkhammer v. Dep't of Health & Human Res.,* Docket No. 03-HHR-073

(May 30, 2003); *Pridemore v. Dep't of Health & Human Res.*, Docket No. 95-HHR-561 (Sept. 30, 1996).

Pritt, et al., v. Dep't of Health and Human Res., Docket No. 2008-0812-CONS (May 30, 2008). In situations 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).

This Grievance Board has continuously refused to address issues when the relief sought is "speculative or premature, or otherwise legally insufficient." *Stepp v. Dep't. of Trans./Div. of Highways,* Docket No. 06-DOH-215 (Oct 27, 2006) citing *Dooley v. Dep't. of Trans./Div. of Highways*, 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). "[R]elief which entails declarations that one party or the other was right or wrong, but provides no substantive, practical consequences for either party, is illusory, and unavailable from the Grievance Board." *Miraglia v. Ohio County Bd. of Educ.*, Docket No. 92-35-270 (Feb. 19, 1993). Typically, a Grievant must show "an injury-in-fact, economic or otherwise" to have what "constitutes a matter cognizable under the grievance statute." *Lyons v. Wood County Bd. of Educ.*, Docket No. 89-54-601 (Feb. 28, 1990); *Dunleavy v. Kanawha County Bd. of Educ.*, Docket No. 20-87-102-1 (June 30, 1987).

The question then, is whether any relief is available, or whether Grievant is simply seeking an advisory opinion. Grievant argued that her countywide seniority should have been considered, rather than her seniority at Watson Elementary School. If Grievant's seniority status were in question, then the grievance would not be moot. Having carefully reviewed the facts and the possible issues to be decided, the undersigned concludes that Grievant's seniority status is not in question; rather, Grievant is seeking an advisory opinion on the legal issues of how extended-day assignments are to be filled,[1] and how the failure to post the assignments for three years affected the statutory requirements applicable to filling such assignments. Were the undersigned to rule on the issues presented, it would

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[1] These assignments would appear to be extracurricular assignments. W. VA. CODE § 18A-4-16 provides, in pertinent part,

> (5) The board shall fill extracurricular school service personnel assignments and vacancies in accordance with section eight-b [§ 18A-4-8b] of this article: Provided, That an alternative procedure for making extracurricular school service personnel assignments within a particular classification category of employment may be utilized if the alternative procedure is approved both by the county board and by an affirmative vote of two thirds of the employees within that classification category of employment.
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> (6) *An employee who was employed in any service personnel extracurricular assignment during the previous school year shall have the option of retaining the assignment if it continues to exist in any succeeding school year*. A county board of education may terminate any school service personnel extracurricular assignment for lack of need pursuant to section seven [§ 18A-2-7], article two of this chapter. *If an extracurricular contract has been terminated and is reestablished in any succeeding school year, it shall be offered to the employee who held the assignment at the time of its termination*. . . ..

(Emphasis added.)

be an advisory opinion as there is no relief available. Any ruling would simply be a determination as to which party correctly interpreted the applicable statutory provisions.

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

Conclusions of Law

1. 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).

2. "[T]he Grievance Board will not hear issues that are moot. 'Moot questions or abstract propositions, the decisions of which would avail nothing in the determination of controverted rights of persons or property, are not properly cognizable [issues].' *Bragg v. Dept. of Health & Human Res.,* Docket No. 03-HHR-348 (May 28, 2004); *Burkhammer v. Dep't of Health & Human Res.,* Docket No. 03-HHR-073 (May 30, 2003); *Pridemore v. Dep't of Health & Human Res.*, Docket No. 95-HHR-561 (Sept. 30, 1996)." *Pritt, et al., v. Dep't of Health and Human Res.*, Docket No. 2008-0812-CONS (May 30, 2008).

3. 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).

4. "[R]elief which entails declarations that one party or the other was right or wrong, but provides no substantive, practical consequences for either party, is illusory, and unavailable from the Grievance Board." *Miraglia v. Ohio County Bd. of Educ.*, Docket No. 92-35-270 (Feb. 19, 1993).

5. This grievance is moot.

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 Dismissal Order. *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: September 5, 2013