PAULA TAYLOR-HURLEY,

Grievant,

v.

DOCKET NO. 96-29-327

MINGO COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Paula Taylor-Hurley, filed this grievance on January 29, 1996, alleging the Mingo County Board of Education ("Board"), violated W. Va. Code § 18A-4-8b, when it failed to fill a posted secretarial position for the central office within twenty working days of the date of posting. Grievant seeks instatement into the position and wages, benefits, seniority and interest. Following adverse decisions at the lower levels, Grievant appealed to level four on July 29, 1996. Hearing was held on September 23, 1996, and this case became mature for decision on October 14, 1996, the deadline for the submission of the parties' post-hearing briefs.

The material facts of this grievance are not in dispute and are set forth in the following findings.

Findings of Fact

1. Grievant was employed by the Board, and at all times relevant to this grievance, was on the preferred recall list.

2. On December 19, 1995, the Board posted several positions including a position for Secretary. G. Ex. 1.

3. Grievant applied for the Secretary position, as well as for an Accountant III/Office Manager position.

4. Grievant was interviewed for the Accountant III/Office Manager position on December 26,

1995. At that time she was told the interview for the Secretary position would be conducted at a later date.

5. Grievant learned through the newspaper on December 30, 1995, that the Accountant III/Office Manager position, as well as other positions on the December 19, 1995 posting, had been filled. G. Ex. 2.

6. The newspaper did not give notice that the Secretary position had been filled. The closing date for the December 19, 1995 postings was December 26, 1995.

7. On December 26, 1995, the Secretary posting was voided by Superintendent Everett Conn, because, due to economic considerations and a mandate from the State Board of Education to the Board to reduce personnel, the Board did not approve his recommendation to fill the position. R. Ex. 1.

8. Grievant filed her grievance on January 29, 1996, twenty working days following the closing date of the December 19, 1995 postings.

Discussion

Grievant alleges the Board violated W. Va. Code § 18A-4-8b when it failed to fill the Secretary position within twenty working days following the closing date of the posting. Grievant also alleges that the Superintendent does not have the authority to void a posting, and that the Board must take some affirmative action to ratify that decision. The Board alleges that the grievance was untimely filed, and that the Superintendent's action in voiding the subject posting was not violative of the applicable statutory provisions.

As to the issue of the timeliness of the grievance, W. Va. Code § 18A-4-8b states, in pertinent part:

> Boards shall be required to post and date notices of all job vacancies of established existing or newly created positions in conspicuous working places for all school service employees to observe for at least five working days. The notice of such job vacancies shall include the job description, the period of employment, the amount of pay and any benefits and other information that is helpful to the employees to understand the particulars of the job. After the five day minimum posting period all vacancies shall be filled within twenty working days from the posting date notice of any job vacancies of established existing or newly created positions. (Emphasis added).

W. Va. Code §18-29-4(a)(1) provides:

> Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

The posting date of the secretary position was December 19, 1995. Twenty working days from that date would be approximately January 18, 1996. Grievant became aware the Board had not yet filled the secretary position after reading a December 30, 1995newspaper article, but believed the Board still had twenty working days from the date the posting was closed to fill the position. However, the statute is clear and unambiguous that the twenty days runs from the "posting date". Therefore, the Board had until January 18, 1996 to fill the position. Grievant then had fifteen days, or until approximately February 2, 1996, to file her grievance. Grievant did not hear from the Board regarding the secretary position, and subsequently filed her grievance on January 29, 1996, still well within the filing limitation.

Grievant alleges the Board violated Code § 18A-4-8b when it did not fill the secretary position, arguing the Superintendent does not have the authority to void a posting without some affirmative Board action. The only evidence presented regarding this issue was the testimony of Assistant Superintendent John Fullen, who testified that the Board told the Superintendent at the December 26, 1995 school board meeting, not to fill the secretarial position due to the mandate from the State Board of Education. This grievance was held open until the maturity date for the submission of the board minutes from that meeting, but those minutes were not provided to the undersigned. School law requires that a board of education post notices of position vacancies and openings, but there is no requirement to do so when a vacancy does not occur. Payne v. Fayette County Bd. of Educ., Docket No. 94-10-144 (Sept. 18, 1994); Terek v. Wetzel County Bd. of Educ., Docket No. 52-86-122-2 (Aug. 25, 1987). Further, statutory violations do not occur when a board decides not to fill a posted vacancy based upon its determination that a need for the position no longer exists. Bowen v. Mingo County Bd. of Educ., Docket No. 95-29-488 (Mar. 29, 1996); Catron v. Mingo County Bd. of Educ., Docket No. 95-29-060 (July 11, 1995). W. Va. Code § 18A-2-7 provides, in pertinent part:

> The superintendent, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter. . . .

Evidence presented in the instant case indicates the Superintendent recommended filling the secretarial position, but the Board did not approve that action based upon financial considerations. Thus, the Superintendent voided the posting. The usual practice in the school setting involves the principal of a school requesting a posting of a vacancy from the board's central office. The Board itself is not involved in the posting process, and does not vote to approve a posting. Thus, if the principal, or here, the superintendent, decides, or is told later, not to fill that vacancy, there is no "action" which the Board is required to approve. There is nothing in the statutes which supports the theory that a board must vote to not fill a vacancy. The only action which the statutes speak to is approving the recommendation of the Superintendent to assign, transfer, suspend or promote school personnel, once he has made that recommendation. The primary purpose of requiring board approval in matters regarding hiring, firing, transfer and demotion is to protect the interests of school employees against arbitrary and capricious acts of a supervisor or principal.

Conclusions of Law

1. It is incumbent upon the Grievant to prove the allegations contained in her grievance by a preponderance of the evidence. Christian v. Mingo County Bd. of Educ., Docket No. 89-29-514 (Jan. 31, 1990).

2. Grievant timely filed her grievance following the expiration of the twenty-days following the posting notice date within which the position must be filled pursuant to W. Va. Code § 18A-4-8b.

3. School law requires that a board of education post notices of position vacancies and openings, but there is no requirement to do so when a vacancy does not occur. Payne v. Fayette County Bd. of Educ., Docket No. 94-10-144 (Sept. 18, 1994); Terek v. Wetzel County Bd. of Educ., Docket No. 52-86-122-2 (Aug. 25, 1987).

4. Statutory violations do not occur when a board of education decides not to fill a posted vacancy based upon its determination that a need for the position no longer exists. Bowen v. Mingo County Bd. of Educ., Docket No. 95-29-488 (Mar. 29, 1996); Catron v. Mingo County Bd. of Educ., Docket No. 95-29-060 (July 11, 1995).

5. There is no statutory requirement that a county board of education act in some affirmative way to approve or ratify a superintendent's decision to void a posting when it has decided not to fill

the vacancy due to economic and budgetary considerations.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mingo 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. 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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: January 8, 1997