EARL SPENCE,

Grievant,

v. Docket No. 97-29-245

MINGO COUNTY BOARD OF EDUCATION,

Respondent,

and

WILLIAM KIRK,

Intervenor.

D E C I S I O N

Grievant, Earl Spence, filed this grievance alleging the Mingo County Board of Education ("MCBOE" or "Board") violated W. Va. Code § 18A-4-8b when it assigned the duties of the Supervisor of Maintenance to Intervenor Bill Kirk without posting the position. Grievant requests as relief that the Supervisor of Maintenance position be posted. This grievance was denied at Level II and waived at Level III. Upon appeal to Level IV, a hearing was held on August 18, 1997. This case became mature for decision on September 19, 1997, the deadline for the parties' proposed findings of fact and conclusions of law.

The undersigned Administrative Law Judge makes the following findings based on the record as a whole.

Findings of Fact

1. Grievant has been employed by MCBOE since 1972, most of this time as a bus operator. For approximately two years in the 1970's, he worked in maintenance as an electrician and as the foreman of the roof crew.

2. In 1992, Grievant became unable to work as a bus operator because of a heart condition, and the medication he was required to take. He was off work for several years. In

1994, he was hired as either a foreman, an assistant, or a coordinator in the Transportation Department. **(See footnote 1)**

3. Intervenor was hired by MCBOE as the Director of Transportation in 1982. He has been in that position since that time.

4. In December 1996, Mr. Bobby Jarrell retired from his position as Supervisor of Maintenance. Superintendent Everett Conn assumed his duties for the remainder of the school year.

5. MCBOE has been directed by the State Department of Education ("SDOE") to decrease the number of service and professional positions, as MCBOE is over the state funding formula. Additionally, MCBOE has a large deficit and has been directed by SDOE to correct this problem.

6. Superintendent Conn decided not to fill the Supervisor of Maintenance position due to the deficit. **(See footnote 2)** **He asked Intervenor if he would accept the duties of Supervisorof the Maintenance Department, as well as continuing as the Director of Transportation. Intervenor agreed to these additional duties.**

7. Intervenor did not receive a pay increase as the result of these additional duties.

8. Intervenor has performed maintenance duties in positions he held prior to becoming an employee of MCBOE.

Discussion

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. (Emphasis Added.)

Grievant argues the above-cited Code Section was violated by MCBOE's failure to post and fill the Supervisor of Maintenance position. This argument is without merit. County boards

have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986). Superintendents have the authority to "[a]ssign, transfer, suspend or promote teachers and all other school personnel," subject to the approval of the board. W. Va. Code §18-4-10(3). Boards of education have the authority "[t]o control and manage all of the schools and school interests for all school activities. . . ." W. Va. Code §18-5- 13(1); Cox v. Bd. of Educ. of Hampshire County, 355 S.E.2d 365, 369 (W. Va. 1987). Additionally, a county superintendent's duties include "powers of independent judgment and discretion." Hall v. Pizzino, 363 S.E.2d 886, 888 (W. Va. 1980). Inherent in Grievant's argument is the idea that any time a position is vacant it must be filled regardless of need. To accept this argument would severely limit the ability of a superintendent to reorganize and manage a county school system in a cost-efficient manner. Napier v. Logan County Bd. of Educ. Docket No. 94-23-541 (Apr. 25, 1995).

Further, the requirement of W. Va. Code § 18A-4-8b is "to post . . . all job vacancies of established existing or newly created positions. . . .” The Director of Maintenance position was not a vacancy because MCBOE chose not to fill the position. It assigned these duties to another employee. “A board of education has the discretion to determine the number of jobs for and the employment terms of service personnel. When a board of education seeks to reduce employment costs, the board may decide that the schools' best interest requires the elimination of some service personnel jobs.” Richardson v. Putnam Bd. of Educ. Docket No. 97-40-189 (Oct. 15, 1997) citing Lucion v. McDowell County Bd. of Educ., 195 W. Va. 297, 446 S.E.2d 487 (1994). Clearly, the above-cited Code Section and case law give a superintendent or a county board of education the authority to reorganize the duties of the administrative staff when they voluntarily accept the change. See Butcher v. Logan County Bd. of Educ., Docket No. 95-23-015 (July 27, 1995). The type of reorganizations and changes made by MCBOE were necessary to comply with the direction of the SDOE to correct a large deficit and to rectify the failure to be within the formula for service personnel positions.

The above-discussion and findings of fact will be supplemented by the following conclusions of law.

Conclusions of Law

1. In a nondisciplinary action, a grievant has the burden of proving his case by a preponderance of the evidence. Barker v. Kanawha County Bd. of Educ., Docket No. 94-20-634 (Jan. 31, 1995).

2. School law requires a board of education to post notices of position vacancies and openings, but there is no requirement to do so when a legitimate vacancy does not occur. Payne v. Fayette County Bd. of Educ., Docket No. 94-19-144 (Sept. 28, 1994); Terek v. Wetzel County Bd. of Educ., Docket No. 52-86-122-2 (Aug. 25, 1987). 3. County boards have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. Dillon v. Bd. of Educ. of County of Wyoming, 177 W. Va. 145, 351 S.E.2d 58 (1986).

4. "A board of education has the discretion to determine the number of jobs for and the employment terms of service personnel. When a board of education seeks to reduce employment costs, the board may decide that the schools' best interest requires the elimination of some service personnel jobs." Richardson v. Putnam Bd. of Educ. Docket No. 97-40-189 (Oct. 15, 1997) citing Lucion v. McDowell County Bd. of Educ., 195 W. Va. 199, 446 S.E.2d 487 (1994).

5. MCBOE did not act in an arbitrary and capricious manner when it decided it was in the school system's best interests to eliminate the position of Director of Maintenance upon the retirement of Mr. Jarrell, and to assign the duties to anotherposition. See Butcher v. Logan County Bd. of Educ., Docket No. 95-23-015 (July 27, 1995).

6. MCBOE had no obligation to post a vacancy that longer existed.

7. Grievant failed to establish by a preponderance of the evidence that the Board violated W. Va. Code § 18A-4-8b in eliminating the Director of Maintenance position and by assigning the duties of that position to Intervenor with his consent and at no additional pay.

8. County superintendents have the authority to make voluntary organizational changes in their administrative staff. Accord Hall v. Pizzino, 363 S.E.2d 886, 888 (W. Va. 1980); Napier v.

Logan County Bd. of Educ., Docket No. 94-23-541 (Apr. 25, 1995).

9. Grievant has failed to demonstrate a violation of W. Va. Code §18A-4-8b.

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.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: April 6, 1998

Footnote: 1

This issue is not important to the outcome of this decision.

Footnote: 2

Because Mr. Jarrell's position was for 261-days, this position is equal two 1 1/3 positions.