LOIS RICHARDS,

Grievant,

v. **DOCKET NO. 99-54-388**

WOOD COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant Lois Richards filed this grievance against the Wood County Board of Education ("WBOE") on or about June 23, 1999. Her statement of grievance reads:

> Lois Richards applied for a Reading Resource position at Franklin Elementary Center. [T]he position was posted and interviews were held, but the school board did not take action within the 30 days required by law. Instead the position was given to a less qualified applicant without benefit of board action.

The stated relief sought was:

> Ms. Richards asks that she be awarded the position. . . . She also asks that the school board follow the qualifications outlined in W.Va. Code 18A-4-7a when filling future positions. (See footnote 1) The following Findings of Fact are properly made from the record developed at Level II.

Findings of Fact

1. Grievant was employed by WBOE as a Kindergarten teacher at Franklin Elementary School during the 1998-99 school year.

2. Kay Tennant retired during the 1998-99 school year. She had been employed by WBOE as an itinerant reading resource teacher.

3. Kay Mitchell also retired during the 1998-99 school year. She had been employed by WBOE as a reading resource teacher at Franklin Elementary School.

4. On or about March 12, 1999, WBOE posted two reading resource teaching positions. The posting identified the school or department as "county," meaning the positions would serve more than one school; that is, they were itinerant positions. The position at Franklin Elementary was not posted.

5. Grievant applied for the posted positions on March 16, 1999, even though she was only interested in the position stationed at Franklin Elementary.

6. The applicants were interviewed by Sue Ellen Johnson, Curriculum Supervisor.

7. Linda Snider also applied for the posted positions. She was the most senior applicant. She was offered an itinerant position, but declined to accept it.

8. On April 12, 1999, Grievant was offered one of the itinerant positionsand declined to accept the offer. She was not offered the position at Franklin Elementary.

9. Regina Carrico accepted one of the itinerant positions when it was offered to her, and Molly Harris was then selected to fill the other posted itinerant position.

10. For the 1998-99 school year Janet Isenhart was employed by WBOE as an itinerant reading resource teacher. She did not apply for the posted positions. She was placed in the reading resource position stationed at Franklin Elementary, after she told Ms. Johnson she would prefer to be stationed at Franklin rather than being in an itinerant position. She holds a Ph.D., she has taught reading resources one year, the same as Grievant, and she has less seniority than Grievant. (See footnote 2)

Discussion

The testimony presented at Level II reveals that the statement of grievance bears no resemblance to what occurred. Ms. Johnson testified that WBOE posted two itinerant reading resource teaching positions, with the plan that each teacher would cover two schools. Ms. Johnson explained that by identifying the school as "county" in the posting, this meant the employees in the two positions could be moved to any of four buildings. One of those positions was vacated by a retirement, and the record does not reflect why the other position was posted. It appears the other position may have been considered a vacancy because the positions werechanged. Both positions had covered two schools, and would continue to cover two schools, but they would not be covering the same schools as before. A vacancy in the reading resource position at Franklin Elementary occurred when the incumbent retired, but this position was never posted. Grievant could not have applied for it if it was never posted. What occurred was that the remaining itinerant teacher, Janet Isenhart, expressed the desire to be stationed solely at Franklin Elementary, and it was made so. The details of this move were not made a part of the record.

Grievant testified she asked Ms. Johnson about the posted positions, and Ms. Johnson told her one of the positions would be stationed at Franklin Elementary, and the other would be itinerant. Ms. Johnson testified Grievant told her she wanted the position at Franklin Elementary, and that they talked about her intention to move Ms. Isenhart into that position.

Regardless of what Ms. Johnson told Grievant, it does not change what was posted. The posted position was not for a specific school, and Ms. Johnson had no authority to bind WBOE to a different interpretation by her words to Grievant. See Berry v. Boone County Bd. of Educ., Docket No. 97-03-305 (Apr. 13, 1998); Chapman v. Dep't of Transp./Div. of Highways, Docket No. 97-DOH-261 (Nov. 24, 1997), citing Ollar v. W. Va. Dep't of Health and Human Resources/W. Va. Div. of Personnel, Docket No. 92-HHR-186 (Jan. 22, 1993). Had the position been posted for a specific school, it is possible others may have made application for the position, or that Ms. Snider would have accepted that position before it was offered to Grievant. It would not be fair to these employees to allow this conversation betweenGrievant and Ms. Johnson to change the posting without giving notice to everyone else.

Notwithstanding the evidence presented at Level II regarding what occurred here, Grievant continued to argue in her Level IV post-hearing written submission that she had applied for a position at Franklin Elementary, and should have been selected because she was the most senior applicant. Respondent simply pointed out that Grievant applied for a position posted as "county," or itinerant, she was offered the position and declined to accept it. As Grievant did not argue the Franklin Elementary position should have been posted, Respondent did not address this issue. While the undersigned believes the real issues here are whether the position should have been posted, and whether WBOE could transfer Ms. Isenhart into the position, neither party addressed these issues or presented evidence on them. Accordingly, these issues are not before the undersigned, and cannot fairly be addressed. It will also be noted, however, that were the undersigned to find that the position should have been posted, Grievant presented no evidence to support a finding that her qualifications were such that she would have received the position. Further, the appropriate remedy would be to require the position to be posted. (See footnote 3) This following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof is upon Grievant to establish her allegations by a preponderance of the evidence. Canterbury v. Putnam County Bd. of Educ., Docket No. 40-86-325-1 (Jan. 28, 1987).

2. Grievant failed to establish that the position she desired at Franklin Elementary was posted; therefore, she could not have been selected for the position.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Wood County. Any 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD **Administrative Law Judge**

Dated: November 23, 1999

Footnote: 1

The grievance was denied at Level I on June 28, 1999. Grievant appealed to Level II, where a hearing was held on July 22, 1999. A Level II decision was issued on August 31, 1999. Level III was waived by Grievant, and she appealed to Level IV on September 9, 1999. The parties agreed to submit this grievance for decision based upon the Level II record. Grievant was represented by Steve Angel, and Respondent was represented by Dean A. Furner, Esquire. This matter became mature for decision upon receipt of the parties' post-hearing written arguments on October25, 1999.

Footnote: 2

Grievant's other qualifications for the position were not made a part of the record.

Footnote: 3

"Where a vacancy occurs in a teaching position at a public school, the county board of education must post a notice of such vacancy pursuant to W.Va. Code, 18A-4-8b(a), and the principal of the school in which the vacancy occurs is without authority to assign another teacher to the vacancy." Syllabus, Bd. of Educ. of Harrison v. Defazio, 180 W. Va. 614, 378 S.E.2d 656 (1989). While, W. Va. Code § 18A-4-7a provides an exception to posting certain positions within elementary schools, it does not appear that exception would be applicable here.