JOYCE TENNANT,

Grievant,

v v.

Docket No. 04-30-386

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent,

and

TRISHA RICE,

Intervenor.

DECISION

Joyce Tennant ("Grievant") alleges entitlement to placement in a half-time secretarial position at University High School ("UHS"), which she alleges was illegally altered and awarded to another employee without posting. The record does not reflect what proceedings occurred at level one, and a level two hearing was conducted on September 30, 2004. The grievance was denied in a level two decision dated October 25, 2004. Level three consideration was bypassed, and Grievant appealed to level four on November 4, 2004. A hearing was conducted in Westover, West Virginia, on December 20, 2004. Grievant was represented by counsel, John E. Roush; the Board of Education was represented by counsel, Kelly J. Kimble; and Intervenor represented herself. (See footnote 1) This matter became mature for consideration upon receipt of the parties' fact/law proposals on January 18, 2005. The following facts have been proven by a preponderance of the evidence of record.

Findings of Fact

1. Grievant is regularly employed by Respondent as a secretary at South Middle School.

2. On August 5, 2004, Respondent posted a vacancy for a half-time secretary at UHS.

3. Grievant applied for the half-time position and was the most senior, qualified applicant.

4. During the 2003-2004 school year, Intervenor was employed by Respondent as a full-time secretary at Brookhaven Elementary School. Due to concerns with her job performance, Respondent decided to transfer her to another school.

5. Sometime in August of 2004, Respondent decided not to fill the half-time secretarial position at UHS. It converted that position into a full-time secretarial position, in which it placed Intervenor. This position was not posted.

6. Grievant has remained in her previous full-time position, but would prefer a half-time position.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W..Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §.4.21 (2004); 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 contends that Respondent did not have the authority to “rescind” the posting for a half-time secretary, then create a full-time position, which was filled without posting. She believes that she should have been placed in the half-time position as the most senior, qualified applicant. Grievant testified that she would not have applied for the position if it had originally been posted as a full-time position, because she is seeking half- time employment.

As to the propriety of Respondent's “creation” of a full-time position for Intervenor without posting, the undersigned agrees with Grievant that this action is prohibited by statute. Pursuant to the provisions of W. Va. Code § 18A-4-8b(g), a board of education is required to post “all job vacancies of established existing or newly created positions.” Certainly there can be no argument that the full-time position created for Intervenor at UHS was not a “newly created” position (See footnote 2), which the statute requires be posted. This is not a case of a discretionary “call” on the part of the board of education, as often occurs during school consolidation, when there is a debatable issue as to whether or not a position is newly created or preexisting. See Rollyson/Ward v. Mingo County Bd. of Educ.,

Docket No. 04-29-140 (Aug. 30, 2004). Indeed, it has been previously recognized by this Grievance Board that half-time positions are distinct from full-time positions, and that assignment of full-time duties to a half-time employee alters the employee's entire assignment, essentially converting it into a position different from that for which theemployee was initially hired. See Thornburg v. Wayne County Bd. of Educ., Docket No. 04-50-170 (Aug. 30, 2004). Similarly, Respondent's alteration of the half-time secretarial position at UHS to a full-time position resulted in the creation of a new position, which it was required to post.

Respondent contends that it should be allowed an exception to the posting requirement under these circumstances, because it created this assignment for Intervenor in lieu of terminating her, thereby “settling” a potential grievance. "'The law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation; and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy.' Syl. Pt. 1, Sanders v. Roselawn Memorial Gardens, Inc., 152 W. Va. 91, 159 S.E.2d 784 (1968).” Syl. Pt. 1, McDowell County Bd. of Educ. v. Stephens, 191 W. Va. 711, 447 S.E.2d 912 (1994). The burden of proof is upon a grievant challenging a settlement to prove by a preponderance of the evidence that the settlement agreement was not fairly made or was in contravention of law or public policy. Manns v. Lincoln County Bd. of Educ., Docket No. 97-22-257 (Oct. 20, 1997); Adkins v. Logan County Bd. of Educ., Docket No. 97-23-216 (Sept. 29, 1997); Vance v. Logan County Bd. of Educ., Docket No. 95-23-190 (Mar. 15, 1996).

Under similar circumstances, this Grievance Board has determined that failure to post a vacancy was improper. In Dawson v. Cabell County Bd. of Educ., Docket No. 97- 06-072 (Oct. 14, 1997), it was held that the placement of an employee (who had filed a grievance) in a position which was not the subject of the grievance, in order to achieve a settlement, violated the posting requirements of W. Va. Code § 18A-4-8b. Because thevacant position was unrelated to the grievance which that employee had filed, the grievants in Dawson had been deprived of their opportunity to intervene in that grievance, and had also been denied their statutory right to apply for the position. Accordingly, the board of education was ordered to post the vacancy, so that all qualified applicants could apply.

The instant grievance is somewhat different from Dawson, in that Grievant does not request that the full-time position at UHS be posted, but that she be allowed to fill the original, half-time position for which she applied. The evidence submitted in this case does not indicate that there was any

particular need for a full-time secretary at UHS, but for the need to place Intervenor in a full-time position. Under these circumstances, Grievant should be placed in the half-time position which was undisputedly needed at UHS, and for which she was the most senior, qualified applicant. As the Supreme Court has held, a board of education does not have the discretion to fill a posted position with an employee who did not apply, when a qualified applicant has applied for the position. See Webster County Bd. of Educ. v. Johns, 191 W.Va. 664, 447 S.E.2d 599 (1994).

The following conclusions of law support this decision.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W..Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §.4.21 (2004); 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. A board of education is required to post "all job vacancies of established existing or newly created positions." W. Va. Code § 18A-4-8b(g). 3. The burden of proof is upon a grievant challenging a settlement to prove by a preponderance of the evidence that the settlement agreement was not fairly made or was in contravention of law or public policy. Manns v. Lincoln County Bd. of Educ., Docket No. 97-22-257 (Oct. 20, 1997); Adkins v. Logan County Bd. of Educ., Docket No. 97-23-216 (Sept. 29, 1997); Vance v. Logan County Bd. of Educ., Docket No. 95-23-190 (Mar. 15, 1996).

4. Respondent created a new, full-time secretary position at UHS, and placed Intervenor in the position without posting, in violation of W. Va. Code § 18A-4-8b(g). See Dawson v. Cabell County Bd. of Educ., Docket No. 97-06-072 (Oct. 14, 1997).

5. Grievant was the most, senior qualified applicant for a half-time secretary position at UHS, and Respondent should have placed her in that position, rather than using it to create a full-time position for Intervenor, who did not apply. See Webster County Bd. of Educ. v. Johns, 191 W.Va. 664, 447 S.E.2d 599 (1994).

Accordingly, this grievance is **GRANTED**, and Respondent is **ORDERED** to place Grievant in the half-time secretary position at UHS with all applicable back pay and benefits.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Monongalia 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 Judgesis 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: February 7, 2005

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Prior to the level four hearing, this Grievance Board had not been notified of the existence of an Intervenor. Therefore, on the day of the level four hearing, Ms. Rice was contacted and agreed to participate in the hearing by telephone.

Footnote: 2

In fact, Respondent has not even asserted that it was not a new position.