WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

BARBARA RIFFLE and

CONNIE WAMSLEY,

Grievants,

v. **Docket No. 06-49-249**

UPSHUR COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Barbara Riffle and Connie Wamsley ("Grievants") initiated grievances on June 16, 2006, and June 13, 2006, respectively, alleging that the Upshur County Board of Education ("Board") was required to post a Cook III/Cafeteria Manager position. They seek posting of the position, so they may have the opportunity to apply. After denials at the lower levels, and consolidation at level two, Grievants appealed to level four on July 24, 2006. The parties elected to have a level four decision rendered based upon the record developed below, supplemented by fact/law proposals, which were received on August 28, 2006. Grievants represented themselves in this matter, and the Board was represented by Howard E. Seufer, Jr., Esquire.

The following pertinent facts have been proven by a preponderance of the evidence of record.

Findings of Fact

1. Grievants are employed by the Board as Cook IIs. 2. Grievant Riffle's seniority date is August 27, 1984, and Grievant Wamsley's seniority date is August 21, 1995.

3. Ann Tomblyn was employed by the Board for the 2004-2005 school year as a Cook

III/Cafeteria Manager at Central Elementary School.

4. Ms. Tomblyn's exact seniority date is not reflected in the record, but it appears that she began employment sometime in 1995.

5. Because Central Elementary School was to close at the end of the 2004- 2005 school year, Ms. Tomblyn was transferred to a Cook II position at Buckhannon- Upshur High School. Her pay was reduced to fit the lower classification category.

6. Ms. Tomblyn filed a grievance which was eventually appealed to the Kanawha County Circuit Court. The final order in that case found that the Board erred in transferring Ms. Tomblyn without terminating her contract for the previous school year. The Board was ordered to restore Ms. Tomblyn's Cook III/Cafeteria Manager classification and compensation, retroactive to the beginning of the 2005-2006 school year. *See Tomblyn v. Board of Education*, Civil Action No. 05-AA-189 (May 24, 2006).

7. After receiving the Circuit Court order, dated May 23, 2006, the Board complied, restoring Ms. Tomblyn's previous classification and pay, although she remained in her Cook II position. (See footnote 1)

8. At the end of the 2005-2006 school year, Arnetta Shingleton, a Cook III/Cafeteria Manager at Washington District Elementary School, retired. 9. Without posting the position, the Board placed Ms. Tomblyn in the position vacated by Ms. Shingleton, effective at the beginning of the 2006-2007 school year.

10. The Board did not place Ms. Tomblyn on the transfer list, gave no notice of a transfer, and did not follow any of the statutory procedures for transferring employees.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their claims by a preponderance of the evidence. (See footnote 2) Grievants contend that, pursuant to the requirements of W. Va. Code § 18A-4-8b(g), the Board was required to post the position vacated by Ms. Shingleton's retirement. However, Respondent contends that, in order to comply with the requirements of W. Va. Code § 18A-4-8 to properly classify all employees, it was required to place Ms. Tomblyn in the first available position which comported with the classification ordered by the Circuit Court.

As Grievants have correctly pointed out, W. Va. Code § 18A-4-8b(g) requires boards of education to “post and date notices of all job vacancies of established existing or newly created positions[.]” The instant situation does present a unique situation, in that the Board was required to return Ms. Tomblyn to her previous classification, although it did not comport with her job duties, and her previous position had ceased to exist. Nevertheless, the undersigned disagrees that this situation created any exception to the statutory posting requirement. While it is true that boards of education are mandated to classify personnel according to their job duties, (See footnote 3) and the Board was certainly placed in a difficult quandary by virtue of the Circuit Court's decision, the undersigned is not persuaded that the Board was allowed to simply ignore the requirement of posting a vacant position. Although Respondent argues otherwise, this situation is somewhat analogous to that which has occurred in cases where a board of education has attempted to circumvent the posting requirement in order to settle or avoid a grievance. It has been held by this Grievance Board that a board of education cannot avoid the posting requirements of W. Va. Code § 18A-4-8b, even in the interest of settling a controversy, if a vacancy (unrelated to the aggrieved issue) occurs. When this occurs, the position must be posted and qualified applicants allowed the opportunity to apply. (See footnote 4)

Similarly, the undersigned does not agree with Respondent's assertion that the instant case is analogous to a previous case in which this Grievance Board determined that no new positions were created when bus routes were reconfigured, thus no posting was required. (See footnote 5) The basis of that decision was that the changes constituted “duty assignments” rather than new positions. It was noted that “[t]he only time that a duty assignment might convert an existing position into a newly created position would be when the nature of the duty assignment is outside the statutory definition of the service personnel position inquestion.” (See footnote 6) In the instant case, it is simply untrue that Ms. Tomblyn's “assignment” was changed when she was moved into the vacant position at Washington District Elementary. On the contrary, Ms. Tomblyn's movement out of the Cook II position which she had been placed in at Buckhannon Upshur High School created a vacancy in that position, while placing her in the Cook III position constituted the filling of a vacancy. Two positions existed prior to the Board's action and continued to exist thereafter. Accordingly, this cannot be construed as a transfer or reassignment of duties, but the filling of a vacancy without proper posting.

Certainly, the undersigned is sympathetic to the predicament in which the Board found itself. If it had received the Court's decision earlier and placed Ms. Tomblyn on the transfer list, that could have

presented a proper, legal mechanism for changing her assignment. (See footnote 7) Unfortunately, that did not happen. The fact remains that a vacancy occurred in a position which was unrelated to Ms. Tomblyn's grievance, and the Board was statutorily required to post it.

The following conclusions of law support this Decision.

Conclusions of Law

1. In a non-disciplinary matter, Grievants have the burden of proving their claims 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. ofEduc.*, 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. Boards of education must "post and date notices of all job vacancies of established existing or newly created positions[.]" W. Va. Code § 18A-4-8b(g).

3. When a vacant position became available, Respondent placed Ann Tomblyn in the position without posting, in violation of W. Va. Code § 18A-4-8b(g). *See Tennant v. Monongalia County Bd. of Educ.*, Docket No. 04-30-386 (Feb. 7, 2005); *Dawson v. Cabell County Bd. of Educ.*, Docket No. 97-06-072 (Oct. 14, 1997).

Accordingly, this grievance is **GRANTED**, and Respondent is **ORDERED** to post the Cook III/Cafeteria Manager at Washington District Elementary School, and hire the most qualified applicant, in accordance with the provisions of W. Va. Code § 18A-4-8b.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Upshur 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: September 29, 2006

_____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Apparently, the Board chose not to appeal the Circuit Court's decision.

Footnote: 2

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.

Footnote: 3

See W. Va. Code § 18A-4-8(l); Pasco v. Ohio County Bd. of Educ., Docket No. 00- 30-032 (June 28, 2000); Farrow v. Putnam County Bd. of Educ., Docket No. 97-40-029 (June 4, 1997.

Footnote: 4

Tennant v. Monongalia County Bd. of Educ., Docket No. 04-30-386 (Feb. 7, 2005); See also Dawson v. Cabell County Bd. of Educ., Docket No. 97-06-072 (Oct. 14, 1997).

Footnote: 5

Mullins v. Logan County Bd. of Educ., Docket No. 94-23-283 (Sept. 25, 1995).

Footnote: 6

Id.

Footnote: 7

See W. Va. Code § 18A-2-7.