THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

VICKIE FLEMING, et al.,

Grievants,

v.

Docket No. 07-10-066

FAYETTE COUNTY BOARD OF EDUCATION,

Respondent,

and

Brenda Jeffries,

Intervenor.

DECISION

Vickie Fleming, Deanna Lucas, and Rita Kinkaid, the original three Grievants, initiated this grievance in mid-October 2006, alleging that the Fayette County Board of Education ("Board") was required to post the Cook III position that is at the center of this grievance. Some of the Grievants seek reclassification to the position of Cook III with back pay for wages lost with interest. All Grievants seek the posting and filling of the Cook III position pursuant to W. Va. Code §§ 18A-4-8b and 18A-4-8g.

Each of the three grievances was denied at level one. The grievances were consolidated at level two, and also denied at level two. Grievants chose to bypass level three. Grievants appealed to level four on February 26, 2007. Subsequently, numerous individuals employed as cooks by the Board sought to intervene in the grievance. These motions were denied, as the employees did not state a

position that was adverse to Grievants, but instead was identical. By Order dated April 26, 2007, these employees were joined as Grievants. A level four hearing was held before Acting Chief Administrative Law Judge Janis I. Reynolds on October 26, 2007, at the Fayette County Board of Education,Fayetteville, West Virginia. Brenda Jeffries appeared for the level four hearing, and was recognized as an Intervenor. (See footnote 1) A number of Grievants were represented by John Everett Roush, Esquire, and Ben Barkey, West Virginia Education Association. The remaining Grievants represented themselves. The Board was represented by Erwin L. Conrad, Esquire, and Jamison T. Conrad, Esquire. This grievance became mature for decision on December 19, 2007. It was subsequently transferred to the undersigned for decision on April 8, 2008, following the announcement of the retirement of Acting Chief Administrative Law Judge Reynolds.

Synopsis

Grievants argue that the Board promoted a fellow employee to Cook III without proper posting. The Board counters that the position in question was reclassified in compliance with statutory regulations, when the duties of the reclassified employee had expanded over time. Based upon the unique facts of this grievance, this situation did not create any exception to the statutory posting requirement. The reclassification of Ms. Jeffries to the category of Cook III can reasonably be viewed as a promotion. Many other employees were qualified for this position. Fairness dictates that the position be posted to allow the hiring decision to be made on the basis of an employee's seniority, and evaluation of past service. Due to structural changes to the school which led to the need for a Cook III, that position at the Fayetteville Elementary School Annex should be treated as a vacancy which was not posted. However, Grievants failed to prove that they should be reclassified because their duties remain most closely aligned with their currentclassification.

The following Findings of Fact are made based upon a preponderance of the evidence presented at levels two and four.

Findings of Fact

1. Grievants are all classified as cooks or cafeteria managers, and are all employed by the Board. The level four hearing revealed that Grievants fall into different categories as to what type of relief they seek. Some of the Grievants, including the Cafeteria Managers, seek the posting of the Cook III position only, while others seek reclassification, still others seek a combination of both.

Grievants have varying lengths of seniority. Many Grievants have been employed as cooks by the Board for more than ten years.

2. The Board made significant changes at Fayetteville Elementary during the summer of 2005. The former Fayetteville Middle School served as an Annex to Fayetteville Elementary School. The Kindergarten and First Grade students were served meals at the Annex. This move necessitated that an additional lunchroom, and breakfast room be located at the Annex building.

3. The Fayette County Food Service Specialist recommended to the Board that Brenda Jeffries be reclassified to Cook III when she discovered that Ms. Jeffries was performing the duties of that classification.

4. On September 18, 2006, the Board voted to reclassify Brenda Jeffries froma Cook II to a Cook III due to additional duties assigned as a result of the reconfiguration of the Fayetteville Elementary school.

5. Ms. Jeffries prepares food at the Fayetteville Elementary School, and transports the food to the Fayetteville Elementary School Annex where it is served. The production records for the Annex to Fayetteville Elementary School are maintained by Ms. Jeffires. Following the reconfiguration of the school, Ms. Jeffries was made responsible for compliance with all of the state and federal regulations for serving requirements, recording all temperatures, making reports, and providing all food orders for that separate location.

6. Grievants assist the various Cafeteria Managers with recording the temperature of food while it is being stored and prepared; they keep records of food production and usage; they contact the appropriate personnel to order food; and they contact the appropriate personnel to request equipment maintenance.

7. Without posting the position, the Board reclassified Ms. Jeffries to the position of Cook III. Ms. Jeffries has seven years of seniority with the Board. The Personnel Director for Fayetteville County Schools confirmed that Fayette County had only one individual classified as a Cook III, and that was Ms. Jeffries. Fayette County Personnel Director indicated that the Cook III position existed in Fayette County Schools at the time Ms. Jeffries was reclassified to the position.

Discussion

___In non-disciplinary matters, Grievants bear the burden of proving their allegations by a

preponderance of the evidence. W. Va. Code § 18-29-6. (See footnote 2) "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievants contend that, pursuant to the requirements of W. Va. Code § 18A-4-8b(g), the Board was required to post the position of Cook III at the Fayetteville Elementary School Annex. Grievants argue that the change in Ms. Jeffries' reclassification was a promotion, and the Board is bound to make promotions using the same criteria as in filling vacancies. In the alternative, some of the Grievants seek to be reclassified from Cook I or II, to the classification of Cook III. (See footnote 3) However, the Board counters that, in order to comply with the requirements of W. Va. Code § 18A-4-8(l) to properly classify all employees, it was required to reclassify Ms. Jeffries after she had taken on additional duties and assignments because of the reconfiguration. The issue of a violation of the posting requirement presents the undersigned with a difficult decision. Mr. Roush aptly points out in providing historical context; “there is always a tension between the requirements of section 8 and 8b with regard to how to handle a situation where an employee is working in a slot or position the duties of which do not match the duties of the classification of the employee.” In addition, the backdrop of this discussion is the clear legislative intent that decisions affecting promotions and the filling of service personnel positions are done on the basis of seniority, qualifications and evaluation of past service. W. Va. Code § 18A-4-8b.

Grievants have correctly pointed out that 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[.]” Therefore, it is clear that school service personnel vacancies must be posted. Grievants acknowledge that, pursuant to the provisions of W. Va. Code § 18A-4-8, boards of educations must reclassify, if appropriate, service personnel such as Ms. Jeffries. In fact, this statute requires a board of education to “review each service person's job classification annually and shall reclassify all service persons as required by the job classification.” W. Va. Code § 18A-4-8(l). Failure to comply with this requirement can result in adverse financial consequences for a county board of education. W. Va. Code § 18A-4-8(l) and (n).

A finding that the position should have been posted is supported by an analysis of whether or not the Board's treatment of Ms. Jeffries is to be viewed as a reclassification or a promotion. W. Va. Code

§ 18A-4-8b(a) and (b) provides, in pertinent part, the following:

> (a) A county board shall make decisions affecting promotions and the filling of any service personnel positions of employment or jobs occurring throughout the school year that are to be performed by service personnel as provided in section eight [§ 18A-4-8] of this article, on the basis of seniority, qualifications and past service. (Emphasis added).
>
> ___(b) Qualifications means that the applicant holds a classification title in his or her category of employment as provided in this section and shall be given first opportunity for promotion and filling vacancies. Other employees then shall be considered and shall qualify by meeting the definition of the job title as defined in section eight of [18A-4-8] of this article, that relates to the promotion or vacancy.

W. Va. Code § 18A-4-8b(d) provides, in pertinent part, the following:

> (d) A promotion is defined as any change in employment that the service person considers to improve his or her working circumstance within the classification category or employment.
>
> (1) A promotion includes a transfer to another classification category or place of employment if the position is not filled by an employee who holds a title within that classification category of employment. (Emphasis added).
>
> (2) Each class title listed in section eight [18A-4-8] of this article is considered a separate classification category of employment for service personnel...

Based upon the forgoing statutory provisions, and the unique facts of this grievance, 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 4) and the Board was certainly placed in a difficult quandary by virtue of the reconfiguration of the school, the undersigned is not persuaded that the Board was allowed to simply ignore the requirement of posting the position.

The Board's action on September 18, 2006, concerning Ms. Jeffries, within this set of facts, can reasonably be viewed as a promotion, with a resulting reclassification. Unlikeother examples of reclassification which resulted in the duties of the reclassified employee expanding over a long period of time, this change in duties occurred in quick fashion. The 2006-2007 school year was the starting point to Ms. Jeffries maintaining the production books for the Fayetteville Elementary School Annex. Ms. Jeffries was notified by the Board of her reclassification on September 19, 2006, with an effective

date of August 28, 2006. In essence, no time had elapsed between her duties as Cook II to her duties has a Cook III.

The level four testimony of Brian Parsons, Fayette County Personnel Director, indicated that Ms. Jeffries was the only employee classified as a Cook III in the county. (See footnote 5) As noted above, a promotion includes a transfer to another classification category or place of employment if the position is not filled by an employee who holds a title within that classification category of employment. That is exactly the case in this grievance. No other Cook III, a separate classification category of employment for service personnel, held that title.

Promotion decisions are to be made on the basis of seniority, qualifications, and past service. This particular set of facts presents many Cook II's that, by definition, are qualified. The troublesome aspect of this grievance is the undisputed fact that Ms. Jeffries has far less seniority then many of the Grievants. Given that many other employees were qualified for this position, fairness dictates that the position be posted to allow the decision to be made on the basis of an employee's seniority, and evaluation of past service. The inequity of this situation is further demonstrated by the Intervenor's testimony at level four. When questioned by one of her co-worker's on whether she felt her position should have been posted, her answer was a simple and prompt reply _ yes.

Further analysis into whether the reconfiguration of Fayetteville Elementary School resulted in creating a vacant position supports a finding which requires the posting of the Cook III position. The Grievance Board has previously determined that no new positions were created when bus routes were reconfigured, thus no posting was required. *Mullins v. Logan County Bd. of Educ.*, Docket No. 94-23-283 (Sept. 25, 1995). 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 in question.” *Id*.

The instant case can be distinguished from *Mullins* because the nature of the duty assignment of Ms. Jeffries did not change when she was moved into the position of Cook III at the Fayetteville Elementary School Annex. She did take on additional duties within the statutory definition of the position that resulted in the promotion, however, the nature of the duty assignment did not change. On the contrary, Ms. Jeffries' movement out of the Cook II position which she had been placed in at Fayetteville Elementary School and placing her in the Cook III position constituted the filling of a

vacancy. The position of Cook III and Cook II existed prior to the Board's action, and continued to exist thereafter. As theBoard acknowledges in its brief, the Cook III position at the Fayetteville Elementary School Annex should be treated as a vacancy which was not posted. (See footnote 6)

The less perplexing issue presented to the undersigned is that of classification. The assertion by some Grievants that they are misclassified is without merit. In order to prevail in a misclassification grievance, an employee must establish that his duties more closely match those of another classification than that under which his position is categorized. *Scott v. Monongalia County Bd. of Educ.*, Docket No. 01-30-505 (Jan. 10, 2002); *Carter v. Kanawha County Bd. of Educ.*, Docket No. 01-20-057 (Apr. 13, 2001). A school service employee who establishes, by a preponderance of the evidence, that she is performing the duties of a higher § 18A-4-8 classification than that under which he is officially categorized, is entitled to reclassification. *Gregory v. Mingo County Bd. of Educ.*, Docket No. 95-29-006 (July 19, 1995); *Hatfield v. Mingo County Bd. of Educ.*, Docket No. 91-29-077 (Apr. 15, 1991). However, simply because an employee is required to undertake some responsibilities normally associated with a higher classification, even regularly, does not render her misclassified *per se*. *Hatfield*, *supra*.

W. Va. Code § 18A-4-8(27) defines “Cook II” as “a person employed to interpret menus and to prepare and serve meals in a food service program of a school. This definition includes a service person who has been employed as a 'Cook I' for a period of four years.” W. Va. Code § 18A-4-8(28) defines “Cook III” as “a person employed toprepare and serve meals, make reports, prepare requisitions for supplies, order equipment and repairs for food service program of a school.”

Grievants did not establish by a preponderance of the evidence that they were employed to make reports, prepare requisitions for supplies, and order equipment and repairs for the school food service program at which they are employed. They do provide assistance to the various Cafeteria Managers of some tasks to assist the Manager in their preparations of reports and requisitions. Incidental performance of some of the duties within the classification does not necessarily mean an employee in a different classification should be reclassified.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. In non-disciplinary matters, Grievants bear the burden of proving their allegations by a preponderance of the evidence. W. Va. Code § 18-29-6.

2. Boards of education are mandated to classify personnel according to their job duties. *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).

3. 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[.]”

4. In order to prevail in a misclassification grievance, an employee must establish that his duties more closely match those of another classification than that under which his position is categorized. *Scott v. Monongalia County Bd. of Educ.*, Docket No. 01-30-505 (Jan. 10, 2002); *Carter v. Kanawha County Bd. of Educ.*, Docket No. 01-20-057 (Apr. 13, 2001).

5. W. Va. Code § 18A-4-8(27) defines “Cook II” as “a person employed to interpret menus and to prepare and serve meals in a food service program of a school. This definition includes a service person who has been employed as a 'Cook I' for a period of four years.” W. Va. Code § 18A-4-8(28) defines “Cook III” as “a person employed to prepare and serve meals, make reports, prepare requisitions for supplies, order equipment and repairs for food service program of a school.”

6. Under this set of facts, where Grievants and Intervenor have equal qualifications and differing seniority, the actions of the Board reclassifying the Intervenor can be viewed as a promotion which should have been handled in the same way as vacancies. Specifically, given that many Grievants and Intervenor are qualified for the position, posting the position is necessary to fill it on the basis of seniority, and past service. In addition, the reconfiguration of the Fayetteville Elementary School created a vacancy which was not posted.

7. Grievants did not establish by a preponderance of the evidence that they were employed to make reports, prepare requisitions for supplies, and order equipment and repairs for the school food service program at which they are employed. Therefore, the assertion by some Grievants that they are misclassified is without merit.

Accordingly, this grievance is **GRANTED**, in part, and **DENIED**, in part. Respondent is **ORDERED** to post the Cook III position at the Fayetteville Elementary School Annex,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 the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. *See* W. Va. Code § 18-29-7 (repealed, *See Footnote 2, supra)*. Neither the

West Public 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: May 8, 2008

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Ronald L. Reece

Administrative Law Judge

Footnote: 1

Ms. Jeffries is the employee reclassified to Cook III, as such, her position is adverse to Grievants.

Footnote: 2

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former statutes, which continue to control the proceedings in this case.

Footnote: 3

Grievants seeking reclassification are Vickie Fleming, Deana Kania (Cook I at Collins Middle School), Rita Kincaid, Deanna Lucas, Masice Miller, Dianna Perry (Cook I at Valley High School), Deborah Pridemore, and Helen Pridemore.

Footnote: 4

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: 5

Mr. Parson also indicated that his classification existed prior to Ms. Jeffries reclassification, however, it was vacant.

Footnote: 6

To place Mr. Conrad's comments in context, this was the Board's suggestion as to the appropriate remedy in the

case.