

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**AMY CHRISMAN,
Grievant,**

v.

DOCKET NO. 2017-2322-CONS

**JEFFERSON COUNTY BOARD OF EDUCATION,
Respondent.**

DECISION

Grievant, Amy Chrisman, filed a grievance against her employer, the Jefferson County Board of Education, on December 6, 2016. The statement of grievance reads, “[o]n or about November 14, 2016, Respondent selected an applicant for Dean of Students at Jefferson High School who was not the most qualified applicant. Moreover, the selection process was flawed because a relative of the successful applicant participated on the hiring committee. Violation of WVC § 18A-4-7a and WVDE Policy 5000.” As relief Grievant seeks “adherence to WVC § 18A-4-7a and WVDE Policy 5000 with all qualified applicants for the position reconsidered under an appropriate committee and fairly evaluated for the position of Dean of Students at Jefferson High School; and any other relief the grievance evaluator deems appropriate.”

A conference was held at level one, and a written response to the grievance was issued on January 3, 2017, by Superintendent Bondy Shay Gibson, stating that the posting was in error in stating that the position required an administrative certificate, and that the position would be reposted. The response also indicated that the interview team for the reposting would not include any relatives of applicants. Grievant appealed to level two on

January 10, 2017, and a mediation session was held on February 24, 2017. Grievant appealed to level three on March 8, 2017. A level three hearing was held on June 6, 2017, before the undersigned Administrative Law Judge in the Grievance Board's Westover, West Virginia office. Grievant was represented by John Everett Roush, Esquire, American Federation of Teachers - West Virginia, and Respondent was represented by Tracey B. Eberling, Esquire, Steptoe & Johnson, PLLC. At the beginning of the level three hearing the parties advised that a second grievance had been filed by Grievant involving related issues, and requested that the second grievance be transferred from level one to level three, and that the two grievances be consolidated for hearing and decision, which request was granted.

The second grievance was filed on or about May 25, 2017, and the statement of grievance reads, "[o]n May 8, 2017, the Jefferson County Board of Education voted to change the title of Dean of Students at Jefferson High School. The Board did not, however, repost the newly titled position." As relief Grievant seeks, "for the position of Student Support Facilitator at Jefferson High School to be posted in adherence to WVC § 18A-4-7a; and any other relief the grievance evaluator deems appropriate." This matter became mature for decision on July 10, 2017, on receipt of the last of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is a School Counselor at Shepherdstown Middle School. She applied for a posted Dean of Students position at Jefferson High School. The posting stated that an administrative certificate was required for the position, or that the applicant be eligible for such a certificate, and it stated that the salary would be calculated based on the

administrative scale. This was a new position and was approved by the board of education to be paid at the teacher salary schedule. The board of education did not approve the requirement of administrative certification. The erroneous posting was not discovered by Respondent until after it had been filled by the successful applicant, who did not hold an administrative certificate, nor was she eligible for one. Additionally, one of the successful applicant's relatives was on the interview committee. The Superintendent was made aware of these issues at the level one conference, and directed that the position be reposted with no administrative certification required, and at the teacher salary schedule, and that no relative of an applicant serve on the interview committee. Respondent acted in a reasonable manner in correcting the error when it became aware of it. The successful applicant possessed the qualifications necessary to the position, and Grievant did not demonstrate that the position was an administrative position. Respondent later changed the title of the position, but did not change any duties, responsibilities, contract terms, or salary. The change in title did not make the position a newly created position which had to be posted.

The following Findings of Fact are properly made from the record developed at levels three.

Findings of Fact

1. Grievant has been employed by the Jefferson County Board of Education ("JBOE") for nine years, and is a School Counselor at Shepherdstown Middle School.
2. During the summer of 2016, the administrators at Jefferson High School met to discuss various issues in preparation for the coming school year. One of the topics of discussion was the need for additional student support services. Jefferson High School

had two half-time teaching positions which would not be filled for the 2016-2017 school year: a Spanish position which had not been filled for some period of time due to lack of qualified applicants, and a math position which was not needed based on student enrollment. The administrators put together a proposal for a full-time position which they proposed be called Dean of Students, to assist with the needs of the student population at Jefferson High School. The position would be funded by eliminating the two half-time teaching positions which had not been filled, and the salary would be based on the teacher salary schedule. The proposal did not envision this position being an administrative position requiring administrative certification. The proposal was presented to the JBOE, and was approved.

3. The job description prepared by the administrators at Jefferson High School describes the job as, “works with the Administrative Team in carrying out the school’s academic and behavior programs. As a professional educator, the Dean of Students understands and responds to the challenges presented by today’s student population. The Dean of Students provides a proactive leadership to engage all stakeholders in the development and delivery of resources, programs and services to support students’ academic achievement, personal and social development, and a positive school climate.” The responsibilities listed for the position include working with administrators, other school staff and parents to develop and implement “strategies to promote effective student behavior and appropriate discipline and help students develop a positive self-concept. Coordinate, facilitate, and implement disciplinary intervention steps and processes, including positive behavioral supports. Manage discipline referrals and assist in the management and structure of the school as determined by the administration. Exercise

appropriate leadership in processing student behavioral problems, including accurate record keeping of infractions as well as communication with parents. Plan and execute educational in-class and out-of-class activities related to disciplinary interventions and supports. Assist in the development of intervention plans for students with chronic behaviors and/or attendance irregularities. Collaborate . . . and participate in regular meetings such as SAT,¹ IEP, and 504 plans. Observe and understand students' behavior and psyche and report suspicions of neglect, abuse etc. . . . Participate in other activities and responsibilities as a member of the administrative team."

4. On September 30, 2016, JBOE posted the Dean of Students position to be located at Jefferson High School. The posting was prepared by a new employee in the Human Resources Department at JBOE, who had no experience in the West Virginia educational system, and it listed the contract term as 200 days, and the salary scale as the administrative salary schedule. The job duties were described in the posting as "works with the Administrative Team in carrying out the school's academic and behavior programs. . . . responds to the challenges presented by today's student population. . . . provides a proactive leadership to engage all stakeholders in the development and delivery of resources, programs and services to support students' academic achievement, personal and social development, and a positive school climate." The minimum qualifications listed in the posting included a valid teaching certificate, a Master's Degree, "[h]old or is eligible for a valid West Virginia administrative certificate at the appropriate programmatic level," and three years of successful teaching experience.

¹ This acronym stands for Student Assistance Team.

5. Grievant applied for the posted Dean of Students position, and was interviewed by an interview committee in October 2016. Five other applicants were interviewed, including Devon Pearrell.

6. The interview committee members were Sherry Ross, Principal at Jefferson High School, Darrius Fenton, Assistant Principal at Jefferson High School, Tony Roman, Assistant Principal at Jefferson High School, Laura Carter and Marcia Stengel, both teachers and Faculty Senate designees from Jefferson High School, and Jenifer Steen, Jefferson High School counselor. Ms. Steen is related to applicant Devon Pearrell. Ms. Steen did not evaluate the applicants, but she participated in the interviews.

7. Grievant has a Bachelor's Degree in Political Science, a Master's Degree in Administration of Justice, and a Master's Degree in School Counseling. She had also earned the requisite number of hours of course work and internships at various schools to qualify to take the examination to earn an administrative certificate on November 2, 2016, which she passed, and she received her administrative certificate in November 2016.

8. Ms. Pearrell did not hold an administrative certificate, nor has she been eligible for an administrative certificate at any time. Ms. Pearrell has a Bachelor's Degree and a Master's Degree in Social Work. She began working as an attendance worker/social worker for the Berkeley County Board of Education in August 2013, and prior to that, she had worked for three years at the Children's Home Society of West Virginia as a Youth Services Worker and a Mental Health Specialist.

9. The posting was in error in requiring an administrative certificate and in listing the salary as per the administrative pay scale. The posting was not revoked by JBOE, and the Principal of Jefferson High School and the interview committee recommended Ms.

Pearrell for the Dean of Students position. The JBOE accepted the recommendations, and Ms. Pearrell was placed in the Dean of Students position effective December 1, 2016.

10. Grievant was the second choice of the Principal of Jefferson High School and the interview committee for the Dean of Students position.

11. After the first grievance was filed, Superintendent Gibson became aware during the level one conference that the posting contained errors regarding the salary and minimum qualifications for the position, and that a relative of Ms. Pearrell was on the interview committee. She directed that the position be reposted with the correct qualifications and salary, and that Ms. Skeen not serve on the interview committee.

12. The Dean of Students position was reposted sometime after January 3, 2017. The posting did not list an administrative certificate or eligibility for such as either a required or preferred qualification, nor did it list a teaching certificate or teaching experience as a required or preferred qualification. The posting listed three years educational experience as a required qualification, and “[e]xperience as a teacher, counselor” as a preferred qualification, as well as special education endorsements preferred. The salary schedule listed in the posting was “[p]ursuant to WV Code § 18A-4-2, commensurate with experience and education level,” which is the teacher salary schedule.

13. Ms. Pearrell was allowed to remain in the Dean of Students position while it was being reposted.

14. The interview committee members were Sherry Ross, Principal at Jefferson High School, Darrius Fenton, Assistant Principal at Jefferson High School, Mary Beth Group, Assistant Principal at Jefferson High School, Laura Carter and Linda Jones, both teachers and Faculty Senate designees from Jefferson High School, Cari Jubb, Jefferson

High School counselor, and Lee Ebersole, JBOE's Coordinator of Federal Program and School Improvement.

15. Ms. Pearrell was once again the successful applicant for the Dean of Students position, as approved by the JBOE at its March 13, 2017 meeting, effective March 20, 2017. Grievant was the second choice of the Principal of Jefferson High School and of the interview committee.

16. At a meeting of the JBOE on May 8, 2017, the JBOE approved the change in the title of the position at issue from Dean of Students to Student Support Facilitator. The title change did not affect the duties, responsibilities, contract term, or salary of the position.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). See also *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). "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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant argued Respondent had a duty to make sure the first posting was accurate, and Respondent was bound by the posting and could not repost the position except to

attract more applicants who were qualified, pointing to WEST VIRGINIA CODE § 18A-4-7a(o)(1), and that the minimum qualifications were changed in the reposting to favor the successful applicant. Grievant argued that Ms. Pearrell could not have been selected because she did not hold an administrative certificate as was required by the first posting. Grievant further argued that an administrative certificate is required because the position was labeled Dean of Students, pointing to *Hoffman v. Mingo County Board of Education*, Docket No. 96-29-021 (June 28, 1996). Respondent pointed out that the first posting contained significant errors, that the qualifications and salary in the posting were not approved by Respondent, and that its actions were taken to correct the errors. Respondent also disputed that the *Hoffman* decision stands for the proposition that when the title Dean of Students is used, the use of this title automatically makes the position administrative.

Taking the issue of whether by labeling the position Dean of Students the position automatically became an administrative position, Grievant's blanket interpretation of *Hoffman* for this proposition is erroneous. It is quite clear that the *Hoffman* decision does not state that any time any board of education uses the title Dean of Students it automatically makes that position one which requires administrative certification. Dean of Students is not a position which is defined by statute. The *Hoffman* decision follows on the heels of earlier Grievance Board cases involving the same Respondent, and is based on a finding that in Mingo County at that time, a Dean of Students was in fact an Assistant Principal position, which finding was based on an analysis of the duties of the position. Whether a particular position, which has been assigned a title which is not defined by statute, is administrative or a classroom teaching position is an issue determined solely by

the duties of the position. The Supreme Court of Appeals of West Virginia has indicated that the location of the position is not dispositive in this analysis, rather, the focus is on the relationship between the employee and the students, and “how the educator spends the *majority* of his or her time, or what his or her *primary* responsibilities are.” *Putnam County Bd. of Educ. v. Andrews*, 198 W. Va. 403, 481 S.E.2d 498 (1996). (Emphasis in original.) In this case, the record reflects that the position would be working with students and would have no responsibility for supervising other employees, no responsibility for administering a particular program or area, or for submitting reports to governing agencies. Whether the position would actually be spending a majority of the time working with students is unknown, as it is a new position, created only with a vision in mind. Grievant did not demonstrate that this position, whether titled Dean of Students or Student Support Facilitator, is an administrative position.

WEST VIRGINIA CODE § 18A-4-7a(o)(1) provides that a county board of education must “post and date notices of each opening at least once. At their discretion, boards may post an opening for a position other than classroom teacher more than once in order to attract more qualified applicants. At their discretion, boards may post an opening for a classroom teacher one additional time after the first posting in order to attract more qualified applicants only if fewer than three individuals apply during the first posting” This statutory provision also states with regard to postings for a classroom teaching position, that, “(E) Job postings may not require criteria which are not necessary for the successful performance of the job and may not be written with the intent to favor a specific applicant.” This statutory provision does not state that a county board of education can **only** post a position a second time, or more, under the stated circumstances, or that it may

not repost a position to correct an error. *Toney v. Lincoln County Bd. of Educ.*, Docket No. 98-22-009 (Mar. 24, 1998).

The Grievance Board has found that, “[a] board of education has a duty to make sure its postings are accurate, and to make sure an employee is properly certified, or to make sure the employee understands the need to obtain certification, before the employee is hired. *Roth v. Ohio County Bd. of Educ.*, Docket No. 35-89-025 (Feb. 28, 1990); *Rash v. Wayne County Bd. of Educ.*, Docket No. 50-87-263 (June 7, 1988); *Cruciotti v. Ohio County Bd. of Educ.*, Docket No. 35-86-110 (Sept. 4, 1986). W. VA. CODE § 18A-2-1.” *Conners v. Hardy County Bd. of Educ.*, Docket No. 99-16-459 (Jan. 14, 2000). Importantly, “[t]he purpose of the job posting statute to accurately reflect the teaching responsibilities of the position is frustrated and confounded when a board of education denotes required certification areas that are not necessary for the vacant posted position.’ *Rash v. Wayne County Bd. of Educ.*, Docket No. 50-87-263 (June 7, 1988).” *Id.* Accordingly, “the Grievance Board has long held that Respondent had the authority to withdraw the posting prior to filling the assignment *Hackney v. Jackson County Bd. of Educ.*, Docket No. 00-18-113 (June 9, 2000); *Toney v. Lincoln County Bd. of Educ.*, Docket No. 98-22-009 (Mar. 24, 1998). See *Otto v. Berkeley County Bd. of Educ.*, Docket No. 89-02-369 (Dec. 28, 1990).” *Powroznik-Hess v. Monongalia County Bd. of Educ.*, Docket No. 2010-0498-MonED (Feb. 10, 2011). Additionally, “[t]his Grievance Board has recognized that boards of education should be encouraged to correct their errors as early as possible. See *Barrett v. Hancock County Bd. of Educ.*, Docket No. 96-15-512 (Dec. 31, 1997).” *Petrovich v. Hancock County Bd. of Educ.*, Docket No. 98-15-074 (July 13, 1998).

In this case, it is clear that the employee responsible for putting the posting together made a mistake. He was not authorized by the JBOE to offer an administrative salary or require administrative certification, nor was he directed by anyone to do so. Unfortunately, the erroneous posting was not discovered in a timely fashion, and it was not withdrawn. However, "[a] state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers and all persons must take note of the legal limitations upon their power and authority. [Citations omitted.]" Syl. Pt. 2, *W. Va. Public Employees Ins. Bd. v. Blue Cross Hosp. Serv., Inc.*, 179 W. Va. 605, 328 S.E.2d 356 (1985). "Any other rule would deprive the people of their control over the civil service, and leave the status and tenure of all employees to be governed by whatever arrangements incumbent administrators may agree to or prescribe." *Freeman v. Poling*, 175 W. Va. 814, 819, 338 S.E.2d 415, 421 (1985), citing *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983). When the mistake was discovered the position was reposted to state the correct information, which would possibly have resulted in a larger applicant pool, which was the reasonable course of action. While it is unclear how Ms. Pearrell was selected for the position under the original posting when she did not meet the minimum qualifications set forth in the erroneous posting, the fact is that the JBOE did not approve administrative certification as a minimum qualification. Ms. Pearrell was qualified for the position as approved by the JBOE, and as set forth in the corrected posting.

Finally, Grievant asserted that the position had to be reposted when Respondent changed the title to Student Support Facilitator, because this was a newly created position. Grievant cited no legal support for the proposition that changing the title of the position made it a new position. None of the duties, responsibilities, salary, or contract terms were

changed. The position remained a non-administrative position. No new position was created by changing the name of the position.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the Public Employees Grievance Bd. 156 C.S.R. 1 § 3 (2008); *Howell v. W. Va. Dep't of Health & Human Res.*, Docket No. 89-DHS-72 (Nov. 29, 1990). *See also 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). "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 & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

2. This statutory provisions relating to posting a position set forth in WEST VIRGINIA CODE § 18A-4-7a(o)(1) do not state that a county board of education can **only** post a position a second time, or more, under the stated circumstances, or that it may not repost a position to correct an error. *Toney v. Lincoln County Bd. of Educ.*, Docket No. 98-22-009 (Mar. 24, 1998).

3. "[T]he Grievance Board has long held that Respondent had the authority to withdraw the posting prior to filling the assignment, and Grievant acquired no right to the assignment merely by her application for it. *Hackney v. Jackson County Bd. of Educ.*, Docket No. 00-18-113 (June 9, 2000); *Toney v. Lincoln County Bd. of Educ.*, Docket No.

98-22-009 (Mar. 24, 1998). See *Otto v. Berkeley County Bd. of Educ.*, Docket No. 89-02-369 (Dec. 28, 1990)." *Powroznik-Hess v. Monongalia County Bd. of Educ.*, Docket No. 2010-0498-MonED (Feb. 10, 2011).

4. "A state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers and all persons must take note of the legal limitations upon their power and authority. [Citations omitted.]" Syl. Pt. 2, *W. Va. Public Employees Ins. Bd. v. Blue Cross Hosp. Serv., Inc.*, 179 W. Va. 605, 328 S.E.2d 356 (1985). "Any other rule would deprive the people of their control over the civil service, and leave the status and tenure of all employees to be governed by whatever arrangements incumbent administrators may agree to or prescribe." *Freeman v. Poling*, 175 W. Va. 814, 819, 338 S.E.2d 415, 421 (1985), citing *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983).

5. "This Grievance Board has recognized that boards of education should be encouraged to correct their errors as early as possible. See *Barrett v. Hancock County Bd. of Educ.*, Docket No. 96-15-512 (Dec. 31, 1997)." *Petrovich v. Hancock County Bd. of Educ.*, Docket No. 98-15-074 (July 13, 1998).

6. Respondent acted reasonably when the mistake was discovered by reposting the position to state the correct information.

7. The successful applicant met the minimum qualifications approved by Respondent, and was qualified for the position as approved by the Respondent, and as set forth in the corrected posting.

8. In the analysis of whether a position is a classroom teaching position or an administrative or other professional position, the focus is on the relationship between the

employee and the students, and “how the educator spends the *majority* of his or her time, or what his or her *primary* responsibilities are.” *Putnam County Bd. of Educ. v. Andrews*, 198 W. Va. 403, 481 S.E.2d 498 (1996). (Emphasis in original.)

9. The position at issue did not become an administrative position by virtue of assigning the position the title Dean of Students. Grievant did not demonstrate that the duties of this position, whether titled Dean of Students or Student Support Facilitator, are such that the position is an administrative position.

10. WEST VIRGINIA CODE § 18A-4-8b states that a “[c]ounty board shall post and date notices of all job vacancies of existing or newly created positions in conspicuous places for all school service personnel to observe for at least five working days.”

11. No new position was created by changing the name of the position in this instance, when no other change was made to the position.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia 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 certified record can be prepared and properly transmitted to the Circuit Court of Kanawha County. See *also* 156 C.S.R. 1 § 6.20 (2008).

Date: August 17, 2017

BRENDA L. GOULD
Deputy Chief Administrative Law Judge