F. DENNIS WEAVER, .

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Grievant, .

.

v. . Docket No. 94-26-129

.

MASON COUNTY BOARD OF EDUCATION, .

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Respondent. .

D E C I S I O N

This is a grievance by F. Dennis Weaver (Grievant) alleging that the Respondent Mason County Board of Education (MCBE) violated W. Va. Code § 18A-4-8b by improperly denying him the opportunity to apply for certain positions. Grievant initiated his grievance at Level I on December 22, 1993. Following denial at Level I on January 7, 1994, Grievant advanced his grievance to Level II where a hearing was conducted on March 16, 1994. After receiving an adverse decision at Level II on March 22, 1994, Grievant appealed to Level III where MCBE waived his grievance on April 5, 1994. Upon timely appeal to Level IV, a hearing was set for June 7, 1994. However, the parties mutually agreed to a resolution based on the record developed below. This matter became mature for decision on August 3, 1994 upon receipt of proposed findings of fact and conclusions of law from the parties.

DISCUSSION

In grievances that are not disciplinary in nature, Grievant has the burden of proving the allegations in his complaint by a preponderance of the evidence. Runyon v. Mingo County Bd. of Educ., Docket No. 93-29-481 (Apr. 4, 1994); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). Consistent with this burden of proof, the following pertinent facts were established by the testimony and exhibits admitted into the record at Level II:

FINDINGS OF FACT

1. Grievant is currently employed by MCBE as a Custodian III, assigned to Leon Elementary School.

2. Grievant was previously employed by MCBE in a multi-classified position as described in W. Va. Code § 18A-4-8 and held the classification titles of Carpenter II, Electrician I, Plumber I and Mason.

3. Grievant was laid off from his multi-classified maintenance position with MCBE in June of 1986 as the result of a reduction in force, shortly thereafter obtaining employment with MCBE as a Custodian.

4. On August 3, 1993, MCBE posted notice of two "Maintenance Employees Temporary" positions to work on an "as needed" basis. G Ex 1; A Ex 1.

5. Grievant did not apply for either of the positions.

6. On or about August 31, 1993 MCBE hired Sam Beckner and Jeffrey Clendenin to fill the positions described in Finding ofFact Number 4. Mr. Beckner subsequently transferred to another position and another applicant who had responded to the posting, Paul Wood, replaced Mr. Beckner.

7. Subsequent to their hiring, MCBE began paying regular pay and extended certain benefits to Mr. Clendenin and Mr. Wood. In addition, these employees have been working on a daily basis since their hiring.

8. MCBE has not acted to change the "as needed" or "temporary" status of the positions at issue.

9. MCBE has never established a date certain when these positions will be terminated.

Consistent with the foregoing Findings of Fact, the undersigned finds that MCBE's actions in these circumstances, while intended to provide additional flexibility in meeting its maintenance requirements, exceeded its authority under W. Va. Code § 18A-4-8b. The pertinent portion of 18A-4-8b applicable here provides:

> Boards shall be required to post and date notices of all job vacancies of established existing or newly created positions in conspicuous working places for all school service employees to observe for at least five working days. The notice of such job vacancies shall include the job description, the period of employment, the amount of pay and any benefits and other information that is helpful to the employees to understand the particulars of the job. After the five day minimum posting period all vacancies shall be filled within twenty working days from the posting date notice of any job vacancies of established existing or newly created positions.

This Grievance Board has previously recognized that the West Virginia Supreme Court of Appeals has consistently construed § 18A-4-8b to favor competitive posting. Bays v. Fayette County Bd. ofEduc., Docket No. 93-10-439 (Aug. 23, 1994), citing Board of Educ. v. DeFazio, 378 S.E.2d 656 (W. Va. 1989); State ex rel. Rose v. Raleigh County Bd. of Educ., 367 S.E.2d 223 (W. Va. 1988); Marion County Bd. of Educ. v. Bonfantino, 366 S.E.2d 650 (W. Va. 1988); Francis v. Logan County Bd. of Educ., Docket No. 93-23-346 (Dec 29, 1993). One of the obvious purposes of posting is to provide information "helpful to the employees to understand the particulars of the job." W. Va. Code § 18A-4-8b. Moreover, § 18A-4-8b specifically requires the posting to include "the period of employment."

According to the evidence developed in this very limited record, MCBE has created two new positions in its Maintenance Department designed to provide maximum flexibility in meeting various maintenance priorities from relatively routine lawn mowing chores to fixing safety hazards identified by the State Fire Marshall. Depending on MCBE's requirements and its financial situation, these "temporaries" may work as little as one day per week or per month or every working day. While there is no apparent legal prohibition to hiring temporary employees on such an "as needed" basis, (See footnote 1) the term of their employment is so indefinite that they could still be working for MCBE long after Grievant has retired. Grievant is correct in complaining that because nodefinite period of employment has been prescribed by the posting, these positions are not truly "temporary." Without restricting MCBE to any particular duration, the undersigned finds that MCBE violated the spirit and intent of the posting provision of W. Va. Code § 18A-4-8b by failing to set forth in its notice a specific duration for the "period of employment" established for these newly-created temporary positions.

Accordingly, the Grievant has established that he was improperly denied the opportunity to evaluate whether or not he wanted to compete for the positions at issue. In order to remedy this violation, consistent with the authority extended under W. Va. Code § 18-29-5, the undersigned finds that MCBE must be required to re-post these positions to include a "period of employment" of some definite duration, consistent with W. Va. Code § 18A-4-8b. However, Grievant has not otherwise established that, had MCBE posted these positions correctly, he would have either applied for or been entitled to one of the positions. Thus, Grievant has not established any basis for obtaining any further relief in this matter.

In addition to the foregoing discussion, the following conclusions of law are appropriate to disposition of this matter:

CONCLUSIONS OF LAW

1. Grievant is required to prove the allegations in his complaint by a preponderance of the evidence. Runyon v. Mingo County Bd. of Educ., Docket No. 93-29-481 (Apr. 4, 1994); Hanshawv. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. Grievant established that MCBE's failure to establish any definite duration for the period of employment for two newly-created temporary maintenance positions being hired on an "as needed" basis, is inconsistent with the spirit and intent of the posting requirement for such vacancies established by W. Va. Code § 18A-4-8b.

Accordingly, this Grievance is hereby **GRANTED** to the extent that MCBE is directed to re-post the newly-created vacancies in its Maintenance Department to include a period of employment of definite duration consistent with this opinion. Grievant has not otherwise established any basis for personal relief.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mason County and 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. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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LEWIS G. BREWER

Administrative Law Judge

Dated: November 22, 1994

Footnote: 1 It is noted that this issue was not raised by this grievance and, thus, is not being decided at this time. However, creation of any non-standard service personnel position may be problematic. See, e.g., Hatfield v. Cabell County Bd. of Educ., Docket No. 90-06-208 (Dec. 17, 1990); Savilla v. Putnam County Bd. of Educ., Docket No. 89-40-

456 (Dec 21, 1989).