LUCILLE DURANTE, et al.

v. Docket No. 95-15-266

HANCOCK COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievants are four school aides, Lucille Durante, Patricia Salvati, Cheryl Glenn, and Carmen Truax, employed by Respondent Hancock County Board of Education (HCBE). They allege HCBE violated W.Va. Code 18A-4-8b when it failed to post a vacant aide position at Allison Elementary School (AES). They seek as relief that the position be posted and filled in accordance with the statute. HCBE denies wrongdoing and insists no vacancy existed at the school. The parties agreed a decision could be rendered on the basis of the record adduced below.1 The case became mature upon receipt of Grievants' fact law proposals on August 14, 1995.

1The record consists of the pleadings, lower-level adverse decisions, and the transcript of the June 8, 1995, level two hearing.

There is no dispute concerning the relevant facts giving rise to this grievance. Based on all matters of record, the following findings of fact are made.2

Findings of Fact

1. During the 1993-1994 school year, three kindergarten classes, teachers and aides were sufficient for AES' kindergar ten program. However, the enrollment of kindergarten students for the 1994-1995 school term required an additional (fourth) kindergarten class, teacher and aide.

2. The additional aide position for AES was properly posted in September 1994. Approximately fifteen persons ap plied, including at least one of the Grievants, Patricia Salvati, a special education supervisory aide at a high school.

3. At the time of the posting, HCBE did not foresee any retirements or resignations of any aides at AES. Thus, Assis tant Superintendent Ronald Daugherty made it known to AES aide applicants that, if demand for a fourth kindergarten class ceased to exist at AES the ensuing school year, a transfer would likely result because of the seniority of the existing aides at AES.

4. Because she could not be guaranteed permanent place ment at AES, Grievant Salvati, the most senior applicant, declined the job, and other Grievants withdrew their bid.

2It appears from the record that several persons who originally joined this grievance withdrew either before or after the level two proceedings.

5. Cathy Markowicz, the successful candidate for the kindergarten aide position at AES in Fall 1994, was the most senior candidate of the applicants who remained in consideration for the position, but was less senior than the Grievants who either did not bid or withdrew their bid for the position.

6. After the beginning of the 1994-95 school year, the most senior aide at AES, Virginia Giebel, unexpectedly announced her resignation in February 1995, effective the end of the 1994-95 school year.

7. Later, in Spring 1995, projected enrollment of kinder garten students for AES for the 1995-1996 school term showed

that three kindergarten classes, not four, would be adequate. Due to Ms. Giebel's retirement, administrators determined that none of the remaining aides at AES, specifically, Ms. Markowicz, needed to be placed on reduction of force or transfer.

Discussion

In support of their case, Grievants strongly argue that the retirement of a service worker causes a vacancy which must be posted for competitive bid.3 They contend HCBE is obligated to place the least senior aide at AES, that is, Ms. Markowicz, on transfer so they can bid on Ms. Giebel's vacated position.

3To further bolster their case, Grievants also asserted that HCBE has not followed "past practice" for posting and hiring aides, and related some examples of times HCBE posted jobs following reduction in force actions when it later became apparent that the positions were still needed. According to HCBE, these altered situations occurred after the end of the school year, and the cited examples were not analogous to the situation at AES. The undersigned agrees.

Grievants' case seems to be premised upon the theory and argu ment that Ms. Giebel's retirement as a kindergarten aide at the end of the 1994-95 became a "vacancy" affecting coincidentally the aide position held by Ms. Markowicz. Grievants' argument is not persuasive.4

Each of the Grievants had an opportunity to bid on a newly-created aide position at AES in Fall 1994, and, because the fate of the job was tenuous, either chose not to bid, or having bid, refused the position when offered. However, a vacancy was not created at AES due to Ms. Giebel's retirement

because the elimination of one kindergarten aide position occurred simultaneously with the retirement.4 The Grievance Board has previously ruled that the retirement of a service worker does not necessarily create a vacancy which must be posted, especially when a position is eliminated. Payne v. Fayette County Bd. of Educ., Docket No. 94-10-144 (Sept. 28, 1994.

That is exactly what happened in this case. A worker retired and a position was eliminated. That Ms. Markowicz may

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4Grievants also argue that a principal has no authority to fill vacancies with existing staff at a school. That is not what happened in this case. Again, Ms. Markowicz was hired as an aide at AES in Fall 1994, and Ms. Giebel's retirement at the end of the school year did not create a vacancy at AES.

4In the Payne grievance, one of three electricians retired. The school board decided the remaining two employees could perform the duties of the retired worker, and simply eliminated the third position. The grievants in that case also sought the posting of the retired worker's position. However, there, as here, no vacancy existed, under the circumstances.

have benefitted from this turn of events to Grievants' detriment did not create a second opportunity for Grievants to bid on a job they previously declined. In short, Grievants failed to show a violation of the posting and job filling requirements of W.Va. Code 18A-4-8b, because no vacancy existed at AES for a kindergarten aide for the 1995-96 school year.

In addition to the foregoing, the following conclusions or law are appropriate.

Conclusions of Law

1. Pursuant to W.Va. Code 18A-4-8b, a board of education must post all vacant or newly-created service personnel posi tions.

2. The retirement of a service worker does not necessari ly create a vacancy, especially when a job is eliminated. See Payne v. Fayette County Bd. of Educ., Docket No. 94-10-144 (Sept. 28, 1994.

3. Grievants failed to prove a violation of the job posting requirements of W.Va. Code 18A-4-8b, in that no vacancy was shown to exist for the position of kindergarten aide at Allison Elementary School due to the simultaneous resignation of an aide and the elimination of a classroom aide position at the school.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Hancock 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 appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

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NEDRA KOVAL

Administrative Law Judge

Date: August 15, 1995