

JUNE MORRIS,

Grievant,

v.

DOCKET NO. 96-20-303

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, June Morris, filed the following grievance on or about June 12, 1996:

Grievant is regularly-employed as a cook. Respondent failed to place Grievant in a summer position she had held in the previous summer in violation of West Virginia Code §18-5-39. Grievant seeks reinstatement to her position with back pay. In addition the Respondent has failed to comply with the terms of the level II decision. [\(See footnote 1\)](#)

At the time the level two hearing was held on June 24, 1996, the position in question had been readvertised as a 261-day position. The level two grievance evaluator concluded it was appropriate to advertise the position as such, and ordered Respondent to fill the position no later than five days from the date of the decision, rendered on July 10, 1996. Grievant appealed that decision to level four on July 18, 1996, and a hearing was held on October 10, 1996, at which time this case became mature for decision.

The material facts are not in dispute and are set forth in the following findings.

Findings of Fact

1. At all times relevant herein, Grievant was employed as a 200-day Cook III at Staunton Elementary School.
2. Grievant applied for and was awarded a summer cook position at Shawnee Community

Education Center during the summers of 1994 and 1995.

3. During the 1995-96 school year, the regularly-employed 200-day Cook at Shawnee Community Education Center resigned, and a substitute was placed in the vacancy.

4. Due to the year-round nature of the Shawnee program, Respondent decided to advertise the cook position at Shawnee as a 261-day position, and eliminate the summer position.

5. The vacancy was advertised on May 8, 1996, as a 200-day Cook III position. LII G. Ex. 1.

6. Nancy Ross, the Principal/Director at Shawnee Community Education Center contacted Bill Courtney in Respondent's Personnel Office after the 200-day posting came out to inform him that the posting was in error, and should have been posted as a 261-day Cook position. LII Tr., p. 28.

7. Grievant made inquiry to Respondent's food services department whether there would be a summer position again at Shawnee around the middle of May, 1996. She was informed at that time that the position was going to be posted as a 261-day position.

8. Grievant filed her grievance on June 12, 1996, objecting to the substitute still holding the position, and requesting that the position be readvertised as a 261-day position, or advertised as a summer position.

9. On June 19, 1996, Respondent readvertised the subject position as a 261- day Cook position at Shawnee. LII G. Ex. 2.

10. At the time of the level two hearing in this matter, the position was still open for bids. The Level II Grievance Evaluator held that it was appropriate for Respondent to advertise the position as a 261-day position, and ordered Respondent to fill the position within 5 days of the decision, dated July 10, 1996.

11. Grievant applied for the 261-day position and was awarded that position on July 30, 1996. Her duties began on August 5, 1996.

Discussion

Grievant alleges that she should receive back pay from June 17, 1996, through July 30, 1996. She claims that had the position been posted as a summer position, pursuant to W. Va. Code § 18-5-39, she would have received it, and should be compensated for that period. Conversely, had the position been correctly advertised as a 261-day position in May, she would have been awarded the position earlier, would have been working during that period, and again, should be compensated for that

period.

W. Va. Code § 18-5-39 provides, in pertinent part:

Notwithstanding any other provision of the code to the contrary, the county board of education is authorized to employ school service personnel to perform any related duties outside the regular school term, as defined in section eight [§ 18A-4-8], article four, chapter eighteen-a of this code. An employee who was employed in any service personnel job or position during the immediate previous summer shall have the option of retaining such job or position if such exists during any succeeding summer. . . .

The undersigned agrees with the level two grievance evaluator that Respondent has the discretion to determine how best to staff its schools. Respondent was not required to fill the Shawnee position with a summer cook in the 1995-96 school year, and thus, as that position did not exist that summer, did not violate W. Va. Code § 18-5-39 in failing to place Grievant into that position.

Respondent also was not bound by the erroneous 200-day posting, and had the authority to readvertise the position as a 261-day position, once it was determined the 200- day posting was made in error. The amendment of a job posting is not prohibited by statutory or case law, and preferably is done through a second posting. Otto v. Berkeley County Bd. of Educ., Docket No. 89-02-369 (Dec. 28, 1990); see also, Catron v. Mingo County Bd. of Educ., Docket No. 95-29-060 (July 11, 1995)(board can rescind posting of position for lack of need).

However, W. Va. Code § 18A-4-8b states, in pertinent part:

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.

W. Va. Code § 18A-4-15 states, in pertinent part:

The county board shall employ and the county superintendent, subject to the approval of the county board of education, shall assign substitute service personnel on the basis of seniority to perform any of the following duties:

. . .

(4) To temporarily fill a vacancy in a permanent position caused by severance of employment by the resignation, transfer, retirement, permanent disability or death of the regular service employee who had been assigned to fill such position: Provided, That within twenty working days from the commencement of the vacancy, the board shall fill such vacancy under the procedures set out in section eight-b [§ 18A-4-8b] of this article and section five [§ 18A-2-5], article two of this chapter and such person hired to fill the vacancy shall have and shall be accorded all rights, privileges and benefits pertaining to such position;

The record does not indicate when the regular 200-day Cook at Shawnee resigned during the 1995-96 school year. However, as the vacancy was initially posted on May 8, 1996, and assuming for purposes of argument that Respondent complied with the above statutory provisions, it could be calculated that her resignation occurred at the latest sometime in April, 1996. Giving Respondent the benefit of the doubt with regard to the erroneous posting, the second 261-day posting was issued on June 19, 1996, and should have been filled pursuant to the above provisions by at least July 18, 1996. The position was not filled until July 30, 1996. Therefore, Respondent violated the above statutory provisions with regard to the filling of the 261-day Cook position at Shawnee. The substitute hired to replace the Shawnee Cook who resigned remained in that position until July 30, 1996, the date Grievant was awarded the position.

Conclusions of Law

1. It is incumbent upon the Grievant to prove all of her allegations by a preponderance of the evidence. Black v. Cabell County Bd. of Educ., Docket No. 06-88- 238 (Jan. 31, 1989).
2. Grievant failed to prove that Respondent violated W. Va. Code § 18-5-39 when it did not post a summer cook position at the Shawnee Community Education Center for the 1995-96 school year. See Catron v. Mingo County Bd. of Educ., Docket No. 95-29- 060 (July 11, 1995).
3. The amendment of a job posting is not prohibited by statutory or case law, and preferably is done through a second posting. Otto v. Berkeley County Bd. of Educ., Docket No. 89-02-369 (Dec. 28, 1990).
4. Grievant has proven by a preponderance of the evidence that Respondent violated W. Va. Code §§ 18A-4-8b and 18A-4-15, when it did not fill the vacant 261-day Cook position at Shawnee Community Education Center within 20 working days of the posting issued June 19, 1996.

Accordingly this grievance is **GRANTED**, and Respondent is hereby **ORDERED** to compensate

Grievant with back pay, benefits, and seniority, for the period July 18, 1996 through July 30, 1996, the time she would have been working in the 261-day position at Shawnee, had it been timely filled in accordance with the provisions of W. Va. Code §§ 18A-4-8b and 18A-4-15.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Kanawha 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.

MARY JO SWARTZ

Administrative Law Judge

Dated: December 31, 1996

[Footnote: 1](#)

The statement of grievance at level four was substantially different than that stated at level one, wherein grievant only asked that the position in question be advertised as either a 261-day position or a summer position. However, Respondent did not object to the restatement of grievance at level four, and the undersigned permitted the amendment to the statement of grievance, pursuant to W. Va. Code § 18-29-3(j).