

MARTHA ADKINS,

Grievant,

v.

Docket No. 95-23-406

**LOGAN COUNTY BOARD
OF EDUCATION,**

Respondent.

DECISION

Martha Adkins (Grievant), an employee of Respondent Logan County Board of Education, alleges a violation of W. Va. Code § 18A-4-7a in regard to filling a kindergarten teaching position at Buffalo Grade School. Grievant seeks posting of the kindergarten position at issue as relief in this matter.

The grievance was denied at Levels I, II, and III. On January 9, 1996, the parties requested a decision on the lower level record. For administrative reasons, this matter was reassigned to the undersigned administrative law judge on June 19, 1996. Based upon a determination that the lower level record was inadequate to render a decision on the merits of this grievance, a Level IV hearing was scheduled and conducted in this Board's office in Charleston, West Virginia, on August 16, 1996. The parties entered into oral stipulations, made closing arguments, and this matter became mature for decision at the conclusion of that hearing.

The facts pertinent to resolution of this grievance are not in dispute. Accordingly, the following Findings of Fact are made in this matter.

FINDINGS OF FACT

1. Grievant holds an elementary teaching certification, K-6, and is employed by Respondent Logan County Board of Education as a classroom teacher.

2. A position for a "classroom teacher" at Respondent's Buffalo Grade School (BGS) was posted on or about August 15, 1995.

3. The posted position resulted when a kindergarten teacher transferred out of BGS to another school, and BGS' principal transferred a properly certified second grade teacher from within the building to the kindergarten position.

4. Grievant applied for the posted elementary position but was not the successful candidate.

DISCUSSION

W. Va. Code § 18A-4-7a provides, in pertinent part:

Boards shall be required to post and date notices of all openings in established, existing or newly created positions in conspicuous working places for all professional personnel to observe for at least five working days. The notice shall be posted within twenty working days of such position openings and shall include the job description. Any special criteria or skills that are required by the position shall be specifically stated in the job description and directly related to the performance of the job.

* * *

Notwithstanding any other provision of the code to the contrary, where the total number of classroom teaching positions in an elementary school does not increase from one school year to the next, but there exists in that school a need to realign the number of teachers in one or more grade levels, kindergarten through six, teachers at the school may be reassigned to grade levels for which they are certified without that position being posted; Provided, That the employee and the county board of education mutually agree to the reassignment.

Grievant argues that this matter involves a "true vacancy" governed by the former provision, not a "realignment" governed by the latter provision, because a teacher transferred out of the building. According to Grievant, Respondent should have posted the vacant kindergarten position. Had that position been filled from within the building in accordance with the criteria established in W. Va. Code § 18A-4-7a, ¶ 1, Respondent could then post the elementary position. Respondent argues that the BGS principal properly exercised his discretion in accordance with the statutory exception above.

Applying W. Va. Code § 18A-4-8b(a), the statute which W. Va. Code § 18A-4-7a superseded in 1990, the Supreme Court of Appeals of West Virginia declared:

Where a vacancy occurs in a teaching position at a public school, the county board of education must post a notice of such vacancy pursuant to W.Va. Code, 18A-4-8b(a), and the principal of the school in which the vacancy occurs is without authority to assign another teacher to the vacancy.

Syllabus, Marion County Bd. of Educ. v. Bonfantino, 179 W. Va. 202, 366 S.E.2d 650 (1988). Accord, Bd. of Educ. v. DeFazio, 180 W. Va. 614, 378 S.E.2d 656 (1989); State ex rel. Rose v. Raleigh County Bd. of Educ., 179 W. Va. 275, 367 S.E.2d 223 (1988). The factual situations in Bonfantino and Rose are strikingly similar to the instant matter, except that those disputes arose in a high school and junior high school, respectively. Given the express support of the Supreme Court of Appeals for competitive posting, the undersigned administrative law judge finds that the 18A-4-7a proviso relied upon by Respondent is not applicable to this situation. The record is clear that not only did the total number of teachers at BGS remain the same, the number of teachers teaching at each grade level likewise remained the same. Had BGS experienced an influx of kindergarten students, and a proportionate decline in second grade students, the principal could reassign a properly certified second grade teacher to the additional kindergarten class, provided that the employee agreed to accept such an assignment. See Glover v. Pendleton County Bd. of Educ., Docket No. 95-36-408 (Oct. 19, 1995). However, there was no need to "realign" the number of teachers in this instance. What was needed was a new kindergarten teacher to fill the vacancy created when a teacher transferred out of BGS. W. Va. Code § 18A-4-7a requires that such a vacancy must be posted and filled competitively.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. Grievant bears the burden of proving her claims by a preponderance of the evidence. Runyon v. Mingo County Bd. of Educ., Docket No. 93-29-481 (Apr. 4, 1993); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988).

2. Where a vacancy occurs in a teaching position at a public school, the county board of education must post a notice of such vacancy pursuant to W. Va. Code § 18A- 4-8b(a) [now § 18A-4-7a], and the principal of the school in which the vacancy occurs is without authority to assign another teacher to the vacancy. Syllabus, Bd. of Educ. v. DeFazio, 180 W.Va. 614, 378 S.E.2d 656 (1989); Syllabus, State ex rel. Rose v. Raleigh County Bd. of Educ., 179 W.Va. 275, 367 S.E.2d 223 (1988); Syllabus, Marion County Bd. of Educ. v. Bonfantino, 179 W.Va. 202, 366 S.E.2d 650 (1988). See

Schwertfeger v. Brooke County Bd. of Educ., Docket No. 5-88-200 (Jan. 31, 1989)

3. The exception to the posting requirements of W. Va. Code § 18A-4-7a, ¶10, contained in W. Va. Code § 18A-4-7a, ¶6, does not apply to the instant situation, because a vacancy was created by an elementary teacher accepting an out of school transfer, and a genuine realignment of teachers did not occur. See Glover v. Pendleton County Bd. of Educ., Docket No. 95-36-408 (Oct. 19, 1995).

Accordingly this Grievance is hereby **GRANTED** and Respondent is **ORDERED** to post and fill the kindergarten position as required by W. Va. Code § 18A-4-7a.

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

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: September 26, 1996