BEVERLY DAWSON, et al.,

Grievants,

v. **Docket No. 97-06-072**

CABELL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

On August 8, 1996, Beverly Dawson and twenty-two other school service personnel (Grievants) employed by Respondent Cabell County Board of Education (CCBE) initiated this grievance at Level I in accordance with W. Va. Code §§ 18A-29-1, et seq. Grievants allege that CCBE violated W. Va. Code § 18A-4-8b by failing to post a secretarial position at Huntington High School. Following denial of their grievance at Level I, Grievants appealed to Level II, where a hearing was conducted on October 8, 1996. Thereafter, CCBE Superintendent Richard Jefferson denied the grievance at Level II on December 13, 1996. (See footnote 1) Grievants appealed to Level III, and CCBE elected to waive consideration of their grievance as authorized by W. Va. Code § 18-29-4(c). Grievants timely appealed to Level IV on February 7, 1997. Following a continuance which was granted for good cause, aLevel IV hearing was held in this Board's office in Charleston, West Virginia, on June 11, 1997. At that hearing, the parties entered into agreed stipulations to supplement the Level II hearing record, and agreed to submit written fact/law proposals. This matter became mature for decision on June 26, 1997, upon receipt of those proposals.

All facts pertinent to resolution of this grievance are contained in the Level II hearing transcript and oral Stipulations of Fact entered into between the parties at Level IV. Consistent with that record and the parties' stipulations, the following findings of fact are made in this matter.

FINDINGS OF FACT

1. Grievants (See footnote 2) are school service personnel employed as secretaries by Respondent Cabell County Board of Education (CCBE). Linda Thompson, who is not a party to this

grievance, is similarly employed as a secretary by CCBE.

2. Sometime in 1995, Ms. Thompson filed a grievance against CCBE relating to her transfer from the CCBE Central Office to Huntington East High School. CCBE had eliminated two secretarial positions at the Central Office, and Ms. Thompson was one of the two least senior Central Office secretaries.

3. On January 16, 1996, Ms. Thompson agreed to settle her grievance against CCBE in exchange for being permanently assigned to a "Records Secretary" position for a 261-day Secretary III at Huntington High School. A Ex 2 at L II. 4. Huntington High School is a new, consolidated school which opened at the beginning of the 1996-97 school year. All secretarial positions at Huntington High School were posted in accordance with W. Va. Code § 18A-4-8b, except for the position awarded to Ms. Thompson.

5. The position which Ms. Thompson was awarded at Huntington High School was not the subject of her grievance.

6. At the time Ms. Thompson was awarded the Secretary III position at Huntington High School, there were other secretaries employed by CCBE, including but not limited to, Grievants Judy Clary, Valerie Leggett, Carolyn Murphy, Sharon Wallace, and Cheryl Farrow, with greater seniority than Ms. Thompson.

7. If the Huntington High School position had been posted, there is a substantial probability that one or more of Grievants would have applied for the vacancy.

DISCUSSION

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving each element of their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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). See W. Va. Code § 18-29-6.

Ordinarily, one cannot employ the grievance procedure to attack a final decision rendered in a prior grievance. Toney v. Lincoln County Bd. of Educ., Docket No. 95-22- 118 (June 30, 1995). Likewise, a settlement of a prior grievance may only be challenged where the grievant demonstrates by a preponderance of the evidence that the settlementagreement was not fairly made, or was in contravention of some law or public policy. Adkins v. Logan County Bd. of Educ., Docket No. 97-23-

216 (Sept. 29, 1997); Vance v. Logan County Bd. of Educ., Docket No. 95-23-190 (Mar. 15, 1996). This requirement arises from the axiom that "the law favors and encourages resolution of controversies by contracts of compromise and settlement rather than by litigation." McDowell County Bd. of Educ. v. Stephens, 191 W. Va. 711, 447 S.E.2d 912 (1994).

Grievants allege CCBE failed to comply with the portion of W. Va. Code § 18A-4-8b which 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." Grievants demonstrated that the new school service personnel position awarded to Ms. Thompson had not been posted in compliance with the foregoing statute. See Langmyer v. Ohio County Bd. of Educ., Docket No. 95-35-565 (Mar. 12, 1996); Yeager v. Nicholas County Bd. of Educ., Docket No. 34-86-229-4 (Nov. 7, 1986). See also Livingood v. Mingo County Bd. of Educ., Docket No. 95-29-525 (May 29, 1996); Weaver v. Mason County Bd. of Educ., Docket No. 94-26- 129 (Nov. 22, 1994). See generally State ex rel. Rose v. Raleigh County Bd. of Educ., 179 W. Va. 275, 367 S.E.2d 223 (1988); Marion County Bd. of Educ. v. Bonfantino, 179 W. Va. 202, 366 S.E.2d 650 (1988).

Grievants further note that W. Va. Code § 18A-4-8b requires that vacant school service personnel positions be filled on the basis of seniority, qualifications, and evaluation of past service. In this regard, Grievants established that one or more of them would have had higher qualifications for the position than Ms. Thompson, based upon the criteria in W. Va. Code § 18A-4-8b. In Hardman v. Lewis County Board of Education, Docket No. 97-21-181 (Sept. 30, 1997), this Grievance Board recently concluded that awarding a newly-created school service personnel position to an employee without posting the vacancy in accordance with W. Va. Code § 18A-4-8b constituted an ultra vires act by the school board. In that particular situation, the grievant was estopped from complaining that she had been deprived of the position contrary to procedural protection contained in W. Va. Code §§ 18A-4-8a(7), 18A-4-8, or 18A-5-8(b). Id. Moreover, the grievant in Hardman was unable to show that the school board had violated any law or public policy when it corrected its error by settling a grievance, posting the position, and awarding the position to the most qualified applicant as defined in W. Va. Code § 18A-4-8b. Id.

This grievance represents the obverse of Hardman. CCBE settled a grievance by awarding a grievant a vacant position which was not the subject of the grievance. Thus, these Grievants were

not aware that their interests were affected by Ms. Thompson's grievance, and had no opportunity to intervene in that grievance under W. Va. Code § 18- 29-4(u). Cf. Adkins, supra, (grievant was aware of pending grievance and made conscious decision not to intervene); Adams v. Cabell County Bd. of Educ., Docket No. 94-06-520 (May 15, 1995) (grievant elected not to intervene at Level III based upon assumption that school board would follow past practice and waive grievance to Level IV); Epling v. Boone County Bd. of Educ., Docket No. 89-03-562 (Feb. 28, 1990), aff'd, Cir. Ct. of Kanawha County No. 90-AA-67 (Apr. 3, 1992) (grievant was aware of grievance but failed to intervene).

Accordingly, the undersigned administrative law judge concludes that the settlement of Ms. Thompson's grievance, in the circumstances presented, was contrary to thelegislative mandate in W. Va. Code § 18A-4-8b requiring posting of vacant service personnel positions. As relief, Grievants ask that CCBE be required to post the position in accordance with the statute. Inasmuch as at least five Grievants are more senior than Ms. Thompson, such relief is justified and will be awarded. See W. Va. Code § 18-29-5(b); Bd. of Educ. v. Defazio, 180 W. Va. 614, 378 S.E.2d 656 (1989).

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

CONCLUSIONS OF LAW

1. In a nondisciplinary grievance, the grievants have the burden of proving each element of their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); 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). See W. Va. Code § 18-29-6.

2. "School personnel laws and regulations are to be construed strictly in favor of the employee." Syl. Pt. 1, Morgan v. Pizzino, 163 W. Va. 454, 256 S.E.2d 592 (1979).

3. Settlement agreements prior to final administrative decision in a grievance are not subject to challenge by employees who were not parties to the prior grievance, unless those employees can prove by a preponderance of the evidence that the settlement agreement was not fairly made or was in contravention of some law or public policy. Adkins v. Logan County Bd. of Educ., Docket No. 97-

23-216 (Sept. 29, 1997); Vance v. Logan County Bd. of Educ., Docket No. 95-23-190 (Mar. 15, 1996).

4. School boards are required to properly post and fill any vacant positions for school service personnel. W. Va. Code § 18A-4-8b; Yeager v. Nicholas County Bd. ofEduc., Docket No. 34-86-229-4 (Nov. 7, 1986). See also Livingood v. Mingo County Bd. of Educ., Docket No. 95-29-525 (May 29, 1996); Weaver v. Mason County Bd. of Educ., Docket No. 94-26-129 (Nov. 22, 1994).

5. Grievants have proven a violation of W. Va. Code § 18A-4-8b, in that CCBE failed to post a newly created position vacancy for a Records Secretary at Huntington High School. See Hardman v. Lewis County Bd. of Educ., Docket No. 97-21-181 (Sept. 30, 1997). See also Webster County Bd. of Educ. v. Johns, 191 W. Va. 664, 447 S.E.2d 599 (1994).

6. Grievants established that a settlement agreement in a prior grievance, of which they had no knowledge, and no opportunity to intervene pursuant to W. Va. Code § 18-29- 4(u), was made contrary to W. Va. Code § 18A-4-8b.

Accordingly this Grievance is hereby **GRANTED** and Respondent Cabell County Board of Education is **ORDERED** to post and fill the school service personnel position of Records Secretary at Huntington High School in accordance with W. Va. Code § 18A-4-8b.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell 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 ofthe 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: October 14, 1997

Footnote: 1

Superintendent Jefferson granted relief at Level II in regard to another position which Grievants contended was not posted properly. Accordingly, Grievants withdrew that aspect of their grievance at Level IV.

Footnote: 2

In addition to Beverly Dawson, the named Grievants in this matter are Sharon Wallace, Jenny Thompson, Carolyn Murphy, Barbara Charlene Ritchie, Sanna Bexfield, Donna Perry, Pitchie Biller, Alice Frye, Judy Clary, Jerri Black, Shirley Cyrus, Judy Slash Byrd, Joanne Drown, Carolyn Raines, Cheryl Farrow, Linda Adkins, Sharon Hampton, Trena Turley, Valerie Leggett, Freddie Tanner, Eleanor Swann, and Norma Harper. See A Ex 1 at L II.