MARSHALL A. GROGG,

Grievant,

v.

DOCKET NO. 96-20-411

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Marshall Grogg, filed the following grievance on August 16, 1996:

> There was a job vacancy, (P.E./Health), at South Charleston High School. An employee at South Charleston was given the job without posting the job. I ask that the job be posted.

Following adverse decisions at the lower levels, Grievant appealed to level four on October 1, 1996. The parties agreed to submit the case on the record developed below, and this case became mature for decision on November 1, 1996, the deadline for the submission of proposed findings of fact and conclusions of law.

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

Findings of Fact

1. Grievant is employed as a health and physical education classroom teacher at Cedar Grove Community School. 2. A regular physical education/health/sports medicine teaching position was posted at South Charleston High School ("South Charleston") on May 20, 1996.

3. An extracurricular head football coach position was also posted at South Charleston on May 20, 1996.

4. Grievant applied for the teaching position at South Charleston, but was not the successful

applicant.

5. Mr. Bob Cummings was the successful applicant for the teaching position, as well as for the head football coach position at South Charleston.

6. In July 1996, Mr. Cummings informed the principal of South Charleston, Bill Walton, that he was resigning from the teaching and coaching positions.

7. Principal Walton had been under the impression that a teacher had to have certification to teach sports medicine. Following Mr. Cummings' resignation, Principal Walton inquired from the board office whether teachers had to have certification to teach sports medicine, and was informed they did not.

8. Based upon this information, Principal Walton re-examined his curricular needs and the teacher schedules, especially in light of the school's change to a 4X4 class schedule, and decided he could better staff the school through realignment of his existing teachers' assignments, rather than filling the health/physical education/sports medicine position.

9. For the 1996-97 school year, Principal Walton assigned health and sports medicine classes to Mike Reed, who is certified in social studies and health, and assigned physical education classes to Todd Chevalier, who was certified in physical education. 10. The health/physical education/sports medicine position was not posted again following Mr. Cummings' resignation.

11. The head football coach position was awarded to Mr. Chevalier. (See footnote 1)

Discussion

Grievant alleges the Board violated W. Va. Code § 18A-4-7a, when it gave the physical education/health/sports medicine position to "an employee at South Charleston" without posting the position, and asks as relief that the position be posted.

W. Va. Code § 18A-4-7a states, 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.

Grievant relies on the West Virginia Supreme Court of Appeals decisions in Marion County Bd. of Educ. v. Bonfantino, 366 S.E.2d 650 (W. Va. 1988), and Rose v. Raleigh County Bd. of Educ., 367 S.E.2d 223 (W. Va. 1988), to support his position, which held:

> 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. (See footnote 2)

The cases relied on by Grievant are easily distinguishable from the instant grievance. In those cases, the principal at the respective schools merely assigned an existing teaching vacancy to another teacher at the school without posting the position. Those teachers' positions then became vacant and were posted. The Court held that it was a statutory violation for the principal to fill vacancies with other teachers without posting the positions.

In the instant case, there simply was no vacancy to post. Once the position was initially filled by Mr. Cummings, that “posting” came to an end and that position was no longer open. When Mr. Cummings resigned the subject position, the principal decided he could realign the classes which would have been taught by a new teacher to existing teachers within the school, in accordance with Board policy.

Kanahwa County Board of Education Administrative Regulation 31.00 states in pertinent part:

> A. 31.10 Definitions --
>
> > (a) Curricular area -- All potential class offerings which require a teacher to possess distinct licensure and/or endorsement shall be regarded as a curricular area.
> >
> > (b) Assignment -- The responsibility to teach classes in one or more curricular areas shall be regarded as an assignment, e.g. a classroom teacher with current responsibilities to teach classes in the math curriculum area and the social studies curriculum area has a math/social studies assignment.
> >
> > (c) Change in assignment -- A change in assignment shall occur if a classroom teacher either agrees or is required to assume teaching responsibilities in a curricular area in addition to the current assignment. Neither an increase in the number of classes within a curricular area nor the decrease or elimination of classes within a curricular area shall constitute a change in assignment.

. . .

> A 31.04 Change in Assignment -- If a principal determines that it will be necessary to change the assignment of a classroom teacher in order to efficiently meet the educational program needs of a school for the next ensuing school year, the affected teacher[s] shall be requested to agree tosuch a change in assignment. If agreement is withheld, the teacher[s] shall be recommended for transfer. If such recommended transfers are approved by the Board, positions reflecting the needed assignments shall be promptly posted.

Principal Walton determined he could increase the number of classes within the affected teachers' curricular areas, i.e., Mr. Reed was assigned additional classes in sports medicine and health, and Mr. Chevalier was assigned physical education classes. This ability to assign additional classes within these teachers' curricular areas eliminated the need for an additional teacher at SCHS. This reassignment of classes was well within the parameters of the Board's policy 31.00 and was not an arbitrary or capricious act on the part of Principal Walton.

As there was no need for an additional teacher at SCHS as a result of the realignment of duties, there was no vacancy, and the Board did not violate the provisions of W. Va. Code § 18A-4-7a in not posting the subject position. Code § 18A-4-7a also states, in pertinent part, that “nothing herein shall prevent the county board of education from eliminating a position due to lack of need.” School law requires that a board of education post notices of position vacancies and openings, but there is no requirement to do so when a legitimate vacancy does not occur. Bowen v. Mingo County Bd. of Educ., Docket No. 95-29-488 (Mar. 29, 1996); Catron v. Mingo County Bd. of Educ., Docket No. 95-29-060 (July 11, 1995); Payne v. Fayette County Bd. of Educ., Docket No. 94-10-144 (Sept. 18, 1994); Terek v. Wetzel County Bd. of Educ., Docket No. 52-86-122-2 (Aug. 25, 1987). It is clear that this provision in Code § 18A-4-7a supersedes the provision relied on by Grievant. In the circumstances present here, the Board did not violate Code § 18A-4-7awhen it elected to rearrange class assignments at SCHS rather than fill a vacant teaching position. See Bowen, supra.

Conclusions of Law

1. Grievant bears the burden of proving his claim by a preponderance of the evidence. Runyon v. Mingo County Bd. of Educ., Docket No. 93-29-481 (Apr. 4, 1993).

2. School law requires that a board of education post notices of position vacancies and openings, but there is no requirement to do so when a legitimate vacancy does not occur. Bowen v. Mingo County Bd. of Educ., Docket No. 95-29-488 (Mar. 29, 1996); Catron v. Mingo County Bd. of Educ., Docket No. 95-29-060 (July 11, 1995); Payne v. Fayette County Bd. of Educ., Docket No. 94-10-144 (Sept. 18, 1994); Terek v. Wetzel County Bd. of Educ., Docket No. 52-86-122-2 (Aug. 25, 1987).

3. Kanawha County Board of Education Administrative Regulation 31.00 permits a principal, with a teacher's agreement, to assign additional classes within the teacher's curricular area of assignment.

4. Grievant has failed to prove the Board violated W. Va. Code § 18A-4-7a by eliminating the need for a physical education/health/sports medicine position at SCHS, and consequently not posting the position.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision 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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: January 29, 1997

Footnote: 1

The selection of Mr. Chevalier as head football coach was the subject of another grievance styled Cyrus v. Kanawha County Bd. of Educ., Docket No. 96-20-410 (Jan. 24, 1997).

Footnote: 2

Code § 18A-4-8b was superseded in 1990 by Code § 18A-4-7a.