DAWN PETROVICH,

Grievant,

v. DOCKET NO. 98-15-074

HANCOCK COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Dawn Petrovich, contends that the half-time Assistant Principal and half- time Classroom Teacher position for which she applied and was selected did not comply with the position described in the posting. She seeks reinstatement to her former position as a Learning Disabilities (LD) teacher at Weir High School. After Grievant complained about the differences between the posting and the position to which she was assigned at Allison Elementary School (Allison), her job duties were adjusted. Accordingly, at level one, on November 24, 1997, Principal Linda S. Robinson stated that she could not provide any further relief than had already been granted. Grievant appealed to level two, where a hearing was conducted on January 21, 1998. Dr. Charles Chandler subsequently denied the grievance. (See footnote 1) Level three consideration was waived, and Grievant appealed to level four on March 16, 1998. A hearing was conducted in this Grievance Board's office in Wheeling, West Virginia, on May 13, 1998. (See footnote 2) This matter became mature for consideration on June 15, 1998, upon receipt of proposed findings of fact and conclusions of law.

The following findings of fact are made from a preponderance of the evidencesubmitted at levels two and four.

Findings of Fact

1. Prior to October of 1997, Grievant was employed by the Hancock County Board of Education (HCBOE) as an LD teacher for approximately 10 years. She was employed at Weir High School at the time of the posting in question.

2. On October 9, 1997, HCBOE posted a vacancy for a position at Allison Elementary School, which described the position as: "Half-time Assistant Principal and Half-time Classroom Teacher with elementary education and learning disabilities assignments."

3. Attached to the posting were job descriptions for both Assistant Principal and Classroom Teacher. The posting did not specifically describe the schedule of duties or specific assignments at Allison.

4. Grievant applied for the position and was interviewed by Principal Linda Robinson, Assistant Superintendent Mary Ann Bucci, and Superintendent Charles Chandler.

5. During the interview for the position, Grievant was told by the interview team that she would perform the Assistant Principal duties in the morning, and that she would be assigned as an LD teacher in the afternoon, specifically to work on a one-on-one basis with student T.M. **(See footnote 3)**

6. After being selected to fill the position, Grievant reported for work at Allison on November 3, 1997. She was presented with a schedule of learning disabilities classesin the morning, along with being expected to work with T.M. for the entire afternoon. The schedule only allowed Grievant time for Assistant Principal duties for approximately one hour in the middle of the day, along with before and after school.

7. Prior to Grievant's arrival, the morning LD classes had been assigned to a substitute. Principal Robinson believed that, due to Grievant's experience and expertise in LD, the substitute would no longer be needed. She had hoped that Grievant and the other full-time LD teacher could work out a schedule for covering all of the LD classes, which would still enable Grievant to perform her duties as Assistant Principal.

8. Upon arriving at Allison and realizing the duties assigned to her differed from those described in the interview, Grievant complained to Assistant Superintendent Bucci, and requested to be reinstated to her former position.

9. After consultation with Principal Robinson, Ms. Bucci ascertained that, in fact, the assignment given to Grievant did not conform to the posting. Accordingly, she and Ms. Robinson decided to make arrangements to insure that Grievant's duties would be as described during the interview.

10. Ms. Bucci offered Grievant two options. She could either teach several LD classes in

the morning and be Assistant Principal in the afternoon, or she could perform Assistant Principal duties in the morning and work only with T.M. in the afternoon. Grievant chose the second option.

11. Since November 6, 1997, Grievant has been performing Assistant Principal duties in the morning and working with T.M. in the afternoon. **(See footnote 4)** **12. Teachers often come to Grievant in the afternoon, requesting her assistance with administrative matters. Grievant has not been required by her superiors to perform administrative duties in the afternoon, and she has not complained to Principal Robinson about this problem.**

Discussion

Respondent does not dispute that, when Grievant began her duties on November 3, 1997, her job did not comport with the posted position for half-time Assistant Principal and half-time LD teacher. However, as soon as the matter was brought to the attention of HCBOE officials, it was corrected within Grievant's first week of work. Accordingly, Grievant has no basis upon which to be returned to her prior position.

Grievant contends that her job duties are still not as described in the posting and subsequent interview. Although the basis for this argument is unclear, it appears that, in part, Grievant believes that the administrative requests which are made of her in the afternoon have substantially changed her job description. Otherwise, she has generally contended that, in spite of HCBOE's correction of the situation, she should be entitled to return to her prior teaching position, because the Allison position did not comport with the posting upon her arrival there.

W. Va. Code §18A-4-7a requires boards of education to post notices of all job openings, which notices must include a job description. A posting is expected to at least give applicants a general idea of the type of work to be performed. See Weaver v. Mason County Bd. of Educ., Docket No. 94-26-129 (Nov. 22, 1994). Although interviews are not required in order to fill school positions, when they are conducted, they must consist of an honest and forthright exchange of information. Thomas v. Kanawha County Bd. of Educ.,Docket No. 94-20-1123 (May 17, 1995).

As stated above, HCBOE does not dispute that the job initially did not comply with the

posting and the description of duties related to Grievant during the interview. Clearly, the schedule presented to Grievant upon her arrival at Allison consisted almost entirely of teaching LD classes, leaving very little time for performing Assistant Principal duties. There is no question that this was not a "half-time Assistant Principal and half-time LD teaching" position. This Grievance Board has previously ruled that the information in a posting must be "essentially" correct so applicants will know what is expected of the position. Barker v. Kanawha County Bd. of Educ., Docket No. 90-20-505 (Feb. 22, 1991). In Thomas, supra, the grievant had been assured during the interview of exactly what the position would entail, only to discover, after being awarded the position, that it was entirely different from what she had been told. It was not possible to make adjustments in the job duties, so the grievant was allowed to return to her previous job.

Grievant contends that the instant situation is identical to Thomas, entitling her to reinstatement to her former position. However, there is one major distinction between this case and Thomas, that being the board of education's inability in Thomas to adjust the job duties to comport with the posting. This Grievance Board has recognized that boards of education should be encouraged to correct their errors as early as possible. See Barrett v. Hancock County Bd. of Educ., Docket No. 96-15-512 (Dec. 31, 1997). In this case, as soon as they had been alerted to the situation, HCBOE officials took the necessary steps to change Grievant's assignment to that for which she had been hired. Grievant was not substantially harmed by having to teach the extra LD classes for only three days.

Moreover, in this case, it is obvious that Principal Robinson acted unilaterally inchanging Grievant's assignment. She admitted during her testimony that having Grievant teach the LD classes was her idea alone, and the superintendent and assistant superintendent had no knowledge of the changes in the schedule. Unlawful or ultra vires statements or actions by public officials when functioning in their governmental capacity are not binding upon the agency. See Parker v. Summers County Bd. of Educ., 185 W. Va. 313, 406 S.E.2d 744 (W. Va. 1991); Daniels v. Greenbrier County Bd. of Educ., Docket No. 96-13-150 (July 31, 1996). Ms. Robinson clearly acted contrary to the posting and explanation given to Grievant during the job interview, completely on her own. Accordingly, her independent actions, without her superiors' knowledge or permission, were not binding upon HCBOE.

Barker, supra, stands for the proposition that an employee is entitled to relief when she has been misled regarding the essential duties and responsibilities of a position. However, that did not happen here, because the actual duties and responsibilities of the Allison position never officially changed; it was merely an independent attempt on Principal Robinson's part to change the agreed upon schedule, which was reversed by HCBOE as soon as they were informed of her plans.

Grievant has also alleged that HCBOE has engaged in discrimination by allegedly allowing another employee to return to her previous job in a similar situation. Debbie Mahoney testified at level four that, early in 1998, she had been selected to fill a newly created position as an itinerant counselor. Although she had the appropriate certification as required by the posting, upon entering into her new duties, Ms. Mahoney felt that her guidance counseling background had not prepared her for the position, and the job should have been filled with someone with a professional psychological counselor's license. HCBOE allowed her to return to her previous position, which had not yet been advertised.

"Discrimination" is defined by W. Va. Code § 18-29-2(m) as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." A grievant seeking to establish a prima facie case of discrimination under this statute must demonstrate the following:

> **(a) that she is similarly situated, in a pertinent way, to one or more other employees:**
>
> **(b) that she has, to her detriment, been treated by her employer in a manner that the other employees have not, in a significant particular;**

and

> **(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employees and were not agreed to by the grievant in writing.**

E.g., Kirchner v. W. Va. Dept. of Educ., Docket No. 94-DOE-569 (Sept. 26, 1995); Webb v. Kanawha County Bd. of Educ., Docket No. 94-20-210 (Nov. 22, 1994); Steele v. Wayne County

Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

Grievant has failed to establish discrimination in this case, because of at least two major differences between her situation and Ms. Mahoney's. Ms. Mahoney did not request to return to her prior position because the new job duties did not conform to the posting, but because she did not feel qualified to perform the job. In addition, just as in the Thomas case, Ms. Mahoney's situation did not involve a question of whether the job duties could be adjusted to accommodate her complaint. As discussed above, Grievant's situation was corrected to satisfy her complaint within a very short time period. Grievant is not similarly situated to Ms. Mahoney. Grievant's claim that her position still does not comport with the posting is unfounded. She is clearly performing each set of duties on a half-time basis. As previously noted, Grievant has not been asked or required to function as Assistant Principal in the afternoon. She has merely felt the need to respond to teachers when asked. However, as testified to by Principal Robinson, these requests are contrary to Ms. Robinson's instructions to teachers to "leave Grievant alone" in the afternoon hours. Nevertheless, a principal has the authority to make changes in a teacher's schedule, as long as the teacher remains in the same certification area and in the same department or grade level. Midkiff v. Wayne County Bd. of Educ., Docket No. 90-50-406 (Mar. 13, 1991). Thus, even if sanctioned by Ms. Robinson, occasional overlap of principal duties into Grievant's afternoon is not a significant alteration of her job duties.

Grievant has not proven by a preponderance of the evidence that she is entitled to be returned to her previous position. The following conclusions of law support the decision reached.

Conclusions of Law

1. In non-disciplinary matters, a grievant bears the burden of proving each element of her grievance by a preponderance of the evidence. See W. Va. Code § 18-29- 6; Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997).

2. If a grievant can demonstrate by a preponderance of the evidence that she was misled by the posting and subsequent interview as to the essential duties and responsibilities of the position which she accepted, she will be granted appropriate relief. Thomas v. Kanawha

County Bd. of Educ., Docket No. 94-20-1123 (May 17, 1995); Barker v. Kanawha County Bd. of Educ., Docket No. 90-20-505 (Feb. 22, 1991). 3. Unlawful or ultra vires statements or actions by public officials when functioning in their governmental capacity are not binding upon the agency. See Parker v. Summers County Bd. of Educ., 185 W. Va. 313, 406 S.E.2d 744 (W. Va. 1991); Daniels v. Greenbrier County Bd. of Educ., Docket No. 96-13-150 (July 31, 1996).

4. "Discrimination" is defined by W. Va. Code § 18-29-2(m) as "any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees." A grievant seeking to establish a prima facie case of discrimination under this statute must demonstrate the following:

> **(a) that she is similarly situated, in a pertinent way, to one or more other employees:**
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> **(b) that she has, to her detriment, been treated by her employer in a manner that the other employees have not, in a significant particular;**

and

> **(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employees and were not agreed to by the grievant in writing.**

E.g., Kirchner v. W. Va. Dept. of Educ., Docket No. 94-DOE-569 (Sept. 26, 1995); Webb v. Kanawha County Bd. of Educ., Docket No. 94-20-210 (Nov. 22, 1994); Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989).

5. Grievant did not establish a prima facie case of discrimination.

6. Grievant did not prove by a preponderance of the evidence that she was misled as to the actual duties and responsibilities of the position at Allison Elementary School.

7. The actions of Principal Robinson in altering the agreed upon schedule forGrievant's new position were ultra vires and not binding upon Respondent.

Accordingly, this grievance is DENIED.

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

Date: July 13, 1998 _____

V. DENISE MANNING

Administrative Law Judge

Footnote: 1

The level two grievance decision is not dated.

Footnote: 2

Grievant has been represented at all levels of this grievance by attorney Basil Legg, and Respondent was represented by its counsel, William Fahey.

Footnote: 3

Consistent with Grievance Board practice, the initials of this minor child will be used in lieu of revealing her full name.

Footnote: 4

A substitute was brought in to cover the morning LD classes, and in January of 1998, that position was filled on a permanent basis.