BELINDA TONEY,

Grievant,

v.

DOCKET NO. 98-22-009

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Belinda Toney, filed the following grievance protesting her non-selection for a bus aide:

> Violations of WV Code 18A-4-8b, 18A-4-7a, and 18A-4-16 in regard to the posted position of supplemental position Harts attendance area for individual to ride bus with special education student. Grievant bid on first posted, performed duties then re-bid at lower rate of pay.
>
> Relief sought is to be awarded the position and back wages and benefits due.

A level two hearing was held on December 8, 1997, and a decision denying the grievance was issued by Charles McCann, Grievance Evaluator, on January 9, 1998. Grievant appealed to level four on January 20, 1998, and this matter was submitted for decision on the record developed below. This grievance became mature on February 20, 1998, the deadline for the parties' submission of proposed findings of fact and conclusions of law.

SUMMARY OF EVIDENCE

Grievant's Exhibits

Ex. 1 -

Grievance form.

Ex. 2 -

October 7, 1997 posting for supplemental position.

Ex. 3 -

Personnel Action Form, dated October 10, 1997.

Ex. 4 -

October 27, 1997 letter from Belinda Toney.

Ex. 5 -

Personnel Action form, dated October 27, 1997.

Ex. 6 -

October 21, 1997 posting for supplemental position.

Testimony

Grievant testified in her own behalf. The Board presented no witnesses.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. Grievant is currently employed as a full-time special education teacher for the Lincoln County Board of Education ("Board"), at Ferrellsburg Elementary School.

2. On October 7, 1997, the Board posted an extracurricular position for a special education bus aide at a rate of $20.00 per day. The posting required that applicants be full-time employees of the Board, and the posting was addressed to service and professional personnel. G. Ex. 2.

3. Grievant bid on the October 7, 1997 posting on October 10, 1997. G. Ex. 3.

4. Grievant was told by Principal Bryant and Doug Smith, Director of Special Education, that she was going to be awarded the position, and directed her to begin performing the duties of the bus aide. Grievant performed the duties of the special education bus aide for 16 days at a rate of $20.00 per day.

5. The Board did not take any formal action awarding Grievant the position. 6. On October 27, 1997, the Board re-posted the position at a lesser rate of pay of $15.00 per day.

7. The second posting was addressed to service or professional personnel, advertising the same position at a rate of pay of $15.00 per day. The second posting did not restrict the applicants to regular full-time employees of the Board. G. Ex. 6.

8. Grievant again bid on the position, under protest because of the lesser rate of pay, on October 27, 1997. G. Exs. 4, 5.

9.

Delores Burton, a substitute aide was awarded the position.

DISCUSSION

Grievant contends it was a violation of statute and arbitrary and capricious for the Board to re-post the special education aide position, once she had begun performing those duties.

The Board contends that, as it had taken no formal action awarding Grievant the position, it was within its authority and discretion to re-post the position. Interestingly, the level two hearing examiner found as a matter of fact that the second posting was posted as a service position only, and did not require that the applicants be full-time employees of the Board. However, the second posting was not offered into evidence, and the only person who testified at that hearing, the Grievant, could not say with certainty what the second posting required. Thus, the hearing examiner's finding of fact on the second posting is not supported by the record. Subsequently, I requested a copy of the second posting to be included in the record, as it is essential in rendering a fair and equitable decision in this matter. That posting has been incorporated into the record as G. Ex. 6 and is reflected in Finding of Fact No. 7. First, with regard to Grievant's argument that the Board violated statutory law by re-posting the position, this Grievance Board has found that no statutory or case law prohibits a county board from modifying a job posting, and thus, Grievant has failed to prove a violation of W. Va. Code §18A-4-8b. Otto v. Berkeley County Bd. of Educ., Docket No. 89- 02-369 (Dec. 28, 1990); Fulk v. Monongalia County Bd. of Educ., Docket No. 94-30-616 (Mar. 30, 1995). There is no evidence that the Board offered Grievant the position after the first posting. While Grievant alleges the Principal of the school and the Director of Personnel advised her to begin performing the duties of that position, without the recommendation of the Superintendent, and the Board's approval, any representations made by those gentlemen would be ultra vires, and not binding upon the Board. See, Blevins v. Raleigh County Bd. of Educ., Docket No. 97-41-314 (Jan. 29, 1998).

Grievant also alleges violations of W. Va. Code § 18A-4-7a and 18A-4-16. Although not clear, I assume the Code § 18A-4-7a provision Grievant is referring to is the posting provision, which 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. 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. No vacancy shall be filed until after the five-day minimum posting period. . . .

Just as was found in Otto, however, there is nothing in the posting provision of Code § 18A-4-7a which prohibits a county board from re-posting a position.

Finally, Code § 18A-4-16 is the statutory provision governing extracurricular contracts. While the subject position clearly falls within the definition of an extracurricularcontract, Grievant has proven no violation of this provision. There was no extracurricular contract executed between Grievant and the Board, and thus, there can be no violation of that statute.

The only challenge Grievant can legally make to the subject posting is that she should have been awarded the position because she was more qualified under the selection provisions of W. Va. Code § 18A-4-8b. However, no evidence was presented as to how the selection was made, or what criteria were considered in the selection process. Grievant presented no evidence to prove she was more qualified than the successful applicant. Nevertheless, it is the Grievant's burden to prove her case by a preponderance of the evidence, and in this instance, Grievant has failed to meet that burden.

Code § 18A-4-8b says applicants shall be considered in the following order:

(1)

Regularly employed service personnel;

(2)

Service personnel whose employment has been discontinued in accordance with this section;

(3)

Professional personnel who held temporary service personnel jobs or positions prior to the ninth day of June, one thousand nine hundred eight- two, and who apply only for such temporary jobs or positions;

(4)

Substitute service personnel; and

(5)

New service personnel.

There is no evidence that Grievant held any temporary service personnel jobs. For this particular position, Grievant would fall under the category “New service personnel” for the bus aide position. Because the successful applicant was a substitute service personnel and would have been considered first, Grievant would not have been selected for the position.

CONCLUSIONS OF LAW

1. There is no statutory or case law which prohibits a county board from modifying a job posting. W. Va. Code §§ 18A-4-8b, 18A-4-7a; Otto v. Berkeley County Bd. of Educ., Docket No. 89-02-369 (Dec. 28, 1990); Fulk v. Monongalia County Bd. of Educ., Docket No. 94-30-616 (Mar. 30, 1995).

2. Without the recommendation of the Superintendent, and the Board's approval, any representations made by the Principal or Director of Personnel that Grievant had been selected for the subject position would be ultra vires, and not binding upon the Board. See, Blevins v. Raleigh County Bd. of Educ., Docket No. 97-41-314 (Jan. 29, 1998).

3. Grievant did not have an extracurricular contract for the subject position, and thus has proven no violation of W. Va. Code § 18A-4-16.

4. Grievant has failed to prove by a preponderance of the evidence that she was the most qualified applicant for the subject position under W. Va. Code § 18A-4-8b.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Lincoln 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: March 24, 1998