JIMMY BERRY,

Grievant,

v. **DOCKET NO. 97-03-305**

BOONE COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

This grievance was filed by Grievant Jimmy Berry, represented at Level IV by Christopher G. Moffatt, Esquire, against Respondent Boone County Board of Education ("BBOE"), represented by Timothy R. Conaway, Esquire, alleging that the job he had been awarded had been posted at a salary of $1,931.00 - 2,975.00 per month, and the contract he was offered was for less than that amount. Grievant sought as relief that he be paid the salary listed in the posting.

The following Findings of Fact necessary to the Decision reached, are made based upon the evidence presented at the Level II and Level IV hearings. (See footnote 1)

Findings of Fact

1. On January 24, 1997, BBOE posted the position of Electronic Technician II/Warehouse Clerk/General Maintenance/Truck Driver. The salary on the posting was $1,931.00 to 2,975.00 per month, pay grade G. The monthly salary had been calculated by Shirley Hill, secretary to the Director of Personnel, Boone County Schools, and represented the monthly salary if the annual salary were paid to the employee over a period of 10 months. This information was not in the posting.

2. W. Va. Code § 18A-4-8a sets the minimum pay scale in pay grade G at $1,260.00 per month for zero years of experience, up to a maximum of $2,010.00 for 30 years of experience. An additional $10.00 per month is added for a high school diploma or GED, and an additional $10.00 per month is added for 12 college credit hours or the equivalent.

3. The county supplement is $147.50 per month. An additional $115.00 is included in the BBOE salary schedule as "State Equity." BBOE did not enact any special supplement for the posted position.

4. Ms. Hill calculated the salary by ascertaining the daily rate of pay for service personnel working in a pay grade G position, including the county supplement, multiplied it by 261 days, and divided that number by 10. She should have divided by 12 rather than 10, because the posted position was a 261 day position paid over 12 months rather than 10 months.

5. Grievant contacted Keith Phipps, Assistant Superintendent of Boone County Schools, regarding the position, and inquired about the salary. Mr. Phipps placed a telephone call to Ms. Hill to verify the salary, and she told him it was correct and how she had calculated the monthly salary. Mr. Phipps told Grievant the monthly salary listed in the posting was correct. Grievant did notinquire about the annual salary, and he was not told the annual salary. Mr. Phipps explained to Grievant's mother during a later conversation how the monthly salary was calculated.

6. The monthly salary quoted to Grievant was based upon an assumption that he would receive his salary over 10 months, and was not intended to represent the monthly salary if he instead received it over a period of 12 months.

7. Grievant applied for the posted position, and was interviewed.

8. Neither Ms. Hill nor Mr. Phipps had authority to bind BBOE to pay a particular salary.

9. At a meeting held February 19, 1997, BBOE voted to employ Grievant in the posted position, effective February 24, 1997.

10. Grievant began work in the position on February 24, 1997, and received an employment contract on February 27, 1997, which stated the salary as $1,490.00 per month, $21,679.50 annually. He telephoned Ms. Hill, and was informed that the salary on the contract was incorrect. He received a corrected contract which stated the monthly rate of pay as $1,620.37 per month, $19,444.50 annually. Grievant did not sign either contract.

Discussion

Grievant bears the burden of proving the allegations of his grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (Mar. 28, 1996). Grievant argued the posting represented a contract with him, and that when BBOE approved his hiring for the posted position, it approved the salary in the posting. He also pointed out he had decided to leave his previous job, and had turned down another job, based upon what he believed the salary would be for this job. BBOE argued that it was not bound by the representations of itsagents who were not

authorized to make promises, nor by the erroneous posting. BBOE intended to employ Grievant at the county salary scheduled rate for a pay grade G.

"A state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers and all persons must take note of the legal limitations upon their power and authority. [Citations omitted.]" Syl. Pt. 2, W. Va. Public Employees Ins. Bd. v. Blue Cross Hosp. Serv., Inc., 328 S.E.2d 356 (W. Va. 1985). "`Any other rule would deprive the people of their control over the civil service, and leave the status and tenure of all employees to be governed by whatever arrangements incumbent administrators may agree to or prescribe.'" Freeman v. Poling, 338 S.E.2d 415, 421 (W. Va. 1985), citing Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983). "It is well settled that a supervisor's oral representation during an interview as to salary is not binding on an agency, where that supervisor does not possess authority to actually hire or set rates of pay." Chapman v. Dept. of Transp./Div. of Highways, Docket No. 97-DOH-261 (Nov. 24, 1997), citing Ollar v. W. Va. Dept. of Health and Human Resources/W. Va. Div. of Personnel, Docket No. 92- HHR-186 (Jan. 22, 1993).

> In effect, potential state employees are charged with knowing that the persons who interview and offer them employment are typically not authorized to make final employment decisions. The prospective employee must not rely on statements made by such individuals as to salary or rates of pay. The new hire must not rely even on official-looking documents, unless the document reviewed is the Form WV-11 by which hiring is actually approved. While this rule is unquestionably burdensome in the extreme to prospective employees, any other rule would render the State powerless before the whims of individual supervisors, and would require strained interpretations of clear precedent set by this Board and the Courts of this State.

Chapman, supra. The footnote following this quote refers to the fact that state employees do not sign a written contract of employment, and refers to the written contract required to be entered into between the employee and a county board of education. It is clear that Grievant cannot rely upon the representations made by Mr. Phipps in support of his argument, as Mr. Phipps had no authority bind BBOE. Further, Grievant's argument that he cannot be expected to understand what is meant in a posting by a pay grade G is rejected.

Grievant argued the posting represented a contract, but offered no support for this proposition. A posting is an advertisement that a position is available and applications for employment are being accepted. It may be withdrawn, and is not an offer of employment or a contract. See Malone v. Marion County Bd. of Educ., Docket No. 96-24-084 (May 30, 1996).

"A basic tenet of contract law is that a contract cannot exist unless all parties agree to the terms." Mitchell v. Mingo County Bd. of Educ., Docket No.95-29-331 (Apr. 30, 1996). W. Va. Code § 18A-2-5

incorporates this basic tenet, and further requires the agreement to be reduced to writing, providing that, "[b]efore entering upon their duties service personnel shall execute with the board a written contract which shall be in the following form: . . .. The employee shall return the contract of employment to the county board of education within thirty days after receipt or otherwise he shall forfeit his right to employment." Thus, it is clear that the only contract which could lawfully be offered to Grievant was a written contract in the form prescribed by statute, which Grievant was obligated to sign and return within thirty days, or forfeit his employment. While the statute required that the written form contract be executed prior to Grievant entering upon his duties, the fact that this did not occur does not void the statutory requirement of a written contract. The posting cannot be substituted for the statutory form contract, and BBOE did not intend that it be a substitute.

Grievant argued that when BBOE approved hiring him for the posted position, it approved the salary set forth in the posting. The posting states the salary is within a pay grade G, and it does not state whether the listed salary range is paid out over 10 months or 12 months, thus it could notbind BBOE to pay Grievant the listed amount every month for 12 months. At no time did BBOE approve hiring Grievant at a salary different from that set forth in the pay scale for a pay grade G. Even if it were accepted that the salary set forth in the posting represented the monthly salary for 12 months, such a salary is inconsistent with a pay grade G, which is also in the posting, and accordingly, it could not be determined that BBOE had in fact voted to pay that salary. If it could be read to mean the salary would be paid for 12 months, since it also says the salary is within a pay grade G, it likewise cannot bind BBOE because it is ambiguous.

Grievant testified he had left his previous employment based upon his understanding of the salary for this position, and had also turned down other employment. "Although a government employee may have a reasonable basis for understanding terms of his employment, those understandings cannot override state law that defines the terms of employment." Syl. Pt. 2, Freeman, supra. Further, even if Grievant may have suffered some harm based upon a misrepresentation as to salary, it does not change the fact that he was expected to know the law, and Mr. Phipps could not bind BBOE by his representations as to salary. In this case, however, it is unclear whether Grievant, in fact, had a reasonable basis for his asserted understanding of the salary, or that he suffered any harm. Grievant curiously did not inquire about the annual salary, and his mother, who apparently was a participant in Grievant's job inquiries, was made aware that the monthly salary was for a period of 10 months, not

12. As to his previous employment, his base annual salary was less than the annual salary for this position. The job he turned down paid $300.00 more per month than what Grievant thought he would be making in this job, but he considered the travel time and time with his family in turning down the higher paying job.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The burden of proof is upon Grievant to prove the elements of his grievance by a preponderance of the evidence. Conner v. Mingo County Bd. of Educ., Docket No. 95-29-476 (March 28, 1996).

2. "A state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers and all persons must take note of the legal limitations upon their power and authority. [Citations omitted.]" Syl. Pt. 2, W. Va. Public Employees Ins. Bd. v. Blue Cross Hosp. Serv., Inc., 328 S.E.2d 356 (W. Va. 1985). "`Any other rule would deprive the people of their control over the civil service, and leave the status and tenure of all employees to be governed by whatever arrangements incumbent administrators may agree to or prescribe.'" Freeman v. Poling, 338 S.E.2d 415, 421 (W. Va. 1985), citing Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983).

3. "It is well settled that a supervisor's oral representation during an interview as to salary is not binding on an agency, where that supervisor does not possess authority to actually hire or set rates of pay." Chapman v. Dept. of Transp./Div. of Highways, Docket No. 97-DOH-261 (Nov. 24, 1997), citing Ollar v. W. Va. Dept. of Health and Human Resources/W. Va. Div. of Personnel, Docket No. 92-HHR-186 (Jan. 22, 1993).

4. Grievant failed to prove that the Boone County Board of Education authorized the payment of a salary of $1,931.00 per month for 12 months for Grievant's position, or hired him at that rate of pay.

5. Grievant failed to prove that the Boone County Board of Education acted in an arbitrary and capricious fashion.

Accordingly, this grievance is **DENIED**.

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

BRENDA L. GOULD

Administrative Law Judge

Dated: April 13, 1998

Footnote: 1

This grievance was filed on March 27, 1997, and Grievant's supervisor responded on that date that the grievance could not be resolved at Level I. A Level II hearing was held on April 15, 1997, and the grievance was denied at Level II on April 22, 1997. Grievant appealed to Level III, Respondent waived its right to hear the grievance on May 6, 1997, and Grievant submitted his grievance to Level IV on June 30, 1997. A Level IV hearing was held before the undersigned Administrative Law Judge on October 29, 1997, and this grievance became mature for decision on January 28, 1998, upon receipt of the last of the parties' written responses.