

SCOTT CONNERS,

Grievant,

v.

DOCKET NO. 99-16-459

HARDY COUNTY BOARD OF EDUCATION,

Respondent, and

SARA ORNDORFF,

Intervenor.

DECISION

Grievant Scott Connors filed this grievance against the Hardy County Board of Education ("HBOE") on or about September 27, 1999. His statement of grievance reads:

I was hired to teach building trades at East Hardy High School for the 1999-2000 school year. I began working in that position in August 1999. On September 3, 1999, I was notified by Mrs. Sharon Hammer that I would need as many as 24 hours from WV Tech to be fully certified for the position. This requirement was not mentioned when the job was posted. I would not have accepted the job had I been told that I was not fully certified.

The stated relief sought was:

I want to be returned to the position that I held during the 1998-99 school year with all back pay and benefits that are due to me. [\(See footnote 1\)](#)

The following Findings of Fact are properly made from the record developed at Level II.

Findings of Fact

1. Grievant was employed by HBOE at East Hardy High School as a special education teacher for several years, and in particular, during the 1998-99 school year. He is certified in M.I./Mild-Moderate, K through 12, Industrial Arts Technology, 7 through 12, "Elec & Electroni," [\(See footnote 2\)](#) 7 through 12, and Metals, 7 through 12. He does not hold a Vocational Certificate. He has been an HBOE employee for 11 years.

2. On May 12, 1999, HBOE posted a Building Trades teacher position at East Hardy High School. The posting stated:

In order to meet state regulations, a Teacher of Building Trades must have either: 1) Four years (8,000 clock hours) experience working the Building Trades; 2) A degree in a related field and three years (6,000 clock hours) experience in Buildings [sic] Trades; or 3) A combination of credit earned in a vocational-industrial education program or a technical school and related work experience as defined by state regulations. 3. Grievant holds a degree in Industrial Arts Technology, with a focus on electricity, electronics, and metals. He worked seven summers as a carpenter and electrician, and four summers as a painter, and performing home repairs. He completed a two year course in Industrial Electricity at a vocational school, and holds a journeyman's electrician's license. He also worked with the previous Building Trades teacher for three to four class periods a day, for four years, as an inclusion teacher in M.I. to build a house. He believed this education and experience made him qualified for the position under the second option set forth in the job posting.

4. Grievant talked to Steve Wilson, Principal of East Hardy High School, about his qualifications. A Mr. Moss was Assistant Superintendent in charge of certification at the time of the posting. Grievant did not talk to him, nor did he talk to anyone else in the board office or at the State Department of Education about whether he met the requirements for the position. Mr. Moss did not contact Grievant about the requirements.

5. Grievant and two others applied for the Building Trades teacher position. Grievant was not interviewed, but was selected for the position. HBOE approved his placement in the posted position on July 19, 1999, and he was notified of his transfer to this position by letter dated July 22, 1999, from HBOE Superintendent Ronald V. Whetzel. This letter does not mention that Grievant will have to complete any other requirements.

6. At some point after the posting, but before the position was filled, Superintendent Whetzel was hired to replace the previous superintendent, Dr. John V. Miller, Jr. Before the position was filled, Dr. Miller told Superintendent Whetzel he did not know whether Grievant was certified for the position. Superintendent Whetzel did not discuss this issue with Grievant prior to HBOE's action to transfer Grievant into the position.

7. On or about August 24, 1999, Sharon Hammer, HBOE Administrative Assistant, sent Grievant a Vocational Permit and Certificate Form and a Verification of Work Experience Form, accompanied by a note for Grievant to send one form to his former employers to verify his work experience, complete the Vocational Permit and Certificate Form, and to call her if he had questions. He received this note on or about August 27. On August 27, 1999, Ms. Hammer sent Grievant the Vocational Permit and Certificate Form again, accompanied by a note which reads, "Scott - There are

several more things you need to complete (w a \$5.00 fee). Please call me next week and we can discuss it." Grievant received this note on or about August 30. On September 3, 1999, Grievant first spoke with Ms. Hammer, who informed him he would have to complete 24 college credit hours, take 2 tests, and obtain vocational certification.

8. By letter dated September 8, 1999, Ms. Hammer informed Grievant he needed to complete the forms she had sent him by September 15, and get her a \$5.00 check for the permit application fee. The letter states, "[t]his will allow you to teach for one year, but we cannot automatically transfer you to another job if you do not get certified. . . . I am sorry if you were lead to believe that a special certification is not required." The letter provides Grievant with the names of personsto contact to verify the requirements.

9. At that point, Grievant called one of those listed in Ms. Hammer's letter, Robert Summerfield, Chair of West Virginia University Institute of Technology's ("Tech") Department of Vocational Education, and Mary Keenan, Regional Teacher Educator at Tech, who is in charge of vocational permits. Ms. Keenan told Grievant he would have to attend a workshop in October and take an exam, and attend summer school one summer full-time to complete the 24 hours of course work at West Virginia Tech.

10. By letter dated September 16, 1999, Ms. Keenan informed Ms. Hammer that, in order for Grievant to gain vocational certification, he would need to meet the requirements set forth in "Title 126 - Series 136, `Minimum Requirements for the Licensure of Professional/Paraprofessional Personnel.'" She also stated Grievant would have to attend a two-day workshop in Ripley in October, take 1 exam, and complete 15 college credit hours. She stated Grievant would not have to be tested in basic skills because he was a certified Industrial Arts Teacher, and this certification also meant he would not be required to complete 9 of the 24 required college credit hours. She pointed out this coursework would have to be completed within three years.

11. Grievant did not believe it was possible for him to attend summer school, due to his family obligations during the summer, and he would have to give up \$4000.00 or more of summer income to attend summer school.

12. Mary Beth Hardy was placed in Grievant's former position, and latervacated it. The special education teacher position at East Hardy High School was then posted on August 24, 1999. Sara Orndorff applied for the position and was selected for the position on August 30, 1999, and began her

duties in this position on September 7, 1999. Grievant was not aware of the posting and did not apply for the position.

13. After speaking with Ms. Hammer and Superintendent Whetzel, Grievant became concerned that he could be dismissed if he did not obtain certification for the Building Trades position. On September 23, 1999, Grievant applied for a posted special education teaching position at East Hardy Early/Middle School, and was selected and placed in the position. [\(See footnote 3\)](#) He teaches grades 6 through 8. His salary and hours are the same as when he taught special education at East Hardy High School.

14. Grievant is head football coach at East Hardy High School, and believes it is important to have daily contact with the players to monitor their grades and problems. He is not required to teach at East Hardy High School in order to remain head coach. In addition, he has spent most of his teaching career at the high school level, and that is where he prefers to teach.

15. East Hardy Early/Middle School is about 200 yards from East Hardy High School.

Discussion

The burden of proof is upon Grievant to establish his allegations by a preponderance of the evidence. Canterbury v. Putnam County Bd. of Educ., Docket No. 40-86-325-1 (Jan. 28, 1987). Grievant argued he was misled by the posting to believe that he met the requirements to fill the position, and would not have accepted the position had he known he did not meet the requirement to be certified. He argued an employee must be able to rely on the information provided by the job posting. He pointed to Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648 (1995), in support of his position.

HBOE argued that "the position was properly posted," Grievant applied for it, and at his request he was transferred into the position. HBOE also pointed to its own policy and to W. Va. Code § 18A-2-1 to show it is the responsibility of the employee to ensure he is certified, and pointed to Grievant's certificate, indicating it "does not show compliance with the posting requirements."

Before going further, it is necessary to address whether, in fact, the position was properly posted. The undersigned takes administrative notice of the entire text of State Board of Education Policy 5202 (126 C.S.R. 136), as found on the State Board's internet site, rather than simply relying upon those portions submitted into the record by HBOE. Having thoroughly reviewed Policy 5202, it is crystal clear that what HBOE wanted, and what the posting should have stated as the minimum

qualification, was the possession of a Vocational Certificate. It is likewise very clear that the requirements in the posting were those for a Full-Time Vocational Permit, as are listed in Policy 5202 at § 19.1.4, which would only allow the person employed to work in the position for one year. The requirements for a Vocational Certificate are found in Policy 5202 at §§ 20.1.1 and 20.1.3, and include testing requirements and the completion of a state approved program. HBOE's argument that the position was properly posted is specious.

Intervenor argued it was Grievant's responsibility to make sure he had the proper certification. She pointed to W. Va. Code § 18A-3-2, which provides that "[a]ny professional educator, as defined in article one of this chapter, who is employed within the public school system of the state shall hold a valid teaching certificate licensing him or her to teach in the specializations and grade levels as shown on the certificate for the period of his or her employment." She also pointed to § 6.1.1(a) of the Policy 5202, which provides:

The educator shall:

a. Familiarize Her/Himself with Licensure Requirements. - Every educator is responsible for familiarizing her/himself with the West Virginia licensure and salary classification requirements and for making application for any licensure/salary classification to which he/she is entitled. It is the educator's responsibility to ensure that he/she holds a license valid for her/his assignment.

That Policy also provides at § 6.1.2(a) that:

The county superintendent shall:

a. Counsel Employees. - The county superintendent or professional designee is encouraged to advise employed educators regarding licensure requirements and to inform each educator concerning her/his professional responsibility for maintenance of her/his license, additional endorsements and/or advanced salary classifications, including the procedures by which these processes are completed. County superintendents are encouraged to notify employees at least one year in advance of the date the employees' license(s) must be renewed. Intervenor also correctly pointed out that the facts of Cowen, supra, differ from the facts here, in that the employees in that instance, whose school was closing, were told by school board representatives prior to the time the positions at the new school were posted, that they would not need to obtain additional certification in order to be placed in positions at the new school, and relied upon that representation. Then the school board chose to post the positions requiring the very certification grievants were told they would not need, yet the board did not allow the grievants the three weeks needed to obtain the certification. This action was found to be arbitrary and capricious. In this case, the requirements for the position were not changed by the school board. It simply put the wrong requirements in the posting, which led Grievant to think he did not need

additional training or certification.

The cases are similar, however, in that in both instances the board or its representatives made misrepresentations to the grievants about the certification requirements, and they relied upon these misrepresentations to their detriment.

Intervenor further pointed to the maxim where one of two innocent parties must suffer because of the dereliction of a third party, it is the least culpable who should prevail, and that would be the Intervenor.

Finally, she argued Grievant's old position was no longer available because it had already been filled and vacated by another employee, and it was that employee's position which she had filled. This argument, while creative, is irrelevant.

This Grievance Board has repeatedly addressed the importance of postings being accurate. "It is well established that `skills required by a board of education for an applicant to qualify for a position must be included in the posting.' Wall v. Putnam Co. Bd. of Educ., Docket No. 89-40-664 (July 10, 1990)." Feltz v. Marion County Bd. of Educ., Docket No. 90-24-078 (Oct. 19, 1990). "The purpose of the job posting statute to accurately reflect the teaching responsibilities of the position is frustrated and confounded when a board of education denotes required certification areas that are not necessary for the vacant posted position." Rash v. Wayne County Bd. of Educ., Docket No. 50-87-263 (June 7, 1988).

In addition to its duty to assure that postings are accurate, and contain all necessary information, a school board has "a duty to screen the fitness of its teachers to maintain the integrity of its schools." Cruciotti v. Ohio County Bd. of Educ., Docket No. 35-86-110 (Sept. 4, 1986), citing James v. W. Va. Bd. of Regents, 322 F. Supp. 217 (S.D.W. Va.), aff'd, 448 F.2d 785 (4th Cir. 1971). Importantly, this Grievance Board has specifically addressed the duty of a board of education to make sure an employee is properly certified, or to make sure arrangements have been made for the employee to obtain certification, before the employee is hired. The facts in Roth v. Ohio County Board of Education, Docket No. 35-89-025 (February 28, 1990), are very similar to those presented here. The teacher in that case was told by school board employees in administrative positions that she would not need additional certification in order to work in the position offered to her, except that she might need BD certification at some point, which would require little additional work on her part to obtain. The Administrative Law Judge ("ALJ") noted:

[The Ohio County Board of Education's] shortsightedness and efforts to "pass the buck" all the way back to the grievant cannot be sustained because events that led to her employment as preschool handicapped teacher cannot be ignored. Moreover, other facts and law cannot be ignored. A county board of education must employ the most qualified applicant for a professional teaching position, W.Va. Code §18A-4-8b(a), but implicit in the mandate is that the employing entity at the time of hiring ensures that the successful applicant meets, or has arranged to meet, minimum requirements for the posted position.

The ALJ went on to cite that portion of Code § 18A-2-1 which provides that all personnel nominated and recommended by a board of education for employment, "shall meet the certification, licensing, training and other eligibility classifications as may be required by provisions of this chapter and by state board regulation;" and Code § 18-5-4, which provides that a school board "may employ such qualified teachers, or those who will qualify by the time of entering upon their duties, necessary to fill existing or anticipated vacancies for the current or next ensuing school year." Thus, HBOE's reliance on W. Va. Code § 18A-2-1 to shift its duty to Grievant is misplaced, as that Code Section refers to the board of education's duty in this regard.

The grievant in Roth had made it clear that she would not have accepted the position had she known it meant she would need to begin a new program of study. The ALJ stated:

a county board of education has the prime responsibility to ensure that newly-developed educational programs, as well as long-standing programs, are structured in compliance with WVDE standards and staffed with properly-certified or -permitted personnel at the onset and thereafter. See Cruciotti v. Ohio Co. Bd. of Educ.[,] Docket No. 35-86- 110 (Sept. 4, 1986). Clearly, if the teaching staff of a school system had the expertise and time to perform the necessary functions of structuring and staffing programs and exercising other such professional judgments, there would be no need to employ an administrative staff.

The evidence is overwhelming in this grievance that responsible OCBE school administrators simply did not do their "homework" in the first place, that is, when the preschool program was initially formulated and grievant was actually employed for it.

The same can certainly be said here. The grievant in Roth was reinstated to her original position to make her whole.

It was the duty of the board of education to make sure the educational and certification requirements were accurate in the posting so that employees were not misled. It was further the duty of the board of education to make sure Grievant was properly certified for the position before hiring him, or to explain to him that the posting was wrong, and make sure he was willing to take on the additional certification requirements before hiring him.

As to HBOE's policy, it simply reiterates that the employee is "ultimately responsible for his/her professional certification," and "may be subject to dismissal" for failure to maintain professional certification. This policy does not say HBOE has no responsibility for assuring its postings are accurate, or that it has no responsibility to employ properly certified personnel. This policy does not change HBOE's duties and responsibilities as discussed above. Further, regardless of what that policy says, HBOE cannot by adoption of a policy, avoid its statutory duties and absolve itself of all responsibility for the accuracy of its postings and shift its responsibilities to its employees.

Superintendent Whetzel knew at least by July 22 that there was a question as to whether Grievant was certified. His excuse for not doing anything at that time to let Grievant know there was a problem, or to see if there was a problem, was that "there was a considerable number of people that were also in the need of additional permits or certifications, etc. So it was just one of several I knew I would have to deal with once I came on board." It was not until August 24 that any action was taken to address this issue with Grievant. Had immediate action been taken even at that late date to communicate clearly and directly to Grievant that the posting was wrong, and he would need to complete a significant amount of course work in order to become properly certified, Grievant could have bid upon his old position, and it is quite likely he would have received it. He could have been returned to his old position before additional employees were affected.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof is upon Grievant to establish his allegations by a preponderance of the evidence. Canterbury v. Putnam County Bd. of Educ., Docket No. 40-86-325-1 (Jan. 28, 1987).
2. A board of education has a duty to make sure its postings are accurate, and to make sure an employee is properly certified, or to make sure the employee understands the need to obtain certification, before the employee is hired. Roth v. Ohio County Bd. of Educ., Docket No. 35-89-025 (Feb. 28, 1990); Rash v. Wayne County Bd. of Educ., Docket No. 50-87-263 (June 7, 1988); Cruciotti v. Ohio County Bd. of Educ., Docket No. 35-86-110 (Sept. 4, 1986). W. Va. Code § 18A-2-1.
3. "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)." Petrovich v. Hancock County Bd. of Educ., Docket No. 98-15-074 (July 13,

1998).

4. Grievant justifiably relied upon the job requirements set forth in the posting, to his detriment.

Accordingly, this grievance is **GRANTED**. Respondent, Hardy County Board of Education is **ORDERED** to return Grievant to his former position special education position at East Hardy High School, and to return Intervenor to her former position at East Hardy Early/Middle School.

Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Hardy County. Any 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

BRENDA L. GOULD

Administrative Law Judge

Dated: January 14, 2000

[Footnote: 1](#)

Grievant's supervisor responded at Level I on October 5, 1999, that he was without authority to grant the relief sought. Grievant appealed to Level II, where a hearing was held on October 19, 1999. A Level II decision denying the grievance was issued on October 25, 1999. Level III was waived by Grievant, and he appealed to Level IV on October 29, 1999. The parties agreed to submit this grievance for decision based upon the Level II record. Grievant was represented by Mary Linn, Respondent was represented by Superintendent Ronald Whetzel, and Intervenor was represented by Kathleen Smith. This matter became mature for decision upon receipt of the last of the parties' written arguments on December 13, 1999.

[Footnote: 2](#)

The record does not reflect the meaning of these abbreviations on Grievant's teaching certificate, although they appear to stand for electricity and electronics.

[Footnote: 3](#)

Mrs. Orndorff had previously been employed at East Hardy Early/Middle School. The parties' proposed findings of fact indicate that Grievant holds Mrs. Orndorff's former position.