STEVEN HOLLEY,

Grievant,

v. **Docket No. 02-18-252**

JACKSON COUNTY BOARD OF EDUCATION,

Respondent,

and

WILLIAM HOSAFLOOK,

Intervenor.

D E C I S I O N

Grievant, Steven Holley, employed by the Jackson County Board of Education (JCBE or Respondent) as a teacher, filed a level one grievance on June 4, 2002, in which he alleged a violation of W. Va. Code § 18A-4-7a when a position was not posted. For relief, Grievant requested that the Social Studies position at Ripley High School (RHS) be posted. The grievance was denied at levels one and two. Grievant elected to bypass level three, as is permitted by W. Va. Code § 18-29-4(c), and advanced an appeal to level four on August 16, 2002. The parties agreed that the matter could be submitted for decision based upon the lower-level record. The matter became mature for decision upon receipt of proposed findings of fact and conclusions of law filed on September 30, 2002. (See footnote 1)

The following facts are undisputed and may be set forth as formal findings of fact.

Findings of Fact

1. Grievant has been regularly employed by JCBE since August 21, 2001, and holds certification in the areas of Social Studies (5-12) and a temporary endorsement forAlternative Education. He is assigned as the Safe and Drug-Free Schools Resource Teacher and Alternative Education Teacher at Ripley High School (RHS).

2. JCBE posted a position in May 2001 for the position of classroom teacher, Social Studies and Introduction to Majors. Included was a note that “Employee [Beverly Shatto] is on one year leave of absence and has a right to return to the position for the 2002-2003 school year.”

3. Intervenor, a 2001 college graduate, was employed by JCBE effective August 21, 2001, to fill Ms. Shatto's Social Studies position at RHS.

4. In Spring 2002, Respondent was notified that Ms. Shatto would return to RHS for the 2002-2003 school year. Because only six Social Studies teachers were needed at RHS, Intervenor's employment was terminated, and he was placed on the preferred recall list.

5. In May 2002, JCBE approved the transfer of Frank Marino from Social Studies/Health teacher to Health teacher at RHS.

6. With Mr. Marino's transfer, only five teachers were assigned to teach Social Studies at RHS. Because six teachers were required to cover all the Social Studies classes, JCBE rescinded its earlier decision to terminate Intervenor's employment.

7. The position vacated by Mr. Marino was not posted.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); Holly v. Logan CountyBd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6.

Grievant asserts that JCBE created a new Social Studies position at RHS, since Mr. Marino taught both Social Studies and Health, which required posting. Grievant also argues that Intervenor was not properly placed on the preferred recall list because there was no reduction in force. On the contrary, Grievant notes that when Ms. Shatto returned, Intervenor's one-year position, created by her leave of absence, concluded.

JCBE argues that Intervenor was employed under a standard probationary contract for regular, full-time employment, which did not include any limiting language which would cause his employment to cease upon Ms. Shatto's return to work. Upon notification that Ms. Shatto would return, JCBE concluded that it employed one too many Social Studies teachers at RHS, and that Intervenor's employment would be terminated to effectuate the reduction in force. Mr. Marino's transfer subsequently negated the reason for the reduction in force, which was rescinded, and Intervenor reinstated at RHS.

W. Va. Code § 18A-4-7a provides in part:

(j) Whenever a county board is required to reduce the number of professional personnel in its employment, the employee with the least amount of seniority shall be properly notified and released from employment pursuant to the provisions of section two, article two of this chapter. . . . If, prior to the first day of August of the year a reduction in force is approved, the reason for any particular reduction in force no longer exists as determined by the county board in its sole and exclusive judgment, the board shall rescind the reduction in force and shall notify the released employee in writing of his or her right to be restored to his or her position of employment.

JCBE's argument in this matter is flawed in that there was no reduction in force. As noted in JCBE's proposed findings of fact number 16, there were six Social Studiesteachers at RHS during the 2001-2002 school year, and there are six Social Studies teachers at RHS in the current year. Intervenor was not employed under a continuing contract, but only as a regular probationary teacher. Notwithstanding the fact that Intervenor was employed under a regular contract, the position had been posted as temporary to fill a vacancy during a leave of absence. Quite simply, Intervenor was hired for one year, after which his contract expired. In this instance, JCBE was not required to take any action to terminate his employment, and there was no reduction in force.

When Mr. Marino transferred to a full-time Health position, a vacancy was created which was to be posted and filled pursuant to Code § 18A-4-7a. This, JCBE did not do. Even if Intervenor had been properly placed on the preferred recall list, regular, full-time professional personnel and those returning from leaves of absence who have greater seniority and are qualified individuals currently employed would be given first opportunity to apply for and accept such position.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.21 (2000); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6. 2. JCBE did not implement a reduction in force when Intervenor's contract expired and Ms. Shatto returned from a leave of absence.

3. Grievant has proven by a preponderance of the evidence that JCBE failed to post the position vacated by Mr. Marino, as is required by W. Va. Code § 18A-4-7a.

Accordingly, the grievance is **GRANTED**, and JCBE is Ordered to post and fill the position currently held by Intervenor.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Jackson 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. 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 Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: November 4, 2002 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Grievant was represented by Anita Mitter of WVEA, Respondent was represented by Howard E. Seufer, Jr., of Bowles Rice McDavid Graff & Love, and Intervenor was represented by Kathleen Smith of WVEA.