RICHARD MAY,

Grievant,

v.

Docket No. 04-50-443

WAYNE COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

The grievant, Richard May, ("May") is employed by the respondent, Wayne County Board of Education ("BOE"), as a custodian at Spring Valley High School ("Spring Valley"). This grievance revolves around a posting for the professional position of Building Construction Technology Instructor ("Building Instructor position") at Spring Valley for the 2004-2005 school year. May claims that he was interested in that vacancy but was not given an opportunity to apply for that position. BOE claims that the position was properly posted.

After he learned that the Building Instructor position had been filled, May filed a grievance, dated August 9, 2004, alleging that "[n]o bid forms were ever made available, after repeated visits and calls to the Wayne board office since June 10, 2004." The relief he requested was "[f]or the job at Northern Vo-tech created by [the retirement of] Johnny Wallace - chance to bid." The grievance was denied at Level I. A Level II evidentiary hearing was held on September 8, 2004, after which a decision denying the grievance was issued on October 13, 2004. May appealed to Level III, where BOE elected to

review theLevel II decision on the record rather than conducting an additional hearing. (See footnote 1) By correspondence, dated November 17, 2004, BOE informed May that BOE had voted to affirm the Level II decision.

A Level IV hearing was held on January 28, 2005, at which May appeared on his own behalf. BOE was represented by its attorney, David Lycan. This grievance matured for decision on March 1, 2005, after both parties submitted proposed findings of fact and conclusions of law.

May bears the burden of proving, by a preponderance of the evidence, that there was a fatal flaw in posting the position. As discussed more fully below, May did not meet his burden. Therefore, this grievance will be denied.

After careful review of the entire record, the undersigned finds that the following facts were proven by a preponderance of the credible and relevant evidence:

Findings of Fact

1 1. May is employed by BOE as a custodian at Spring Valley.

2 2. May holds a West Virginia contractor's license. (See footnote 2)

3 3. Near the end of the 2003-2004 school year, May learned that the employee who held the Building Instructor position would be retiring at the end of the school year. This was a professional position in which May was interested and for which he believed he was qualified.

4 4. During the 2003-2004 school year, May asked the former superintendent about the certification required for the position of Building Instructor. On May 17, 2004, May also called the BOE central office and spoke with a secretary who told him that the certification requirements would be listed on the posting for that position.

5 5. On May 24, 2004, May asked Spring Valley's secretary, Cosbie Farley, if the “bid forms” were available for the Building Instructor position. He was correctly informed by Ms. Farley that “no forms were available at that time.”

6 6. May watched the bulletin board at Spring Valley for a posting or a “bid,” as he referred to it.

7 7. Postings at Spring Valley were tacked to a bulletin board in the “sign-in” room at that time. There was no copier in the room where the vacancies were posted.

8 8. The Building Instructor position was included among a number of vacancies set forth in a

"Notice of Vacancies - Professional Personnel," which was posted from "May 28-June 4, 2004." Level II, Exhibit B.

9 9. May worked every day throughout the posting period. He would have been in the room where the position was posted at approximately 3:00 p.m. each of those days.

10 10. Neither May nor any one of six fellow employees at Spring Valley saw the posting for the Building Instructor position during the posting period from May 28 to June 4, 2004. Level II, Exhibit 2.

11 11. It is a common practice for employees to remove postings of vacant positions to make copies for themselves.

12 12. Secretary Cosbie Farley removed the posting at Spring Valley after it expired. She retained it in a locked file cabinet in her office. Both she and May observed thepresence of several different tack holes in that copy of the posting, which suggests that it had, in fact, been removed and returned to the bulletin board at various times.

13 13. Some employees from Spring Valley applied for vacant positions that were listed in the same posting with the Building Instructor position. No one from Spring Valley applied for the Building Instructor position.

14 14. In addition to written postings of vacant positions, BOE also maintains a hotline on which a caller can hear a recorded listing of current position postings.

15 15. May did not call the hotline. (See footnote 3) Instead, he relied upon his wife and upon a friend, Melissa Christian, to make those calls.

16 16. May's wife was in Texas throughout the posting period for the Building Instructor position.

17 17. At Level II, Melissa Christian testified that she called the hotline "every night" to check for job postings for some of her family members and for May. Tr.14. On cross- examination, she conceded that she "might have missed one or two nights" during the months of May and June. Tr.15. In any event, Melissa Christian missed the recording that indicated the Building Instructor position had been posted.

18 18. May drove to the BOE central office at some point during the week of July 12, 2004. He looked for a posting for the Building Instructor position but did not find one. He did not speak with the Personnel Director or anyone else while he was there.

19 19. Despite the fact that he did not speak with anyone at the BOE office about the position, May complained that “at no time during calls or visits did anyone state that the position was filled.”

20 20. May also complained that “all of the administrators” at Spring Valley knew that he had a West Virginia contractor's license. He also asserted that they all knew that he was interested in the Building Instructor position but no one ever contacted him about it. May never named any particular individual he thought should have contacted him about the vacancy.

21 21. On August 4, 2004, May learned that the Building Instructor position had been filled.

22 22. After he learned that the position had been filled, May submitted an application for the Building Instructor position at Spring Valley.

23 23. Notwithstanding May's speculation on the subject, there was no evidence that anyone from BOE called any potential applicants to suggest that they apply for the Building Instructor position.

Discussion

At both Level II and Level IV, May conceded that the Building Instructor position was properly posted by BOE and that it was placed on the telephone hotline. Tr.26-27. His complaints, as stated at Level IV, were 1) that the written posting may have been taken down to be copied, and 2) that no one contacted him to tell him that the Building Instructor position had been posted, both of which caused him to miss the opportunity to apply for that position. There is no doubt that May was interested in applying for the position of Building Instructor at Spring Valley. Nor is there any doubt that he missed the posting and failed to timely apply for the position.

Vacant professional positions are subject to the posting requirements of West Virginia Code section 18A-4-7a(o), (See footnote 4) which provides, in pertinent part, as follows:

> Openings in established, existing or newly created positions shall be processed as follows: (1) Boards shall be required to post and date notices which shall be subject to the following: (A) The notices shall be posted in conspicuous working places for all professional personnel to observe for at least five working days; (B) The notice shall be posted within twenty working days of the position openings and shall include the job description; . . .
>
> (2) No vacancy shall be filled until after the five-day minimum posting period;
>
> (3) If one or more applicants meets the qualifications listed in the job posting, the successful applicant to fill the vacancy shall be selected by the board within thirty working days of the end of the posting period[.]

As reflected in the foregoing, there is no requirement that the vacancies be placed on a telephone hotline. This service is provided by BOE as a courtesy to its employees. Nonetheless, because May conceded that the position was both properly posted and placed on the telephone hotline recording, these issues need not be addressed further.

While it is unfortunate that May did not see the posting for the Building Instructor position, this does not provide a predicate for removing the successful applicant and re- posting the position. The legal obligations of BOE were met when the position was posted, as May concedes that it was.

In his post-hearing submission, May argues that the posting was not up for the requisite five-day minimum by virtue of having been taken down at various times to be copied. The fact that there were several tack holes in the original posting suggests that the document had, in fact, been removed from the bulletin board for copying. In addition, some of the employees at Spring Valley were applicants for other positions on the same posting. This also suggests that the posting may have been removed for copying.

Removal of this particular notice from the bulletin board at Spring Valley at various points during the posting period does not, however, invalidate the posting process. As discussed by the Supreme Court of Appeals of West Virginia, vacancy notices are, by statute, required to “be posted in 'conspicuous working places' and not in any specified or particular working place.” *Quintrell v. Lincoln County Bd. of Educ*., 195 W. Va. 347, 349, 465 S.E.2d 618, 620 (1995)(*per curiam*). Although *Quintrell* involved a service position, the similarity in the posting requirements make it analogous to the circumstances at hand. Actually, the circumstances of *Quintrell* were more sympathetic to the grieving employee than in this grievance because the job in which Ms. Quintrell was interested had not been posted at the bus garage where she worked. It had, however, been posted at the central office and at all of the schools. The *Quintrell* Court deemed this sufficient to satisfy thestatutory requirement “that notices of vacancies be displayed where interested and qualified persons might readily see them.” *Quintrell*, 195 W. Va. at 349, 465 S.E.2d at 620 (citing *Marion County Bd. of Educ. v. Bonfantino*, 179 W. Va. 202, 366 S.E.2d 650 (1988)). Vacancies for professional positions are required to be posted “in conspicuous working places for all professional personnel to observe for at least five working days.” W. Va. Code § 18A-4-7a(o). The posting for the Building Instructor position was distributed to all of the county schools, including Spring Valley, where May was working. It was also placed in the central office and on the telephone hotline. By analogy to *Quintrell*, this distribution

of the Building Instructor posting satisfies the statutory posting requirement. The fact that May did not see the notice does not provide a predicate for relief. The *Quintrell* Court expressly declined "to hold that because an employee does not receive actual notice of the posting, he or she is able to maintain a grievance for the vacant position." *Quintrell*, 195 W. Va. at 349, 465 S.E.2d at 620.

May places a great deal of emphasis on the efforts he made to apply for the position. The implication from his statement of grievance that he was somehow deliberately stymied in his efforts to apply for this position is not supported by the facts. On May 17, 2004, May made one telephone call to the BOE central office. This was prior to the time the position was posted. During that call, he spoke with the receptionist who answered the phone. The focus of his inquiry was on the certification that would be required for the Building Instructor position. He did not speak with the Personnel Director or his secretary.

On May 24, 2004, May asked the secretary at Spring Valley whether the position had been posted. At that point, it had not. May went to BOE's central office on oneoccasion to look at the postings. However, this was in July, after the posting period for the Building Instructor slot had already expired. Despite having gone to the trouble of traveling to the central office, May did not speak with the Personnel Director or anyone else who might have been able to tell him that the posting had already expired. Therefore, May's complaint that "at no time during calls or visits did anyone state that the position was filled" lacks any significance.

May's complaints that no one told him that the position had been posted are without any legal significance because he failed to identify anyone who had a duty to do so. May made vague assertions that other applicants were contacted by someone from the BOE and asked to apply. May did not identify any applicant who had been contacted to apply for the position. Nor has he identified anyone who made such calls to inform particular individuals that the position had been posted. Upon such vague assertions, it is impossible to determine if there were any improprieties.

At Level IV, May attempted to argue that the posting for the Building Instructor position was substantively incorrect. That issue is not properly part of this grievance, however, because May did not see the posting and did not timely apply for the position.

May also belatedly attempted to claim that a default had previously occurred at Level I. Such claim is not timely and, thus, will not be considered at this late date. Syl. pt. 4, *Hanlon v. Logan County Bd. of Educ*., 201 W. Va. 305, 496 S.E.2d 447 (1997)("In order to benefit from the 'relief by

default' provisions . . . a grieved employee or his/her representative must raise the 'relief by default' issue during the grievance proceedings as soon as the employee or his/her representative becomes aware of such default.") Based upon the foregoing, a review of the applicable law, and the arguments of the parties, the undersigned hereby concludes as follows:

Conclusions of Law

1 1. This is not a disciplinary grievance. Therefore, May bears the burden of proof. W. VA. CODE ST. R. § 156-1-4.21(2004), *Sprouse v. Lewis County Bd. of Educ.*, Docket No. 01-21-144 (Sept. 14, 2001), *Holly v. Logan County Bd. of Educ*., Docket No. 96-23-174 (Apr. 30, 1997).

2 2. May must prove his allegations by a preponderance of the evidence. W. VA. CODE ST. R. § 156-1-4.21 (2004). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

3 3. May has conceded that the position in which he was interested was properly posted. The fact that he did not see the posting and did not receive actual notice of the vacancy does not provide a predicate for relief. *Quintrell v. Lincoln County Bd. of Educ*., 195 W. Va. 347, 349, 465 S.E.2d 618, 620 (1995)(*per curiam*).

4 4. May has failed to prove that he is entitled to the relief sought.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wayne 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 tosuch appeal, and should not be so named. However, the appealing party is required by West Virginia Code section 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:

April 20, 2005

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JACQUELYN I. CUSTER

Administrative Law Judge

Footnote: 1

This option is available to BOE pursuant to West Virginia Code section 18-29-4(c).

Footnote: 2

The license entered into the Level II record expired May 30, 2004. At Level IV, May did not introduce a current version of his license but he testified, without contradiction, that he holds a license.

Footnote: 3

This is contrary to May's assertion during his opening statement at Level II that he began calling the hotline.

Footnote: 4

There is a similar posting requirement for service positions. W. Va. Code § 18A-4- 8b. Because the Building Instructor position May was interested in was a professional position, West Virginia Code section 18A-4-8b does not apply.

Figure

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Figure

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