LOU ENNIS

v. Docket No. 93-35-516

OHIO COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant is employed by Respondent Ohio County Board of Education (OCBE) as a custodian. He filed the following appeal at level four: (See footnote 1)

Grievant contends that the Respondent filled a vacancy for a custodian at Wheeling Park High School by an in[-]house transfer and then filled the resulting vacancy by county wide posting. Grievant applied for the position, but declined it when he learned it would not be for the shift assigned to the employee who left the position. Grievant alleges a violation of West Virginia Code §§18A-4-8b and 15.

Grievant claims the vacancy was for work on the day shift which he highly desires. OCBE denies wrongdoing in this action and maintains Grievant did not prove his case.

Based on all matters of record, the following findings offact are made. (See footnote 2)

Findings of Fact

1. Due to Wheeling Park High School's (WPH) high degree of usage during the curricular day, for after-school and related activities and due to security reasons, the school is staffed with custodians on an around-the-clock basis, generally with a day shift, 7:00 a.m. to 3:00 p.m., an "afternoon" shift, from 3:00 p.m. to 11:00 p.m., and a night shift, from 11:00 p.m. to 7:00 a.m.

2. On or about October 13, 1993, OCBE posted a 261-day Custodian III position for WPH. The posting specified that the job entailed a "flexible work schedule."

3. The WPH vacancy occurred when a WPH custodian trans ferred to a custodial position in another school. He initially had been assigned to work an afternoon shift at WPH in August 1992. According to this worker, he then asserted seniority rights and obtained a day shift. After a time, however, he and another WPH custodian who worked in the afternoon, agreed to an administratively-approved permanent trade of their work shifts due to an undisclosed work-related problem. At that point, the departing custodian had worked the afternoon shift for approxi mately seven months. (See footnote 3) 4. Grievant, employed as a weekday custodian at Triadelphia Middle School on the afternoon shift, was among the applicants for the resultant WPH vacancy. Grievant believed the

posted position was a day shift job and that the "flexible work schedule" requirement at WPH basically meant custodians there would occasionally work shifts other than their designated ones on a fill-in basis or for emergencies.

5. The most senior applicant was offered the vacant position at WPH, but he declined.

6. Grievant, next in line seniority-wise, also declined the vacancy at WPH when informed at his interview by WPH's principal and custodial coordinator that he would be required to work weekends and the afternoon shift there. (See footnote 4)

7. The third most-senior applicant accepted the posted WPH position and transferred there from another school.

8. The WPH custodian who originally traded shifts in February 1993 with the man who vacated the WPH position, re tained the day shift assignment at WPH.

9. Grievant filed a grievance and essentially requested as relief that jobs be posted shift-specific and filled seniori ty-wise and that he be placed in a daytime job at WPH with no weekend work. T2.15-16.

Discussion

The heart and soul of Grievant's argument seems to be that, in order to comply with the spirit and intent of the hiring mandates of Code §18A-4-8b, OCBE must designate, post and fill WPH's custodial (service personnel) positions as shift specific. He argues in his level four brief that OCBE must "post and fill the vacancy which actually occurs for all employees to bid upon." He claims WPH's principal has no authority to assign an employee to fill a vacated position from within the ranks of WPH's staff.

OCBE states that the outcome of this case turns on several factors. First, because Grievant was offered but declined the WPH position, the grievance is moot, and the most Grievant could obtain would be an advisory opinion. Next, OCBE urges, Grievant failed to prove that the seniority-based hiring requirements of W.Va. Code §18A-4-8b apply in any manner to shift scheduling within a school. Finally, OCBE maintains its utilization and implementation of flexible scheduling was challenged in the past by some of WPH's custodians, but that the flexible scheduling of workers was ultimately upheld in a level four decision, Holloway v. Ohio County Bd. of Education, Docket No. 91-35-028 (Oct. 9, 1991).

In this case, Grievant simply has failed to meet his burden of proof. W.Va. Code §18A-4-8b does not expressly mandate that service positions be posted as shift-specific. Further, aside from the

question of whether shift-specific posting is required even though the job posting includes notice of a flexibleworking schedule, Grievant failed to prove that the job he now seeks was a day-shift job at all. The vacancy at WPH occurred when a then-current afternoon shift worker, and not a day-shift worker, transferred out of WPH to another site. Therefore, WPH's principal did not "fill" a day-shift vacancy from within the ranks of WPH's custodians as Grievant alleges.

Moreover, Grievant possessed no hiring priority based on his seniority with respect to the vacancy at WPH because he was not the most-senior applicant. See Daggett v. Wood County Bd. of Educ., Docket No. 91-54-497 (May 14, 1992). Grievant was given an interview for the posted position only because the most-senior applicant, the worker with seniority-based prefer ence under W.Va. Code §18A-4-8b, declined the job. When Grievant was told at the interview that the job entailed after noon shift work and also some weekends, he informed the offi cials that he was not interested in the position.

At the point Grievant declined the vacancy at WPH, prompt ing OCBE to fill the job with the next-most-senior and interest ed custodian/applicant, Grievant lost his limited right to that vacancy and any basis for the requested relief of instatement to the position. Had Grievant accepted the job when given the opportunity, he could have attempted to bring about an adjust ment in his work shift within WPH by asserting any seniority rights he may have had, the same as the former WPH custodian had done when initially hired to work at WPH.

In addition to the foregoing, the following conclusions of law are made.

Conclusions of Law

1. W.Va. Code §18A-4-8b does not expressly mandate that service personnel positions be posted as shift-specific.

2. Principals have some latitude when assigning duties to like-classified service personnel within their schools. See Gemmer v. Wood County Bd. of Educ., Docket No. 91-54-274 (Dec. 23, 1991).

3. Grievant failed to establish that the seniority requirements of Code §18A-4-8b regarding the filling of service personnel positions apply to the shift scheduling of custodians within a school.

4. Grievant is not entitled to any relief in this matter because he declined the job in question, and the job is no longer available to him; therefore, the essential question of shift-specific posting has been mooted. See Daggett v. Wood County Bd. of Educ., Docket No. 91-54-497 (May 14, 1992).

5. Moot questions or abstract propositions, the decision of which would avail nothing in the determination of controverted rights, are not properly cognizable in the griev ance procedure. See Harrison v. Cabell County Bd. of Educ., 351 S.E.2d 604 (W.Va 1985); Smith v. Lincoln County Bd. of Educ., Docket No. 89-22-714 (Feb. 22, 1990).

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Ohio 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 appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

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NEDRA KOVAL

Administrative Law Judge

Date: May 31, 1994

Footnote: 1 Adverse decisions were issued at levels one and two on November 2, and December 8, 1993, respectively. The matter was advanced to level four on or about December 15, 1993, where hearing was conducted March 23, 1994. OCBE filed post-hearing fact/law proposals April 20, 1994; Grievant filed his proposals on May 5, 1994.

Footnote: 2 The record consists of the grievance pleadings, lower-level decisions, the transcript of the December 6, 1993 hearing (T2._), a transcript of the level four hearing (T4._), and the parties' post-hearing fact/law proposals.

Footnote: 3 Grievant's counsel subpoenaed this custodian to appear at the level four hearing. At hearing, counsel questioned the worker closely about the shifts he worked at WPH, from the time he began the assignment at WPH in July 1992 (following county-wide transferactions), until the time he left for a job at a different school. T4.18-21. At some point, Grievant's counsel conceded that, under the circumstances, the trade of work shifts between the two WPH custodians was not contrary to law because the parties to the switch agreed and the administration approved.

Footnote: 4 Grievant also stated at the December 6, 1993 level two hearing that he would not have accepted a day shift assignment at WPH which included weekend work T2.15.