PEGGY KUHN and JANET NEWHOUSE

v. Docket No. 93-24-402

MARION COUNTY BOARD OF EDUCATION

DECISION

Grievants, Peggy Kuhn and Janet Newhouse, employed by the Marion County Board of Education (Board or Respondent) as service personnel, advanced a complaint to level four of the grievance procedure on September 28, 1993. Grievants allege that the Board violated W.Va. Code §18A-4-8 by reducing their salaries after they bid upon and received lower-classified positions than those they had previously held. A level four hearing was held on December 3, 1993. Proposed findings of fact and conclusions of law were submitted by both parties on January 21, 1994, at which time the matter became mature for decision. (See footnote 1)

The facts of this matter are undisputed. 1. During the 1992-93 school year Grievants held 261 employment term contracts of employment. Grievant Kuhn was assigned as a Custodian III at the RESA building and Grievant Newhouse was assigned as a Secretary III at the central office.

2. The Respondent elected not to continue offering custodial services to the RESA building for the 1993-94 school year and abolished the position held by Grievant Kuhn.

3. As a result of a reorganization of the central office staff, the position held by Grievant Newhouse was abolished.

4. The Board terminated Grievants' contracts of employment pursuant to W.Va. Code §18A-2-6, reemployed them with a 208 day employment terms and placed them on the transfer/unassigned list for the 1993-94 school year.

5. Respondent assured Grievants that they could bid on and fill positions of a lower pay grade within their respective classifications but would retain their former pay grades which would not be reduced as a result of the reassignments.

6. In reliance upon this assertion Grievant Newhouse bid upon and received a Secretary II position. The Secretary II classification is compensated at the "E" paygrade. Grievant Newhouse had

been compensated at the "F" pay grade as a Secretary III. 7. Grievant Kuhn bid upon and received a position of Custodian I, pay grade "A". Grievant Kuhn had previously been classified in pay grade "C" as a Custodian III.

8. By Memorandum dated June 4, 1993, Assistant Superintendent Dennis Edge advised Grievants that "it appears that the current law does not permit you to retain a III pay grade unless you bid on and receive such a position."

Subsequent to much, if not all, of the above actions the West Virginia Supreme Court of Appeals issued a decision in the matter of Harrison Co. Bd. of Educ. v. Coffman, 430 S.E.2d 331 (W.Va. 1993). In Coffman the grievant, a Custodian III assigned a 261-day employment term, bid upon two, 200-day Custodian III positions, contingent upon his retention of the longer employment term. Respondent did not consider the bid because the contingency "unilaterally changed the employment term" of the posting. Subsequent to the bidding, Respondent changed the employment term for the positions to 261 and 220-day employment terms. The positions were awarded to two Custodian IIIs who were on the pending transfer/subsequent reassignment list. The Court determined that Respondent had improperly showed favoritism when it rejected grievant Coffman's application and accepted the application of another custodian with less seniority despite that applicant's desire to retain a 220-day contract. Citing Coffman the Board claims that it is not permitted to grant preferential treatment to a service employee based upon the fact that the employee was placed on the transfer list. Therefore, Grievants received the positions upon which they bid by virtue of their seniority; however, W.Va. Code §18A-4-8b requires that they be compensated at a designated paygrade and to allow the retention of a paygrade for the positions which they previously held would result in favoritism and discrimination because they would be compensated at a higher salary than identically situated employees.

Grievants argue that the present case may be distinguished from Coffman based upon factual differences.

In the case at bar, there is no evidence of a Custodian III with more seniority than Kuhn bidding upon the position filled by Kuhn. There is no evidence of any other Custodian III whose application was disregarded because their application for position was conditioned on retaining their higher classification. In short there is no evidence of a disparity of treatment of similarly situated employees which characterized Coffman and which is required to constitute favoritism. The same can be said of

Newhouse. There is no evidence of a similarly situated employee denied the opportunity of retaining their higher pay grade.

Grievants' Conclusion of Law No. 1.

Grievants additionally argue that the Board is estopped from lowering their pay grades because they bid upon the positions with lower pay grades in reliance on the Board's assurances that their pay grades would not be reduced.

Presumably Respondent's past practice of allowing employees who were transferred as a result of a reduction inforce to retain the pay grade of the position formerly held was an effort to minimize the effects of the personnel changes on those employees. However meritorious the intent, this practice resulted in employees working in one class title but receiving compensation from another classification, a violation of W.Va. Code §18A-4-8a, which specifies the pay grade for each class title. Grievants themselves note that school personnel laws and regulations must be strictly construed in favor of the employees they were designed to protect. Morgan v. Pizzino, 256 S.E. 2d 592 (W.Va. 1979). This holding would support a conclusion that the statutory pay grades must be accurately applied.

To allow Grievants to retain the higher level pay grades also could easily be defined as favoritism since the transferred employees were the beneficiaries of "preferential, exceptional or advantageous treatment." See W.Va. Code §18-29-2(o). The practice was also undoubtedly discriminatory since the difference in treatment of the employees was not "related to the actual job responsibilities of the employees or agreed to in writing by the employees." See W.Va. Code §18-29-2(m).

Neither may Grievants prevail on the basis of estoppel. Although relief may be granted in some instances where the employee establishes actual and reasonable reliance on the employer's conduct or representation, estoppel cannot be applied when the employer's representation was in statutory violation and would result in discrimination and favoritism. Parker v. Summers Co. Bd. of Educ., 406 S.E.2d 744 (W.Va. 1991).

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

CONCLUSIONS OF LAW

1. The compensation of service personnel employees in a pay grade higher than that assigned to

the position they hold is a violation of W.Va. Code §18A-4-8a.

2. The compensation of service personnel employees in a pay grade higher than that assigned to the position they hold would result in discrimination and favoritism as defined in W.Va. Code §18-29-2 (m) and (o).

3. Although Grievants reasonably relied upon the Board's assertion that their pay grades would not change even though they accepted positions with lower pay grades, they may not prevail under the theory of estoppel where the Board's proposed action was in violation of statutory provisions establishing pay grades and resulted in discrimination and favoritism.

4. Grievants have failed to prove by a preponderance of the evidence that they are entitled to compensation in a pay grade higher than that statutorily assigned to the positions they currently hold.

Accordingly, the grievance is Denied.

JULY 26, 1994 SUE KELLER

SENIOR ADMN. LAW JUDGE

Footnote: 1

The record establishes that consideration was waived at level one. Following a hearing at level two, Superintendent Jane M. Reynolds denied the grievance. Grievants indicate that a decision had been rendered by the Board at level three on September 20, 1993, but that no written decision had been received as of September 27. In the "statement of grievance" Grievants asserted that they "retain[ed] the right to claim a default judgment based upon the Respondent's failure to issue a written decision."