BOBBY CARTER

v. Docket No. 95-BOD-148

BOARD OF DIRECTORS/SHEPHERD COLLEGE

DECISION

Grievant, Bobby Carter, employed by Shepherd College (Respondent) as a Building Service Worker, filed a level one grievance on February 23, 1995, after his work schedule was changed. The matter was denied at levels one and two and Grievant perfected a level four appeal on April 10, 1995. The matter became mature for decision on August 2, 1995, when both parties waived the right to file post hearing proposed findings of fact and conclusions of law.

The facts of this matter are undisputed.

1. Grievant has been employed by Shepherd College for approximately twenty-four years. He is presently classified as a Building Service Worker and is assigned to the Butcher Center (gymnasium).

2. During the fall semester of the 1994-95 school year Grievant's work schedule was from 4:00 a.m. to 12:00 p.m.

3. Effective February 27, 1995, Grievant's work schedule was changed to 6:00 p.m. to 2:00 a.m.

4. Grievant's schedule reverted to the "early" shift during the summer months, but he is scheduled to resume the "evening" shift with the commencement of the 1995-96 academic year.

5. In order to earn extra money to pay his father's medical bills, Grievant has held a second job cleaning offices of a private business, from 5:00 until 9:00 p.m. The shift change prohibits Grievant from retaining the outside employment.

Grievant does not dispute Respondent's right to assign employees as needed; however, he argues that this specific change was arbitrary and capricious because it was unwarranted. He also asserts that as the custodian with most seniority, he should be allowed first preference as to shift assignment.

Respondent denies that the change was arbitrary, but rather asserts that the shift adjustment was fully in compliance with the West Virginia Board of Regents Classified Employees' Handbook, Sections 3.1, 3.3, and 6.6, which address the supervisor's responsibility to set standards and arrange the schedules for employees. (See footnote 1) Respondent further asserts that employees have no right to shift selection based upon seniority.

Consistent with a growing number of educationalinstitutions, Respondent has contracted out its building maintenance work. The Marriott Corporation was responsible for the management of the maintenance staff at all times relevant herein. James Johnson, Housekeeping Manager, Marriott employee, and Grievant's immediate supervisor, issued a memorandum dated February 20, 1995, officially notifying Grievant of the shift change. That document stated in pertinent part:
we are experiencing many complaints concerning the cleaning standard at the Butcher Center. This may be due to the majority of cleaning being completed while this facility is occupied with staff and students. . . . The change [in Grievant's schedule] will allow the college better cleaning after evening events and also, better performance when this facility is vacant.

At the level four hearing Mr. Johnson testified that he made the decision to change Grievant's shift because there were problems cleaning during the day and the condition of the building. When deciding which of the two building service workers assigned to the Center would be moved to the evening shift, Grievant was selected due to a medical condition which prohibited him from performing the heavier daytime work and his unwillingness to cooperate with the program. Dr. Daniel Starliper, Director of Human Resources, and David Grove, Assistant Director of the Physical Plant, testified that they approved of Grievant's transfer based upon Mr. Johnson's representations.

Upon review of the record in its entirety, it must bedetermined that the reasons given for the transfer were not supported by the evidence. First, Mr. Johnson stated that complaints had been made regarding the cleanliness of the building. When pressed for the name of the complainants, he cited secretary Joan Manross and himself. Interestingly, Ms. Manross testified that she had made a complaint several years ago, not to Mr. Johnson, and the problem was corrected shortly thereafter. Ms. Manross stated that she had not complained since that incident.

Monte Cater, Director of Athletics and Head Football Coach, stated that the Center is a big building in a deteriorating condition, and that while he has a general concern that not enough people are assigned to keep it clean, he has no specific complaint regarding cleanliness. He further opined

that the users of the building could offer much assistance in this endeavor.

Bobby Williams, the other Building Service Worker regularly assigned to the Center, opined there was no reason or need to assign a worker to the night shift because he and Grievant could clean the entire building during the day. Mr. Williams stated there is a great deal of work to be done in the building and that he has requested Grievant to be reassigned to day shift. While not clearly articulated, Mr. Williams seemed to indicate that two people cleaning the building at the same time was more efficient. This is apparently supported by the fact that another building serviceworker, identified only as Simone, was assigned to the Center during the day after Grievant was transferred to the night shift. In reference to any medical restrictions placed upon Grievant, Mr. Williams opined that it was more reasonable to assign Grievant to the day shift when assistance was available.

Grievant testified that he had undergone surgery for hemorrhoids during the first semester and that his physician had directed that he be on "light duty" from December 5, 1994, until January 9, 1995. This restriction primarily prohibited him from lifting anything in excess of twenty-five pounds. Grievant questions this matter as a basis for the shift change inasmuch as he was required to use large, heavy floor care machines at night. The machines were fitted with wheels; however, Grievant noted that it was necessary to pull them out, and push them back into, the storage closet. Working alone at night, he had no one to call for assistance when faced with these duties. Grievant opined that he performs the same work at night as he did during the day, and in any event, he has since completely recuperated and no longer functions with any limitations.

It is accepted that Respondent has a great deal of discretion in the assignment and transfer of personnel. It is also clear that while seniority is determinative in certain situations, such as the assignment of overtime, it is not a controlling factor when making shift changes. Notwithstandingthese conclusions, Grievant has proven that his transfer to another shift was arbitrary and capricious because Mr. Johnson could not substantiate the allegation of complaints, the medical restrictions no longer apply, and the need for a day shift worker continued to exist as evidenced by the assignment of another worker to the Center. (See footnote 2)

Grievant's alleged unwillingness to cooperate with the program is particularly lacking in merit. When asked how Grievant was uncooperative, Mr. Johnson stated that he once refused to complete some trash removal. That incident apparently occurred during Grievant's recovery period when lifting was restricted. The only other example of Grievant's unwillingness to cooperate provided by Mr.

Johnson was that Grievant had refused to accept options offered at the time of the transfer. Since neither Grievant nor Mr. Williams were interested in working the late shift, Mr. Johnson stated that he suggested they might rotate the shift work. That Grievant declined the offer is not surprising. He could hardly keep a second job when he could work only every other week or every two of four weeks. Initially, Mr. Johnson also stated that he offered to make the transfer on the basis of seniority but that Grievant had refused. On cross-examination it wasclarified that while such a possibility was discussed, no such offer was ever made.

The need for an evening building service worker is not questioned. Mr. Johnson indirectly indicated that prior to February, an evening worker had been assigned to the Butcher Center. However, the assignment of another employee to the early shift previously held by Grievant establishes that his services were needed during the day.

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

CONCLUSIONS OF LAW

1. In order to prevail, it is incumbent upon a grievant to prove the allegations of the complaint by a preponderance of the evidence. Froats v. Hancock County Bd. of Educ., Docket No. 93-15-463 (Aug. 28, 1995).

2. Because no rational basis existed for Grievant's shift transfer in this instance, it would be inequitable to uphold the transfer decision on the specific facts in this case.

Accordingly, the grievance is Granted and Respondent Ordered to reinstate Grievant to the 4:00 a.m. to 12:00 p.m. shift at the Butcher Center.

DATED 8/29/95 SUE KELLER, SENIOR ADMN. LAW JUDGE

Footnote: 1*This Handbook, dated May 8, 1987, apparently has not been updated since the Board of Regents was replaced with the Board of Directors in 1989.*

Footnote: 2*Although not well developed, Grievant also raised the issue of whether the transfer was affected by his inability to continue loaning Mr. Johnson money. Grievant stated that he had been loaning the supervisor $10 or $20 upon occasion for about six months. The money was promptly repaid but Grievant stated that he could no longer afford the loans after he assumed the additional medical debts.*