ICY MILLS

v. Docket No. 95-41-202

RALEIGH COUNTY BOARD OF EDUCATION

DECISION

The grievant, Icy Mills, is employed by the Raleigh County Board of Education (Board) as a Custodian III assigned to Sophia/Soak Creek Elementary School. She initiated this complaint at Level I January 31, 1995, alleging that the Board had improperly posted a Custodian III position at Hollywood Elementary School (HES). Her supervisor was without authority to grant relief, and the grievance was denied at Level II following a hearing held February 20, 1995. The Board also denied the grievance at Level III following a hearing held May 15, 1995. Appeal to Level IV was made May 23, 1995, and the parties subsequently agreed that a decision could be rendered on the record developed at the lower levels. There were no proposed findings of fact and conclusions of law submitted on behalf of either party. (See footnote 1)

There is no dispute over the facts of the case. During the 1993-94 school year, and for at least the six preceding years, HES Custodian Joan Peck worked a 6:00 a.m. to 2:00 p.m. shift and HES Custodian III John Cook was assigned a 10:30 a.m. to 6:30 p.m. shift. This schedule continued into the 1994-95 school term until November 1994 when Mr. Cook and Ms. Peck requested and received approval to switch shifts.

Prior or simultaneous to giving his approval, HES Principal E. Christopher Gallagher was furnished a statement from Ms. Peck's physician recommending the change. The doctor opined that the switch would "allow her to perform her work duties with less problems in regard to her arthritic status." The record reflects that while there is some overlap of certain duties assigned to the two shifts, the first is more physically demanding than the second.

On November 16, 1994, Ms. Peck, Mr. Cook, and Principal Gallagher signed the following agreement.

> We, Joan Peck and John Cook, custodians at Hollywood Elementary, are requesting a permanent change in our time schedules. The current schedules are: Joan Peck - 6:00 am to 2:00 pm and John Cook-10:30 am to 6:30 pm. The change would be: John Cook - 6:00 am to 2:00 pm and Joan Peck - 10:30 am to 6:30 pm. Both Joan Peck and John Cook mutually agree to this change of time schedule.
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> This change will benefit Joan Peck because it will lighten her work load, eliminate shoveling of snow and cleaning of gym floor, and give her help with putting away lunch tables. Mrs. Peck's health hinders the completion of her assigned duties. Dr. George Lovegrove's (Mrs. Peck's personal physician) letter collaborates this point. He suggests that medically a time schedule change would greatly benefit Mrs. Peck.
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> We are both Custodian III's and no changes would need to be made in pay scale.

At the time, Mr. Gallagher was aware that Ms. Peck had been considering retirement for several years but had no reason to believe that it was imminent. The record does not reflect whether Ms. Peck had then made any decisions on retirement.

On or about January 14, 1995, Ms. Peck announced that she would retire effective January 31, 1995. The January 17, 1995 posting for her position indicated a 10:30 a.m. to 6:30 p.m. schedule. The grievant and others made applications. Ms. Dreama Nelson, the most senior applicant, was ultimately awarded the job.

The grievant concedes and the Grievance Board has held that county boards are under no statutory obligation to forever maintain school service positions according to shift. See, Ennis v. Ohio County Bd. of Educ., Docket No. 93-35-516 (May 31, 1994). She also acknowledges that pursuant to W.Va. Code §18A-4-8a, principals may alter the schedules of school service employees who consent to the changes. (See footnote 2) She asserts, at least in essence, that it was arbitrary and capricious to allow Mr. Cook to obtain the "preferable" shift through an exchange rather than through seniority-based, competitive bidding. As relief, the grievant seeks that the position be reposted with a 6:00 a.m. to 2:00 p.m. shift.

The Board maintains that it was proper exercise of Principal Gallagher's authority to approve of and continue the change inschedules. The Board also asserts that the grievant seeks illusory or de minimus relief in that Ms. Nelson, by virtue of her greater seniority, would obtain the position regardless of how it was posted.

The undersigned finds it more expedient to address the substantive question in the case than to analyze the Board's claim regarding the speculative nature of the relief sought. (See footnote 3) Since there is no statutory requirement that a county board maintain school service personnel positions as shift specific, the approval of the change and the subsequent posting are reviewed against the "arbitrary and capricious" standard. Pockl v. Ohio County Bd. of Educ., 406 S.E.2d 687 (W.Va. 1991); Moses v. Mercer County Bd. of Educ., Docket No. 93-27-001 (April 8, 1993).

The undersigned finds initially that there is nothing inherently arbitrary in permitting employees in the same classification at a particular school to switch schedules or allowing them to assume the "preferable" schedule of a departing employee prior to the notice of vacancy. It seems that these practices are more likely to cause mischief than infringe on any employee's rights. In any event, the grievant has not shown that the Board acted arbitrarily in the matter.

Implicit in the grievant's contentions is that Ms. Peck and Mr. Cook, and necessarily Mr. Gallagher, conspired to place Mr.Cook on the early shift. Neither Ms. Peck nor Mr. Cook were ever called to testify, and Mr. Gallagher's testimony reflects that he was merely accommodating a requested change in schedules for documented health-related reasons, an action permitted by W.Va. Code §18A-4-8a, and well within his authority under W.Va. Code §18A-2-9. (See footnote 4) See, Dancy v. Raleigh County Bd. of Educ., Docket No. 95-41-139 (Sept. 7, 1995). Since there is no evidence to the contrary, it must be assumed that Mr. Gallagher, for legitimate reasons, determined that Mr. Cook should continue on the earlier shift. (See footnote 5)

Finally, there is no evidence of record that the 6:00 a.m. to 2:00 p.m. shift was preferable to anyone but the grievant. Given the shift's earlier start time and more physically demanding tasks, it could readily be concluded that Mr. Cook was not favored at all. (See footnote 6)

Accordingly, the grievance is **DENIED**.

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

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JERRY A. WRIGHT

ADMINISTRATIVE LAW JUDGE

Dated: November 30, 1995

Footnote: 1*The parties made their legal positions clear in opening and closing remarks at the lower level hearings.*

Footnote: 2*The statute, in pertinent part, provides, "No service employee shall have his or her daily work schedule changed during the school year without such employee's written consent."*

Footnote: 3*It is also noted that it is not certain from the record whether Ms. Nelson would apply for and accept the second shift position if it were posted. While the Board's spokesperson at the lower level hearings represented that she would, Ms. Nelson did not testify at those hearings.*

Footnote: 4*"[P]ublic school principals. . .shall supervise the management and the operation of the school or schools to which they are assigned."*

Footnote: 5*Curiously, while Mr. Gallagher was questioned extensively regarding his approval of the request, he was never asked to explain the reasons for his decision to retain Mr. Cook on the earlier shift. Some portions of his testimony at least imply that he believed Mr. Cook, by virtue of the written agreement, had obtained some rights to the shift.*

Footnote: 6*The undersigned concurs with the suggestion of Charlotte Hutchins, the Level II Grievance Evaluator, that the Board consider adopting a policy whereby agreements to change shifts between employees would be voided if one of the employees retires or resigns within ninety days of the agreement.*