CURTIS GUNNOE,

Grievant,

v. DOCKET NO. 97-41-302

RALEIGH COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Curtis Gunnoe, Grievant, alleges violation of W. Va. Code §§18-29-2(p) and 18A-4-8, stating that Respondent has misclassified his summer 1997 position, in reprisal for earlier grievances he filed. The grievance was denied at Levels I and II, after a hearing at Level II on May 29, 1997. Level III was waived, as allowed by statute. A hearing was held at Level IV, and the matter became mature for decision with receipt of the parties' written submissions on September 22, 1997. (See footnote 1)

ISSUES

.A A. Was Grievant misclassified in the summer of 1997 as a Custodian III?

.B B. Did Grievant prove that a pattern of reprisal has been engaged in by RCBE?

FINDINGS OF FACT

The following findings are made from the record developed in this grievance, including the testimony at Level IV. 1 1. Grievant is regularly employed by the Raleigh County Board of Education (RCBE) in the classification Custodian III/Electronic Technician I, assigned to Woodrow Wilson High School (WWHS).

2 2. Grievant is primarily responsible for care of the auditorium at WWHS. WWHS's auditorium is utilized by the school, outside groups and the community at large.

3 3. Grievant maintains and operates the sound and lighting equipment in the auditorium, in addition to cleaning and maintaining the auditorium itself. His Electronic Technician I duties include "doing the lights and the sounds" and repairing equipment such as microphones, cables, and communication systems. (L II, Tr. pp. 43-45.)

4 4. Grievant is supervised by Miller Hall, WWHS Principal. Principal Hall reports to Assistant Superintendent Racine Thompson.

5 5. Grievant's regular employment year is from approximately August 6 to June 6. (Tr. pp. 31-32 and 86.)

6 6. Grievant was originally employed by RCBE in 1989 as a Custodian III. Mr. Thompson recommended that Grievant be reclassified as a Custodian III/Electronic Technician I in February, 1992. Mr. Thompson's recommendation was not accepted. However, Grievant won reclassification in the spring of 1992 as the result of a grievance which was resolved before reaching Level IV. (L II, pp. 18, 41; L IV, Gr. Ex. D.)

7 7. In the summer of 1992, RCBE posted the position of Auditorium Manager. Grievant applied for the position. Another employee was selected. Grievant grieved, seeking the position, unsuccessfully.

8 8. The Auditorium Manager is responsible for ensuring the sound system and lights are properly functioning in the auditorium. (L II, Tr. p. 83.)

9 9. During the summers of 1993, 1994, 1995, 1996, and 1997, Grievant applied for and received one of eight summer positions at WWHS posted as Custodian III. He was paid at his regular Custodian III/Electronic Technician I rate of pay during his 1993, 1994, and 1995 summer employment. (L II, Tr. p. 46; L IV, Admin. Exs. A-D.)

10 10. During the summer of 1996, Grievant was paid at his regular Custodian III/Electronic Technician I rate of pay only for the first two of his six weeks of summer employment. He performed electronic technician's work during at least part of his summer employment that year. (L II, Tr. p. 45.)

11 11. Principal Hall originally requested seven Custodian IIIs and one Custodian III/Electronic Technician I for summer employment in 1997. After discussing the school's needs with Mr. Thompson, Mr. Hall reconsidered his request. Eight Custodian IIIs were requested, and the summer positions were posted as such. The positions were posted as working from June 10-27, and from July 7- 25. Grievant applied for and obtained one of these positions. (L II, Tr. pp. 78-80 and Joint Ex. 1.)

12 12. Grievant was paid as a Custodian III during the summer 1997 employment. Generally, he cleaned the auditorium, helped clean rooms in the main building, waxed floors, cut grass, and performed other work to get the building ready for the start of school in the fall. (L II, Tr. p. 88-90, 97.)

13 13. Principal Hall approves overtime for service personnel at WWHS. He generally does not obtain Mr. Thompson's permission in granting overtime requests, except for extended summer overtime

employment of a week or more. Due to long-standing RCBE practice, Mr. Hall restricts overtime to 3.5 hours per day, when leave to work overtime is granted. (L II, Tr. pp. 80-81, 83.)

14 14. Sometime prior to summer 1997, a major community user of the auditorium, the West Virginia State Musical Theater, went out of business.

15 15. While the position of Auditorium Manager has existed at WWHS for many years, it has occasionally been filled by persons holding other positions within Raleigh County, or has been filled in an acting capacity. Grievant received some overtime work due to the Auditorium Manager's unavailability, and some when he worked as acting Auditorium Manager. (L IV, Gr. Ex. D.)

16 16. During the summer of 1997, many staff and most students were absent from WWHS. Many rooms were unused. (L II, Tr. p. 97.)

17 17. There were few scheduled events in the auditorium for the summer of 1997. During the summer contract employment period (June 10 through 27, and July 7 through 25), one two-day event actually utilized the auditorium. During that event (a ROTC "Tops in Blue" concert), Grievant did a "power hook up" for a generator belonging to ROTC. (See footnote 2) This activity was Electronic Technician I work. Otheranticipated users had cancelled, or their events were conducted during times not covered by the summer contract terms. (L II, Joint Ex. 1, Tr. pp. 39, 85-87.)

18 18. After his 1992 grievances, the amount of overtime work Grievant received declined. In 1991-92, Grievant received approximately $9,403 for overtime worked. In 1992-1993, Grievant received approximately $1,544 for overtime worked. In 1993-1994, Grievant received approximately $873 for overtime worked. In 1994- 1995, Grievant received approximately $535 for overtime worked. In 1995-1996, Grievant received approximately $1,715 for overtime worked. In 1996-1997, Grievant received approximately $950 for overtime worked. (L II, Tr. pp. 19-21; L IV, Gr. Exs. A and B.)

19 19. Several requests for professional leave (See footnote 3) which Grievant made after 1992 were not granted by Mr. Thompson. Mr. Thompson disapproved professional leave requests for an October 1996 conference from Grievant and another employee, which were later approved by Superintendent Dials. A February 28, 1997, request to use professional leave to visit the State Legislature was denied, as was a similar request from at least one other service employee, as Mr. Thompson believed personal leave should be used for such activity. Superintendent Dials later approved these requests for professional leave. A request to take professional leave on May 2, 1997, to attend the spring conference of the County Service Personnel Association, was sent by Mr.

Thompson to SuperintendentDials, as Mr. Thompson did not know whether or not to approve it. Mr. Dials approved that request on April 14, 1997. An identical request from another employee was approved by Mr. Thompson on April 17, 1997, because Mr. Thompson knew to approve it after Mr. Dials approved Grievant's request. (L II, Joint Ex. 9, Admin. Exs. 1 and 2, Tr. pp. 46-54, 56-61, and 70-74.)

20 20. Assistant Superintendent Thompson is the chairman of the WWHS Auditorium Committee (See footnote 4) , which receives copies of the auditorium schedule regularly. He was aware of the small number of events scheduled for the summer of 1997. Mr. Thompson was also the principal at WWHS before taking the Assistant Superintendent position. (L II, Tr. pp. 62, 93-95.)

21 21. Grievant's duties during the summer of 1997 were not the same duties as he performs during the regular school year. He performed Electronic Technician I work on only one occasion during the 1997 summer employment term, as noted in Finding Number 17. All other duties were those of a Custodian III.

DISCUSSION

As this grievance involves non-disciplinary matters, the burden is on Grievant to prove all elements of his case by a preponderance of the evidence. Stover v. Mason County Bd. of Educ., Docket No. 96-26-048 (Nov. 27, 1996); Weaver v. Mason County Bd. of Educ., Docket No. 94-26-129 (Nov. 22, 1994). See also, W. Va. Code §18-29-6. Grievant must prove that his position wasmisclassified in the summer of 1997, and that Respondent engaged in reprisal in classifying his summer position.

A. Was Grievant misclassified in the summer of 1997 as a Custodian III?

In order to prevail on a claim that his position is misclassified, an employee must establish, by a preponderance of the evidence, that his duties more closely match those of a Code §18A-4-8 classification other than that under which his position is categorized. Porter v. Hancock County Bd. of Educ., Docket No. 93- 15-493 (May 24, 1994); Pope v. Mingo County Bd. of Educ., Docket No. 91-29-068 (July 31, 1992). (See footnote 5) As the employment involved here is a summer contract position, Grievant's regular year activities are not at issue. Grievant must prove that his duties during the summer of 1997 more closely matched those of a classification other than Custodian III. Grievant contends that his summer position should have been that of Custodian III/Electronic Technician I.

The class titles of Custodian III and Electronic Technician I are both defined in W. Va. Code §18A-4-8. "Custodian III" means "personnel employed to keep buildings clean and free of refuse, to operate the heating or cooling systems and to make minor repairs." W. Va. Code §18A-4-8. "Electronic technician I" means "personnel employed at the apprentice level to repair and maintain electronic equipment." Id. "Multi-classification" means "personnel employed to perform tasks that involve the combination of two or more classtitles in this section. In such instance the minimum salary scale shall be the higher pay grade of the class titles involved." Id. (See footnote 6)

Grievant was paid at the higher Electronic Technician I rate for several summers preceding the one at issue here. However, that fact does not establish that the summer 1997 position should have been classified differently. It is clearly through error or oversight that Grievant was paid at his multi-classified rate during the summer as well as during the regular school year, previously. (See footnote 7)

"Determinations of the number of service personnel and the length of their employment terms are primarily management decisions." Lucion v. McDowell County Bd. of Educ., 191 W. Va. 399, 402, 446 S.E.2d 487 (1994). The statutory provision pertaining to summer employment clearly provides for posting positions as needed. (See footnote 8) There is no requirement that one receive hissame class title or rate of pay during summer employment, when he assumes another position. RCBE (acting through Principal Hall and Assistant Superintendent Thompson) determined that it needed only Custodian IIIs for the summer of 1997. Such a determination was uniquely within its discretion.

In 1997, Principal Hall specifically considered WWHS' need for an Electronic Technician during the summer, and realized that very few events were scheduled which might justify such a position. Consequently, he revised his request to reflect the need for eight Custodian IIIs. As only one of the scheduled events was actually held, Principal Hall's "second thoughts" on hiring an Electronic Technician I were validated.

Grievant sees the specter of reprisal in Mr. Thompson's request that Mr. Hall think through the needs of his school before posting a Custodian III/Electronic Technician I position. However, such a review was justified by responsible shepherding of resources based on actual needs of the school, and may be demanded by statute. (See footnote 9) Moreover, Mr. Hall's original 1997 request was for different positions than were posted in prior years, which justifies some inquiry, particularly by an administrator familiar with the school and its past practice. It was Mr. Hall's requestfor a multi-

classified summer position which was unusual, rather than the final classification of that position as a Custodian III.

The actual job duties assigned must now be examined. Grievant testified that his summer job duties were not remarkably different than those performed during his regular employment contract for the school year. However, when Grievant attempted to explain the Electronic Technician duties he performed (or could have performed) during the summer, it became apparent that most of those duties did not occur during the relevant six week employment period. Rather, activities which Grievant referenced as requiring his Electronic Technician skills occurred during his regular school year term of employment, or occurred outside the employment periods specified on the summer job posting (during the summer school break, for example). While Grievant testified he worked for two weeks repairing speakers and associated equipment, which he thought occurred in July 1997, documentary evidence indicated that this work was actually performed in May. (L IV, Admin. Ex. E.) Thus, Grievant's contention that he performed substantial work within the Electronic Technician I definition was not generally supported by the evidence.

With the exception of one incident where Grievant performed a "power hook up" for a ROTC event, his employment duties were exclusively custodial. A single isolated incident does not mandate a position's reclassification.

"[S]imply [being] required to undertake some responsibilities normally associated with a higher classification, even regularly, does not render [a grievant] misclassified per se." Hatfield v.Mingo County Bd. of Educ., Docket No. 91-29-077 (Apr. 15, 1996). (See footnote 10) Incidental duties which are not outside the responsibilities defined for a class title, and which require an inconsequential amount of time to complete, will not warrant a different classification if the remainder of one's duties are accurately described by one's current classification. Graham v. Nicholas County Bd. of Educ., Docket No. 93-34-224 (Jan. 6, 1994), citing Martin v. Fayette County Bd.of Educ., Docket No. 89-10-110 (July 20, 1989).

In Graham, a Custodian I was responsible for locking and unlocking school doors to let students in and out for after-school activities, and also for securing the doors and turning out lights at the end of her shift. She generally spent less than half an hour on these tasks each shift. Although security work is specified in the Custodian II (but not the Custodian I) definition, the security duties were found incidental to and not outside responsibilities of a Custodian I, and the grievance was denied.

Graham thus indicates that a duty can be within the responsibilities of a class title even when not specifically delineated in that title's definition, where the same duty is specified in the definition of another class title within the classification category. Graham further indicates that a half-hour per day is insufficient time spent in a job duty to justify reclassification. Comparing this case to Graham, the time involved in performing the single task is insufficient to justify reclassification of the summer position. Grievant performed this work during some part of one work day, which necessarily is less than half an hour per day for every day of an employment term. However, Graham does not and cannot justify assigning a job duty which is clearly outside the scope of duties assignable to the employee's class title. On the evidence presented here, power source hook up cannot be viewed as being within the defined duties of a Custodian III. (See footnote 11) If such a job duty were required by the employer on a regular basis, Grievant would be entitled to the higher rate of pay and multi-classification even if the cumulative time involved was not great.

However, RCBE did not require such work on a regular basis during Grievant's summer employment. (See footnote 12) All tasks but one which Grievant performed during the summer were properly assigned to the Custodian III class title. In the particular circumstances presented in this case, I conclude that Grievant is not entitled to multi-classification and a higher rate of pay for the entire summer of 1997. However, because the one task was clearly outside the Custodian job duties and the evidence tends to show that itsperformance was required, he is entitled to pay as an Electronic Technician I for the time during which he was engaged in the "power hook up."

B. Did Grievant prove that a pattern of reprisal has been engaged in by RCBE?

Grievant presented much evidence in an attempt to show a long- standing pattern of reprisal. Grievant asserted that, since he filed two grievances in 1992, Mr. Thompson has treated him differently than before, to Grievant's detriment.

W. Va. Code §18-29-2(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." In order to prove his case, Grievant must meet the standard set forth in Conner v. Barbour County Bd. of Educ., Docket No. 93-01-421 (Apr. 20, 1994), and cases cited therein. (See footnote 13) Grievant must show:

1) He engaged in a protected activity;
2) he was subsequently treated in an adverse fashion by the employer or agent;

3) the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

4) there was a causal connection, consisting of an inference of retaliatory motive, between the protected activity and the adverse treatment; and

5) the protected activity was a significant factor in the employer's decision.

If the grievant makes this prima facie showing, the employer may still prevail if it can demonstrate that it would have taken the same action had the protected conduct not occurred. Thegrievant may still prevail if the proffered reason for the adverse action is shown to be pretextual. In most cases, reprisal must be proven by circumstantial evidence and inferences drawn therefrom. Id. at 5.

Here, Grievant has clearly shown the first three of the five elements of his prima facie case. He filed grievances in 1992 (a protected activity), the employer's agents knew of his grievances, and he has since suffered adverse treatment in his employment.

Grievant showed that there was a marked decline in overtime pay immediately following 1991-92. This provides an inference of retaliatory motive, or a causal connection between the protected activity and the adverse overtime situation, because it occurred so close in time to the protected activity. (See footnote 14)

However, RCBE provided evidence that the 1992 grievances were not a factor in the reduced overtime, stating that employment of the Auditorium Manager in 1992, and reductions in the use of the auditorium, alleviated its need for much of the overtime Grievant had previously worked. Grievant did not show that this reason for reduced overtime was in any way manufactured, or pretextual. (See footnote 15) Consequently, his information merely shows that the overtime pay,and presumably the overtime hours resulting in that pay, have fluctuated based upon the staffing and needs of WWHS.

Grievant also sought to show a pattern of reprisal in the handling of his requests for professional leave. All the examples of leave requests were for 1996-97. The length of time elapsing between the 1992 grievances and the 1996-97 leave actions does not give rise to any inference of retaliatory motive. Moreover, the requests were treated the same as similar requests from other service personnel, and Mr. Thompson had legitimate explanations for his handling of the requests. These actions do not appear retaliatory.

As noted above, reprisal was also not established in determining the classification of the summer 1997 position. Mr. Hall had initially sought to benefit Grievant by requesting a multi-classified summer position. Mr. Thompson, being somewhat aware of the school's scheduled activity and prior practice,

asked Mr. Hall to examine the needs of the school. On further thought, Mr. Hall determined only custodial work was needed for the summer. His determination was borne out by actual events. No pattern of retaliatory behavior is established.

CONCLUSIONS OF LAW

1 1. In order to prevail on a claim that his position is misclassified, an employee must establish, by a preponderance of the evidence, that his duties more closely match those of a W. Va. Code §18A-4-8 classification other than that under which his position is categorized. Porter v. Hancock County Bd. of Educ.,Docket No. 93-15-493 (May 24, 1994); Pope v. Mingo County Bd. of Educ., Docket No. 91-28-068 (July 31, 1992).

2 2. W. Va. Code §18-29-2(p) defines "reprisal" as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it."

3 3. In order to prevail on a claim of reprisal, a grievant must show:

1) He engaged in a protected activity;

2) he was subsequently treated in an adverse fashion by the employer or agent;

3) the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity;

4) there was a causal connection, consisting of an inference of retaliatory motive, between the protected activity and the adverse treatment; and

5) the protected activity was a significant factor in the employer's decision.

If the grievant makes this prima facie showing, the employer may still prevail if it can demonstrate that it would have taken the same action had the protected conduct not occurred. The grievant may still prevail if the proffered reason for the adverse action is shown to be pretextual. Conner v. Barbour County Bd. of Educ., Docket No. 93-01-421 (Apr. 20, 1994).

4 4. Grievant failed to prove he was misclassified in his 1997 summer position. However, he did prove that he worked outside of the Custodian III classification on one occasion.

5 5. Grievant failed to prove any pattern of reprisal.

Accordingly, this grievance is hereby **GRANTED IN PART AND DENIED IN PART**. Grievant's request for reclassification and backpay is **DENIED**; however, Respondent is **ORDERED** to pay

Grievant the Electronic Technician I wages to which he is entitled for performing Electronic Technician work on one occasion during his summer of 1997 employment.

Any party may appeal this decision to the Circuit Court of either Kanawha or Raleigh County. 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.

Dated: October 30, 1997

JENNIFER J. MEEKS **Administrative Law Judge**

Footnote: 1

The evidence adduced at Level II is cited as "L II, Tr. p. __," for the transcript, and "L II, Joint Ex. __," or "L II, Admin. Ex. __," for the documents. Documents admitted into evidence at the Level IV hearing are cited as "L IV, Gr. Ex. __," or "L IV, Admin. Ex. __."

Footnote: 2

The description of this activity was not sufficiently detailed to determine exactly what is involved. However, Grievant testified that specialized knowledge is required, in order to determine amperage demanded and match it appropriately with power sources available. Grievant's testimony is buttressed by the fact that ROTC had an electrician disconnect the generator when the event was over.

Footnote: 3

Respondent has a policy, which gives rise to the term "professional leave," allowing both professional and service employees to attend "professional conferences." (L II, Joint Ex. 7.)

Footnote: 4

This committee is made up of approximately 25 members who are individuals from the community at large. It makes recommenda- tions to the principal regarding matters affecting the auditorium. (L II, Tr. pp. 95-96.)

Footnote: 5

In Porter, Cook IIs who kept records were found misclassified, as the Cook III definition included recordkeeping duties, and the Cook II definition did not. In Pope, a change in working titles was found not to result in a change in duties, such that the grievants were misclassified.

Footnote: 6

As provided in W. Va. Code §18A-4-8a, Custodian III is in pay grade C, while Electronic Technician I is in pay grade F. Thus, Grievant is entitled to payment at the Electronic Technician I rate of pay during the regular school year.

Footnote: 7

Either RCBE failed to post the job appropriately, if Grievant was performing both custodial and electronic technician's work; or it paid him at a rate higher than allowed for the Custodian III position he was filling.

Footnote: 8

The pertinent parts of W. Va. Code §18-5-39, governing summer employment, provide:

> *Notwithstanding any other provision of the code to the contrary, the county board of education is authorized to employ school service personnel to perform any related duties outside the regular school term as defined in [W. Va. Code §18A-4-8]... The salary of a summer employee shall be in accordance with the salary schedule of persons regularly employed in the same position in the county where employed.*

* * *

> *For the purpose of this section, summer employment for service personnel shall be defined, but not limited to, filling jobs and positions as defined in [W. Va. Code §18A-4-8] and especially established for and which are to be predominantly performed during the summer months to meet the needs of a county board of education.*

Footnote: 9

W. Va. Code §18A-4-8 states: "The county boards shall review each service personnel employee job classification annually and shall reclassify all service employees as required by such job classifications."

Footnote: 10

In Hatfield, a Custodian I was found misclassified where she had daily duties filling a hopper for the heating system, and also cleaned the playground area and made minor repairs. Such activi- ties were found in the definition for a Custodian III.

Footnote: 11

RCBE's counsel suggested that other custodians performed such activities at other schools. However, the relevant comparison of job duties is with the statutory definition, not with the job duties of other employees in the same class. Conclusion of Law 2, Midkiff v. Lincoln County Bd. of Educ., Docket No. 95-22-262 (Mar. 19, 1996).

Footnote: 12

Respondent's counsel at least implied that Respondent had not required Grievant to perform this duty at all, when he suggested that ROTC may have requested Grievant's help. However, Respondent presented no evidence on this point. Grievant's testimony as a whole clearly indicated that he believed he was required to perform such work.

Footnote: 13

This standard is based upon the order and allocation of proof for establishing retaliatory discharge set forth in Frank's Shoe Store v. Human Rights Com'n, 365 S.E.2d 251 (W. Va. 1986).

Footnote: 14

Proximity in time between the protected activity and the adverse treatment is often cited as giving rise to the inference of a causal connection. See, e.g., Conner, supra; and Robateau v. Cabell County Bd. of Educ., Docket No. 95-06-213 (Mar. 15, 1996).

Footnote: 15

Grievant asserted that employment of an Auditorium Manager other than himself was itself a retaliatory action of his employer. However, it is assumed that this issue was included in his unsuccessful 1992 grievance regarding his non-selection for the Auditorium Manager position, and is not further discussed here.