HOWARD HILL

v. **Docket No. 97-25-102**

MARSHALL COUNTY BOARD OF EDUCATION

DECISION

During the 1996-1997 school year, Grievant, Howard Hill, was employed by Respondent, Marshall County Board of Education, as a Plumber I/General Maintenance Worker. In October of 1995, Grievant applied for and was awarded a temporary 260-day position created by the absence of Plumber II, Bob Elias. Mr. Elias then retired at the end of the 1995-1996 school year. The vacancy was posted as a Plumber I/General Maintenance Worker, a 238-day position, which Grievant also obtained. He had passed the competency test and was qualified as a Plumber I. Grievant was the only employee classified as a Plumber for the 1996-1997 school year.

Grievant filed two grievances on November 13, 1996, alleging the following:

- 1 -

I'm filing for 260 day employment instead of 238 days. The need for 260 day employment is there because unqualified workers are working in my position while I'm off on my unscheduled days, and 260 days cut to 238 days was not mandatory in the first place.

- 2 -

I'm filing for classification Plumber II because there cannot be a Plumber I unless there is a Plumber II to work under. The three year probationary period Mr. Bland (See footnote 1) told me that I had to complete is county policy and the state said when the last plumber retired, it should have been Plumber II.

Level I and Level II decisions denying Mr. Hill's grievance were issued on November 13, 1996 and January 24, 1996, respectively. Grievant appealed to Level III, whereupon Respondent waived participation in the grievance under authority of W.Va. Code § 18-29- 4(c) on February 11, 1997. Grievant appealed to Level IV on February 21, 1997. A Level IV hearing was held on May 8, 1997. With the submission of proposed Findings of Fact and Conclusions of Law, the matter became mature for decision on June 16, 1997.

Discussion

Part number 1 of Mr. Hill's grievance pertains to the difference between the 238-day position and the 260-day position. The 260-day position has 21 days annual leave. The 238-day position has none.

This difference is pertinent in that Grievant took unpaid leave from the last week in October to the first week in November. During his absence, there were no plumbers on duty. He was the only plumber. There were repairs made during his absence which were performed by General Maintenance Workers. (Level IV, Grievant's Exs. 1-4). Grievant objects, alleging that a Plumber should have performed the repairs, meaning that they should have called him to do so. He further alleges that if he were a 260-day and not a 238-day employee, he would have been available. Thus, Grievant reasons that it wouldbe beneficial to Respondent that he be reclassified to the 260-day position. Grievant also claims that he is misclassified because he is really doing the work that was formerly done by a Plumber II, Mr. Elias. The difference between the two positions as indicated by W.Va. Code § 18A-4-8 is as follows:
Plumber I: Personnel employed as an apprentice plumber and helper.
Plumber II: Personnel employed as a journeyman plumber.

In addition, Respondent promotes a Plumber I to a Plumber II after a length of service of three years either as an employee of Respondent or another county. (Level IV Testimony, Stephen Bland).

The issue of timeliness was raised by Respondent at the Level II hearing. The posting of the Plumber I/General Maintenance Worker position was on or about June 3, 1996. (Level II, Respondent's Ex. No. 1). The employment term was clearly designated as “238 days, 8 hours

per day". Based upon this clear language, Respondent believes that Grievant knew or should have known that the position advertised was not one for 260 days. His contract, dated June 11, 1996, also clearly provided that the period of employment was 238 days. Therefore, anywhere from June 3 to June 11, 1996, Grievant should have been aware of the term of his employment.

W.Va. Code § 18-24-4(a)(1) in pertinent part provides that:

Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

Accordingly, under the provisions of West Virginia law, Grievant should have filed within fifteen days of June 3 to June 11, 1996, the period in which he had sufficientinformation to know of a grievable event. Both the posting and the contract specified 238 days as the duration of the contract. The undersigned finds that the filing of Part 1 of this grievance is not timely filed as to issues raised regarding the term of the employment contract.

Grievant further contends that he was discriminated against. The general maintenance workers who performed plumbing in his absence, were 260-day employees, and that he should be also. Respondent explained that through attrition, 260-day contracts were being replaced by 238-day contracts. Thus, when Mr. Elias retired, his 260-day contract was replaced with Grievant's 238-day contract. This was also true of other positions. Replacements hired to fill vacancies due to retirement or resignation were offered 238-day contracts, not 260-day contracts. (Level II Testimony, Stephen Bland, page 34). This was the policy of the Respondent and not an isolated action directed toward Grievant.

W.Va. Code § 18-29-2(m) defines discrimination as:

Any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.

In order to establish a prima facie case of discrimination under W.Va Code § 18-29- 2(m), a grievant must show the following:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that the other employee(s) have been given advantages or treated with preference in a significant manner not similarly afforded him; and,

(c) that the difference in treatment has caused a substantial inequity to him, and that there is no known or apparent justification for this difference.

Abston v. Putnam County Bd. of Educ., Docket No. 97-40-057 (July 28, 1997).

In the instant case, Grievant has put forth no evidence to establish a prima facie showing of discrimination. He has not shown that his 238-day contract was a product of discrimination by Respondent. Others, similarly situated to Grievant, would be employees replacing or succeeding persons who had 260-day contracts. However, personnel in various positions were offered 238-day contracts as they replaced those who had resigned or retired. It was a general policy and Grievant was treated no differently. If discrimination were the case, the November 13 filing of his grievance would not be a timely response to a June 11 contract.

Another issue is Grievant's belief that the work done by the General Maintenance employees in his absence should have been done by a Plumber. This amounts to an allegation that the General Maintenance Workers were performing duties not within their classification.

The duties of a General Maintenance Worker are as the name indicates, general. W.Va. Code § 18A-4-8 defines the position as "personnel employed as helpers to skilled maintenance employees and to perform minor repairs to equipment and buildings of a county school system."

The posting provides no more information. To make minor repairs is the extent of either definition. (Level II, Respondent's Ex. No. 1)

At the Level IV hearing, Ronald Pettit, David Hall, and Raymond Yoho, all General Maintenance Workers, testified as to the duties they performed during Grievant's absence. Mr.

Pettit stated that he was called upon to do occasional plumbing duties and was sometimes assisted by Mr. Hall and Mr. Yoho. He said that his plumbing work consisted of minor repairs such as fixing leaky commodes and clogged drains. Anything more wouldbe left until Grievant returned. For example, if a pipe leaked and repair could be delayed by merely turning off the water, then that would be done. Repair would be made by Grievant upon his return.

Accordingly, it is the opinion of the undersigned that the duties performed by Mr. Pettit, Mr. Hall and Mr. Yoho, were performed within the classification of general maintenance. Their work consisted of minor repairs, not requiring the expertise of a Plumber. Respondent's Ex. Nos. 1 and 2, at Level IV indicate that the plumbing was just part of their duties, an incidental part. This is somewhat analogous to Stewart v. Brooke County Bd. of Educ, Docket No. 96-05-394 (April 10, 1997). Stewart held that incidental painting could be performed by a Custodian and did not require the services of a Painter. The reasoning in Stewart and the instant case is based upon the evidence that the work done was incidental and minor.

Grievant's final contention is that he is doing the work of a Plumber II and should be classified as such. He is not assisting or otherwise performing the duties of an apprentice. He is not an apprentice to a Plumber II, nor is he supervised by a Plumber II. He is alleging misclassification. His grievance is timely as to that issue. It is regarded as a continuing violation and an employee is allowed to contest it at any time, although only once. See Martin v. Randolph County Bd. of Educ., 195 W.Va. 297, 465 S.E.2d 399 (1995).

It has been established in prior decisions that for the purposes of promotion and filling of positions, Custodians I, II, III, and IV are considered one classification. Meeks v. Kanawha County Bd. of Educ., Docket No. 92-20-249 (Sept. 25, 1995). In another case, involving the same parties, Grievant Meeks was a Heating and Air Conditioning MechanicII ("HVAC II"). This was not a classification case but it does discuss the qualifications needed to fill a position requiring training and skill. Instead, Mr. Meeks alleged discrimination because, although classified as a HVAC II, he was not allowed to work without supervision. Others in the HVAC II position were. As with the Plumber I and II positions, a HVAC I was an apprentice position and the HVAC II was a journeyman position. It was determined by ALJ Reynolds that Grievant demonstrated a prima facie case of discrimination by showing that he had been treated differently from others similarly situated. However, Respondent displayed a legitimate, non-

discriminatory reason for requiring supervision. Respondent believed that Grievant's skills were not sufficient for him to safely perform work without proper supervision. Respondent allowed him to stay as a journeyman, but he was really not qualified. He had insufficient training and experience to be a HVAC II. It was, therefore, reasonable to treat him differently from other journeymen. Meeks v. Kanawha County Bd. of Educ., Docket No. 95-20-019 (Sept. 27, 1995).

In the instant case, the difference between Plumber I and Plumber II is also the level of skill. Respondent requires as a matter of policy, three years on the job experience or journeyman papers from a proper authority to qualify as a Plumber II. Grievant has neither. He may be performing some of the same plumbing duties as a Plumber II, but he is not fully qualified. There was no evidence that he needs supervision as in Meeks. Grievant Hill has sufficient skills to work safely without supervision, but he is otherwise not qualified to be a Plumber II. (Also see Simmons v. Randolph County Bd. of Educ., Docket No. 96- 42-385 (Nov. 26, 1997).

Based upon the foregoing and other matters of record, the following findings of factand conclusions of law are made.

Findings of Fact

1. From October 1995, until the end of the 1995-1996 school year, Grievant held a temporary position as a Plumber II, filling the open position created by the absence of Plumber Bob Elias.

2. Mr. Elias's position was for a term of 260 days.

3. Mr. Elias retired at the conclusion of the 1995-1996 school, leaving an open position for a Plumber/General Maintenance Worker.

4. The open position was posted on or about June 3, 1996 and was for a Plumber I/General Maintenance Worker.

5. The posting clearly provided that it was for a 238-day term.

6. Respondent's policy is to replace 260-day contracts with 238-day contracts through attrition, as a result of retirement and resignations.

7. Grievant bid for and obtained this position, entering into the employment contract on

or about June 11, 1996.

8. The employment contract clearly provided that it was for a term of 238 days.

9. Grievant commenced his employment by Respondent as a Plumber I/ General Maintenance Worker at the beginning of the 1996-1997 school year.

10. Grievant did not initiate the grievance process until on or about November 13, 1996.

11. A 260-day contract has 21 days paid annual leave, while the 238-day contract has no paid annual leave. 12. Grievant took an unpaid leave from October 28, 1996, through November 1, 1996.

13. During Grievant's absence, minor plumbing repairs were made by General Maintenance Workers who Grievant alleges were working out of their classification.

14. General Maintenance Workers, as part of their duties, make minor repairs.

15. Respondent's policy is to require three years plumbing experience or journeyman certification to advance from Plumber I to Plumber II.

16. Grievant is qualified for the position of Plumber I, but does not have the three years plumbing experience nor journeyman certification.

Conclusions of Law

1. A grievance is to be filed within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant. W.Va. Code § 18-24-4(a)(1).

2. The posting of June 3, 1996 and the employment contract of June 11, 1996, for the Plumber I/General Maintenance Worker position at issue both indicated that the term of employment was for 238 days.

3. Grievant knew or should have known by June 3, 1996 and no later than June 11, 1996, that the position in question, Plumber I/General Maintenance Worker was for a term of 238 days and not 260 days.

4. Grievant instituted this grievance on or about November 13, 1996, alleging among other things, that the employment term should be 260 days and accordingly, as to that issue, is untimely filed.

5. When alleging discrimination, Grievant must first demonstrate a prima faciecase. (Abston v. Putnam County Bd. of Educ., Docket No. 97-40-057 (July 28, 1997).

6. Grievant did not demonstrate a prima facie case of discrimination.

7. If a prima facie showing had been made, Respondent has shown a legitimate, non-discriminatory reason for not classifying grievant as a Plumber II.

8. Because it is a continuing violation, an employee may contest a misclassification at any time, although only once. Martin v. Randolph County Bd. of Educ., 195 W.Va. 297, 465 S.E.2d 399 (1995).

9. Grievant's grievance is therefore timely filed as to the issue of misclassification.

10. Grievant has the burden of proving his case by a preponderance of the evidence. 156 C.S.R. 4.19 (Procedural Rules, W. Va. Education and State Employees Grievance Board).

11. Grievant did not prove by a preponderance of the evidence that General Maintenance Workers were working out of their classification in the performance of minor plumbing repairs.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Marshall 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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JAMES D. TERRY

Administrative Law Judge

DATE: December 31, 1997

Footnote: 1 ***Mr. Bland is the Personnel Director for Respondent***