JAMES D. SHAVER, JR., and CARMELA J. JOHNSON,

Grievants,

v. Docket No. 98-13-091

GREENBRIER COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

James D. Shaver, Jr., and Carmela J. Johnson (Grievants), Custodian IIIs employed by Respondent Greenbrier County Board of Education (GCBE), filed a grievance pursuant to W. Va. Code §§ 18-29-1, et seq., alleging that:

> [T]he current workload is not evenly or equitably distributed in violation of W. Va. Code §18-29-2; the opportunity to fill temporary vacancies are [sic] not being offered to regular employees at the work site in violation of W. Va. Code §18A-4-15; Grievants' daily work schedules have been changed without their written consent; and; restoration of discretion to Grievants to determine at what point during their daily schedule they take their one-half hour duty free lunch period.

The grievance was denied at Level I by Principal William Harris (Harris). The grievance was advanced to Level II where an evidentiary hearing was conducted on March 13, 1998. Grievant was represented at this hearing by Larry Parrish, county representative of the West Virginia School Service Personnel Association, and GCBE was represented by Erwin L. Conrad, Esq. The grievance was denied at Level II by Dwight D. Livesay on March 19, 1998. The grievance was advanced to Level III where participation was waived by GCBE, pursuant to W. Va. Code §18-29-4(c).

A Level IV Hearing was held before the undersigned on May 26, 1998. Grievant was represented at this hearing by John Roush, Esq., and GCBE was again represented by Erwin L. Conrad, Esq. This matter became mature for decision on June 26, 1998.

The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record, including the transcript of the Level II hearing, testimony taken at Level IV, and documentary evidence admitted at Levels I through IV.

FINDINGS OF FACT

1. Grievants are Custodian IIIs employed at Greenbrier West High School (GWHS) by Respondent GCBE.

2. Grievants were hired under a posting specifying a daily work schedule of 4:00 p.m. to

Midnight. Grievants' employment contracts with GCBE do not specify a daily work schedule.

3. At some point in 1995 or 1996, before Harris became Principal of GWHS, Grievants' daily work schedule was changed to 2:30 p.m. to 10:30 p.m. Grievants were also permitted to forego their one-half hour duty free lunch recess and leave at 10:00 p.m.

4. GCBE did not vote to approve this change.

5. On May 14, 1997, Grievants signed written agreements with the Office of the Principal of GWHS, Harris, prepared by that office. These agreements stated that Grievants' work schedule was from 2:30 p.m. to 10:30 p.m. The agreement further reflected Grievants' waiver of their one-half hour duty free lunch recess in exchange for being allowed to leave work at 10:00 p.m.

6. Harris and Head Custodian Doug Cooper (Cooper) noticed that the quality of Grievants' work was declining. Harris also received complaints from the community thatGrievants were leaving work before 10:30 p.m. (See footnote 1)

7. Cooper wrote many notes to Grievants in an attempt to improve their performance. Cooper also wrote several memos to Harris detailing his frustration with Grievants' shortcomings as custodians.

8. Evening ball games frequently took place at GWHS, causing extra work for Grievants.

9. Grievants were accustomed to not performing every task on the list of their daily cleaning duties every day. Such tasks included emptying pencil sharpeners and cleaning chalk trays. This was done because some of the tasks could, as a practical matter, readily be postponed, and to allow Grievants more time to clean after the ball games.

10. Grievants were not assigned more work than other custodians, and their work could be accomplished in the time allotted.

11. At the start of the second semester of the 1997-1998 school year, Harris restored Grievants' original schedule of 4:00 p.m. to Midnight, largely to allow Grievants more time to clean after ball games.

12. Grievants verbally consented to the restoration of the 4:00 p.m. to Midnight schedule.

13. GCBE did not vote to approve this change.

14. When a Custodian was absent, Harris called other regular service employees holding the classification of Custodian, on a rotating and seniority basis, to substitute forthe absent custodian.

DISCUSSION

Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6. A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991).

Grievants' first complaint is that the custodial workload is not evenly or equitably distributed in violation of W. Va. Code §18-29-2. This section of the Code provides definitions of terms used throughout Article 29, which sets forth the grievance procedure for education employees. However, because Grievants' contention that the custodial workload is not fairly distributed may fairly be viewed as an allegation of discrimination, and because the grievance procedure is intended to provide "a simple, expeditious and fair process for resolving problems. . .," grievants' first issue will be considered an allegation of discrimination. W. Va. Code §18-29-1.

A grievant claiming discrimination is limited to alleging that an employer's acts violated this Board's authorizing legislation, W. Va. Code §§ 18-29-1, et seq.. Vest v. Bd. of Educ. of County of Nicholas, 193 W. Va. 222, 455 S.E.2d 781 (W.Va. 1995). 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 faciecase of discrimination, a grievant must prove:

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

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) have not, in a significant particular; and

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing.

Steele v. Wayne County Bd. Of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once the grievant establishes a prima facie case, the burden shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for the employment action. Id. However, a grievant may still prevail if he can demonstrate the reason given by the respondent was mere pretext. Steele, supra.

Grievants failed to establish a prima facie case of discrimination. Grievants established that they are similarly situated to other custodians employed by GCBE. However, they failed to show that they were treated, to their detriment, by GCBE in a manner that other employees were not. They were not assigned more work than other custodians. Respondent established that Cooper, as well as substitute custodians Johnie Knapp, Alberta Nettles, and Donald Hanson performed Grievants' custodial duties in the time allotted. Mr. Knapp also testified that Grievants' assignments are easier than some others. Grievants presented no witnesses to testify in support of this complaint, and conceded that the substitute custodians were being truthful when they testified that the assigned work could be completed in the time allotted. Grievants have failed to prove discrimination.

Grievants' second complaint is that the opportunity to fill temporary vacancies is notbeing offered to regular employees at the work site in violation of W. Va. Code §18A-4-15.

W. Va. Code § 18A-4-15 states:

> [I]f there are regular service employees employed in the same building or working station as the absent employee and who are employed in the same classification category of employment, such regular employees shall be first offered the opportunity to fill the position of the absent employee on a rotating and seniority basis with the substitute then filling the regular employee's position.

The record reflects that this procedure was followed by GCBE. Harris testified that, on one occasion when Cooper was absent, he called upon the next most senior regular custodian, Grievant Shaver, to substitute. When Shaver declined, Harris called upon Grievant Johnson, the next most senior regular custodian, who also declined to substitute. On that occasion, the position went unfilled. See Hassie v. Cabell County Bd. of Educ., Docket No. 90-06-050 (Apr. 24, 1990). On another occasion when Cooper was absent, Harris again called Shaver, and then Johnson, before getting Mr. Rodney Amick to substitute.

Grievants presented no witnesses to testify that they were denied the opportunity to fill temporary vacancies in violation of W. Va. Code §18A-4-15. Grievants have failed to prove this contention.

Grievants' third complaint is that their daily work schedules have been changed without their written consent. W. Va. Code § 18A-4-8a(7) states:

> "[n]o service employee may have his or her daily work schedule changed during the school year without the employee's written consent[.]" See Smith v. Lincoln County Bd. of Educ., Docket No. 89- 22-324 (Apr. 3, 1990).

The record reflects that Grievants' daily work schedule was changed to 2:30 p.m.to 10:30 p.m.

before Harris became Principal of GWHS. Harris later restored Grievants' original schedule of 4:00 p.m. to Midnight in mid-year. Scheduling custodians is within Harris' statutory authority as a principal. Principals “shall supervise the management and operation of the school or schools to which they are assigned. . . the principal shall assume administrative and instructional supervisory responsibility for the planning, management, operation and evaluation of the total educational program of the school or schools to which they are assigned.” W. Va. Code § 18A-2-9. This Grievance Board has held that principals may schedule custodians. Myers/Cain v. Wetzel County Bd. of Educ., Docket No. 94-52-325 (Oct. 27, 1994); Holloway v. Ohio County Bd. of Educ., Docket No. 91-35- 028 (Oct. 9, 1991).

Harris specifically testified that scheduling was his responsibility. L. II Trans. at 188. Furthermore, on May 14, 1997, Grievants signed written agreements with the Office of the Principal of GWHS, prepared by that office, stating:

> I agree to give up my lunch break of :30 minutes with the understanding that I may end my work day :30 minutes early. My present work schedule is from 2:30 p.m. until 10:30 p.m. By not stopping for my :30 minute lunch break, I will end my work day at 10:00 p.m.

The record is devoid of any vote by GCBE itself to either establish, change, or restore Grievants' schedules, and GCBE produced no document purporting to be Grievants' written consent to restoring their daily work schedule to 4:00 p.m. to Midnight.

The undersigned finds that the alteration of Grievants' daily work schedule by one and one-half hours is a substantial one. This Grievance Board has held that alterations of bus operators' schedules by thirty-five minutes, and by one hour and forty five minutes, were not slight, or ”de minimus,” alterations. Froats v. Hancock County Bd. of Educ.,Docket No. 89-15-164/202 (Aug. 31, 1989), Runyon/Skeens v. Lincoln County Bd. of Educ., Docket No. 97-22-479 (Feb. 6, 1998); See Smith, supra.

While the job posting, which specified a daily work schedule of 4:00 p.m. to Midnight, and Grievants' employment contracts, which did not specify a daily work schedule, are pertinent to the resolution of this grievance, they are not dispositive. W. Va. Code § 18A-4-8a(7) refers to the actual “daily work schedule” of a service employee. Principal Harris had the authority to determine Grievants' schedules, but only under the terms of the statute, which requires their written consent to mid-year changes. Grievants' verbal consent to the restoration of the 4:00 p.m. to Midnight schedule

is insufficient, because the statute plainly demands written consent. The only schedule change with written consent in the record of this grievance shows that Grievants consented to a work schedule of 2:30 p.m. to 10:30 p.m. Grievants have proved that their daily work schedules were changed in mid-year without their written consent.

Grievants' final complaint is that they can no longer determine at what point during their daily work schedule they take their one-half hour duty free lunch recess. W. Va. Code § 18A-4-14(3), which grants the recess, also states: "[n]othing in this section shall be construed to prevent. . . any service personnel from exchanging his lunch recess for any compensation or benefit mutually agreed upon by the employee and the county superintendent of schools or his agent." As noted above, Grievants signed written agreements with the Office of the Principal of GWHS, prepared by that office, waiving their one-half hour duty free lunch recess in exchange for being allowed to leave work at 10:00 pm.

It is beyond dispute that Harris was an agent of the Superintendent when he offeredGrievants this agreement and, considering the scope of a principal's statutory authority discussed above, Grievants have established that they are entitled to forego their lunch recess and leave work at 10:00 p.m. However, they are not entitled to determine at what point during their daily schedule they take a recess, because the written agreement plainly states that they have exchanged their lunch recesses for the "benefit mutually agreed upon" of an early departure from work. W. Va. Code § 18A-4-14(3).

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. Grievants have the burden of proving their grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd., 156 C.S.R. 1 § 4.19 (1996); Payne v. W. Va. Dept. of Energy, Docket No. ENGY-88-015 (Nov. 2, 1988). See W. Va. Code § 29-6A-6.

2. Discrimination is defined 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. W. Va. Code § 18-29-2(m).

3. In order to establish a prima facie case of discrimination, a grievant must prove:

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

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) have not, in a significant particular; and

(c) that such differences were unrelated to actual job responsibilities of the grievant and/or the other employee(s), and were not agreed to by the grievant in writing. Steele v. Wayne County Bd. Of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once the grievant establishes a prima facie case, the burden shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for the employment action. Id. However, a grievant may still prevail if she can demonstrate the reason given by the respondent was mere pretext. Steele, supra.

4. Grievants failed to establish a prima facie case of discrimination.

5. If there are regular service employees employed in the same building or working station as an absent employee and who are employed in the same classification category of employment, such regular employees shall be first offered the opportunity to fill the position of the absent employee on a rotating and seniority basis with the substitute then filling the regular employee's position. W. Va. Code § 18A-4-15.

6. Grievants have failed to prove that they were denied the opportunity to fill temporary vacancies in violation of W. Va. Code § 18A-4-15.

7. No service employee may have his or her daily work schedule changed during the school year without the employee's written consent. W. Va. Code § 18A-4- 8a(7).

8. Scheduling custodians is within the statutory authority of a principal. Principals supervise the management and operation of the school or schools to which they are assigned. Principals have administrative and instructional supervisory responsibility for the planning, management, operation and evaluation of the total educational program of the school or schools to which they are assigned. W. Va. Code § 18A-2-9, Myers/Cain v. Wetzel County Bd. of Educ., Docket No. 94-52-325 (Oct. 27, 1994), Holloway v. Ohio County Bd. of Educ., Docket No. 91-35-028 (Oct. 9, 1991).

9. Grievants, by signed, written agreements with the Office of the Principal of GWHS, consented to a daily work schedule of 2:30 p.m. to 10:30 p.m.

10. Grievants' daily work schedule was changed in mid-year without their written consent.

11. Although school service employees are granted a one-half hour duty free lunch recess, nothing in the statute prevents any service personnel from exchanging his or her lunch recess for any compensation or benefit mutually agreed upon by the employee and the county superintendent of

schools or his agent. W. Va. Code § 18A-4-14(3).

12. Grievants, by signed, written agreements with the Office of the Principal of GWHS, waived their one-half hour duty free lunch recess in exchange for being allowed to leave work at 10:00 pm.

13. Grievants are not entitled to determine at what point during their daily schedule they take a one-half hour duty free lunch recess, because they have exchanged their lunch recesses for the "benefit mutually agreed upon" of an early departure from work. W. Va. Code § 18A-4-14(3).

Accordingly, this grievance is **GRANTED IN PART** and **DENIED IN PART,** and Respondent Greenbrier County Board of Education is **ORDERED** to reinstate Grievants' daily work schedule of 2:30 p.m. to 10:30 p.m., and to allow them to leave work at 10:00 p.m. in exchange for their one-half hour duty free lunch recess.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Greenbrier County. Any 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 Judgesis 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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ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated July 29, 1998

Footnote: 1 *A concerned citizen apparently stationed himself at a nearby Tastee-Freeze to conduct surveillance of Grievants' departure times.*