TIMOTHY SNYDER,

Grievant,

v. **Docket No. 00-24-263**

MARION COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Timothy Snyder ("Grievant") filed this grievance at level one on May 8, 2000, challenging the posting of a Custodian I/II position by the Marion County Board of Education ("MCBOE"). After being denied at level one, a level two hearing was held on July 13, 2000, followed by a written denial of the grievance dated July 20, 2000. Level three consideration was bypassed, and Grievant appealed to level four on August 11, 2000. A hearing was held on September 15, 2000, in order to determine whether a default had occurred at the informal conference level of this grievance. By order dated October 23, 2000, the undersigned found that a default had not occurred, and this matter proceeded to a level four hearing on the merits of the grievance on January 10, 2001, in the Grievance Board's office in Morgantown, West Virginia. Grievant was represented by counsel, John E. Roush of the West Virginia School Service Personnel Association, and Respondent was represented by counsel, Stephen R. Brooks. This matter became mature for consideration upon receipt of the parties' fact/law proposals on February 1, 2001.

The following findings of fact are made from a preponderance of the evidence of record.

Findings of Fact

1. Grievant has been employed by MCBOE as a Custodian I/Custodian II/Watchman for approximately six years. He is currently assigned to Miller Junior High School.

2. Grievant's job duties include cleaning the school, making minor repairs, changing lights, and providing security. Grievant works from 9:30 p.m. until 5:00 a.m. Sunday through Thursday, and is responsible for making sure no one disturbs the property at night.

3. Harry Sheppard was also employed by MCBOE as a Custodian I/Custodian II/Watchman until his resignation in February of 2000. He was assigned to Miller Junior High School on Fridays and Saturdays (when Grievant is not there), and to the Maintenance Department three days per week. His duties included cleaning, emptying garbage, making minor repairs, and providing security. His working hours were from 7:00 p.m. to 5:00 a.m.

4. On March 22, 2000, MCBOE posted the position vacated by Mr. Sheppard as Custodian I/Custodian II, and reduced the working hours from 9:00 p.m. until 5:00 a.m. The duties of the position were not altered.

5. Grievant did not apply for Mr. Sheppard's position when it was posted in March of 2000.

6. Grievant receives no additional compensation by having “watchman” as part of his multiclassification.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his claims by a preponderance of the evidence. Procedural Rules of the W. Va.Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

Grievant contends that Mr. Sheppard's position should have been posted as Custodian I/Custodian II/Watchman, because the job duties did not change, and security remains a large portion of the responsibilities. He is requesting that the position be correctly posted, because he is “trying to protect the Watchman classification.” Grievant's requested relief is somewhat unclear, however, in that he testified at level two that, if the position were reposted, he “might take a look at it,” but would not necessarily apply. At level four, when questioned as to how he had been damaged by this posting, Grievant stated that he had not suffered any damage “yet.” Apparently, Grievant fears that, at some time in the future, his position as a watchman may be in jeopardy. He explained that, in 1993, a decision was made by the MCBOE administration to reclassify all watchmen as custodians, and he believes that the position is being “phased out.” Nevertheless, it is undisputed that Grievant would receive the same compensation whether or not Watchman is part of his multiclassified title, both in his own position and in the position vacated by Mr. Sheppard.

Grievant is correct in his contention that, although he did not apply for the position at issue, he has standing to file a grievance contesting the posting itself. See Taylor- Hurley v. Mingo County Bd. of Educ., Docket No. 96-29-265. However, the specific reasoning in Hurley, supra, was that, when the position was wrongly posted, the grievant "suffered harm because she was denied the opportunity of being considered for the position." In the instant case, Grievant has expressed no specific desire to be consideredfor the position, but seems more concerned with its title. This Grievance Board held in Conley v. Logan County Board of Education, Docket No. 97-23-521 (Apr. 29, 1998), that when a grievant cannot prove that he has personally been affected by an allegedly improper posting, he is entitled to no relief.

___Nevertheless, the evidence submitted in this case does not demonstrate that the posting was improper. W. Va. Code § 18A-4-8 defines service personnel job classifications, and describes the positions at issue in this case as follows:

> "Custodian I" means personnel employed to keep buildings clean and free of refuse.
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> "Custodian II" means personnel employed as a watchman or groundsman.
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> * * * *
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> "Watchman" means personnel employed to protect school property against damage or theft. Additional assignments may include operation of a small heating plant and routine cleaning duties.

W. Va. Code §18A-4-8 places a burden on county boards of education to see that the duties of a particular service position coincide with the classification and paygrade to which it is assigned. Robinson v. Nicholas County Bd. of Educ., Docket No. 93-34-197 (Mar. 25, 1994). Simply stated, the statute requires the board to call the position what it is. Gosnell v. Raleigh County Bd. of Educ., Docket No. 94-41-112 (Apr. 21, 1995). As was held in Taylor, supra, when a board of education posts a vacant position, it must call the position "what it is" pursuant to the required duties of that position.

The statutory definitions for the custodial classifications were discussed in Graham v. Nicholas County Board of Education, Docket No. 93-34-224 (Jan. 6, 1994). Noting that many of the classifications listed in W. Va. Code §18A-4-8 have similar or overlapping duties, the administrative

law judge held that performance of “crossover” duties does notalways mean that the position is misclassified. In fact, it was specifically noted that locking doors and windows and securing buildings are duties incidental to both the Custodian I and Custodian II job classifications.

The definition for Custodian II provided in W. Va. Code §18A-4-8 clearly includes personnel employed as watchmen. In fact, it would seem that, by not specifically listing the duties of a Custodian II, but merely stating that such personnel are “employed as a watchman,” the legislature contemplated that the ensuing “Watchman” classification definition would be incorporated into the Custodian II definition. Accordingly, MCBOE committed no error in posting Mr. Sheppard's position without including the Watchman classification, because the duties of that position are clearly encompassed within the Custodian II definition contained in W. Va. Code §18A-4-8.

Consistent with the foregoing, the following conclusions of law are appropriate.

Conclusions of Law

1. In a non-disciplinary matter, Grievant has the burden of proving his claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. W. Va. Code §18A-4-8 places a burden on county boards of education to see that the duties of a particular service position coincide with the classification and paygrade to which it is assigned. Robinson v. Nicholas County Bd. of Educ., Docket No. 93-34-197 (Mar. 25, 1994).

3. “'Custodian II' means personnel employed as a watchman or groundsman.” W. Va. Code § 18A-4-8.

4. “'Watchman' means personnel employed to protect school property against damage or theft. Additional assignments may include operation of a small heating plant and routine cleaning duties.” W. Va. Code § 18A-4-8.

5. "Because of similarities in the nature of certain jobs listed in Code §18A-4-8, two or more job definitions may encompass the same duties. Proof that an employee performs such 'crossover' duties does not necessarily mandate that his position be reclassified." Conclusion of Law 4, Graham v. Nicholas County Bd. of Educ., Docket No. 93-34-224 (Jan. 6, 1994).

6. The position posted by Respondent on March 22, 2000, was correctly described as Custodian I/Custodian II.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Marion 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: February 16, 2001 _____

DENISE M. SPATAFORE

Administrative Law Judge