LEON TAULTON, JR.,

Grievant,

v. **Docket No. 01-19-594**

JEFFERSON COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Leon Taulton, Jr., (Grievant) employed by the Jefferson County Board of Education (JCBE) as a Custodian III, filed a level one grievance on August 2, 2001, in which he alleged violations of W. Va. Code §§18A-4-8b, 18A-4-8g, and 18A-4-15 occurred when a position was improperly posted and filled. Grievant requests that he be awarded the day shift position at Wright Denny Elementary School, lost wages and benefits, compensation for additional travel expenses, and interest on all monetary sums. (See footnote 1)

Grievant elected to bypass consideration at level three after the matter was denied at levels one and two, and filed a level four appeal on December 4, 2001. An evidentiary hearing was conducted in the Grievance Board's Westover office on February 15, 2002, at which time Grievant was represented by John E. Roush, Esq., of WVSSPA, and JCBE was represented by Howard E. Seufer, Jr., of Bowles Rice McDavid Graff & Love. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on or before March 8, 2002.

The following facts are derived from the record developed at level two and supplemented at level four.

Findings of Fact

1. Grievant has been employed by JCBE as a Custodian III assigned to C.W. Shipley Elementary School at all times pertinent to this grievance.

2. JCBE employs two custodians at Wright Denny Elementary School (WDES). John Milton was assigned the day shift, and Harry Martin was assigned the night shift during the 2000-2001 school year, although neither position was posted and filled as shift specific.

3. John Milton, the day-shift custodian at WDES, retired at the end of the 2000- 2001 school year.

4. Mr. Martin requested that he be allowed to move from the night shift to the day shift upon Mr. Milton's retirement. Consistent with JCBE's past practice, WDES principal William Willingham, granted the request.

5. On or about May 4, 2001, JCBE posted a vacancy for a Custodian at WDES. The posting did not specify the shift the successful applicant would work.

6. Grievant applied for the WDES position, but withdrew his application upon learning that the successful applicant would work the night shift.

7. Grievant has been employed by JCBE since February 1989, while Mr. Martin has been employed since July 2000.

8. In December 2000, Don Lemon, a custodian at Shepherdstown Elementary School, request to move to the day shift position when it became vacant was denied, and he was advised that he would have to bid on it.

9. JCBE posts custodial vacancies at some school as shift-specific, while posting them with no shift designation at other schools, depending on how the positions have been filled historically at that school.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance 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.

Initially, JCBE asserts that because Grievant declined the position in question, and it is no longer available to him, the question of shift-specific posting has been rendered moot, and is not properly cognizable in the grievance procedure. Any claim that an employee is barred from pursuing a grievance due to some action, or failure to act, subsequent to the grievable event, is an affirmative defense, and the employer has the burden of proving such a defense by a preponderance of the evidence. See Ray v. Cabell County Bd. of Educ., Docket No. 96-06-343 (Feb. 21, 1997); Lowry v. W. Va. Dep't of Educ., Docket No. 96-DOE-130 (Dec. 26, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

As previously noted, when Grievant was told that the job entailed evening shift work, he withdrew

his application from further consideration. Although the present matter was instigated as a result of this specific position posting, the issue is broader, as it questions JCBE's ongoing practice. Grievant's decision to decline the position once he learned that it was not what he expected or wanted, does not constitute a waiver of his grievance rights.

Grievant has failed to prove that JCBE's posting was improper. Grievant argues that position postings must reflect the actual vacancy which exists, and that JCBE's practice of posting shift-specific positions at some schools, but not at others, is arbitrary andcapricious. JCBE asserts that W. Va. Code § 18A-4-8b does not expressly mandate that service personnel positions be posted as shift specific, and that it has consistently and uniformly maintained designated postings at each of the schools.

The Grievance Board has previously determined that W. Va. Code § 18A-4-8b does not require that a board of education post service personnel positions as shift specific. Mills v. Raleigh County Bd. of Educ., Docket No. 95-41-202 (Nov. 30, 1995); Ennis v. Ohio County Bd. of Educ., Docket No. 93-35-516 (May 31, 1994). The only remaining question is whether JCBE's practice of assigning shifts to some schools and not others, is improper. While the practice is unusual, if not unique, and is based on historical rather than pragmatic considerations, the evidence does not support a finding that it violates any statutory provision or is arbitrary and capricious.

In addition to the foregoing, the following conclusions of law are made.

Conclusions of Law

1. Any claim that an employee is barred from pursuing a grievance due to some action, or failure to act, is an affirmative defense, and the employer has the burden of proving such a defense by a preponderance of the evidence. See Ray v. Cabell County Bd. of Educ., Docket No. 96-06-343 (Feb. 21, 1997); Lowry v. W. Va. Dep't of Educ., Docket No. 96-DOE-130 (Dec. 26, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996).

2. W.Va. Code §18A-4-8b does not expressly mandate that service personnel positions be posted as shift-specific. 3. Grievant failed to establish that the seniority requirements of Code §18A-4-8b regarding the filling of service personnel positions apply to the shift scheduling of custodians within a school.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Jefferson 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: March 29, 2002 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Grievant did not address W. Va. Code § 18A-4-8(g) at level four, and it is deemed abandoned. W. Va. Code § 18A-4-15 addresses substitute employees, and does not directly apply to this matter.