SHIRLEY WEAVER, et al.,

Grievants,

v. **Docket No. 03-39-129**

PRESTON COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Shirley Weaver, William Strawser, and Michael Cool ("Grievants") initiated this proceeding on October 3, 2002, requesting reclassification to Custodian IV, with back pay. The grievance was denied at level one on October 16, 2002. Upon appeal to level two, a hearing was held on December 19, 2002, and the grievance was denied in a written decision dated January 14, 2003. Level three consideration was waived. Grievants appealed to level four on May 9, 2003, and a hearing was held in the Grievance Board's office in Westover, West Virginia, on July 7, 2003. Grievants were represented by counsel, John E. Roush of the School Service Personnel Association, and Respondent was represented by counsel, Kimberly S. Croyle. This matter became mature for consideration upon receipt of the parties' fact/law proposals on August 11, 2003.

The following findings of fact are made based upon a preponderance of the credible evidence of record.

Findings of Fact

1. Grievants are employed by the Preston County Board of Education ("PCBOE") as Custodian IIIs, assigned to Preston High School ("PHS"). Grievants work the "evening" shift from 3:00 p.m. to 11:00 p.m. 2. Grievant Weaver has been working at PHS for approximately six years; Grievant Cool has been assigned there for 13 years; and Grievant Strawser began his assignment there at the beginning of the 2002-2003 school year.

3. Grievant Strawser has been placed on transfer for the 2003-2004 school year and will not be assigned to PHS.

4. Terry Barlow and Carolyn Stuchel are also assigned to PHS and are classified as Custodian IVs.

5. Mr. Barlow and Ms. Stuchel were reclassified as Custodian IVs in 1999, initially as part of an agreement to entice them to work the midnight shift.

6. From 1999 through the fall of 2002, Grievants did not object to Mr. Barlow and Ms. Stuchel having a higher classification, because they worked a different shift. During that time, the school was divided into different areas of responsibility for cleaning, and each “team” performed their cleaning duties as requested by the principal. All the custodians ordered supplies, and Mr. Barlow and Ms. Stuchel did not exercise any supervisory authority over the other custodians.

7. Beginning in September of 2002, Edna Rothwell, Principal of PHS, reassigned Mr. Barlow and Ms. Stuchel to the evening shift with Grievants, informing Grievants that the two Custodian IVs were their “supervisors.”

8. Since September of 2002, Mr. Barlow and Ms. Stuchel have received various instructions from Ms. Rothwell regarding custodial duties, including development of a compliance plan as the result of a health inspection, which included determining which custodians would be responsible for specific duties, along with specific rules and procedures for cleaning and maintenance, and development of a detailed plan for cleaning,supplies, and school security. Also since September, Grievants have been required to submit all supply requests to Mr. Barlow and Ms. Stuchel, who are responsible for the ordering and inventory.

9. In addition to the above, Mr. Barlow and Ms. Stuchel also perform cleaning duties similar to those performed by Grievants, including classrooms, floors, hallways, and restrooms.

10. Mr. Barlow and Ms. Stuchel will be returned to the midnight shift at the onset of the 2003-2004 school year.

Discussion

Grievants allege that they perform the same duties and responsibilities as Mr. Barlow and Ms. Stuchel, so they should also be classified as Custodian IVs. Because a misclassification grievance is non-disciplinary in nature, Grievants have the burden of proving their case by a preponderance of the

evidence. Midkiff v. Lincoln County Bd. of Educ., Docket No. 95-22-262 (Mar. 3, 1996); Perdue v. Mercer County Bd. of Educ., Docket No. 92-27-280 (Mar. 29, 1993). In order to prevail on a claim that their positions are misclassified, employees must establish, by a preponderance of the evidence, that their duties more closely match those of another classification defined by W. Va. Code § 18A-4-8, other than that under which their positions are categorized. Pope v. Mingo County Bd. of Educ., Docket No. 91-28-068 (July 31, 1992).

As a preliminary issue, Respondent contends that this grievance is untimely, because Grievants have known for several years that the Custodian IVs held that classification. The burden of proof is on the respondent asserting that a grievance was nottimely filed to prove this affirmative defense by a preponderance of the evidence. Hale and Brown v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). If the respondent meets this burden, Grievant may then attempt to demonstrate that he should be excused from filing within the statutory timelines. Kessler v. W. Va. Dep't of Transp., Docket No. 96-DOH-445 (July 29, 1997). The grievance process must be started within 15 days following the occurrence of the event upon which the grievance is based or within 15 days of Grievant's discovery of that event, pursuant to West Virginia Code § 18-29-4(a).

The time period for filing a grievance ordinarily begins to run when the employee is unequivocally notified of the decision being challenged. Kessler, supra. See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989). Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990), discussed the discovery rule of W. Va. Code § 18-29-4. Syllabus Point 1 states, "the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to the grievance."

Respondent argues that Grievants knew that the Custodian IVs were so classified for at least three years before filing their grievance. Grievants explained that they did not feel they had been “grieved” until Mr. Barlow and Ms. Stuchel were assigned to the same shift with them and it became clear they were performing the same duties, along with working the same hours. Since the instant grievance is requesting reclassification as relief, Grievants need only file their grievance within fifteen days of the last time they performed duties which they believe rendered them misclassified. In Martin v. Randolph County Bd.of Education,195 W. Va. 297, 465 S.E.2d 399 (1995), the Court stated in Syl. Pt. 5 that “W. Va. Code §18-29-2 (1992), allows an employee to contest a misclassification at any

time (although only once). As with a salary dispute, any relief is limited to prospective relief and to back relief from and after fifteen days preceding the filing of the grievance." Accordingly, Grievants' misclassification claim is timely.

West Virginia Code § 18A-4-8 defines “Custodian III” as employees who “keep buildings clean and free of refuse,” and who “operate the heating or cooling systems and . . . make minor repairs.” The same statute defines “Custodian IV” as “personnel employed as head custodians.” It further specifies that “[i]n addition to providing services as defined in 'custodian III,' their duties may include supervising other custodian personnel”. Clearly, these definitions contemplate that Custodian IIIs and IVs will perform the same duties, but that Custodian IVs are charged with the additional responsibility of being “head custodians,” which is not otherwise defined in the statute. Although Custodian IVs “may” have supervisory duties, these are obviously not required of the classification. The fact that Grievants and the Custodian IVs are performing similar duties does not render Grievants misclassified. "Because of similarities in the nature of certain jobs listed in W. Va. 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." Graham v. Nicholas County Bd. of Educ., Docket No. 93-34-224 (Jan. 6, 1994). This is especially true in the instant case, when the two classifications actually encompass the same duties. Grievants have not established that they have been employed as “head custodians” or have any duties other than the usual ones assigned to Custodian IIIs. Accordingly, reclassification of them to Custodian IVs would be improper and unsupported by any facts. Even if it were the case that the Custodian IVs to which Grievants compare themselves are misclassified, this would not entitle Grievants to reclassification. When a grievant compares himself to others who are employed in a higher classification and are performing similar work, but the others are misclassified, the remedy is not to similarly misclassify the grievant. Akers v. W. Va. Dep't of Tax and Revenue, 194 W. Va. 456, 460 S.E.2d 702 (1995); Kunzler v. Dep't of Health and Human Serv., Docket No. 97 HHR-287 (Jan. 18, 1996).

Grievants also contend that Respondent has violated W. Va. Code § 18A-4-5b, which requires uniformity in "all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county." The West Virginia Supreme Court of Appeals has addressed this issue twice in recent years, finding in Flint v. Board of Education, 207 W. Va. 251, 531 S.E.2d 76 (1999) that employees who do not have the same

classifications (in that case, multiclassifications) could not possibly be performing like assignments and duties. Revisiting the issue once again in Board of Education v. Airhart, 212 W. Va. 175, 569 S.E.2d 422 (2002), the Court determined that, although employees' duties need not be "identical" to entitle them to uniformity, the duties must be "substantially similar or essentially identical." Grievants have failed to establish that their duties are identical to those of the Custodian IVs, who clearly have additional duties which Grievants do not. Although Grievants testified that all the custodians at PHS “work together” to get the daily work and special projects accomplished, there is clear evidence that the principal has charged the Custodian IVs with a higher level of responsibility in developing, planning, and accomplishing the work. Although it does not appear that these additional duties were assigned to Mr. Barlow and Ms. Stuchel prior to the 2002-2003 school year, Grievants are only alleging misclassification dating back to the fall of 2002. Accordingly, Grievants are not entitled to the same pay as Custodian IVs.

Similarly, Grievants have not established discrimination or favoritism with regard to their classifications. "Discrimination" is defined by W. Va. Code § 18-29-2(m) 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." Similarly, "favoritism" is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.” W. Va. Code § 18-29-2(o).

The test to determine whether Grievants have established a prima facie case of discrimination or favoritism requires Grievants to establish by a preponderance of the evidence:

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

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

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

Hays v. W. Va. Div. of Employment Security, Docket No. 91-ES-505/92-ES-003 (Dec. 31, 1992); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990). Once Grievants establish a prima facie case of discrimination or favoritism, Respondent can then offer a legitimate reason to substantiate its actions; thereafter, Grievants must show that the offered reasons are

pretextual. Prince, supra.

Grievants are not similarly situated to the Custodian IVs, who perform additional duties beyond the usual custodial duties assigned to Grievants. Accordingly, they have not established a prima facie case of discrimination or favoritism, and they are not entitled to the requested relief of reclassification. (See footnote 1)

The following conclusions of law support the decision reached.

Conclusions of Law

1. Because a misclassification grievance is non-disciplinary in nature, Grievants have the burden of proving their case by a preponderance of the evidence. Midkiff v. Lincoln County Bd. of Educ., Docket No. 95-22-262 (Mar. 3, 1996); Perdue v. Mercer County Bd. of Educ., Docket No. 92-27-280 (Mar. 29, 1993).

2. "W. Va. Code § 18-29-2 (1992), allows an employee to contest a misclassification at any time (although only once). As with a salary dispute, any relief is limited to prospective relief and to back relief from and after fifteen days preceding the filingof the grievance." Syl. Pt. 5, Martin v. Randolph County Bd. of Education,195 W. Va. 297, 465 S.E.2d 399 (1995).

3. Grievants' misclassification claim is timely.

4. In order to prevail on a claim that their positions are misclassified, employees must establish, by a preponderance of the evidence, that their duties more closely match those of another classification defined by W. Va. Code § 18A-4-8, other than that under which their positions are categorized. Pope v. Mingo County Bd. of Educ., Docket No. 91- 28-068 (July 31, 1992).

5. Grievants have not established by a preponderance of the evidence that they are misclassified as Custodian IIIs.

6. W. Va. Code § 18A-4-5b requires uniformity in "all salaries, rates of pay, benefits, increments or compensation for all persons regularly employed and performing like assignments and duties within the county." This provision has been interpreted to mean that boards of education are required only to provide uniform benefits and compensation to similarly situated employees, meaning those who have "like classifications, ranks, assignments, duties and actual working days." Board of Education v. Airhart, 212 W. Va. 175, 569 S.E.2d 422 (2002); Covert v. Putnam County Bd. of Educ., Docket No. 99-40-463 (Feb. 29, 2000); Stanley v. Hancock County Bd. of Educ., Docket No. 95-15-

217 (Sept. 29, 1995).

7. Grievants are not performing like assignments and duties to Custodian IVs and hold a different classification, so no uniformity violation has been proven. 8. In order to prove a prima facie case of discrimination or favoritism, pursuant to W. Va. Code §§ 18-29-2(m) and (o), Grievants must establish by a preponderance of the evidence:

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

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

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

Hays v. W. Va. Div. of Employment Security, Docket No. 91-ES-505/92-ES-003 (Dec. 31, 1992); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990).

9. Grievants have failed to establish a prima facie case of discrimination of favoritism.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Preston 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: August 28, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

The additional allegation raised by Grievants regarding unfairness in calling evening or night shift custodians to cover day shift was granted at level two and need not be addressed further.