SHERMAN WILEY,

Grievant,

v. DOCKET NO. O5-27-208

MERCER COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, the Head Custodian at Bluefield High School, filed a grievance on April 15, 2005, in which he claimed that Respondent improperly changed his daily schedule from a day shift to a night shift. As relief, he is seeking to be reassigned to a day shift.

After denials at levels one and two, level three was bypassed and the parties submitted the issue for decision at level four based on the record already developed. Grievant was represented by West Virginia School Service Personnel Association Attorney John E. Roush, Esq., and Respondent was represented by counsel, John H. Shott. The matter matured for decision on September 6, 2005, the deadline for the parties to submit their proposed findings of fact and conclusions of law.

Issues and Arguments

Grievant contends that Respondent has violated provisions of W. Va. Code §§ 18A- 4-8a and 18A-2-7 by changing his shift without due process. Respondent contends its change in Grievant's work schedule was permissible under the Code and the terms of Grievant's contract. Based on a preponderance of the evidence adduced at the hearing, I find the following material facts have been proven:

Findings of Fact

1. Grievant is regularly employed by Respondent as Head Custodian at Bluefield High School, with over thirteen years of seniority.
2. During the 2004-2005 school year, Grievant worked from 6:00 a.m. to 2:00 p.m.
3. In March, 2005, Bluefield High School Principal Joe Turner notified Grievant by letter that, for

the 2005-2006 school year, his schedule would be from 3:00 p.m. to 11:00 p.m. Mr. Turner had previously informed Grievant that the change would be made.

4. Grievant did not agree to the proposed change in schedule.

5. Respondent took no action to formally transfer Grievant.

6. Mr. Turner believed the schedule change was necessary because the school was cited for uncleanliness, and he determined that the night shift required closer supervision.

Discussion

This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. (See footnote 1) "Grievances contending an employee's schedule has been changed in violation of W. Va. Code § 18A-4-8a(7), which limits changes in a school service employee's daily work schedule during the school year to those which are consented to in writing by the employee, must be decided on a case-by-case, fact-specific basis." (See footnote 2) W. Va. Code § 18A-4-8a(7) provides:

> No service employee shall have his or her daily work schedule changed during the school year without such employee's written consent, and such employee's required daily work hours shall not be changed to prevent the payment of time and one-half wages or the employment of another employee.

Although Grievant did not agree to the change in his schedule, in writing or otherwise, the "during the school year" language in this statute on which he relies cannot be ignored. Grievant was told during the 2004-2005 school year of the *impending* change, but the actual change was made after the conclusion of the year, to be in effect for the following year. For this reason, W. Va. Code § 18A-4-8a is inapposite to the situation in dispute now.

Grievant's second avenue of attack is a line of Grievance Board decisions discussing whether a schedule change constitutes a transfer. *West Virginia Code* § 18A-2-7 permits the Superintendent, subject only to approval of the board, to transfer an employee, after the employee is given notice and an opportunity to be heard. Grievant was given no such opportunity for a hearing before the Board, and Respondent contends that the schedule change did not amount to a transfer requiring such opportunity.

In *Thomas v . Wetzel County Bd. of Educ.,* (See footnote 3) another case in which a custodian was changed from a day shift to a night shift, the Grievance Board found that "[t]he changing of Grievant's

shift by five hours from a desirable day shift to a less desirable evening shift, without utilizing the transfer procedure, violates W. Va. Code § 18A-2-7." This case effectively overruled *Myers and Cain v. Wetzel County Bd. of Educ.*, (See footnote 4) a case cited byRespondent as support for its position. *Isaacs v. Cabell County Board of Education*, (See footnote 5) which Respondent cites as "the most recent decision on point," is not really on point. In that case, it was found a principal had latitude to change custodians' schedules and work assignments during the school year without running afoul of statutory restrictions, but the changes made in that case were *de minimus*, and did not affect starting and stopping times.

In this case, Grievant's schedule was changed significantly, triggering the notice and hearing requirements of W. Va. Code § 18A-2-7 as applied to transfers. Grievant is therefore entitled to return to his previous schedule for the 2005-2006 school year, and if Respondent still feels a schedule change of this magnitude is necessary, it must provide Grievant written notice and an opportunity to challenge the action before the board prior to the 2006-2007 school year.

The following Conclusions of Law support this decision:

Conclusions of Law

1. This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Resources*, Docket No. 92-HHR-486 (May 17, 1993).

2. "Grievances contending an employee's schedule has been changed in violation of W. Va. Code § 18A-4-8a(7), which limits changes in a school serviceemployees' daily work schedule during the school year to those which are consented to in writing by the employee, must be decided on a case-by- case, fact-specific basis. *Napier v. Mingo County Bd. of Educ.*, Docket No. 00-29-086 (July 13, 2000) (See footnote 6) ; *Sipple v. Mingo County Bd. of Educ.*, Docket No. 95-29-487 (Mar. 27, 1996). *See Conner v. Barbour County Bd. of Educ.*, Docket Nos. 93-01-543/544 (Jan. 31, 1995); *Roberts v. Lincoln County Bd. of Educ.*, Docket No. 92-22-131 (Aug. 31, 1992)." *Redman v. Jackson County Bd. of Ed.*, Docket No. 04-18-028 (May 27, 2004).

3. *West Virginia Code* § 18A-4-8a(7) prevents an employer from changing a service

employee's daily work schedule during the school year, without the employee's consent. If the proposed change is not to occur during the school year, this restriction is not to be applied.

4. *West Virginia Code* § 18A-2-7 permits the Superintendent, subject only to approval of the board, to transfer an employee, after the employee is given notice and an opportunity to be heard.

5. The changing of Grievant's shift by five hours from a desirable day shift to a less desirable evening shift, without utilizing the transfer procedure, violates W. Va. Code § 18A-2-7. *Thomas v . Wetzel County Bd. of Educ.*, Docket No. 96-52-268 (Oct. 31, 1996). To the extent that *Myers and Cain v. Wetzel County Bd. of Educ.*, Docket No. 94-52-325 (Oct. 10, 1994) is inconsistent with that conclusion, it has been overruled.

6. Changing Grievant's work schedule from starting at 6:00 a.m. to starting at 3:00 p.m., without utilizing the transfer procedure, violates W. Va. Code § 18A-2-7. For the foregoing reasons, this grievance is **GRANTED**. Respondent is ORDERED to return Grievant to his previous shift for the 2005-2006 school year.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mercer 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 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.

September 20, 2005

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

See, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21.

Footnote: 2

Redman v. Jackson County Bd. of Ed., Docket No. 04-18-028 (May 27, 2004).

Footnote: 3

Docket No. 96-52-268 (Oct. 31, 1996).

Footnote: 4

Docket No. 94-52-325 (Oct. 10, 1994).

Footnote: 5

Docket No. 9-06-002 (April 27, 1999).

Footnote: 6

This case was reversed by the Kanawha County Circuit Court in Civil Action No. 00-AA-133, (2001), but the circuit court was then reversed and the Grievance Board affirmed in Napier v. County Board of Education of Mingo, [214 W. Va. 548,] 591 S.E.2d 106 (W. Va. 2003).