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FLORA MAE CLEVINGER

v.

Docket No. 17-86-261-3

HARRISON COUNTY BOARD OF EDUCATION

DECISION

Flora Clevenger, grievant, is employed by the Harrison County Board of Education and attained Custodian IV in July, 1984. On April 24, 1985, she filed a grievance under the then existing grievance procedure alleging that her (261-day employment term contract) vacation time should not have been taken away from her in order to be reclassified from a custodian III to IV at Adamson School. No timeliness issue was raised and the grievance proceeded to level III on or about May 29, 1985. The respondent board did not act upon the grievance again until April 24, 1986, when grievant was contacted and asked whether she wished to proceed with her

grievance.¹

Grievant eventually retained private counsel to represent her interests in the grievance and after several written exchanges between grievant's counsel, county administrators and the administrative office of the West Virginia Education Employees Grievance Board, the appeal was properly acknowledged at level four on September 4, 1986. A level four hearing was conducted December 6, 1986, in Elkins, West Virginia and respective counsel for the parties agreed upon an extensive briefing schedule.²

The event which gave rise to this grievance occurred when grievant forfeited a 261-day employment term for a 200-day term as the result of a bidding procedure in order to receive an advanced classification position from Custodian III to IV at her school and then reconsidered that action after learning that other employees received advanced classifications without relinquishing their 261-day contracts providing a paid vacation.

¹ Grievant received a letter from Nancy Houston, then Attorney/Coordinator, Employee/Employer Relations for Harrison County Schools, who advised her that under the new grievance procedures she could appeal the previous level II decision to the board of education. Apparently Ms. Houston had not become totally familiar with the provisions of W.Va. Code, 18-29-1 et seq. effective July 1, 1985, or she would have realized the current level two appeal procedure mandated an evidentiary hearing of record. In any event, grievant had no burden to advise administrators of her desire to proceed with a grievance appeal already on file and there being no withdrawal therefrom.

² Debate over whether to remand the grievance back to level two, as suggested by respondent's new counsel, was resolved when it was determined that the possible necessity of several hearings could create a hardship for grievant with extended attorney fees.

The last of over fifty pages of various legal memoranda and proposals was received by the undersigned hearing examiner on or about February 27, 1987.

Grievant's employment as a custodian with the school system began in 1978. After serving several schools she advanced to custodian III sometime in 1982; she was currently assigned to Adamson School in January, 1984, holding her original 261-day term contract. She testified that in January, 1984, the head custodian had a heart attack and she performed his duties at the request of the principal. The head custodian did return but was relegated to working the night shift; thus, grievant continued to perform the daytime head custodian duties at her principal's request. At some point the designated head custodian got into some trouble and was reassigned out of Adamson.

On July 2, 1985, the board posted a Custodian IV position and grievant wrote to the Superintendent stating she was interested in the position and worked at Adamson. She testified that she had asked to be promoted or reclassified to Custodian IV as she was performing those duties. She said that school authorities told her there were no more 261-day custodian positions through reclassification or by any other means and she would have to bid on the custodian IV position and relinquish her 261-day contract for a 200-day employment term. Subsequently, grievant signed a letter prepared by administrators in which she consented to give up her 261-day contract in order to accept the custodian IV position with a 200-day employment term and was "awarded" the bid.

Grievant stated that she later heard that another custodian, Juanita Roach, had filled a posted vacancy for an advanced classification position but did not have to give up her 261-day contract.

She wrote to the then superintendent asking why she but not other employees had to give up her paid summer vacation and requested a response. No response was forthcoming then or later. Some investigation on her part revealed that other service personnel had been upgraded in a similar fashion and, upon the advice of a service personnel representative, grievant filed this grievance.

Grievant held some mistaken beliefs regarding the grievance procedure and other matters. For instance, she believed that the respondent's lack of action processing and proceeding with her grievance had resulted in her entitlement to the requested relief.³

Grievant's several service personnel witnesses, Earl Brooks, Danny Hyde and Juanita Roach, offered convincing testimony that certain maintenance positions were posted at 200 or 240-day employment terms but were not filled in the requisite 20-day period pursuant to W.Va. Code, 18A-4-8b. Instead, qualified and eligible personnel

³ Grievant also believed she had to seek private counsel in order to "get action". The record does not support a finding that she was forced to seek private counsel nor that the respondent refused to recognize her counsel when its attorney suggested she could receive free legal assistance through the West Virginia School Service Personnel Association attorney. Grievant was and is a member of the WVSSPA; she spoke of counseling with her local representative and sought private counsel of her own volition as she or any grievant may do. Grievant admitted that she took no affirmative action for a lengthy period of time when the board did not proceed with the grievance. On the other hand, respondent's excuses for their lack of action was weak even allowing for an adjustment period regarding the new procedures brought about by the enactment of W.Va. Code, 18-29-1 et seq.; the West Virginia Education Employees Grievance Board was operational in both Charleston and Elkins in January, 1986.

holding a 261-day contract would refrain from bidding but were assigned to perform the needed advanced classification work. In time, from several weeks to several months, these workers would be upgraded or reclassified to the higher designated position within their classification.⁴

Counsel for grievant argues that grievant was entitled to be promoted to the level IV vacancy at Adamson pursuant to the hiring and promotion provisions of W.Va. Code, 18A-4-8b(b). She further argues that the procedures implemented by the board to effect the modification of grievant's 261-day contract did not comport with school law or basic contract law.

Finally, counsel argues that grievant was denied uniformity of benefits guaranteed by W.Va. Code, 18A-4-5b and 8 when she was required to forfeit her 261-day contract in order to advance in classification for the position vacancy but other employees had

⁴ Mr. Brooks said he knew of two electricians and a plumber's advanced classification positions/vacancies that were filled by persons holding 261-day contracts who were allowed to keep them. Mrs. Roach said she was reassigned to the annex at South Harrison High School to fill a Custodian III vacancy posted January 10, 1984, that she had not bid upon. She was reclassified from custodian I to III in June, 1984, after she threatened to file a grievance. Danny Hyde said he would not bid upon an Electrician II vacancy posted May, 1984, but was reassigned to perform those duties and was reclassified from electrician I to II in June, 1984. Both Roach and Hyde held 261-day contracts and retained those contracts after the reclassification.

had no such requirement and were reclassified to advanced positions/
vacancies.⁵

Grievant asks that her 261-day employment term be reinstated
and that she be awarded costs and attorney fees as permitted by
statute.

Counsel for the respondent called Loren Flanigan, Administrative
Assistant, Supportive Services; Odis Trader, supervisor of custodians;
and Robert Skidmore, Administrative Liason Officer in charge of
personnel operations, to testify on behalf of the school board.
These persons closely associated with service employees personnel
matters generally spoke of the board's restructuring policy to
eliminate 261-day employment terms and the procedure by which grievant
was informed of her options to remain a custodian III at 261 days
or to become a custodian IV for a 200-day contract. Their thrust
was that grievant consented to bid upon and be reassigned for a
position/vacancy while the other employees at issue were reclassified
because they performed the duties of the position/vacancy.⁶

⁵ Due to the disposition of this grievance on the evidence
it is unnecessary to reach counsel for grievant's arguments.

⁶ None of the witnesses produced the written personnel
policy of which they spoke about regarding the board's
"restructuring" nor could they cite the specific date the
policy went into effect. While these persons knew of the
situation at Adamson when the custodian IV had his heart
attack, none knew from personal knowledge how long grievant
performed the custodian IV duties but, in any event, character-
ized her work as "temporary".

Counsel for the respondent contends that pursuant to W.Va. Code, 18A-4-8, a board of education has authority to set its employment terms not in contradiction of the statute. Further, the board's policy not to grant 261-day contracts, although not written nor clearly pinpointed in time, was in effect when the facts constituting this grievance arose. Counsel maintains that employees may obtain a position via two means. An employee may bid on a vacancy as grievant did when the designated custodian IV departed Adamson school. The board established the vacancy as a 200-day position and grievant's consent to accept it as such did not amount to a relegation as contemplated by law.

Counsel distinguished the bidding method to obtain a position from the reclassification method in which a service personnel employee may obtain a position. He cites W.Va. Code, 18A-4-8 requiring that the board reclassify service personnel when the employee has been performing the duties of the higher classification "on a permanent and ongoing basis". Counsel contends that witnesses Roach and Hyde were performing the higher classification duties and the board was required to reclassify them without altering their 261-day contracts, while grievant bid on a posted 200-day vacancy which duties she had performed temporarily. Thus, he argues, the situations by which these persons obtained their advanced classification positions were totally different and, accordingly, the

board violated no laws instating them as it did.⁷

Although timeliness was not raised at levels one and two of this grievance, the board's position at level four is that the grievance was not timely filed and should be dismissed.⁸

In addition to the foregoing factual recitation the following specific findings of fact are appropriate. The proposed findings of fact submitted by the parties have been examined and considered; to the extent that the proposals are consistent with the findings and conclusions of the hearing examiner, they are incorporated herein.

⁷ Counsel's argument that these situations were dissimilar is not supported by the evidence. Even though the custodian IV at Adamson was present and working for the most part from January to July, 1984, he was not performing the IV duties. Rather, the un rebutted evidence is that grievant performed those duties. According to counsel's reasoning, Roach performed advanced classification duties "permanently and ongoing" for five months, Hyde for less than two and both were entitled to reclassification at the board's discretion. It is absurd to even advance the theory that the board could or would have asked them to quit performing the duties since the initiation of the performance, i.e., the assignment, was to fill a posted vacancy/job opening. A characterization then that the advanced classification duties grievant performed for six months was "temporary", (see, footnote 6, supra,) is without merit.

⁸ The position of counsel for the board of education that the grievance is untimely is not well taken. This grievance proceeded through levels one and two as noted above with no issue of timeliness raised; subsequently, the board sat on the level three appeal for almost one year. Grievant's recitation of her mistaken beliefs regarding the grievance procedure establish just cause for her seven month delay and was far more credible than the respondent's rationale for its lack of action for eleven months and especially when it had not previously raised a timeliness issue regarding grievant's filing.

FINDINGS OF FACT

1. Grievant, Flora Clevenger, was employed as a custodian I by the Harrison County Board of Education in 1978 and held a continuing 261-day contract throughout reassignments, promotions and/or reclassifications upgrading her to custodian III at Adamson School, all this prior to January, 1984.

2. In January, 1984, the Custodian IV at Adamson had a heart attack and at the principal's request, grievant assumed his duties. He returned to Adamson, "got into some trouble" and was relegated to work the night shift. Grievant continued to perform the custodian IV duties , again at the request of her principal. In July, 1984, the custodian IV was transferred, reclassified and reassigned to other duties and the custodian IV position was posted.

3. By letter addressed to the school superintendent grievant expressed interest in the position. Grievant was informed by school authorities that in order to obtain the custodian IV position, she would have to relinquish her 261-day contract as the county's present policy was that all "new" custodian personnel positions would be employed on a 200-day employment term basis, whether by reassignment or reclassification.

4. School administrators could not specify exactly when the policy was adopted and did not offer written copy of the policy into evidence; therefore, it is presumed that it is an unwritten policy. Employees generally knew of the unwritten policy which appears to have begun sometime in 1980 - the 200-day employment term appears in the custodian job descriptions (for school custodians) but did not appear in the specific job postings which were introduced into evidence.

5. Senioresd service personnel employees holding 261-day contracts would not bid on posted positions of advanced classification within their classification or class title if the employment term was for a lesser amount than 261 days. Subsequently, the position would never be "officially" filled, the employees would perform the advanced classification duties as needed by the county and would eventually be officially reclassified, upgraded, promoted or whatever to the advanced classification and retain their 261-day contract. Responsible school authorities knew or should have known of this practice since it was acted upon administratively.

6. Grievant, believing she had no other alternative, did sign a paper, ostensibly a letter from her to the superintendent but prepared by school administrators, in which she relinquished her 261-day contract and paid summer vacation commencing with the summer of 1985 in order to bid on the position of custodian IV at Adamson with a 200-day contract.

7. In September, 1984, grievant learned that Juanita Moore had filled a position posted in January for a custodian III, had not relinquished her 261-day contract but was "reclassified" to custodian III in June. She then wrote to the former superintendent asking for an explanation why she but not other service personnel were required to forfeit the 261-day contract; there was no response to her inquiry from him or his successor or any other personnel administrator.

8. Grievant inquired of other service personnel and discovered others who had been upgraded to vacancies. She then consulted with a local service employee representative. She was advised that she would have to file a grievance which she did on April 24, 1985, under the grievance procedure in existence prior to July 1, 1985. The grievance was denied at levels I and II and appealed to level III on May 29, 1985. No timeliness issue was raised by the board of education at the previous levels.

9. For reasons not adequately explained or justified by the respondent who had an attorney on staff at the time the new grievance procedure went into effect, grievant's grievance appeal was not acted upon until April 24, 1986.

10. Grievant had mistaken beliefs regarding the previous and present school employees grievance procedure and otherwise demonstrated just cause for delay in filing this grievance.

11. Grievant established that the length of time she performed the duties of a Custodian IV equaled or exceeded the length of time other service personnel performed the duties of a higher level classification assignment prior to an administratively effected reclassification to that higher level position.

12. Grievant demonstrated her entitlement to reclassification, without forfeiture of her 261-day contract, from Custodian III to IV prior to the departure of the formerly designated Custodian IV who had been relegated in work assignment to Custodian III.

13. Had grievant been timely and properly reclassified to Custodian IV retaining her 261-day contract and then subsequently sought or bid upon the custodian IV vacancy at Adamson School as she did, the school board could not have required her to forfeit her 261-day contract or otherwise relegate her in any manner upon instatement to the position as a matter of law.

CONCLUSIONS OF LAW

1. W.Va. State Board of Education Policy No. 5300(7) requires that all official and enforceable personnel policies must be written and available to all employees. Bruce Miller v. Fayette County Board of Education, Docket No. 10-86-284-4; O'Conner and Robinson v. Marion County Board of Education, Docket No. 24-86-202-2, 203-2.

2. A school board is estopped at level four from alleging a grievance is untimely filed when it did not raise the issue at previous appeal levels and in its own processing of the grievance did not meet reasonable timeliness or otherwise comply with the July 1, 1985, procedural requirements of W.Va. Code, 18-29-1 et seq.

3. W.Va. Code, 18A-4-8 requires a reclassification of an employee serving as a custodian III who is performing the duties of a custodian IV. Connie Casto, et al. v. Kanawha County Board of Education, Docket No. 20-86-014; Mary Davis v. Kanawha County Board of Education, Docket No. 20-86-204-1.

4. At Adamson School, grievant proved that she performed the custodian IV duties prior to the departure of the designated head custodian relegated to custodian III work status and she should have been reclassified accordingly.

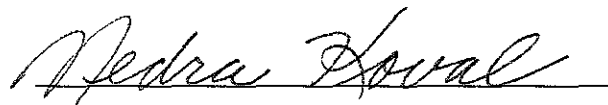
5. No service employee, without his written consent may be relegated to any condition of employment which would reduce his benefits for which he would qualify by continuing in the same position and classification currently or subsequently held. W.Va. Code, 18A-4-8.

6. A school board which secures a consent to relegation from a service personnel employee who believed she had no alternative in order to obtain advanced classification status violates the spirit and intention of the relevant provision of W.Va. Code, 18A-4-8.

7. Pursuant to W.Va. Code, 18-29-5, hearing examiners may resolve grievances and fashion fair and equitable relief not inconsistent with W.Va. Code, 18-29-1, et seq., or the rules or regulations of the West Virginia Education Employees Grievance Board. Linda Burdette v. Summers County Board of Education, Docket No. 45-86-280-4.

Accordingly, this grievance is GRANTED in substance and the board of education is directed to rescind grievant's agreement to reassignment from Custodian III to IV at Adamson School and to reclassify her as Custodian IV reinstating her 261-day term of employment effective July, 1985. Absent express authority to award attorney fees in any case or costs at level four, that request is DENIED.

Either party may appeal this decision to the Circuit Court of Kanawha County or Harrison County and such appeal must be filed within thirty days of receipt of this decision. (W.Va. Code, 18-29-7). Please advise this office of your intent to do so in order that the record can be prepared and transmitted to the Court.



NEDRA KOVAL
Hearing Examiner

Dated: April 10, 1987