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ELAINE KOONTZ

v.

Docket No. 25-88-048-3

MARSHALL COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant, Elaine Koontz, is employed by the Marshall County Board of Education as a Custodian III and is assigned to McNinch Elementary School. On January 7, 1988 she filed a level one grievance alleging numerous statutory violations with respect to her seniority rights, job duties and work conditions and reprisal by her principal. The grievance was denied at level one and a level two hearing was conducted February 16, 1988; an adverse decision was rendered February 24, 1988 and the board of education affirmed the level two decision on March 9, 1988. The parties agreed to submit the matter at level four on the record developed at the lower levels. Grievant's representative submitted proposed findings of facts on June 13, and the board submitted its proposals June 30, 1988.

Several years ago a custodian at McNinch School, Harry Hall, had retired and his job was put up for bid as a 10:00 p.m. to 6:00 a.m. night shift. Grievant bid upon this position as posted and received it. (T.13). At some point while grievant worked the "midnight" shift, the principal, Mr. Redd, permitted her to adjust her work hours to accommodate her attendance at some type of evening class. Grievant met with the principal in early December 1987 to relate to him some concerns about other custodians working weekends and getting "comp" time off through the week and the fact that some of the custodians could move their shifts when a substitute was hired for an absent custodian. She told him she would like to do the same.

Grievant claims that the principal was cordial and said he would accommodate her with respect to her concerns, however, shortly after the meeting, the principal informed her that she could not be flexible in her work schedule any longer and she had to strictly keep the 10:00 p.m. to 6:00 a.m. working hours of her shift. She said he gave her notice of weekend work which stated the work was on a "voluntary" basis (no comp time) and also gave her a schedule with a checklist of her duties which she was to fill out every evening. She characterized these actions as reprisal on the principal's part. (T.8-10).

Grievant further contends that her employment as a midnight shift custodian is a de facto night watchman's position and that some of the duties she performs are dangerous and could result in her injury. She feels unsafe in the building at night because

there have been intruders and claims that she could be disabled while on her shift and no one would find her until the next morning. Grievant states that all of her duties could be performed at an earlier time and to resolve this situation grievant feels that she should have dayturn custodian shift and be given the opportunity to fill vacant shifts of absent employees.

The school board contends that grievant bid upon her present position and that there are currently no vacancies for a dayturn custodial position at McNinch. The board avers there have been no acts of reprisal against the grievant, no violations of safety standards with respect to her assigned duties or night shift, and no violation of her seniority rights.

The facts in this case fail to support grievant's allegations of retaliation, violations of safety standards and disregard of her seniority rights, generally. However, grievant is correct with respect to her position regarding the employment of substitute service personnel pursuant to W.Va. Code, 18A-4-15(6). The statute provides that regular employees employed in the same building as an absent employee shall be given first opportunity to fill the position of the absent employee with a substitute then filling the regular employee's position. Adams v. Doddridge County Board of Education, Docket No. 09-87-152-3.

In addition to the foregoing narration, the following findings of facts and conclusions of law are appropriate.

### FINDINGS OF FACT

1. The grievant is employed as a Custodian III at McNinch Elementary school and assigned to a night turn shift between 10:00 p.m. and 6:00 a.m., a job she bid upon approximately four years ago which promoted her from an afternoon shift with a 238-day employment term to the new shift with a 261-day employment term. (T.20,21). The school board employs night shift custodians at many other county schools. (T.16).

2. Grievant acknowledged that there were no daytime job vacancies at McNinch and she could not bump anyone else from their daytime positions. (T.23).

3. Grievant's school was broken into last summer at a time when no employees were in the school. (T.33). She stated that she once caught a glimpse of a woman in the building sometime after 10:00 p.m. (T.35) but when she thoroughly checked the area there was nobody there. She called the sheriff's office that night and did so on several other occasions when she found a door she had previously locked unlocked a couple hours later. (T.14,15). Later her husband installed a deadbolt lock on the inside of the door so that no one can get in even if they have a key. The lights at the school may go off during an electrical storm for which grievant keeps a flashlight and she

has been given a key to access the breaker box. (T.17). These incidents do not serve to prove grievant's allegations that her night time employment is an endangerment to her or violative of safety standards. Further, she has not supported her contention that she should have keys to access certain rooms in the school during her work hours for which she has no cleaning responsibilities and she has no knowledge whether other custodians have keys to restricted areas.

4. Grievant is not required to perform any duties other than to clean her assigned building areas, the duties of a Custodian III, and she is not required to patrol the grounds or building to protect school property against damage or theft as an employee classified as Watchman must do. (T.30).

5. As a result of her expressed concerns grievant is no longer required to perform duties such as standing on a stepladder to replace lightbulbs or to move heavy portable wall units to sweep (T.25-28) and has not shown any county practice or policy with respect to her custodial duties or working hours which are detrimental to her health as contemplated by W.Va. Code, 18-29-2(a).

6. Measures to insure that the custodians at McNinch school fulfill their scheduled employment hours and perform their assigned duties were taken prior to grievant's filing of the instant

grievance but subsequent to an earlier grievance (T.31,32). However, the measures were applied uniformly to all of the school's three custodians to satisfy possible questions of employee performance and overtime wages due to employees working hours not those of their regularly scheduled work hours (T.61,62) and do not, as such, amount to reprisal or discrimination against grievant as contemplated by W.Va. Code, 18-29-3(p) and W.Va. Code, 18-29-3(m).

7. Grievant failed to substantiate that other employees were permitted to work at times other than school hours and then take off week days as "comp" time, a charge denied by school officials; conversely, school officials did not deny that shift exchanges were permitted between absent daytime employees without allowing grievant an opportunity to fill in as substitute for the absent daytime employee, thus that charge stands as proven.

#### CONCLUSIONS OF LAW

1. It is incumbent upon a grievant to prove each and every allegation constituting the grievance by a preponderance of the evidence. Wade v. Marion County Board of Education, Docket No. 24-86-248-3; Butta v. Ritchie County Board of Education, Docket No. 43-86-315-3; Harrison v. Kanawha County Board of Education, Docket No. 20-86-219.

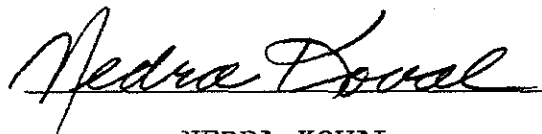
2. W.Va. Code, 18A-4-15(6) provides that regular employees employed in the same building as an absent employee shall be given first opportunity to fill the position of the absent employee with a substitute then filling the regular employee's position. Adams v. Doddridge County Board of Education, Docket No. 09-87-152-3.

3. Grievant herein was not given an opportunity to substitute for absent daytime custodians and she is entitled to the relief she requests.

Accordingly, this grievance is **GRANTED** in part and the board is Ordered to call grievant to substitute for an absent day time or afternoon custodian if sufficient notice has been given but **DENIED** as to her request to be instated to a daytime custodian's position or have another employee be assigned to accompany her on her night time shift.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Marshall County and such appeal must be filed within thirty (30) 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.

DATED: July 21, 1988



NEDRA KOVAL  
Hearing Examiner