



**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**

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DWIGHT HASSIE

v.

Docket No. 90-06-050

CABELL COUNTY BOARD OF EDUCATION

D E C I S I O N

Dwight Hassie, regularly employed by Respondent Cabell County Board of Education as a custodian at Milton Elementary School (Milton), initiated this grievance at Level I on December 8, 1989, charging a

Violation of. . .[W.Va. Code §]18A-4-15 in regard to the employment of service personnel substitutes and a violation of. . .[W.Va. Code §]18A-4-8a in regard to no service employee shall have his daily work schedule changed during the school year without his written consent. The grievant is performing duties of absent custodian with no substitute being hired for three days. Relief sought is compensation for additional duties and for substitutes to be hired first day.

Following Code §18-29-3(c) waiver at Level I¹, denial at Level II and Code §18-29-4(c) waiver at Level III, Grievant advanced his claim to Level IV, where it was heard April 10, 1990. At the Level IV hearing, Grievant did not present additional evidence, but characterized his case as

¹ See Bumgardner v. Ritchie Co. Bd. of Educ., Docket Nos. 89-43-222/etc. (June 12, 1989).

consisting of only one issue of law² which could be decided upon the Level II record. Grievant also clarified that his complaint related exclusively to November 21 and 22, 1989, although he added that the practice of substitutes' not being supplied on the first day of a regular custodian's absence had occurred upon other occasions.³ Respondent, without objection from Grievant, supplemented the Level II record⁴ at Level IV with testimony from Bill Adams, its Service Personnel Manager, and certain documents.⁵ The parties requested and were allowed until April 20, 1990, to

² I.e., whether Respondent's practices regarding the timing of calling substitute personnel are lawful. See generally this Decision, infra; see also n. 3.

³ Despite Grievant's express assertion that his claim was limited to November 21-22, 1989, the undersigned will consider his complaint regarding substitutes as continuing to the present. See n. 7. Obviously, November 21 and 22 are past, and there is no way the assignment of a substitute custodian to Milton on those dates could be ordered.

⁴ References to the Level II hearing transcript in this Decision will be designated "T. #."

⁵ Respondent's Exhibit 1, a March 23, 1988, internal memorandum, states, in part, "a substitute custodian. . .[is] not to be sent to a building with three or more custodians until after the third consecutive day of absence of a regular custodian." Respondent's Exhibit 2 is the 1989-90 daily work schedule of Homer Flowers, Head Custodian, Milton, and Exhibit 3 is Grievant's similar schedule. Respondent's Exhibit 4 is titled "Cabell County Schools Job Description - (Head) Custodian IV."

Exhibits 2 and 3 appear as appendices to this Decision.

submit post-hearing fact-law proposals;⁶ thus, the case is mature for disposition.⁷

There is essentially no dispute as to the facts surrounding this controversy. Grievant, pursuant to Code §18A-4-15(6),⁸ was offered and accepted temporary placement as the higher-paid Head Custodian at Milton during the extended illness-related absence of its regular Head Custodian, Homer Flowers. This created a vacancy in Grievant's position, which was not filled until the third day of his service as Head Custodian.⁹ As a result, he performed not

⁶ Respondent adopted the Level II findings and conclusions as a its proposal at Level IV, supplemented by an April 12, 1990, filing. Grievant's fact-law proposals were received on April 20.

⁷ While Grievant maintains his claim for compensation, it is clear from statements made by him and his representative, at both Levels II and IV, that the issue of substitute provision is the crux of his complaint. See, e.g., T. 7.

⁸ In pertinent part:

[I]f there are regular service employees employed in the same building or working station as the absent employee and who are employed in the same classification category of employment, such regular employees shall first be offered the opportunity to fill the position of the absent employee on a rotating and seniority basis with the substitute then filling the regular employee's position. A regular employee assigned to fill the position of an absent employee shall be given the opportunity to hold that position throughout such absence.

⁹ Although this was the explanation offered at Level IV, at Level II, Grievant testified that he had "moved up" to fill the Head Custodian slot; that after a time, Mr. Ricky Mayes "moved up to fill my place"; then, when "Mr. Gibson was off sick for two days, . . . [Milton Principal] (Footnote Continued)

only the duties of Head Custodian but also certain of those of his regular job, although not asked to do so save that Milton Principal Caldwell asked him "to sweep the classrooms." T. 10. Compare Resp. Ex. 2, 3. Also upon his own initiative, he worked one hour "overtime" on November 22. T. 9-10.¹⁰

W.Va. Code §18A-4-15

Grievant argues that Code §18A-4-15, on its face, requires Respondent to provide Milton with a substitute custodian on the first instance of a regular staffer's absence.¹¹ Respondent counters that the law is broad and allows county boards of education leeway to fashion reasonable measures to address temporary-replacement situations as, in its view, it has. Resp. Ex. 1; see n. 5. According to Mr. Adams, for at least the past ten years, Cabell County Schools has consistently practiced calling substitute janitors to cover institutions, as follows: for those with

(Footnote Continued)

Caldwell took Mr. Mayes back down. . .which left a schedule. . .vacant, and I gave both duties that day to myself." T. 6. It appears the "two days" referenced were November 21 and 22, see id.; however, whatever the situation, these particulars do not affect the outcome herein.

¹⁰ Generally speaking, a county board of education is not obligated to compensate an employee who voluntarily assumes duties or works hours additional to those to which he or she is assigned. Andrews v. Putnam Co. Bd. of Educ., Docket No. 40-87-330-1 (June 7, 1987).

¹¹ Code §18A-4-15(1) provides, in part, "The county board [of education]. . .shall assign substitute service personnel. . .[t]o fill the temporary absence of another service employee."

only one custodian, for every day he or she is absent; for those with two custodians, for the second and subsequent days of absence; and for those with three or more, for the third and following days. While the exact number of janitors regularly employed at Milton was not established, it is accepted that there are and were, at all relevant times, at least three including Grievant and Mr. Flowers.¹²

It appears Grievant may have performed more duties than were required of him on November 21 and 22. He did not claim that he was then asked to do anything "extra" by Mr. Caldwell except to "prepare for lunch [and sweep] out classrooms." T. 6.¹³ However, the Head Custodian's schedule, Resp. Ex. 2, includes the responsibility to "Help prepare gym for lunch and afternoon classes." Furthermore, the Head Custodian's job description, Resp. Ex. 4, includes the following entry: "Performs other duties as may be assigned by his/her immediate supervisor." While this latter catch-all requirement certainly could easily be abused, there is no evidence of such impropriety in this case. Rather, as explained by Respondent, in the pursuit of its

¹² Mr. Mayes and Mr. Gibson were identified at Level II as Milton custodians. T. 6. Also see n. 9. In his proposed findings of fact, at ¶3, Grievant refers to "the three custodians assigned to Milton Elementary."

¹³ Grievant did go on to comment, without details, "[T]here's several different -- working day shift is all different. . .[.] One day it could be one thing, and the next day it could be something else." T. 6.

practice on substitute provision, employees such as Grievant are only expected to absorb the absolutely-essential duties of the absent and non-replaced staffer, which are quite few in number, for no more than two days. See T. 18. Beyond that, as acting Head Custodian, Grievant had an overall responsibility, freely and knowingly accepted by him, see T. 11, which superseded his normal janitorial role yet included ultimate responsibility therefor and for those of all other Milton custodians. Id.

Code §18A-4-15 does not specify that county boards of education in West Virginia must fill temporarily vacant positions with substitutes on the first day of an incumbent's absence. Indeed, it would seem that a practice such as the one put forth by Respondent is not only the result of a reasonable interpretation of that statute, but also a prudent means of pursuing effective stewardship of public funds. Aside from Grievant's protestations that he was never aware of the practice before the current schoolyear,¹⁴ and his representative's view that Code §18A-4-15's plain language mandates that substitutes always be provided at the initial point a regular staff member is away from work, no evidence or persuasive argument was presented that the

¹⁴ Grievant has been employed by Respondent for more than eight years. T. 5.

practice¹⁵ was unreasonable, arbitrary, capricious or invalid.¹⁶

¹⁵ As pointed out by Grievant's representative, Resp. Ex. 1 was an internal memo and not a written Cabell County Board of Education policy. Although Respondent's Superintendent, in his Level II decision, called it a "policy" and identified it as "a written practice and procedure of the Cabell County School System for over ten years," ¶15, its attorney, at Level IV, called it "a policy with a small 'p'," apparently meaning Respondent has never officially acted upon the same. Mr. Adams' testimony, at T. 17, tends to confirm this; however, the record satisfactorily establishes that Respondent has consistently employed this practice for an extended period and so has, in effect, adopted it as its own. It is noted that the "policy" has been in some sort of written form since at least March 1988, Resp. Ex. 1, and apparently available to "every employee," consistent with West Virginia Board of Education Policy 5300(7). It is recognized, however, that the law favors the formal promulgation of personnel policies by a county board of education, whenever practicable. See, e.g., State ex rel. Hawkins v. Tyler Co. Bd. of Educ., 275 S.E.2d 908 (W.Va. 1981).

¹⁶ May v. Mingo Co. Bd. of Educ., Docket No. 29-87-029-4 (May 22, 1987), does not mandate a different result. In May, the grievant complained that she was deprived of income when an elementary school principal did not effect the calling of a substitute to cover his secretary's five-day absence due to a family member's serious illness. While it is true that the permanent secretary was away five days, the principal, at first, reasonably believed her absence would be only one or two days and had determined it inefficient to bring in someone, untrained in the school's procedures, for that brief period. As time progressed, it became a day-to-day matter of whether the incumbent employee would return, and the principal and a part-time volunteer performed only the essential duties of the secretary. While May holds Code §18A-4-15 "mandatory" and that it "must be strictly construed in favor of the

(Footnote Continued)

W.Va. Code §18A-4-8a

Grievant argues his daily schedule was changed without his consent in violation of Code §18A-4-8a.¹⁷ His claim is simply without merit. When he accepted the Head Custodian post, he did move from an 8:00 a.m.-4:00 p.m. tour to a 6:00 a.m.-2:00 p.m. schedule; however, he does not complain of this change.¹⁸ Rather, he contends that when he had to perform some of his regular custodial duties, e.g., cleaning certain classrooms, his daily schedule as Head Custodian was changed. Compare Resp. Ex. 2, 3. Respondent countered that Code §18A-4-8a does not grant to an employee a vested right in the maintenance of each and every detail of his daily written work schedule, but rather an overall protection against a significant change in his job's hours or its general focus.¹⁹ Respondent's position is well taken and has been adopted by this Grievance Board, coincidentally in a

¹⁷ In relevant portion: "No service employee shall have his daily work schedule changed during the school year without his written consent. . ."

¹⁸ County boards of education in West Virginia might be well advised to obtain employees' written acceptance of Code §18A-4-15 temporary assignments to avoid potential Code §18A-4-8a problems.

¹⁹ Respondent's counsel argued quite persuasively that, if Grievant's line of reasoning were followed to its extreme, Respondent could discipline Grievant, when serving in his regular custodial role, for not cleaning Rooms 212 - 213 - 214 - 216 - 215 precisely in that order and exactly between 3:00-3:45 p.m. each day. See Resp. Ex. 3.

case also involving custodial work. Cogar v. Upshur Co. Bd. of Educ., Docket No. 49-86-346-2 (Mar. 9, 1987).²⁰

Aside from those rendered in the narrative, the following findings of fact and conclusions of law are made.

FINDINGS OF FACT

1. Grievant, a regularly-employed custodian at Milton Elementary School (Milton), accepted, pursuant to W.Va. Code §18A-4-15(6), temporary assignment as Milton's Head Custodian while the incumbent Head Custodian was on extended absence. At the time, Grievant understood he, as acting Head Custodian, would be ultimately responsible for all needed janitorial work at Milton.

2. Pursuant to its longstanding practice, since Milton's regular custodial force was at least three in number, Respondent did not provide a substitute custodian to fill Grievant's regular position until the third day of his absence therefrom. Accordingly, there was a vacancy November 21-22, 1989.

²⁰ As noted in Coburn v. Kanawha Co. Bd. of Educ., Docket No. 20-86-087 (Sept. 10, 1986), aff'd, C.A. #86-C-AP-212 (Kan.Co., W.Va., Cir.Ct. Mar. 14, 1989), whether or not modifications to a service employee's work schedule are lawful must be decided on a case-by-case basis.

3. Mr. Caldwell, Milton Principal, asked Grievant to clean certain classrooms during November 21-22, 1989. These rooms were on Grievant's regular-employment schedule but not that of his Head Custodian's schedule.

4. Respondent's written job description for its Head Custodians includes as a responsibility the performance of "other duties as may be assigned by his/her immediate supervisor."

5. Grievant was not expected or asked to work overtime or to assume, aside from his Head Custodian duties, tasks of the vacant position other than essential ones on November 21-22, 1989. However, he did, of his own volition, work one hour overtime on November 22.

CONCLUSIONS OF LAW

1. W.Va. Code §18A-4-15(1) provides that a county board of education "shall assign substitute service personnel. . .[t]o fill the temporary absence of another service employee." However, the statute does not require a county board of education to provide a substitute in each and every instance of a service employee's absence, when that employee's essential duties are few and may on a very temporary basis be covered by remaining staff.

2. Respondent's practice of not providing a substitute custodian, for schools with a regular custodial staff of three or more, until the third day of a custodian's vacancy, is not inconsistent with Code §18A-4-15(1). Further, as

applied in this scenario, it is reasonable and not arbitrary or capricious.²¹ Cf. May v. Mingo Co. Bd. of Educ., Docket No. 29-87-029-4 (May 22, 1987).

3. Grievant's work schedule as Head Custodian was not changed, within the meaning of Code §18A-4-8a, when he voluntarily worked overtime on November 22, cf. Andrews v. Putnam Co. Bd. of Educ., Docket No. 40-87-330-1 (June 7, 1987); nor was it so changed when he was asked to perform certain essential duties consistent with the Head Custodian's job description. See Cogar v. Upshur Co. Bd. of Educ., Docket No. 49-86-346-2 (Mar. 9, 1987).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell 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 Hearing Examiners is a party to such appeal,

²¹ Of course, if more than one member of a given institution's custodial staff is absent on the same day, it is assumed that strict application of the practice might be foregone.

and should not be so named. This office should be advised of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.

A handwritten signature in black ink, appearing to read "M. Drew Crislip", written over a horizontal line.

M. DREW CRISLIP
Hearing Examiner

Date: April 24, 1990