WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

GASTON CAPERTON
Governor

Offices
240 Capitol Street
Suite 515
Charleston, WV 25301
Telephone 348-3361

JERRY SEXTON

v. Docket No. 89-03-659

BOONE COUNTY
BOARD OF EDUCATION

D E C I S I O N

Grievant Jerry Sexton, employed by Respondent Boone County Board of Education as a custodian, initiated a grievance in Fall 1989 alleging that he was "improperly transferred from his custodial position at Van Elementary School [Van] in violation of [W.Va. Code] §18A-2-7 and §18A-4-8b(b)" and requesting "reinstatement to [the] full-time position at Van Elementary." The grievance was denied at Levels I and II and Respondent waived consideration at Level III. The claim was advanced to Level IV, where a hearing was held.[1]

[1]Grievant appealed to Level IV on November 13, 1989. A hearing scheduled for December 6 was continued at his request. Hearing was held January 3, 1990, and proposed findings of fact and conclusions of law were received February 2.

At hearing Grievant added the allegation that Respondent violated 42 U.S.C. §609(a)(1)(b), a provision of the Social Security Act (1984). Respondent denied any violation, as charged, and also contended the grievance was untimely filed.

The positions of the parties were altered finally by their proposals. Grievant's proposed findings of fact and conclusions of law do not allege any violation of W.Va. Code §18A-2-7, although he maintains his other contentions, and Respondent makes no reference to any untimeliness argument, but it adds the argument that this matter is moot.

The essential facts are not in dispute. Prior to the 1989-1990 school year Grievant was a full-time custodian at Van, working the evening shift, while another full-time custodian worked during the day. In Spring 1989 he was notified that, while he would retain his position at Van for one-half his workday, he would be placed on transfer for the rest of the time.[2] Grievant testified that at the transfer hearing the reduction of custodial services at Van from 2 full-time employees to 1½ was justified on the basis of "square footage," that is, that schools with greater floorspace than Van were served by 1½ janitors.

Manuel Arvon, Superintendent of Boone County Schools, testified that, due to budget restraints, it was necessary

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[2]There is no contention that Respondent failed to meet any of the timelines required by W.Va. Code §18A-2-7.

to cut custodial staffing (along with other positions); that the decision on where to make the cuts was essentially based on the relative square footage of the schools, although other factors were considered, such as changes in the populations at the schools; and that the decision was to reduce the custodial help at four schools, including Van, by one half-time position at each school. The transfer was effected; while Grievant continues to work one-half of his shift at Van, the last half of his workday is spent at Scott High School.

Grievant accepted the transfer until three CWEP (Community Work Experience Program) workers appeared at Van at the beginning of the school year and did some of the work that he had done. He testified that after the grievance was initiated the CWEP workers left, but he has no doubt that such workers will again be utilized unless Respondent is ordered not to use them. He also testified that he has been reassigned some of the duties the CWEP workers carried out.

Respondent's timeliness argument is not accepted.[3] While the record fails to demonstrate exactly when Grievant filed his claim, apparently he initiated this grievance shortly after the beginning of the school year, when the

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[3]It may be that the parties wished to abandon the arguments made at hearing and not repeated in their proposals, but, because that is not clear, they are addressed here. It is noted that, because both such contentions are rejected, addressing them has not prejudiced either party.

CWEP workers appeared. As Grievant testified, he had no reason to question the propriety of the transfer before then; only with their doing custodial work at Van did he start to believe that the transfer was unjustified. Where the facts giving rise to the claim are not or cannot be known earlier, upon learning those facts the claim may be brought.[4] The grievance has not been shown to have been untimely filed.

Respondent argues that the issue is moot because the CWEP workers are no longer at Van. Because Grievant asks for relief that he be given back his full-time position at Van,[5] pointing to the use of the workers as evidence that his transfer was improper, at least insofar as the propriety of the transfer is at issue the case is not mooted by the workers' disappearance.

However, there is absolutely no evidence indicating that the availability of CWEP workers influenced the

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[4]This ruling is similar to an issue of untimeliness in a claim of discrimination. See Holcomb v. W.Va. Dept. of Highways, Docket No. 89-DOH-398 (Oct. 31, 1989), where it was held that, since unequal treatment is the crux of a discrimination charge, a grievance alleging discrimination is timely if filed upon discovery that such different treatment had occurred.

[5]At hearing Grievant did state that he would be satisfied if Respondent would agree to exclude all CWEP workers as long as he is working one-half time at Van and to give any further custodial work at Van to a regular employee. That proposal, not accepted by Respondent, is considered an offer of settlement not altering Grievant's requested relief.

decision to transfer Grievant, as Grievant may recognize by not arguing in his proposals that there was any violation of W.Va. Code §18A-2-7.[6] Rather, the uncontradicted testimony that Respondent used straightforward calculations to determine how the cuts should be made and Mr. Arvon's further testimony, as follows, support that there was no such influence and no other abuse of discretion in Respondent's decision to transfer Grievant. Firstly, clarifying that CWEP workers are individuals eligible for public assistance who can subsidize their income by working a few hours a month under a federal program that pays their wages, Mr. Arvon testified that a board of education is not involved at all in contracting for them; that the CWEP workers in this case were hired by the principal of Van. When asked on cross-examination whether availability of CWEP workers was a factor in considering the cuts in custodial personnel, he categorically replied, "No," repeating that principals make the contracts; no approval of Respondent is even needed. He also noted that CWEP workers had been used at Van since

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[6] W.Va. Code §18A-2-7, providing for transfer of school personnel, "allows a superintendent of schools and a county board of education great discretion in their power to transfer, although that power must be exercised in good faith for the benefit of the school and not arbitrarily. State ex rel. Hawkins v. Tyler Co. Bd. of educ., 166 W.Va. 363, 275 S.E.2d 908 (1980); see also Morgan [v. Wood Co. Bd. of Educ., Docket No. 89-54-470 (Nov. 29, 1989)]; Edwards v. Berkeley Co. Bd. of Educ., Docket No. 89-02-234 (Nov. 28, 1989)." Post v. Harrison Co. Bd. of Educ., Docket No. 89-17-355 (Feb. 20, 1990).

1983, although there were not records of their use in the 1987-1988 and 1988-1989 school years. This testimony in particular establishes that there was no connection between the decision to cut custodial staff, resulting in Grievant's transfer, and the decision to use CWEP workers since Respondent made the first decision and the principal of Van the second.

Similarly, Grievant's further contention that Respondent violated 42 U.S.C. §609(a)(1)(A), which allows utilization of the CWEP only where the program "does not result in displacement of persons currently employed" also must fall, for the evidence does not establish that the program in any way caused Grievant's removal from the full-time position; it therefore did not result in his displacement.[7]

The further contentions Grievant makes in his proposals add up to one broad argument: If a board of education has custodial work that it would like done, it must employ regular service personnel to do it and cannot make use of programs such as CWEP.[8] Grievant relies on the definitions

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[7]It is actually questionable whether Grievant was "displaced" within the terms of the federal statute, for he still remains a full-time employee. Moreover, it is uncertain whether violation of such a federal statute can properly be the subject of this grievance proceeding. However, because, even if both of these issues were decided favorably to Grievant, he nevertheless has not established a violation of the federal statute, they need not be addressed at this time.

[8]It is arguable that Respondent's contention of (Footnote Continued)

of the custodian classification titles in W.Va. Code §18A-4-8,[9] the provision of W.Va. Code §18A-2-5 that a "board [of education] is authorized to employ such service personnel...as is deemed necessary for meeting the needs of the county school system," and the principle of law that

> School personnel positions must be posted and priority to filling said positions must be given to regular employees within the classification title of the vacancy on the basis of seniority, qualifications, and evaluations of past service[,]

citing W.Va. Code §18A-4-8b(b), and argues that they

> demonstrate that the Code authorizes the Respondent to hire school service personnel to clean its schools. When such a position is necessary, it must give priority to its own employees in the filling of said vacancy.

Grievant finally argues,

(Footnote Continued)
mootness may have validity with regard to this aspect of the grievance, although it is also arguable that, because Respondent can readily employ and then remove CWEP workers, the issue may be of a "fleeting and determinate nature," Israel v. W. Va. Secondary Schools Activities Commission, No. 18904 (W.Va. Dec. 20, 1989), and therefore, while technically moot, should be addressed. However, the issue of mootness need not be fully discussed or decided due to the outcome of this decision on the merits.

[9]Grievant simply quotes the following provisions:

> "Custodian I" means personnel employed to keep buildings clean and free of refuse.
> "Custodian II" means personnel employed as a watchman or groundsman.
> "Custodian III" means personnel employed to keep buildings clean and free of refuse, to operate the heating or cooling systems and to make minor repairs.
> "Custodian IV" means personnel employed as head custodians. In addition to providing services as defined in "Custodian III," their duties may include supervising other custodian personnel.

> A county board of education may not use independent contractors to perform jobs in areas in which the Legislature has provided classification titles. These jobs must be filled in the traditional employment manner and the individuals in question must be employees of the system. Interpretation of the State Superintendent of Schools, November 8, 1982; O'Connor v. Margolin, 296 S.E.2d 892 (W.Va. 1982); California School Employees Association v. Willits Unified School District of Mendocineo County, 52 Cal. Rptr. 765 (Cal. 1966).
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> Application: These cases and interpretation lend strength to the assertion that school service jobs are to be performed by school service personnel. Although the alternative to school service personnel dealt with was independent contractors, the same princip[le] should also apply to "free labor" from another agency.

In Duffle v. Kanawha Co. Bd. of Educ., Docket No. 20-87-190-2 (Oct. 26, 1987), service personnel alleged that the respondent therein violated Code §18A-2-5 in awarding summer maintenance work to a private contractor, relying on the same cases Grievant cites here. It was held,

> While a board of education is authorized by W.Va. Code, 18A-2-5 to employ such service personnel as is deemed necessary for meeting the needs of the school system, this statute does not make the employment of service personnel mandatory[.][10]

It must be emphasized that in Duffle at issue was whether the board of education had to employ service personnel or whether it could use its funds to hire a private contractor. This case even more clearly does not involve a violation of Code §18A-2-5 since no wages were paid by Respondent and therefore true employment of the workers is not involved.

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[10]In footnote Duffle also distinguished the cases Grievant relies on.

Because the CWEP workers' wages are paid by the program, not Respondent, it simply could accept their services much like accepting volunteer services which, it is noted, would also be proscribed were Grievant's argument accepted.[11]

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[11]Grievant apparently recognized that, if the grievance were granted on the basis that Respondent must employ regular service personnel for all its custodial work, reposting of the position would be the normal remedy, but contended that reinstatement was nevertheless required, arguing that the following provision of W.Va. Code §18A-4-8b(b) "demonstrates the exemption from the posting requirement for jobs held continuously by service employees": "The county board of education may not prohibit a service employee from retaining or continuing his employment in any positions or jobs held prior to the effective date of this section and thereafter." The contention is frivolous. Firstly, Grievant did not even assert that he has been in the position at Van since 1983, the provision's effective date. Secondly, the provision does not support his position in any case since "it is a statement that the criteria for determining seniority for filling service personnel positions, effective June 3, 1983, shall not penalize service employees holding jobs on that date since they were awarded those jobs at a time when a different method of calculating seniority was appropriate." Willcoxen v. Mason Co. Bd. of Educ., Docket No. 26-88-231 (Jan. 10, 1989).

Since Grievant's overall argument is rejected, resulting in denial of the grievance, it is not necessary to address Respondent's contention that Johnson v. Lincoln Co. Bd. of Educ., Docket No. 89-22-139 (June 28, 1989), where it was held that the Grievance Board was without authority to order the respondent board of education to extend the grievants' assignments from part-time to full-time and therefore could not grant the relief requested, controls in this matter. It is noted that, in Johnson, the full-time positions sought by the grievants had never existed, unlike the situation here.

In addition to the findings of fact and conclusions of law contained in the foregoing discussion, the following are appropriate:

Findings of Fact

1. Respondent, due to budget restraints, in Spring 1989 lowered the number of its custodial positions, along with others, basing its determination where to make the cuts primarily on the relative floor footage of the schools. Consequently, it determined that Van Elementary School, where Grievant was a full-time custodian, and three other schools should each lose one half-time custodial position. Grievant accordingly was transferred half-time to another school, retaining a half-shift at Van.

2. The principal of Van contracted with the federal Community Work Experience Program (CWEP) for CWEP workers to carry out some custodial functions at Van during the 1989-1990 school year.

3. CWEP workers had been used since 1983. Their salaries are not paid by Respondent.

4. Grievant initiated his grievance upon learning that the CWEP workers were doing custodial work at Van, including some of the duties he had previously carried out. During the fall, 1989, the three CWEP workers discontinued their work and some of the duties have been reassigned Grievant.

Conclusions of Law

1. Since Grievant had no reason to question the propriety of his transfer until he learned of the utilization of CWEP workers at Van and he initiated grievance proceedings immediately after so learning, his grievance was timely filed.

2. Because Grievant questions the propriety of his transfer and requests reinstatement to his full-time position at Van, that the CWEP participants no longer work at Van does not render this case moot.

3. There is no evidence supporting that the availability of CWEP workers influenced the decision to lower the number of custodians at Van and to transfer Grievant half-time; indeed, that Respondent used a straightforward calculation of floor space to determine where to make the cuts in custodial help and that it was the decision of the principal of Van to utilize CWEP workers, which did not require or get Respondent's approval, while it was Respondent's decision to transfer Grievant, negate any such nexus.

4. "There are no statutory provisions regulating the number of custodians required to maintain the schools in a sanitary condition and the boards of education have great latitude in the exercise of discretion in adopting formulae for that purpose. It is only when boards of education abuse their discretion or act in an arbitrary or capricious manner

in the exercise of this discretion that the decisions thereon can be reviewed in the grievance procedure." Blankenship v. Kanawha Co. Bd. of Educ., Docket No. 20-86-012 (Nov. 26, 1986).

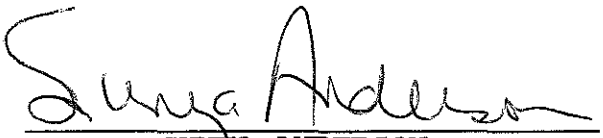
5. Because Grievant failed to establish that the use of CWEP workers caused him to be transferred, he also did not establish that the CWEP "program result[ed] in [his] displacement," contrary to 42 U.S.C. §609(a)(1)(A).

6. Grievant failed to establish that Respondent abused its discretion or violated W.Va. Code §18A-2-5, see Duffle v. Kanawha Co. Bd. of Educ., Docket No. 20-87-190-2 (Oct. 26, 1987), or any other law in utilizing the CWEP workers.

Accordingly, the grievance is **DENIED.**

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Boone 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, and should not be so named. Please advise this

office of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.



SUNYA ANDERSON
HEARING EXAMINER

Date: March 16, 1990