**THOMAS THOMAN**

**v. Docket No. 93-15-291**

**HANCOCK COUNTY BOARD OF EDUCATION**

**D E C I S I O N**

Grievant, employed by Respondent Hancock County Board of Education (HCBE) as a Custodian II, claims HCBE acted improperly with respect to post-transfer actions and the filling of certain custodial positions, effective the beginning of the 1993-94 school year. He alleges violations of W.Va. Code §§18A-4-8b, 18-29-2(m) and 18-29-2(o). As relief, Grievant, who desires a night-shift job, seeks reassignment to the same position and/or work shift he held during the 1992-93 school year or, in the alternative, that HCBE fill all custodial positions according to seniority. (See footnote 1)

The facts giving rise to this grievance were not in conten tion. Therefore, based on all matters of record, the followingfindings of facts are made.

Findings of Fact

1. During the 1992-93 school year, Grievant worked at HCBE's Vocational-Technical Center (Vo-Tech); he was assigned to work the night shift.

2. On or about March 30, 1993 Grievant was notified that he was being recommended for placement on the trans fer/unassigned list. All other custodians in the county re ceived similar notices.

3. The purpose of the mass transfer was to reorganize custodial staffing patterns throughout the school system. All custodial positions would be given extended employment terms (200-plus work days). In addition, some custodial positions were to be multi-classified as "Custodian III/General Mainte nance" at some schools and upgraded and titled as "Custodian IV/General Maintenance" at other, larger schools.

4. At some point in Spring 1993, Superintendent Daniel Curry met with the custodial staff on at least one occasion to explain the reorganization and to insure workers that disrup tions would be minimized via reassignments when possible. Essentially, workers were told they would be reassigned to their current positions, if available. See T2.26, 28-29.

5. To effectuate the custodial upgrade and reclassifica tion process, HCBE offered competency tests for "General Mainte nance" to all custodians who wished to take it. Any custodian who wished

to obtain one of the new multi-classified "Custodi an/General Maintenance" positions had to pass this test. 6. Grievant voluntarily took and passed the competency test as did most of the custodians.

7. A Custodian III who served at Vo-Tech on the day shift during the 1992-93 school year failed the test. This particular position was among those which were earmarked for an upgrade to "Custodian III/General Maintenance" for the 1993-94 school year.

8. HCBE posted all of the multi-classified "Custodi an/General Maintenance" positions as well as the remaining custodian positions in the county for the 1993-94 school year.

9. HCBE filled all of the multi-classified "Custodi an/General Maintenance" positions in the county for the 1993-94 school year on the basis of seniority, including the newly-des ignated position at Vo-Tech. Since the day shift Vo-Tech Custo dian III who failed the general maintenance test was not quali fied to fill her former position, now altered, that position was filled with the most senior qualified applicant, an individual who had been assigned to another school the previous 1992-93 school year.

10. After the multiclassified positions were filled, each custodian who had not been awarded one of the multiclassified positions was placed back in his or her old assignment, if it was still available. As a result, nearly all of the remaining custodians were reassigned to the same custodial positions they held the prior year.

11. The employment of the newcomer to Vo-Tech created an overage of custodians with respect to 1992-93's staff numbers. As a result, the day-shift Vo-Tech Custodian III who failed thegeneral maintenance test was simply assigned to fill the Custo dian II night shift position which Grievant formerly held, and Grievant, the least senior custodian at Vo-Tech, was not re called to his position at that school.

12. Grievant, still unassigned, was ultimately offered his choice of the only two available positions at schools other than Vo-Tech, neither of which was a night shift assignment. Grievant accepted one of the jobs.

Discussion

HCBE defended its actions in filling the custodial posi tions as being justified under the circumstances. However, Grievant's argument that the manner in which HCBE "filled" the posted custodial positions amounted to not only an unwarranted act of discrimination against him but also a prohibited act of favoritism upon the party who was permitted to take his posi tion, in violation of

Code §§18-29-2(m) and 18-29-2(o), respec tively, has some merit. (See footnote 2) Granted, HCBE had a legitimate busi ness interest in keeping its promise to workers to reassign when possible, when former jobs were available, and to avoid serious county-wide disruption in its custodial reorganization process, as it contends. However, HCBE's defense in this vein falls flat upon a close scrutiny of the factual situation.

HCBE promised all the custodians reassignment if their jobswere available; however, all workers except Grievant were treated according to the plan. Had HCBE acted properly in resolving the Vo-Tech dilemma, it would have reassigned Grievant to his position because the Custodian II night-shift slot was still available. To properly reassign Grievant and transfer the worker who lost her job would have caused no more or less disruption in the school system than to improperly assign the day-shift Custodian III to Grievant's night-shift Custodian II slot and transfer Grievant to another school and work shift. HCBE's error in this matter was to overlook the fact that the day-shift Custodian III at Vo-Tech lost her job, and it was she who had no job to which to return, not Grievant. Certainly, service personnel have been given no "bumping" rights in the school laws to date.

Moreover, notwithstanding HCBE's belief and practice that the least senior worker in a building should be the first to go to another site when an overage of workers occurs, this proce dure is only proper when down-sizing becomes necessary and all other factors are equal. What occurred at Vo-Tech was not a situation of lost enrollment and need to reduce overall staff numbers by eliminating one of two like-classified workers through transfer and reassignment of a worker to another site. Rather, an old position was eliminated and a new position created for the day shift at Vo-Tech; had the Vo-Tech day worker qualified for the job, she would have won the bid and no overagewould have occurred. (See footnote 3)

The overage worker in this case was not Grievant but the day-shift custodian who failed to qualify for the redesigned day-shift Custodian IV/General Maintenance position. Despite her seniority, that employee's right to remain at Vo-Tech became totally extinguished when the most-senior qualified applicant from another school was hired for the daytime slot. She was treated favorably in that she was permitted to displace Grievant and take Grievant's night-shift position instead of being given the same options offered to him, i.e., a seniority-based choice of the remaining, available custodial jobs outside of Vo-Tech. HCBE offered no legitimate explanation for this action.

In addition to the foregoing, the following conclusions of law are appropriate.

Conclusions of Law

1. Discrimination means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees. W.Va. Code §18-29-2(m).

2. Favoritism means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees. W.Va. Code §18-29- 2(o).

3. Grievant established that he was similarly situated toall other custodians placed on transfer and promised their old jobs, if they qualified and the jobs were still available, but was treated differently when he was not permitted to keep his job like the other reassigned custodians.

4. While HCBE had a legitimate business reason for avoiding unnecessary disruptions in its reorganization and assignment of custodial staff, that rationale did not explain the displacement of Grievant instead of the staffer at Vo-Tech who failed to qualify for her old position because the loss at Vo-Tech of either Grievant or the other custodian would have resulted in the disruption of only one worker.

5. HCBE's treatment of Grievant in this case amounted to an act of discrimination and favoritism for which it could articulate no legitimate business interest.

Accordingly, this grievance is **GRANTED**, and HCBE is Ordered to reassign Grievant to his 1992-93 custodian position and status at Vo-Tech.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Hancock 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 Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

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**NEDRA KOVAL**

**Administrative Law Judge**

**Date: May 24, 1994**

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*Footnote: 1 Grievant did not prevail at the lower grievance levels and appealed to level four where hearing was held on October 14, 1993. However, subsequent to the hearing, settlement negotiations ensued and the matter was held in abeyance. In March 1994, Grievant's counsel informed the undersigned negotiations had failed and also suggested a briefing schedule. Grievant filed fact/law proposals on April 19, 1994; HCBE filed a letter brief on May 2, 1994.*

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*Footnote: 2 Grievant is also correct that HCBE's method of filling the posted custodial positions was contrary to the hiring requirements of W.Va. Code §18A-4-8b. Grievant's argument that all of the custodian's jobs should have been filled pursuant to §18A-4-8b, according to seniority, or that all of the custodians, including him, who qualified for their former positions should have been so reassigned is correct and/or reasonable.*

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*Footnote: 3 The record reflects that the day-shift Vo-Tech custodian and a worker in another school were the only custodial staffers who were displaced by the filling of the new multiclassified positions.*