DARRELL J. GREGORY,

Grievant,

v. DOCKET NO. 95-29-006

MINGO COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Darrell J. ("Butch") Gregory, filed this grievance on or about November 29, 1994, alleging that "I am currently classified as a Custodian I but my assigned duties are that of a Custodian III. I ask to be re-classified as a Custodian III and awarded back pay for this school year." Following adverse decisions at the lower levels, Grievant advanced an appeal to Level IV on January 4, 1995. A hearing was held on May 2, 1995, and following the receipt of post-hearing submissions, this case became mature on June 10, 1995. (See footnote 1)

Grievant has been employed by Respondent as a Custodian I at Williamson Grade School since the beginning of the 1993-94 school year. During the 1993-94 school year, Principal Steve Cantees assigned Grievant to work the third shift, or 11:00 p.m. to 7:00a.m. Grievant's duties included cleaning nine classrooms, a stairwell, hall, and cafeteria, as well as maintaining the furnace in the evening and on alternative weekends. (See footnote 2)

By letter dated June 6, 1994, Grievant, through his representative, requested of Assistant Superintendent Johnny Fullen, that he be reclassified to a Custodian III due to his assignment to maintain the furnace. Ex. 1. Mr. Fullen discussed this request with the Superintendent and wondered why Grievant was performing furnace duties when Williamson Grade School already had a Custodian III who was supposed to perform those duties.

Williamson Grade School was to get a new principal in November 1994, and Mr. Fullen decided to wait and discuss the custodian situation with the new principal upon his arrival. The new principal, Randy Keathley, arrived on November 21, 1994. Grievant requested of Mr. Keathley that he be reclassified, and Mr. Keathley wrote a memorandum to Mr. Fullen on November 28, 1994, relaying

Grievant's request. Ex. 2.

Subsequently, Mr. Fullen met with Principal Keathley and Mrs. Peggy Mays, the Custodian III, to discuss why Grievant was performing furnace duties, and indicated to Mr. Keathley that the situation needed to be corrected. Mr. Keathley wrote Grievant a memorandum on January 19, 1995, informing him that he was not toperform furnace duties any longer. Ex. 5. Grievant ceased maintaining the furnace on or about that date. (See footnote 3)

W. Va. Code § 18A-4-8 defines Custodian I and III as follows:

> "Custodian I" means personnel employed to keep buildings clean and free of refuse.

> "Custodian III" means personnel employed to keep buildings clean and free of refuse, to operate the heating and cooling systems and to make minor repairs.

That Code section further provides that:

> The county boards shall review each service personnel employee job classification annually and shall reclassify all service employees as required by such job classifications. The state superintendent of schools is hereby authorized to withhold state funds appropriated pursuant to this article for salaries for service personnel who are improperly classified by such county boards. Further, he shall order county boards to correct immediately any improper classification matter and with the assistance of the attorney general shall take any legal action necessary against any county board to enforce such order.

An school service employee who establishes, by a preponderance of the evidence, that he is performing the duties of a higher Code § 18A-4-8 classification than that under which he is officially categorized, is entitled to reclassification. Hatfield v. Mingo County Bd. of Educ., Docket No. 91-29-077 (Apr. 15, 1991); Holliday v. Marshall County Bd. of Educ., Docket No. 89-25-376 (Nov. 30, 1989); Scarberry v. Logan County Bd. of Educ., Docket No. 89-23-63 (Oct. 30, 1989). However, simply because an employee is required to undertake some responsibilities normally associated with ahigher classification, even regularly, does not render him misclassified per se. Hatfield, supra.

In the instant case, Grievant presented credible evidence that he performed the duties of a Custodian III in maintaining the furnace during the 1993-94 school year and up to January 19, 1995.

While Respondent's counsel attempted to cast doubt on whether Grievant actually performed those duties, there did not seem to be any serious dispute from Assistant Superintendent Fullen or Principal Keathley that Grievant did indeed perform those duties. The evidence also shows that Assistant Superintendent Fullen and Principal Keathley took steps to correct the misclassification situation by ordering Grievant to refrain from performing any furnace-related duties in the future.

Findings of Fact

1. Grievant has been employed as a Custodian I at Respondent's Williamson Grade School since the beginning of the 1993-94 school year.
2. During the 1993-94 school year, and up to January 19, 1995, of the 1994-95 school year, Grievant maintained the school's furnace in the evenings and alternatively on the weekends.

Conclusions of Law

1. In order to prevail in a misclassification grievance, an employee must establish, by a preponderance of the evidence, that his duties more closely match those of another classification than that under which his position is categorized. Savilla v. Putnam County Bd. of Educ., Docket No. 89-40-546 (Dec. 21, 1989).
2. For the period of the 1993-94 school year, up until January 19, 1995, Grievant's duties were primarily those of a "Custodian III" as that position is defined by W. Va. Code § 18A-4-8.

Accordingly, this grievance is **GRANTED**. Respondent is ordered to compensate Grievant as if he had been officially classified as a Custodian III from the beginning of the 1994-95 school year until January 19, 1995, less any appropriate offset, and to amend his personnel records to reflect his service as a Custodian III for that period.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mingo 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 intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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MARY JO SWARTZ

Administrative Law Judge

Dated: July 19, 1995

Footnote: 1 *Grievant submitted proposed findings of fact and conclusions of law on June 2, 1995. No submissions were received from Respondent.*

Footnote: 2 *From approximately November 1993 until April or May, 1994, Grievant was on workers' compensation due to a work-related injury. When Grievant resumed work in April or May, 1994, he resumed his duties, including maintaining the furnace.*

Footnote: 3 *Grievant contends that he is still maintaining the furnace on the second shift. However, it is clear that Mr. Keathley and Mr. Fullen instructed Grievant to cease performing furnace duties in January, 1995. Thus, any furnace duties Grievant may be currently performing are voluntary in nature, and not at the direction of any school official.*