JEFFREY FULK

v. Docket No. 94-30-616

MONONGALIA COUNTY BOARD OF EDUCATION

DECISION

Grievant, Jeffrey Fulk, employed by the Monongalia County Board of Education (Board) as a substitute custodian, filed a level one grievance on September 7, 1994, in which he alleged a violation of W. Va. Code §18A-4-8b when a substitute with less seniority was placed into a regular position of custodian at Westwood Middle School. The grievance was denied at levels one and two. Grievant bypassed level three and advanced his appeal to level four on October 21, 1994. An evidentiary hearing was conducted on December 2, 1994, and the matter became mature for decision with Grievant's submission of proposed findings of fact and conclusions of law on January 6, 1995. (See footnote 1)

A review of the record establishes the following findingsof fact.

1. Grievant was employed by the Board as a substitute custodian in July 1994.

2. By posting dated July 14, 1994, the Board announced vacancies for two positions of Custodian III at Westwood Middle School. The positions were identified as ten-month, full-time assignments, with a work schedule from 3:00 p.m. to 11:00 p.m. One Custodian III position was filled.

3. By posting dated July 20, 1994, the Board reposted the remaining vacancy for Custodian III at Westwood Middle School. The position was identified as a ten-month, full-time assignment with a four, ten-hour day (3:00 p.m. to 1:00 a.m.) work schedule.

4. There is no dispute that the position posted on July 20, 1994, was one of the two positions posted on July 14, 1994.

5. Grievant applied for both positions posted on July 14, 1994.

6. Grievant did not file an application for the July 20, 1994, posting.

7. The first position was awarded to a more senior applicant and is not contested by Grievant.

8. The second position was awarded, effective August 11, 1994, to a substitute custodian with less seniority than Grievant.

9. The Board has previously "rolled over" applicationsfrom an initial posting when a position is reposted. In this instance the applications were not "rolled over."

Grievant argues that the alteration of the daily work schedule from five, eight-hour days to four, ten-hour days does not result in the creation of a new position. Grievant notes that the location/school, classification, pay grade, annual salary, and other benefits remain the same. Because a board of education may, by statute, change the daily schedule or make an alteration to the employment term of a service personnel employee with no reposting requirement, Grievant argues that no new position was created and that his application should have been "rolled over" to the second posting.

The Board asserts that the reposting was proper in that the different work schedule created essentially a separate and distinct position from that posted earlier in July. Although "roll overs" had occurred in the past, the Board distinguishes this situation in that the reposting involved revised criteria while those situations in which applications were rolled over involved positions reposted only to correct mistakes. The Board concludes that it properly exercised its substantial discretion in matters relating to personnel matters by reposting a newly-created position in compliance with W. Va. Code §18A-4-8b.

As noted by Grievant in his proposed findings and conclusions, several statutory provisions address schedulechanges and alteration of employment terms for service personnel. W. Va. Code §18A-4-8a provides that "[n]o service employee shall have his or her daily work schedule changed during the school year without such employee's written consent . . . ." Conversely, this provision permits a change, with the employee's consent.

W. Va. Code §18A-2-6 establishes a continuing contract for service employees upon completion of three years of acceptable employment. A continuing contract is to remain in effect "except as modified by mutual consent of the school board and the employee . . . ." Again, this provision would clearly permit an employee to agree to a change in his assignment.

W. Va. Code §18A-4-19(b) expressly states that any alteration of an employment contract of a service personnel employee which changes the number of days in the employment term or reduces or eliminates the local salary supplement or benefits due to the defeat of a special levy, does not

create a new position.

These provisions illustrate that certain changes may be made to a service personnel employee's daily schedule and employment term; however, implicitly, they apply to current employees. None of the cited statutes specifically address the issue in the context of posting. Grievant's argument that two postings which listed vacancies with the same classification, pay grade, employment term, and salary are forthe same position, is not unreasonable. Neither can it be determined that the Board's determination that two like positions with significantly different work schedules were two different positions.

Some direction is provided in W. Va. Code §18A-4-8b which requires boards of education to post and date notices of all job vacancies. Notices "shall include the job description, the period of employment, the amount of pay and any benefits and other information that is helpful to the employees to understand the particulars of the job." Hours per day/days per week clearly is information helpful to the understanding of the job. Further, the difference between a four and a five-day work week is of such significance that it may influence whether an individual will apply for any given position. Based upon those considerations, it cannot be determined that the Board violated any statutory provisions or otherwise acted beyond its authority by determining a new position was created. (See footnote 2)

In addition to the foregoing findings of fact and discussion it is appropriate to make the following formal conclusions of law.

CONCLUSIONS OF LAW

1. County boards of education have substantial discretion in matters relating to personnel actions; however, this discretion must be exercised reasonably, in the best interest of the schools, and in a manner which is not arbitrary and capricious. Board of Educ. v. Enoch, 186 W.Va. 712, 414 S.E.2d 630 (1992).

2. Grievant has failed to prove by a preponderance of the evidence that the Board acted in statutory violation or was arbitrary and capricious in determining that revising the work schedule of a posted vacancy resulted in a different position which required reposting.

Accordingly, the grievance is DENIED.

DATED APRIL 30, 1995 SUE KELLER, SENIOR ADMN. LAW JUDGE

Footnote: 1*The Board notified the undersigned by letter dated December 15, 1994, that additional submissions were unnecessary and that it chose to rely upon the record.*

Footnote: 2*Although the practice of "rolling over" applications is not in question, it is noted that the Board should proceed consistently with this practice. Apparently the prior instances involving such action is not widely known or relied upon because numerous individuals who applied for the position posted on July 14, reapplied for the July 20 posting.*