CARL POLING

v. DOCKET NO. 95-46-444

TAYLOR COUNTY BOARD OF EDUCATION

DECISION

This is a grievance filed by Carl Poling (Grievant), senior custodian at Taylor County Middle School, against his employer, the Taylor County Board of Education (Respondent). Grievant alleges that:

> [r]espondent offered and permitted substitute custodians to perform an extra work assignment at Grafton High School during the Labor Day weekend (September 2, 3, 4, 1995). The Respondent did not offer this assignment to Grievant, the most senior custodian employed by the Respondent, although it did offer this assignment to custodians regularly employed at Grafton High School. Grievant alleges that this assignment is an extra-duty assignment pursuant to West Virginia Code §18A-4-8b and requests retroactive wages and benefits.

As relief, Grievant requests compensation for the three daysof work which he lost because Respondent failed to offer him the opportunity to work September 2-4, 1995.

After the grievance was denied at Level I on September 8, 1995, Grievant appealed to Level II where a hearing was held on September 15, 1995. Following an adverse decision at Level II on September 27, 1995, Grievant appealed to Level III where the Board waived the Level III hearing pursuant to W.Va. Code §18-29-4(c). On November 16, 1995, a Level IV evidentiary hearing was held at the Grievance Board's office in Elkins and this case became mature on December 15, 1995, upon receipt of the reply brief submitted by Grievant's counsel.

BACKGROUND FACTS

Prior to the commencement of the 1995-1996 school year, a major asbestos abatement program had been undertaken and completed during the summer months which included asbestos floor tile

being removed from Grafton High School during building renovations. As a result, during the week of August 28, 1995, the first week of school, some non-asbestos dust was present at the school. School officials were aware that a dust problem existed and custodians of the high school had scrubbed the halls early in the week in response to the problem. In addition, several shop vacuums were purchased to help eliminate any developing dust.

Mr. Greg Cartwright, Principal of Grafton High School, spoke with Dr. Teets, Superintendent of Taylor County Schools, on August 28 or 29, 1995, regarding the dust problem at Grafton High School. The school's custodians cleaned and sprayed areas of the school with water in order to control the dust on Wednesday, August 30, 1995. Mr. Cartwright also spoke with Mr. Kermit Bias, Assistant Superintendent for Taylor County, on Tuesday, August 29, 1995, regarding the problems at the school with the dust.

On Friday, September 1, 1995, the first week of school, at approximately 3:30 p.m., Dr. Teets met with Mr. Cartwright, a group of teachers and two board members at Grafton High School to address complaints about the extreme heat at the school. During the meeting, persons complained about: (1) contact lens\eye irritation, (2) aggravated asthma\breathing problems and (3) expressed concern that the dust itself was a health concern, even though the dust was, in fact, not asbestos dust. In addition to the health concerns, Dr. Teets testified that the dust presented a potential threat to equipment such as the computers and the heating system at the school.

According to Dr. Teets, the consensus after the meeting was that the accumulation of dust in the rooms and hallway of the Grafton High School had become an "emergency situation" and needed to be cleaned over the Labor Day weekend, September 2-4, 1995. Whereupon, at approximately 4:00 p.m., Dr. Teets called Mr. Bias at his office and directed Mr. Bias to obtain the employees to clean the building.

Mr. Cartwright, principal of Grafton High School, offered the assignment to clean the school to the regularly employed custodians assigned to Grafton High School, but all declined this offer.

Thereafter, Mr. Bias gave a list of substitute custodians to Mr. Cartwright with instructions to contact the substitutes in the order their name appeared on the list. Mr. Cartwright and Mr. Bias spoke later that same evening while attending the high school football game around 9:30 p.m. Mr. Bias left the game with the impression that substitute custodians had not yet been obtained to work during the weekend. Although Mr. Cartwright began contacting substitute custodians that Friday, he

was not able to secure all necessary custodial help until Saturday afternoon, September 2, 1995.

Two substitute custodians, Mr. Charles Watkins and Ms. Judy Spencer were contacted by Mr. Cartwright late Friday evening and reported to Grafton High School on Saturday, September 2, 1995. These two custodians worked on Saturday, Sunday and Monday, September 2, 3, 4, 1995, respectively. A third custodian, Mr. Clyde Spring, who is normally scheduled to work at Grafton High School on Saturdays also worked on Saturday, September 2, 1995. A third substitute custodian, Russ Isner, was contacted Saturday afternoon and worked on Sunday and Monday, September 3 and 4, 1995. Therefore, there were three custodians working each of the three days, to ensure that the dust would be eliminated prior to classes resuming on September 5, 1995.

Respondent did not contact and offer the Grafton High School assignment to any of its regular custodians employed at other schools within the county. Therefore, Grievant was not contacted by Respondent and offered an opportunity to work September 2-4,1995, even though Grievant, Respondent's most senior regularly employed custodian, was available and could have been easily contacted or notified by the Respondent.

DISCUSSION

The initial determination which must be made is whether the three-day cleaning assignment at Grafton High School which occurred during the extended Labor Day weekend was an extra-duty assignment subject to the provisions of W.Va. Code §18A-4-8b. The cleaning assignment at Grafton High School resulted from a need to thoroughly clean the building due to an accumulation of dust resulting from the renovation project. Respondent ordered a one-time cleaning of the high school over a three day holiday weekend in an attempt to address this problem. This assignment consisted of additional cleaning duties over and above the normal cleaning duties performed by the custodians employed at Grafton High School. These duties were performed outside the scope of the normal working hours of the regularly employed custodians and over a weekend when no custodians employed by Respondent were scheduled to work with the exception of Clyde Spring. Mr. Spring, who is employed at the high school, worked on Saturday, September 2, 1995, in addition to the substitute custodians that were brought in to clean the high school during that weekend.

The Code identifies the following three separate categories of additional duties: (1) extracurricular duties which are defined byW.Va. Code §18A-4-16(1) (See footnote 1) ; (2) extra-duty assignments which are defined by W.Va. Code §18A-4-8b (See footnote 2) ; and (3) supplemental school service

personnel assignments\vacancies which are referred to in W.Va. Code §18A-4-16(5) but are not defined in the Code. While the Code is silent as to whether other categories may or can exist, it fails to specify any other additional categories. However, the Code clearly dictates that W.Va. Code §18A-4-8b applies to each of the three aforementioned categories. (See footnote 3)

While neither party contends that the Grafton High School cleaning assignment was either an extracurricular duty or a supplemental school service personnel assignment, Grievant argues that the cleaning assignment was an extra-duty assignment.Resourcefully though, Respondent, when briefing the case, creates a fourth category based upon a February 2, 1995, State Superintendent's Opinion. Said Opinion states that "a board of education does not have to award an extra job to the most senior bidder when to do so would be contrary to the interest and safety of the school children involved or similar reasons." However, Respondent's argument that its action was justified by the circumstances at Grafton High School fails because it was never explained how the interest and safety of the school children was advanced or protected by Respondent's offering of these extra-duties to substitute custodians. Nor did Respondent ever establish or explain why it would not have accomplished its goals as rapidly by contacting its regular custodians as opposed to contacting substitute custodians. Respondent simply failed to proceed correctly, because it could have just as easily called and offered these extra-duties in accordance with W.Va. Code §18A-4-8b (See footnote 4) to regular custodians, including Grievant.

The September 2-4, 1995, cleaning assignment at Grafton High School was clearly an extra-duty assignment. Additional cleaning of a school is something which occurs periodically or occasionally and a county board should be prepared to properly "call-out" employees as the situation may require. It should further be noted that activities such as field trips and proms do not occur on aregular basis and often do not occur more than once a year.

Respondent asserts that its response was proper due to the "emergency" nature of the situation at Grafton High School. However, W.Va. Code §18-4-10(10), in delineating a county superintendent's powers and duties, states that a county superintendent shall:

> [a]ct in case of emergency as the best interests of the school demand: Provided, That an emergency as contemplated in this section shall be limited to an unforeseeable, catastrophic event including natural disaster or act of war: Provided, however, That nothing in this section shall be construed as granting the county superintendent authority to override any statutory or constitutional provision in the exercise of said

emergency power except where such authority is specifically granted in the particular code section.

The Supreme Court of Appeals for West Virginia, in Randolph Co. Bd. of Ed. v. Scalia, 387 S.E.2d 524 (W.Va. 1989), at 527, set forth the essential elements of an emergency as: (1) that the condition be unforeseen or unanticipated, and (2) that it calls for immediate action.

Neither of the these two prongs of the test are met by Respondent. Under the first prong, Respondent's argument fails because Respondent was well aware of the problem with the dust accumulation at the school during the previous week as there had been at least two telephone calls from the principal of Grafton High School to the Respondent's superintendent and assistant superintendent. Furthermore, shop vacuums had been purchased and custodians at the high school attempted to eliminate the dust bycleaning and spraying areas of the high school with water during the first week of classes.

The second prong of the test seeks to determine if immediate action as required. The evidence showed that the principal and the assistant superintendent discussed this "emergency" while attending the Friday night football game. Urgent circumstances of the type alluded to in W.Va. Code §18-4-10(10) are not present in this case. Granted Respondent had a substantial task which needed to be completed over the three day weekend, but that simply does not convert the cleaning assignment into an emergency situation, catastrophic event, natural disaster or act of war.

Furthermore, this Grievance Board has on prior occasions found the following situations to be extra-duty assignments: (1) the securing of a building outside of normal working hours so that custodians could leave the building (See footnote 5), and (2) the performance of an extra bus run in order to take children home before their regularly scheduled dismissal time due to a frozen water pump (See footnote 6).

It should also be noted that W. Va. Code §18A-4-8b makes no provision for the allocation of extra-duty assignments based upon an employee's site or job location. Rather W. Va. Code §18A-4-8b states that seniority within a particular category of employment shall determine who receives first priority.

In summary, since it has been determined that the Grafton HighSchool Labor Day Weekend cleaning assignment was an extra-duty assignment, and that Respondent's emergency situation allegation fails, the undersigned finds that Respondent acted in an arbitrary and capricious fashion

when it did not adhere to the dictates of W.Va. Code §18A-4-8b in determining the order in which custodians would be offered the extra-duty assignment.

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

Findings of Fact

1. Grievant is employed by Respondent as a regular full-time custodian and is currently assigned to Taylor County Middle School. 2. Grievant is Respondent's most senior custodian, having been employed by the Respondent as a custodian for 24 years.

3. Grievant's regularly assigned work shift for the 1995-1996 school year is Monday through Friday, 6 a.m. to 2 p.m. Grievant completed his regularly assigned shift on Friday, September 1, 1995, and went home immediately after the completion of his shift and either remained there for the evening or had left on his answering machine. Furthermore, it takes Grievant approximately five minutes to travel from the middle school to his home.

4. Grievant was available and was willing to work during the Labor Day weekend on September 2, 3, and 4, 1995, but Respondent failed to attempt to notify him.

5. Respondent did not contact and offer the Grafton Highassignment to any of its regular custodians employed at other schools within the county.

6. Respondent employed substitute custodians September 2-4, 1995, for a cleaning assignment at Grafton High School.

Conclusions of Law

1. In a nondisciplinary action, Grievant has the burden of proving his case by a preponderance of the evidence. Napier v. Logan Co. Bd. of Educ., Docket No. 94-23-541 (Apr. 25, 1995).

2. School personnel laws and regulations are to be strictly construed in favor of the employee. Morgan v. Pizzino, 256 S.E.2d 592 (W.Va. 1979), Yoho v. Marshall Co. Bd. of Educ., Docket No. 25-86-073-2 (Dec. 3, 1986).

3. W.Va. Code §18A-4-8b, makes no provision for the allocation of extra-duty assignments based upon an employee's site or job location.

4. W.Va. Code §18A-4-8b defines extra-duty assignments "as irregular jobs that occur periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips."

5. The cleaning operation at Grafton High School over Labor Day weekend, September 2-4, 1995, was an extra-duty assignment within the meaning of W.Va. Code 18A-4-8b.

6. Grievant has proved beyond a preponderance of the evidence that he is entitled to compensation for the three days of cleaning which Respondent failed to offer to him on September 2-4, 1995.

Accordingly, this grievance is GRANTED, and Respondent is ORDERED to compensate Grievant for three days work as if Grievant had worked September 2-4, 1995, within thirty (30) days of receipt of this decision.

DATED: 12/29/95 JEFFREY N. WEATHERHOLT, ADMN. LAW JUDGE

Footnote: 1W.Va. Code §18A-4-16(1) in pertinent part states that extracurricular duties shall mean, but not be limited to, any activities that occur at times other than regularly scheduled working hours, which include the instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students, and which occur on a regularly scheduled basis.

Footnote: 2W.Va. Code §18A-4-8b defines extra-duty assignments "as irregular jobs that occur periodically or occasionally such as, but not limited to, field trips, athletic events, proms, banquets and band festival trips".

Footnote: 3W.Va. Code §18A-4-8b requires states that [n]otwithstanding any other provisions of this chapter to the contrary, decisions affecting such personnel with respect to extra-duty assignments shall be made in the following manner: An employee with the greatest length of service time in a particular category of employment shall be given priority in accepting such assignments, followed by other fellow employees on a rotating basis according to the length of their service time until all such employees have had an opportunity to perform similar assignments. The cycle then shall be repeated ... ". Furthermore, W.Va. Code §18A-4-16(5) mandates that "[t]he board of education shall fill extracurricular and supplemental school service personnel assignments and vacancies in accordance with section eight-b [§18A-4-8b], article four of this chapter ... ".

Footnote: 4It should also be noted that W. Va. Code §18A-4-8b makes no provision for the allocation of extra-duty assignments based upon an employee's site or job location.

Footnote: 5Sullivan v. Jackson Co. Bd. of Educ., Docket No. 93-18-369 (Jan. 26, 1994).

Footnote: 6 *Thomas, et al. v. Doddridge Co. Bd. of Educ.*, *Docket No. 90-09-072 (July 31, 1990).*