STEVE STRICKLAND,

Grievant,

v. DOCKET NO. 95-20-189

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Steve Strickland, filed this grievance on March 6, 1995, protesting his placement on the transfer list for the upcoming 1995-96 school year. Specifically, Grievant, a Custodian I, contends that he has more seniority than a Custodian III, who is being retained, in violation of Board policy. Following adverse decisions at the lower levels, Grievant appealed to Level IV on May 16, 1995. Hearing was held on July 18, 1995 and the parties were invited to submit proposed findings of fact and conclusions of law by August 1, 1995, at which time this case became mature for decision.

The material facts in this case are not in dispute and are set forth in the following findings.

Findings of Fact

1. Grievant has been employed by Respondent Kanawha County Board of Education as a Custodian I at Elkview Middle School for approximately 11-1/2 years.

2. During the 1994-95 school year, Respondent initiated a new policy that modified the square footage assigned per custodian from 17,500 to 20,000 square feet. In connection with the schools that were identified to lose custodial staff as a result of the modification, the Custodian I grade of custodial staff was identified for reduction or transfer across the county.

3. This modification resulted in a need to reduce the number of custodians at Elkview Middle School from 5 full-time custodians to 4 full-time and 1 half-time custodial positions.

4. Grievant was the least senior Custodian I at Elkview Middle School during the 1994-95

school year.

5. Grievant was notified that he was being placed on the transfer list by letter dated April 7, 1995. The notification was in compliance with the transfer statute, W. Va. Code § 18A-2-7.

6. Ira Utt is a Custodian III at Elkview Middle School and has less seniority than Grievant as a custodian. (Grievant has 11-1/2 years and Utt has approximately 8 years of custodial seniority.) Mr. Utt did not receive a transfer notice.

7. Gary Riley is a Custodian I at the school and has more seniority than Grievant. Riley is assigned to the day shift. Grievant is assigned to the night shift.

8. The position to be eliminated is the day shift Custodian I position held by Riley. He has been informed that for the 1995-96 school year he will move to the evening shift position held by Grievant during the 1994-95 school year.

Discussion

Grievant contends that his transfer violates Respondent's policy on transferring service personnel. Respondent admits that it relied on its transfer policy in identifying Grievant for transfer. Respondent's transfer policy for service personnel, Adm. Reg. 35.00, states:

> A 35.01 Reduction - If a determination is made to reduce a service position from a school, the employee assigned to the position to be reduced shall be recommended for transfer. For example, if a half-time kindergarten aide position is recommended to be reduced for the next ensuing school year, the aide currently assigned to the position will be recommended for transfer.
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> A 35.02 Seniority - Seniority will only be a factor when a reduction is recommended where two or more service personnel are employed in equivalent positions, in which case the least senior employee will be recommended for transfer. For example, if a full-time Custodian I position is recommended to be reduced for the next ensuing school year and the school currently has three full-time Custodians I, the least senior full-time Custodian I will be recommended for transfer. Seniority will be determined by the date service commenced with the county within a classification, less any time away from work due to reduction in force, resignation, or a leave of absence not related to a compensable on-the-job injury.

Jt. Ex. 1.

Grievant alleges that: (1) the position identified for reduction was a day-shift Custodian I position,

and Grievant worked on the night-shift, thus his transfer was in violation of Section A 35.01 of the transfer policy; and (2) he is not the least seniorof all custodial staff at Elkview Middle School, and thus Respondent violated Section A 35.02 of its policy in identifying him for transfer.

Respondent maintains that custodial positions are not shift-specific and it is within the discretion of the principals to make custodial assignments, thus, while the day-shift custodial staff will be reduced by one-half position, it is not improper for Grievant, who worked on the night-shift, to be reduced. The undersigned agrees with Respondent that non-shift specific positions, such as custodians or cooks can be reassigned by principals based upon the needs of the school (see e.g., Slone v. Cabell County Bd. of Educ., Docket No. 95-06-055 (July 24, 1995). Thus, if this were the only factor to be addressed, Grievant would not prevail in this instance.

However, after a careful review of Respondent's policy and the applicable statutes dealing with seniority of school service personnel, the undersigned finds that Grievant must prevail in this grievance with respect to the seniority provision of Respondent's policy.

Respondent's policy and the example contained therein reflect Respondent's assertion that it was proper to identify a specific grade of classification to be reduced, e.g., Custodian I, and then transfer the individual within that grade with the least seniority. A review of this Board's caselaw reveals that at one time that theory prevailed. See Meeks v. Kanawha County Bd. of Educ., Docket No. 92-20-204b (Sept. 25, 1992) ("Meeks I"), and its companioncase, Meeks v. Kanawha County Bd. of Educ., Docket No. 92-20-249 (Sept. 25, 1992) ("Meeks II").

Similar to the instant case, Mr. Meeks was a Heating and Air Conditioning Mechanic (HEAC) I who was reduced in force, while less senior HEAC II's retained their positions. Mr. Meeks claimed it was a violation of statute to reduce him while retaining less senior HEACs, even though they were in a higher grade of the classification.

W. Va. Code § 18A-4-8b, outlining seniority rights for school service personnel, provides, in pertinent part:

> Should a county board of education be required to reduce the number of employees within a particular job classification, the employee with the least amount of seniority within that classification or grades of classification shall be properly released and employed in a different grade of that classification if there is a job vacancy: Provided, that if there is no job vacancy for employment within such classification or grades of classification, he shall be employed in any other job classification which he previously held with the county board [of education] if there is a vacancy and shall retain any seniority accrued in such job classification or grade of classification.

. . .

> Each class title listed in . . . [Code §] 18A-4-8 shall be considered a separate classification category of employment for service personnel, except for those class titles having Roman numeral designations, which shall be considered a single classification of employment.

Mr. Meeks maintained that the HEAC classification category should be considered a single classification of employment because it was designated by Roman numerals. Thus, because he was not the least senior of all HEAC employees, it was a violation of the statute to reduce his employment. The Respondent argued that thatprovision only applied to hirings and promotions, not reductions, and the Administrative Law Judge agreed in Meeks I, supra.

However, since the decision in Meeks I, the Legislature has enacted W. Va. Code § 18A-4-8g (1993), regarding how seniority for school service personnel is determined, which states, in pertinent part:

> For all purposes, including the filling of vacancies and reduction in force, seniority shall be accumulated within particular classification categories of employment as those classification categories are referred to in section eight-e ([§ 18a-4-8e] of this article: Provided, That when implementing a reduction in force, an employee with the least seniority within a particular classification category shall be properly released and placed on the preferred recall list. The particular classification title held by an employee within the classification category shall not be taken into consideration when implementing a reduction in force. (Emphasis added).

Code § 18A-4-8e, dealing with competency testing for service personnel, mirrors, in pertinent part, the section of 18A-4-8b cited by the Administrative Law Judge in Meeks I:

> Each classification title defined and listed shall be considered a separate classification category of employment for service personnel and shall have a separate competency test, except for those class titles having Roman numeral designations, which shall be considered a single classification of employment and shall have a single competency test. (Emphasis added).

. . .

> Once an employee passes the competency test of a classification title, said applicant shall be fully qualified to fill vacancies in that classification category of employment as provided in section eight-b
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> [§ 18A-4-8b] of this article and shall not be required to take the competency test again.

Thus, Code §§ 18A-4-8e and 18A-4-8g, when read in pari materia, support Grievant's contention that he is not the least-senior employee within the custodial classification category at Elkview Middle School, and further provide that he is qualified to fill any position within that classification category. The enactment of those Code sections serves to clarify and modify this Board's previous decisions in Meeks I and Meeks II, that an employee shall only be considered equal within the classification category for hiring and promotion purposes. As noted above, Code § 18A-4-8g specifically provides that the seniority of all employees within a classification category shall be considered "For all purposes, including the filling of vacancies and reduction in force, . . .". (Emphasis added.)

Applying the above statutory analysis to Respondent's transfer policy for service personnel, it is clear that Respondent acted in error in placing Grievant, not the least senior custodial employee at Elkview Middle School, on the transfer list. In actuality, the first sentence of Respondent's Policy A 35.02 is a correct statement of the law as it now stands. It is merely the example used to demonstrate that policy that is now in error. The above-cited statutes make it clear that a decision to reduce custodial staff must entail a review of all custodial employees, regardless of grade within classification, to determine who has the least amount of seniority, and that it is inappropriate to single out a particular grade within the custodial staff for reduction or transfer.

Conclusions of Law

1. For all purposes, including the filling of vacancies and reduction in force, Custodian I, II, III and IV is considered one classification category of employment. See W. Va. Code §§ 18A-4-8b, 18A-4-8e, 18A-4-8g.

2. Principals have some latitude when assigning duties to like-classified service personnel within their schools. Slone, supra; Ennis v. Ohio County Bd. of Educ., Docket No. 93-35-516 (May 31, 1994); Gemmer v. Wood County Bd. of Educ., Docket No. 91-54-274 (Dec. 23, 1991). Thus, it was not improper for Respondent to identify a day-shift custodial position for reduction, yet look to the night-shift staff for the least senior employee to transfer.

3. Grievant has proven by a preponderance of the evidence that he has more seniority than other currently employed individuals within the Custodial classification category of employment at Elkview Middle School, thus his transfer is in violation of the above-cited Code sections and Respondent's policy on transfer of service personnel.

Accordingly, this grievance is **GRANTED**. Respondent is hereby **ORDERED** to rescind Grievant's notice of transfer for the 1995-96 school year and reinstate him to his position as Custodian I at Elkview Middle School.

Any party may appeal this decision to the Circuit Court of Kanawha 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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MARY JO SWARTZ

Administrative Law Judge

Date: August 8, 1995