

LEWIS DALE THOMAS,

Grievant,

v.

Docket No. 96-52-268

WETZEL COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Lewis Dale Thomas, alleges the Wetzel County Board of Education ("WCBOE") violated W. Va. Code §§ 18A-2-7 and 18A-4-8a(7), as well as violating his seniority rights, when it exchanged his shift with a less senior employee. This grievance was denied at Levels I and II, and waived at Level III. Grievant then appealed to Level IV where the parties agreed to submit the case on the record developed below. The case became mature for decision on August 14, 1996, the deadline for the parties' proposed findings of fact and conclusions of law.

The facts of this case are not in dispute and will be set out below as Findings of Fact.

Findings of Fact

____ 1. ____ Grievant is employed as a Custodian III at New Martinsville School. He has twelve years of seniority. ____ 2. ____ On May 1, 1996, he was informed, in writing, by his school principal, that his work hours would be changed from 10:00 a.m. to 6:00 p.m., to 3:00 p.m. to 11:00 p.m. for the 1996-97 school year. Additionally, Grievant would be assigned to another portion of the building.

____ 3. ____ Ms. Hazel Blair, a less senior custodian, who had worked the 3:00 p.m. to 11:00 p.m. shift, was informed she would be placed in the a.m. time slot and Grievant would be placed in the p.m. slot.

____ 4. ____ Although Grievant asked why this exchange would occur, no reason was given.

____ 5. ____ Grievant had previously been on less desirable evening shifts and had moved himself up, through a series of job changes and postings, to be placed on the day shift.

____ 6. ____ Grievant's rate of pay and classification were not changed.

Issues

Grievant argues that a five hour change in his shift schedule, from the day to evening shift, constitutes a transfer, and that he did not receive the notice and hearing protections required by W. Va. Code § 18A-2-7 for this change. Grievant also states that his seniority rights were violated when a less senior employee received, without explanation, the position that he had achieved through seniority. Grievant argues WCBOE's decision was arbitrary and capricious, and, although not well pled, raises the issue of favoritism, and questions why a less senior employee was placed in the more desirable day time position. WCBOE contends the change was not a transfer, and was within the principal's discretion.

Discussion

W. Va. Code §18A-2-7 states the superintendent has the authority to transfer school personnel, but an employee must receive notice "on or before the first Monday in April if he is being considered for transfer . . .". Additionally, the employee has the right to request in writing the reasons for the proposed transfer. Respondent cites Myers and Cain v. Wetzel County Bd. of Educ., Docket No. 94-52-325 (Oct. 10, 1994), for the proposition that Grievant's situation does not rise to the level of a transfer. If Respondent is correct, Grievant is not entitled to the above-cited Code protections.

In Cain, the Administrative Law Judge found a change in one custodian's hours by 2 and 2/3 hours and the second custodian's hours by 4 and 2/3 hours did not constitute a transfer. Transfer in that grievance was defined as "a reassignment from one location or job site to another." Cain cited SER Hawkins v. Tyler County Bd. of Educ., 275 S.E.2d 908 (W. Va. 1981) to support this definition of transfer. However, Hawkins, which dealt with professional employees, does not define the word transfer, and only states "[t]eachers have no vested right to be assigned to any particular school in the county." Id. at 912. Hawkins also holds a court will not interfere with a school board's discretion to transfer and assign teachers to another school if such action is for the benefit of the school system and is not arbitrary. Id. at 911. (Emphasis added.) "Arbitrary and capricious use of the power will not be permitted." Beverlin v. Bd. of Educ., 216 S.E.2d 554 (W. Va. 1975). Cain stated a transfer for a teacher could be "a substantial change outside a 'teacher's presently utilized area of certification, discipline, department[,] or grade level of many years standing'." (Citing Schafstall v. Brooke County

Bd. Educ., Docket No. 05-86-347-3 (Mar. 30, 1987). Because teachers usually work during the day, a shift in work hours was not one of the options considered in this list of changes that could constitute a transfer. Thus, it is possible a substantial change in a teacher's working hours could constitute a transfer, but this issue was not addressed.

Given that the above-sources do not completely define the term transfer for service personnel, further explanation is necessary. The American Heritage Dictionary defines transfer as: "to convey or shift from one place to another." 2d Ed. at 1286. Elkouri and Elkouri in How Arbitration Works state "[a] transfer may be effected when the employer requires employees . . . to move from one shift to another . . .". Id. at 530. See also Midland Rubber Co. 18 LA 590, 593 (Cheney, 1952). Additionally, the undersigned takes administrative notice that in many work settings, such as hospitals, individuals who work evening and night shifts are paid a shift differential because these shifts are considered less desirable and more disruptive of a typical family life.

An examination of what a transfer is and is not, as it relates to service personnel must be viewed in light of this Board's recognition that service personnel positions do not have to be posted as shift specific, and that principals have some latitude in assigning duties and working hours to service personnel at their schools. See Cain, supra; Ennis v. Ohio County Bd. of Educ. Docket No. 93-35-516 (May 31, 1994). The Administrative Law Judge in Cain held principals have latitude to reassign custodians' work hours when these changes do not involve an entire 8-hour shift.

The key question then is when, if ever, does a change in an employee's schedule create a transfer. The undersigned finds that, although a principal does have "some latitude when assigning duties [and working hours] to like classified service personnel," this discretionary action must be taken in "good faith for the benefit of the school system . . . [and] [a]rbitrary and capricious use of power will not be permitted." Cain, supra; Hawkins, supra at 911-12. In this instance, to change an employee's shift by five hours, from a chosen day shift to a less desirable evening shift is a transfer, and as such is subject to W. Va. Code § 18A-2-7 protections. W. Va. Code § 18A-2-7 allows the employer to transfer an employee or change his duties, but it gives the transferred employee the right to ask for a hearing and an opportunity to ask why the transfer occurred. Accordingly, to the extent Cain, supra disagrees with this holding it is specifically overruled. On a fact specific basis, a change in hours, significantly altering an employee's work schedule, can constitute a transfer.

Additionally, to change an employee's shift by five hours from a chosen day shift to a less

desirable evening shift, without recourse to the transfer process and without an explanation, is arbitrary and capricious, especially when Grievant has, through the process of bidding and postings, placed himself in this chosen position.

Grievant also argues WCBOE's action of changing his shift without utilizing the transfer process with a less senior employee violates his seniority rights. This factor is especially compelling given Grievant's testimony that he acquired this day shift through his seniority. The West Virginia Supreme Court of Appeals in Harrison County Bd. of Educ. v. Coffman, 189 W. Va. 273 (1993), stated, " the legislature's intention to emphasize seniority as the determinative factor in decisions affecting the promotion and filling of school service personnel positions . . . is clear." Id. at 275. Code Sections relating to service personnel are replete with references about the importance of seniority in the filling of positions and in the transfer, promotion and RIFing of service personnel. Some examples of the importance of seniority are: 1) W. Va. Code § 18A-4-8, decisions affecting promotions and filling of positions are to be based on seniority, qualifications, and performance evaluations; 2) W. Va. Code § 18A-4-8b, during a RIF the least senior employees are RIF'd first; and 3) W. Va. Code § 18A-4-8b, RIF'd employees with the most seniority are rehired first. WCBOE has obviously followed these seniority mandates in the past, as Grievant achieved his day-shift position through seniority. The switching of a more senior employee with a less senior employee, which results in the more senior employee in the less desirable position, violates the intent, if not the exact letter of the Code provisions on seniority. This is not to say that service personnel cannot have their shifts changed, but it must be done in a proper manner, with proper notice and for an identified reason. Carter v. Bd. of Directors/Shepherd College, Docket No. 95-BOD-148 (Aug. 29, 1995). Thus, without stated reasons and application of the transfer process, this five hour change from a day shift to an evening shift is incorrect. The above discussion also supports Grievant's poorly formulated charge of favoritism. (See footnote 1) Grievant alleges he was treated differently than a similarly situated employee. W. Va. Code §18-29-2(o) defines favoritism as "unfair treatment of an employee as demonstrated by preference, exceptional or advantageous treatment of another or other employee."

To prove discrimination or favoritism a grievant must establish a prima facia case which consists of demonstrating:

(a) that he is similarly situated, in a pertinent way, to one or more other employee(s);

(b) that he has, to his detriment, been treated by his employer in a manner that the other employee(s) has/have not, in a significant particular;

and,

(c) that such differences were unrelated [to] actual job responsibilities of the grievant and/or other employee(s), and were not agreed to by the grievant in writing.

If a grievant establishes a prima facie case, a presumption of favoritism exists, which the respondent can rebut by presenting a legitimate, nondiscriminatory reason for the action. However, the grievant may still prevail if he can demonstrate the reason given by the respondent was pretextual. Steele, et al. v. Wayne County Bd. of Educ., Docket No. 89- 50-260 (Oct. 19, 1989).

Grievant has established a prima facie case of favoritism. He and Ms. Blair are similarly situated; he has been treated in a detrimental manner; and such differences were not related to his job responsibilities and were not agreed to in writing. Grievant asked his principal at Level I why the change was implemented, and only received the answer that "New Martinsville School is in compliance with State Code 18A-4-8a. Grievance is denied." At the Level II hearing, Grievant clarified that he had asked why the change occurred and was given no specific reason. Grievant also stated he knew of no reason why Assistant Principal Brian Jones would not give him a specific answer to his question. Level II Trans. at 10. The failure of WCBOE to explain its actions brings into question issues of good faith and arbitrary and capricious behavior. The undersigned finds WCBOE engaged in preferential treatment in exchanging Grievant's position with a less senior employee without a credible or understandable explanation.

The above discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. The changing of Grievant's shift by five hours from a desirable day shift to a less desirable evening shift, without utilizing the transfer procedure, violates W. Va. Code § 18A-2-7.

2. WCBOE's action in this case, of changing Grievant's shift by five hours and removing him from a desirable shift or position, which he achieved through seniority, and replacing him with a less

senior employee, without explanation is an abuse of discretion and is an arbitrary and capricious act. See Harrison County Bd. of Educ. v. Coffman, 189 W. Va. 273 (1993); Carter v. Bd. of Directors/Shepherd College, Docket No. 95-BOD- 148 (Aug. 29, 1995).. 3. “Because no rationale basis existed for Grievant's shift transfer in this instance, it would be inequitable to uphold the transfer decision on these specific facts in this case.” Carter, supra.

4. WCBOE was guilty of favoritism when, without explanation, it displaced Grievant from a more desirable shift with a less senior employee.

Accordingly, this Grievance is **GRANTED**, and WCBOE is ordered to place Grievant back into his 10:00 a.m. to 6:00 p. m. shift.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wetzel 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.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: October 31, 1996

[Footnote: 1](#)

This issue, while inherent in Grievant's complaint, was not discussed in any meaningful way at the Level II hearing.