TERRY STEWART,

Grievant,

V. Docket No. 96-05-394

BROOKE COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

The grievant is employed by the respondent Brooke County Board of Education during the regular school term as a bus operator. He also was employed by the respondent as a temporary summer employee, filling the position of Paint/Ground Crew Employee. The summer employment was completely separate from his regular employment as a Bus Operator. He performed these summer duties for several years, as recently as 1995.

This grievance was filed August 13, 1996, with the following allegation:

"Classified custodians are working in the Painter Classification. I have worked the past five summers on the Paint Crew as a Painter, and I feel that I am being denied the opportunity to paint. This is in violation of Code Number 18-5-39.

I wish to receive paid Painter's wages for the Summer Painting that was done by Custodians or to be able to have the opportunity to Paint for these wages. Also, I wish to be hired as a Painter in the future for such Painting."

The grievance was denied at both Levels I & II on August 23, 1996, and September 13, 1996, respectively. Appeal was made by the grievant to Level IV on September 16, 1996. A scheduledhearing was held on December 18, 1996, at the Wheeling Grievance Board office. The parties waived their right to file briefs, whereupon the case became mature for decision on that date.

Grievant contends that the Board's action violated W.Va. Code §18-5-39, which provides at paragraph six, "An employee who was employed in any service personnel job or position during the previous summer shall have the option of retaining the job or position if the job or position exists during any succeeding summer."

In response, the Brooke County Board of Education, (BOE), contends that due to lack of need, it

hired no temporary summer maintenance employees. The work instead was to be done by Custodians. The amount of painting was small and the BOE contended that it would amount to no more than 2% of the Custodians' time.

The substantive issue is whether the BOE, violated Code §18-5-39 when it assigned the summer duties formerly done by the grievant to a Custodian. Were the painting duties as described by the grievant within the job description of a Custodian and if not, what is the legal effect?

PROCEDURAL ISSUE

A procedural issue was raised by the BOE at the Level II hearing held September 6, 1996. It moved for dismissal based upon W.Va. Code §18-29-4, alleging the grievance was not timely filed. This issue will be dealt with first.

Testimony was taken at the Level II hearing to develop facts showing when the grievable event would have become known by the grievant. The grievable event was in part actually a non- event. Therefore, a determination must be made as to when the grievant realized that something was not to happen, i.e., the posting of the summer positions and that the work was being performed in another manner. On or about July 30 or 31, 1996, is when the grievant testified he first realized there had been painting that summer when he was at the school and noticed the painting. He inquired andlearned that it had been done by Custodians. It should be noted that the grievance form was signed by him on July 31, 1996, and filed August 13, 1996, within fifteen days of when he would have first known.

The usual notification or posting time would have been early June. Grievant's Level II, Exhibit 3, the posting of 1995 for the Paint/Ground Crew position was June 13, 1995. The testimony of Rodney R. McDaniel, Director of Facilities of Brooke County Schools is consistent on that point with that of the grievant. He testified that in the past years, through 1995, the summer job openings were posted before the end of the regular school term, usually by the first week in June.

It may be inferred that the lack of notification or posting would have been observed by the grievant around the middle of June. However, one may conclude from that fact, that there merely is no painting to be done. This would be disappointing but was not, at that point, a grievable event. However, on or about July 31, the grievant learned that there had been painting done by Custodians, whom he believed were not properly classified to do the work. He filed this grievance on August 13,

within the 15-day requirement. I, therefore, conclude the filing of the grievance to have been timely.

MAIN ISSUE

As stated before, the main issue is whether there has been a violation of W.Va. Code §18-5- 39. What the BOE did in assigning painting to the custodians was a reallocation of duties among existing personnel. This is an accepted practice, usually of economic benefit to the employer. However, the grievant contends the reallocation resulted in a Custodian performing work, specifically painting, that is not within his job classification. If this is so, does the reallocation result in a grievable event giving standing to the grievant, who claims the legal right to do the painting? The Custodian III position is defined in W.Va. Code §18A-4-8 as follows:

> "...personnel employed to keep buildings clean and free of refuse, to operate the heating system and to make minor repairs."

Eastham v. Tyler County Bd. of Educ., Docket No. 91-48-519 (June 30, 1992), involved a year round Custodian III who performed painting duties for a ten-day period during the summer. He grieved to request painters' wages. The Administrative Law Judge found the painting duties to be voluntary and not mandatory thus denying the grievance. This decision leads one to conclude that if his painting walls, doors and touch up areas had been mandatory, he would have been working out of his classification as a Custodian III. At page five, paragraph two of her opinion, the ALJ states in the second sentence, "While TCBE's contention that grievant's extensive painting was within the scope of a custodian's duties to perform minor repairs in the form of occasional touch up or limited painting is without merit, grievant did have a clear right-of-refusal to perform any major ongoing painting work during Summer 1991." Thus, it may be concluded that even though it may constitute a misclassification, the worker may perform duties not within his classification, if on a voluntary basis.

The BOE's Level II, Exhibit 6 should be noted. It is the Brooke County Schools Job Description for the Custodian III position. A twenty-item list of duties does provide at number 10 includes "performs general maintenance around the building, including such tasks as changing light bulbs, making furniture and equipment repairs or adjustment, **painting**, oiling motors, adjusting fan belts, etc." (Emphasis added).

Painting is included as one of many duties. What must be determined is the extent to which the specific duty is performed taken within the context of the total job description. Are they primary duties or are they incidental? Blankenship v. Kanawha County Bd. Of Educ., Docket No. 20-87-202-1 (Oct. 26, 1987), is helpful in analyzing whether duties are incidental or primary to a job. In Blankenship, the grievant was a general maintenance employee who sought to be reclassified as a truck driver. It was determined that his primary duty was to assist a masonry craftsperson. Though he made some deliveries, requiring him to drive a truck, it was found to be incidental and subservient to his other work. He was not reclassified.

In the instant case, Donald Clemm, the Custodian III who painted during the summer of 1996, testified at the Level IV hearing that he and another custodian spent approximately 50% of their work time painting and the rest, cleaning. Rodney R. McDaniel, the Facilities Director, testified that painting may have been more than 50%. The area painted comprised about one third of the Brooke High building. Included were classrooms, hallways, the gymnasium, cafeteria, and other places. Mr. Clemm testified further that during the regular school term, he would on occasion be required to paint, but it was only touch-up and spot painting. Extensive painting was to be done only when students were not on the premises and, therefore, was essentially performed only during the summer. The testimony of Custodian Donald Clemm, Facilities Director Rodney R. McDaniel, and the record as developed at the lower levels, show that the painting during the summer of 1996 was not an incidental part of the duties of the custodians involved. The amount of time spent and the size of the areas painted were significant. Mr. McDaniel testified at the Level IV hearing that Mr. Clemm and the other Custodian were even paid painter's wages. However, when the painting duties are evaluated within the context of Mr. Clemm's year-round duties, they become insignificant. He painted only on a part-time basis for a period of a few weeks. He was working completely within the confines of Brooke County's job description. His painting was incidental to his primary duties of cleaning and maintenance.

W.Va. Code §18-29-2 defines “grievance” as a violation of the rules, regulations, writtenagreements, laws, etc. resulting in a claim by one or more affected employees. An affected employee is one: (1) whose employment with its rights and privileges have been adversely altered or changed, or; (2) has lost a job, or failed to obtain a promotion, loss of wages, etc. In Crawford v. Boone County Bd. Of Educ., Docket No. 94-03-1131 (June 30, 1995), the grievant applied for a

computer teaching job but was passed over because she could not meet the certification requirement. Her contention that the posting was inappropriate was meaningless, since she wouldn't have qualified whether there was proper posting or not. She was not adversely affected by the allegedly grievable event, the inappropriate posting. Also, see Mullins v. Kanawha County Bd. of Educ., 94-20-364 (Dec. 12, 1994), which found that the grievant's failure to meet minimum qualifications for a job resulted in his having no standing to object to the posting.

In the instant case, was Mr. Stewart was adversely affected by the actions of the respondent in not retaining him as a painter? Does he have standing to challenge the respondent? The language of W.Va. Code §18-5-39 gave him priority to be retained to fill the summer position of Painter. He established this right by successfully bidding and working as a Painter during the summer of the year before. But, this gives him a legal right to the summer position of painter only. During the summer of 1996, no such position existed. Painting was properly performed as an incidental part of the duties of the full-time Custodians. The grievant suffered no loss of any rights or privileges because without the position or job in existence there were none to lose. Only if a summer Painter position had been filled by someone else would the grievant have suffered a loss which would have made him an “affected employee”.

Also see, Duffle, et. al. vs. Kanawha County Bd. of Educ., Docket No. 20-87-190-2 (Oct. 26, 1987), wherein the Grievance Board responded to a grievance filed by six persons applying for summer employments. The Kanawha BOE did not post or advertise the positions which had beenheld by the Grievants during the prior summer. It was held that, “A board of education is not statutorily required to employ service personnel when it is more efficient and/or economical to contract the work to private industry”, Duffle, Conclusion of Law 4, page 5. Under the Duffle case, the respondent would not be required or mandated to post and fill a position if economically, they can do the work in some other authorized way. In the instant case, they would be authorized to reallocate the work among existing employees just as they would be allowed to contract the work to private industry.

In addition to the foregoing discussion, the following findings of fact and conclusions of law are appropriate in the matter.

FINDINGS OF FACT

1. The grievant worked for the respondent as a temporary summer employee in the Paint/Ground Crew position in the summer of 1995.

2. Under W.Va. Code §18-5-39, the grievant would have retained the Paint/Ground Crew position for the summer of 1996, if it had been available, but the position did not exist.

3. Instead, the BOE assigned painting duties to Custodians Donald Clemm and another.

4. The painting done by Mr. Clemm and another Custodian during the summer of 1996, was incidental when considering their year-round job duties as a whole, even though comprising 50% of their labor for several weeks during the summer of 1996.

5. The grievable event would have been the assignment of a custodian to the primary duty of painting, without filling the position of Paint/Ground Crew Employee and the grievant's obtaining knowledge of that fact.

CONCLUSIONS OF LAW

1. In non-disciplinary matters, a grievant must prove all the allegations constituting thegrievance by a preponderance of the evidence. Rupich v. Ohio County Bd. of Educ., Docket No. 89- 35-719 (June 1990).

2. The grievant's filing was within 15 days of July 31, 1996, the day he obtained knowledge of a grievable event and therefore, was timely.

3. The BOE did not violate W.Va. Code §18-5-39 in the summer of 1996, by assigning to a Custodian the same painting duties as those performed by the grievant during the previous summer.

4. The BOE is not required in all instances to post and/or fill employment positions when the work can be done more economically through a reallocation of duties among employees.

5. The grievant was not adversely affected by the actions of the BOE in mandating that painting be assigned to full-time Custodians, and had no standing to file and proceed with this grievance in that the Respondent BOE had no legal obligation to fill the vacant position. Crawford v. Boone County Bd. Of Educ., Docket No. 94-03-1131 (June 30, 1995).

6. The grievant was not an affected employee under the terms of W.Va. Code § 18-29-2.

Accordingly, this grievance is **DENIED**.

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

JAMES D. TERRY

Administrative Law Judge

DATE: April 10, 1997