JAMES ISAACS,

Grievant,

v.

DOCKET NO. 99-06-002

CABELL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, James Isaacs, filed the following grievance against his employer, the Cabell County Board of Education, on September 29, 1998:

> Violation of WV Code 18-29-2, section m, discrimination, and section o, favoritism, with regard to change in grievant's daily work schedule and the changes of another employee.
>
> Relief sought is to have his schedule returned to the schedule grievant performed last school year.

The grievance was denied at level one by Grievant's immediate supervisor, Charles Buell, and a level two hearing was conducted on November 12, 1998. The grievance was denied by Superintendent David Roach, by decision dated December 11, 1998. Grievant appealed to level four on January 5, 1999, and a hearing was conducted in the Grievance Board's Charleston, West Virginia office on March 18, 1999. The grievance became mature for decision on April 19, 1999, the deadline for the parties' proposed findings of facts and conclusions of law. Grievant was represented by Susan Hubbard, West VirginiaEducation Association, and the Board was represented by Howard E. Seufer, Jr., Bowles, Rice, McDavid, Graff & Love.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. Grievant is employed by the Board as a custodian at Huntington High School.

2. During the 1998-99 school year, Grievant works the midnight shift, meaning that he reports to work at 10 p.m., leaves at 6 a.m., has a 30-minute duty free lunch at 2 a.m., and takes two ten-minute breaks, one before lunch and one after. He worked the same shift throughout the 1997-98 school year.

3. During the summer between the 1997-98 and the 1998-99 school years, some changes were made in the specific duties which more than half of the 12 Huntington High School custodians would be expected to complete each working day. The changes were all announced before the 1998-99 school year began.

4. The changes referred to in Finding of Fact 3 were recommended by the Head Custodian at Huntington High, who felt that the adjustments promoted efficiency. They involved the duties which the custodians were expected to complete during their assigned shifts. Duties were added and deleted from the custodians' workloads. The changes did not alter the starting time, quitting time, lunch time, or break times of any custodian, including Grievant.

5. In Grievant's case, the changes included deleting from his duties the job of “cleaning office complex at entrance to concourse,” deleting from his duties “cleaningclassroom B156,” and adding to his duties the job of “cleaning concourse restrooms in main hall.”

6. Grievant testified that it takes more time to complete his 1998-99 duties than it did to complete his 1997-98 duties. Even so, Grievant admits that the changes in the duties have not required that he start work any earlier or stay any later than in the 1997-98 school year. He has also been able to maintain the same lunch schedule and breaks.

7. Grievant is labeled the “second man” on the midnight shift, meaning he is expected to exercise some supervision over other employees. Grievant also held the “second man” designation during the 1997-98 school year. Grievant is not required to evaluate other employees, nor does he complete any paperwork as part of that responsibility.

8. Another custodian on the midnight shift, Mark Taylor, is required in 1998-99 to clean the office complex at the entrance to the concourse which Grievant cleaned last year. According to Grievant, Mr. Taylor has expressed to him his willingness to relinquish that duty to Grievant and to assume Grievant's job of cleaning the concourse restrooms in the main hall. Grievant asked the

Head Custodian to allow Grievant and Taylor to switch duties for the 1998-99 school year. She denied the request, but said she would consider it for the 1999-2000 school year.

9. Although the Board posts Huntington High custodian positions with specified shifts, the postings do not tie specific work assignments and duties to specific shifts. The Head Custodian, with the approval of the school administration, is empowered to realign custodial duties among custodians on the same or different shifts. The situation is thesame at the Board's other schools. Thus, an applicant for a vacant custodial position on a specific shift at Huntington High or any other school cannot assume that he or she will be performing the same array of duties as the person who previously held the job.

CONCLUSIONS OF LAW

1. The burden of proof is upon the grievant to prove each element of his grievance by a preponderance of the evidence. Procedural Rules of the West Virginia Education and State Employees Grievance Board, 156 C.S.R. 1 § 4.19 (1996). The grievant has failed to meet that burden in this case.

2. W. Va. Code § 18-29-2(m) defines “discrimination” as “any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.” In order to establish a claim of discrimination, an employee must establish a prima facie case of discrimination by a preponderance of the evidence. In order to meet this burden, the Grievant must show:

(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 the other employee(s) and were not agreed to by the grievant in writing.

Steele v. Wayne County Bd. of Educ., Docket No. 89-50-260 (Oct. 19, 1989). Once the grievant establishes a prima facie case of discrimination, the burden shifts to the employer to demonstrate a legitimate, non-discriminatory reason for the employment decision. Steele, supra; see Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). However, a grievant may still prevail if he can demonstrate the reason given by the employer was mere pretext. Id.

3. Grievant has failed to establish a prima facie case of discrimination. He established that he is similarly situated to other custodians at Huntington High, but failed to show that he was treated by the Board, to his detriment, in a manner that other employees were not. Like Grievant's responsibilities, the work duties of more than half the Huntington High custodians were adjusted between the 1997-98 and 1998-99 school years. And like the other custodians, Grievant's duties were adjusted without changing his starting and quitting times, his lunch time, or his break schedule. He is not required to work more than the normal eight-hour day, nor is he required to perform any duties other than those contemplated by his classification.

4. It is common in the workplace, in both the public and private sectors, that employees may be required to perform different tasks dependent solely on the shift which they work. This is not a significant difference which may be used to establish a prima facie showing of discrimination. Damron v. Mingo County Bd. of Educ., Docket No. 91-29-491 (Oct. 20, 1992).

5. For the same reasons set forth above, Grievant's claim of favoritism must fail.

6. The revision of a custodian's area assignment within an educational complex which does not change his daily work hours does not constitute a change of his work schedule as contemplated by W. Va. Code § 18A-4-8a. Cogar v. Upshur County Bd. ofEduc., Docket No. 49-86-346-2 (Mar. 9, 1987). (See footnote 1) But even if, as Grievant contends, the adjustment of his duties amounted to a change in schedule, the scheduling of custodians is within the statutory authority of the principal or his designees. See Shaver v. Greenbrier County Bd. of Educ., Docket No. 98-13-091 (July 29, 1998); Myers/Cain v. Wetzel County Bd. of Educ., Docket No. 94-52-325 (Oct. 27, 1994); Holloway v. Ohio County Bd. of Educ., Docket No. 91-35-028 (Oct. 9, 1998). A schedule change does not require the employee's consent unless made after the school year begins. W. Va. Code § 18A-4-8a.

7. The State Superintendent of Schools has interpreted the school laws as prohibiting employees from trading positions. See State Superintendent's May 19, 1995 letter to Dwight D.

Dials, and his October 25, 1989, letter to Ronald J. Daugherty. For the same reasons, two custodians assigned to the same school do not have the right to swap duties.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of the Cabell County. Any 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

_____

MARY JO SWARTZ

Administrative Law Judge

Dated: April 27, 1999

Footnote: 1

Nor does it constitute a transfer. Matthews v. Preston County Bd. of Educ., Docket No. 39-88-239 (July 27, 1989).