

**ROGER ADKINS,**

**Grievant,**

**v.**

**DOCKET NO. 00-22-118**

**LINCOLN COUNTY BOARD OF EDUCATION,**

**Respondent.**

## **D E C I S I O N**

Grievant, Roger Adkins, filed this grievance against his employer, the Lincoln County Board of Education ("Board") on March 13, 2000:

WV Code 18A-4-8 concerning General Maintenance contract. I disagree with 18A-4-8g based on signed contract. There was no classification title change. Custodian III and General Maintenance, same salary schedule, same job description. Duval, Hamlin, West Hamlin jobs should be reconsider (sic); pay should be readjusted. I believe custodian positions 9/97 Duval, 98 Duval, 3/2000 Hamlin, 3/2000 W. Hamlin should have been mine. Request pay for days lost. Seniority days adjusted.

The grievance was denied on March 13, 2000, at level one by Duval High School Principal David E. Bell. A level two hearing was held on March 22, 2000, and a level two decision denying the grievance was issued on March 27, 2000, by hearing examiner Charles S. McCann. Grievant bypassed level three and appealed to level four on April 3, 2000. A level four hearing was held on June 2, 2000, and this matter became mature for decision on June 21, 2000, the deadline for the parties' proposed findings of fact and conclusions of law. Grievant appeared pro se, and the Board was represented by James W. Gabehart, Esq.

### SUMMARY OF EVIDENCE

#### Level Three Board Exhibits

Ex. 1 -

July 1, 1999 Lincoln County Schools Vacancy Bulletin, with attached General Maintenance job description .

Ex. 2 -

July 12, 1999 memorandum from Sue Ross to Charles McCann re: General Maintenance test.

Ex. 3 -

Lincoln County Schools Temporary Contract of Employment for General Maintenance.

Ex. 4 -

Lincoln County Board of Education Personnel Action Form, dated July 19, 1999.

Ex. 5 -

Grievance documents; April 20, 2000 letter from Trina Burns to Roger Adkins.

#### Level Four Grievant's Exhibits

Ex. 1 -

August 25, 1997 Board agenda request.

Ex. 2 -

August 28, 1997 Board agenda request.

Ex. 3 -

Seniority listing for custodians.

Ex. 4 -

Newspaper articles.

Ex. 5 -

October 29, 1999 Board agenda request.

Ex. 6 -

Probationary Contract of Employment for Service Personnel, dated August 19, 1999.

Ex. 7 -

Custodian III Job Description.

Testimony

Grievant testified in his own behalf. The Board presented the testimony of Charles S. McCann.

FINDINGS OF FACT

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

1. Grievant is employed as a ½ time Custodian with a 200-day contract, assigned to Duval High School.
2. On July 1, 1999, the Board posted a temporary, full-time, General Maintenance vacancy pending the return of the regular employee. Attached to the posting was a job description for General Maintenance. LIII Bd. Ex. 1.
3. Grievant bid on the position, passed the competency test for General Maintenance, and was awarded the position. LIII Bd. Exs. 2; 4.
4. Grievant entered into a temporary contract of employment for the General Maintenance vacancy pending the return of the regular employee, Darnell Richmond, and not to exceed the 1999-2000 school year. LIII Bd. Ex. 3.
5. Grievant worked in the temporary General Maintenance position until November 2, 1999.
6. The absent regular employee, Darnell Richmond, died on September 17, 1999. LIV G. Ex. 4.
7. After considering its options and personnel needs, the Board acted approximately one month later to abolish the General Maintenance position Grievant had been occupying, and returned him to his regular, one-half (½) time Custodian position at Duval High School. LIV G. Ex. 5.
8. The Board erroneously credited Grievant with Custodian seniority while he was working in the General Maintenance position.
9. In the Spring of 2000, the Board posted positions for a permanent, regular, full-time Custodian at West Hamlin Elementary, and, at or near the same time, a temporary, regular, full-time

Custodian position at Hamlin, pending the return of the regular employee. 10. Grievant applied for both of these positions. Grievant was initially selected for the temporary position at Hamlin.

11. At that time, a question was raised regarding adjustment of Grievant's seniority as a Custodian to account for the time he spent working as a General Maintenance worker during the summer and fall of 1999. As a result of this adjustment, the Board did not credit Grievant with seniority in the Custodian classification during the time he worked in the General Maintenance classification.

12. After adjusting Grievant's seniority as a Custodian, another employee who had previously been below Grievant on the seniority list, was awarded the West Hamlin position.

13. Grievant was awarded the temporary Hamlin position.

### DISCUSSION

Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88- 130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

Grievant claims that, because he was not credited with Custodian seniority during the time he worked as General Maintenance, he was denied a Custodian job at a different school for the 2000-2001 school year. It must be noted that it was extremely difficult, both at the level two and level four hearings, to pin down exactly what Grievant's complaints are and his argument of the evidence to support the same. However, the precipitating event clearly was his failure to obtain a position which resulted from the adjustment of his Custodian seniority to deduct the time spent in the General Maintenance classification. The undersigned will attempt to address all the claims raised by Grievant at levels two and four of the grievance process.

The Board denies it has violated any applicable rules, regulations, laws or statutes in calculating Grievant's seniority.

With regard to Grievant's claim that he should have been credited with Custodian seniority while working in the General Maintenance classification, W. Va. Code § 18A-4-8b clearly states that "the seniority of any service personnel shall be determined on the basis of the length of time the employee has been employed by the county board within a particular job classification." That Code

Section further provides that, “[s]eniority acquired within different classification categories shall be calculated separately.” Finally, W. Va. Code § 18A-4-8g provides:

The seniority of an employee who transfers out of a class title or classification category of employment and subsequently returns to that class title or classification category of employment shall be calculated as follows:

The county board shall establish the number of calendar days between the date the employee left the class title or category of employment in question and the date of return to the class title or classification category of employment. This number of days shall be added to the employee's initial seniority date to establish a new beginning seniority date within the class title or classification category. The employee shall then be considered as having held uninterrupted service within the class title or classification category from the newly established seniority date. The seniority of an employee who has had a break in the accumulation of seniority as a result of being willfully absent from employment duties because of a concerted work stoppage or strike shall be calculated in the same manner.

It is clear the Board properly calculated Grievant's seniority within the Custodian classification when it deducted the time spent working in the General Maintenance position.

However, Grievant points to the similarity of the job descriptions for Custodian and General Maintenance to argue he should have been credited with both Custodian and General Maintenance seniority for the time he worked in the General Maintenance position. There is no dispute that Grievant was not employed in a multi-classified position, or that he was unaware he was leaving the Custodian position when he accepted the General Maintenance position. Grievant, in essence, is arguing that he should have been multi- classified when he accepted the General Maintenance position to include the Custodian classification.

“In order to prevail in a misclassification grievance an employee must establish, by a preponderance of the evidence, that her duties more closely match those of another W. Va. Code §18A-4-8 classification than that under which [her] position is categorized.” Porter v. Hancock County Bd. of Educ., Docket No. 93-15-493 (May 24, 1994). Hamilton v. Jackson County Bd. of Educ., Docket No. 91-18-264 (Mar. 31, 1992). Conversely, simply being required to undertake some responsibilities normally associated with a higher classification, even regularly, does not render a grievant misclassified, per se. Hamilton v. Mingo County Bd. of Educ., Docket No. 91-29-077 (Apr. 15, 1991). Additionally, when a statutory definition is very generally worded, as here, it must be broadly applied. Sites and Murphy v. Pendleton County Bd. of Educ., Docket No. 94-36-1112 (May 31, 1995). A county board of education is required by W. Va. Code § 18A-4-8b to review each service personnel's job description annually and reclassify all service personnel as required by

the job classifications.

W. Va. Code § 18A-4-8 defines “Custodian III” as “personnel employed to keep buildings clean and free of refuse, to operate the heating or cooling systems and to make minor repairs.” That Code Section defines “General Maintenance” as “personnel employed as helpers to skilled maintenance employees and to perform minor repairs to equipment and buildings of a county school system.” Finally, “Multiclassification” means “personnel employed to perform tasks that involve the combination of two or more class titles in this section. In such instances the minimum salary scale shall be the higher pay grade of the class titles involved.”

While these definitions are similar in nature, a review of the pertinent job descriptions reveals that the essential functions of the two job classifications are not. The purpose of the Custodian classification is to ensure that the schools are clean and free of refuse, and meet certain health and safety standards. The purpose of the General Maintenance classification is to perform duties relating to the upkeep and maintenance of the buildings and other facilities. There is nothing in the General Maintenance job description that relates to responsibility for keeping the schools clean and free of refuse, other than the employee's own worksite. While some of the duties of these two job descriptions may overlap from time to time, it is clear the majority of the Custodian's time is spent cleaning the schools, while the majority of the General Maintenance employee's time is spent repairing buildings and equipment, painting, moving furniture and equipment, and related trades work. Grievant presented no evidence that he continued to perform custodial work while employed in the General Maintenance classification. Thus, he has failed to prove by a preponderance of the evidence that he should have been multiclassified during that time period.

Grievant also argued at level four that the General Maintenance position he occupied should have been abolished sooner, thus allowing him to return to the Custodian position quicker, resulting in additional seniority in that classification. The evidence shows that the regular employee in that position, Darnell Richmond, died on September 17, 1999. The Board acted to abolish the position on October 29, 1999, approximately one month later. Grievant has presented no evidence or law which would support his claim that the position should have been abolished more quickly.

Grievant also complains he should have been selected for the permanent position at West Hamlin. Grievant argues that, had the Board not adjusted his seniority to deduct the Custodian seniority awarded while he was working in the General Maintenance position, he would have been

the most senior applicant for the West Hamlin position.

Related to this claim, Grievant also complains that he missed approximately 30 days' seniority from the time he was initially recommended for the temporary Hamlin position and the time he ultimately entered into the duties of the job.

Grievant was initially selected and recommended for the temporary Hamlin position. It was during this time a question arose about Grievant's seniority date, and whether it had been accurately calculated. The Superintendent rescinded his recommendation that Grievant be hired for the Hamlin position until the seniority records could be reviewed. Subsequently, after correctly calculating Grievant's seniority, Grievant was placed into the Hamlin position, and another employee who had been below Grievant on the seniority list, was awarded the permanent West Hamlin position.

As it has already been held that the Board correctly calculated Grievant's seniority to not include Custodian seniority for the time he served in the General Maintenance position, Grievant has failed to establish that he was entitled to the permanent West Hamlin position awarded to a more senior applicant.

The Board took the correct action in ensuring the seniority lists were correct before selecting an applicant for the Hamlin position. Further, there is no evidence that the Board exceeded the time within which posting and filling of positions must take place. Therefore, Grievant has not established any violation by the Board in waiting to fill the position until after it had determined its seniority lists were correct.

Finally, Grievant raised some claims regarding positions which he claims he should have received in 1997 and 1998. The Board raised the defense of untimely filing regarding these claims. Where the employer seeks to have a grievance dismissed on the basis that it was not timely filed, the employer has the burden of demonstrating such untimely filing by a preponderance of the evidence. Ooten v. Mingo County Bd. of Educ., Docket No. 96- 29-122 (July 31, 1996); Hale v. Mingo County Bd. of Educ., Docket No. 95-29-315 (Jan. 25, 1996). Once the employer has demonstrated that a grievance has not been timely filed, the employee has the burden of demonstrating a proper basis to excuse his failure to file in a timely manner. Kessler v. W. Va. Dept. of Transp., Docket No. 96-DOH-445 (July 29, 1997); Higginbotham v. W. Va. Dept. of Public Safety, Docket No. 97-DPS-018(Mar. 31, 1997); Sayre v. Mason County Health Dept., Docket No. 95-MCHD-435 (Dec. 29, 1995), aff'd, Circuit Court of Mason County, No. 96-C-02 (June 17, 1996). See Ball v. Kanawha County Bd. of Educ., Docket

No. 94-20-384 (Mar. 13, 1995); Woods v. Fairmont State College, Docket No. 93-BOD-157 (Jan. 31, 1994); Jack v. W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991).

A grievance must initiate the grievance process within fifteen days following the occurrence of the event upon which the grievance is based. W. Va. Code §18-29-4(a)(1). The running of the relevant time period is ordinarily deemed to begin when the employee is unequivocally notified of the decision being challenged. Harvey, supra; Kessler, supra. See Rose v. Raleigh County Bd. of Educ., 199 W. Va. 220, 483 S.E.2d 566 (1997); Naylor v. W. Va. Human Rights Comm'n, 180 W. Va. 634, 378 S.E.2d 843 (1989). Grievant presented no evidence that he was in any way prevented from filing grievances over those positions at the time, and those claims are necessarily time-barred.

### CONCLUSION OF LAW

Grievant has failed to establish any violation of rule, regulation, policy, law or statute by the Board in recalculating his seniority and deducting the Custodian seniority he had been given for the time he served in the General Maintenance position.

Accordingly, this grievance is **DENIED**.

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

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**MARY JO SWARTZ**

**Administrative Law Judge**

**Dated: July 7, 2000**