RANDY HILL,

Grievant,

v. **Docket No. 03-10-365**

FAYETTE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Randy Hill ("Grievant"), employed by the Fayette County Board of Education ("FCBE") as a Custodian, filed a level one grievance on June 16, 2003, in which he alleged misclassification, discrimination and harassment. Grievant did not state any requested relief. The grievance was denied at levels one and two, and FCBE waived participation at level three. Appeal was made to level four on or about November 25, 2003. Grievant, represented by John E. Roush, Esq., of the West Virginia School Service Personnel Association, and FCBE counsel Erwin Conrad, agreed to submit the matter for decision based upon the lower-level record, supplemented with proposed findings of fact and conclusions of law, filed on February 2, 2004.

The following facts have been derived from a preponderance of the evidence.

Findings of Fact

1. Grievant has been employed by FCBE as a Custodian I since April 24, 2000, and was assigned to Gauley Bridge High School (GBHS) at all times pertinent to this grievance. 2. In addition to Grievant, Mike and Brenda Neff were assigned to GBHS as Custodian IIIs. Mr. and Ms. Neff were assigned to work during the day (6-2 and 10-6, respectively), and Grievant worked the evening shift (2-10 p.m.). (See footnote 1)

3. Both positions held by Grievant and Ms. Neff were advertised by posting dated March 21, 2000. Grievant did not bid on the Custodian III position which was a temporary assignment pending return of the regular employee. Early in the 2003-2004 school year, Ms. Neff bid on an Aide position, and the Custodian III position was again posted as a temporary position. Again, Grievant did not bid on it.

4. Grievant's duties during the 2002-2003 school year included cleaning classrooms, restrooms, stairwells, and the auditorium (as needed). Grievant was scheduled to cut grass from 2:00 to 2:30 p.m., daily. Ms. Neff was also scheduled to cut grass one-half hour per day. Snow removal duties were to be shared by all the custodians. All three custodians were scheduled to work mornings for this purpose on days school was canceled due to snow.

5. Due to a reduction in force, Grievant's assignment for the 2003-2004 school year is Gauley Bridge High School from 2:00 to 5:30, and Montgomery Middle School from 6:00 to 10:00 p.m.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va.Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); 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. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993).

Initially, Grievant's claim appeared to be that Principal Vickers demonstrated favoritism/discrimination in his treatment of the custodians. Included in his level two testimony were comments that Ms. Neff did not assist with the grass cutting, and neither of the Neffs assisted with snow removal. At that time, Grievant requested that the Neffs be required to help him, or that he not be required to complete those tasks. Due to the significant change in circumstances, Grievant acknowledges that much of the favoritism/discrimination claim has been resolved, but continues to assert that the assignment of the same duties to a Custodian I and Custodian IIIs constituted favoritism/discrimination, and that assignment of the snow and grass duties resulted in his misclassification. (See footnote 2) FCBE argues that Grievant has failed to establish that his duties more closely matched another classification than that which he was assigned.

W. Va. Code § 18A-4-8 includes the following pertinent definitions:

"Custodian I" means personnel employed to keep buildings clean and free of refuse;

"Custodian II" means personnel employed as a watchman or groundsman;

"Custodian III" means personnel employed to keep buildings clean and free of refuse, to operate the heating or cooling systems and to make minor repairs;

"Groundsmen" means personnel employed to perform duties that relate to the appearance, repair and general care of school grounds in a county school system. Additional assignments may include the operation of a small heating plant and routine cleaning duties in buildings.

W. Va. Code §§ 18A-4-8 places a burden on county boards of education to see that the duties of a particular service position coincide with the classification and paygrade to which it is assigned. Robinson v. Nicholas County Bd. of Educ., Docket No. 93-34-197 (Mar. 25, 1994). "In order to prevail in a misclassification grievance an employee must establish, by a preponderance of the evidence, that his duties more closely match that of another W. Va. Code §§18A-4-8 classification than that under which his position is categorized." Porter v. Hancock County Bd. of Educ., Docket No. 93-15-493 (May 24, 1994). *See* 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. Whittington v. Putnam County Bd. of Educ., Docket No. 02-40-035 (Mar. 4, 2002); Hamilton v. Mingo County Bd. of Educ., Docket No. 91-29-077 (Apr. 15, 1991).

"Because of similarities in the nature of certain jobs listed in W. Va. Code § 18A-4-8, two or more job definitions may encompass the same duties. Proof that an employee performs such 'crossover' duties does not necessarily mandate that his position bereclassified." Graham v. Nicholas County Bd. of Educ., Docket No. 93-34-224 (Jan. 6, 1994). This is especially true in the instant case, when the two classifications actually encompass the same duties.

Grievant has not offered evidence to prove that the classification of Custodian III more closely fit the duties of his position. The vast majority of Grievant's work involved the cleaning of the inside of the building. Both the grass cutting and snow removal duties were minimal and seasonal. The position descriptions of the three custodians indicates that the grass cutting was shared with one, and the snow removal duty was to be shared by all three. The partial assignment of these duties did not result in Grievant being misclassified.

The fact that Ms. Neff may have been performing the same duties as Grievant would indicate that she may have been misclassified. (See footnote 3) When a grievant compares himself to another who is employed in a higher classification and performing similar work, but the other employee is misclassified, the remedy is not to similarly misclassify the grievant. Akers v. W. Va. Dep't of Tax and Revenue, 194 W. Va. 456, 460 S.E.2d 702 (1995); Weaver v. Preston County Bd. of Educ., Docket

No. 03-39-129 (Aug. 28, 2003); Kunzler v. Dep't of Health and Human Serv., Docket No. 97 HHR-287 (Jan. 18, 1996). While the comparison of duties establishes that the position held by Ms. Neff was improperly classified, it does not entitle Grievant to the requested relief of reclassification. Neither has Grievant established discrimination or favoritism with regard to his classification. "Discrimination" is defined by W. Va. Code § 18-29-2(m) 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." Similarly, "favoritism" is defined as "unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees." W. Va. Code § 18- 29-2(o).

The establish a prima facie case of discrimination or favoritism Grievant must prove by a preponderance of the evidence:

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

(b) that the other employee(s) has/have been given advantage or treated with preference in a significant manner not similarly afforded him; and,

(c) that the difference in treatment has caused a substantial inequity to him and that there is no known or apparent justification for this difference.

Hays v. W. Va. Div. of Employment Security, Docket No. 91-ES-505/92-ES-003 (Dec. 31, 1992); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990). Once Grievant establishes a prima facie case of discrimination or favoritism, Respondent can then offer a legitimate reason to substantiate its actions; thereafter, Grievants must show that the offered reasons are pretextual. Prince, supra.

Grievant has failed to make a prima facie case of discrimination/favoritism because he and the Neffs held different classifications, and therefore, were not similarly situated. A review of the position descriptions further establishes that Mr. Neff, was assigned duties consistent with the classification of Custodian III. He was responsible for operating theheating system and cleaning the fieldhouse and concessions stand, as well as field pickup after football games. He was also required to complete a daily pickup of trash around the perimeter of the building and clean the playground after lunch. However, Ms. Neff's position description was substantially similar to Grievant's as she was assigned

to clean classrooms, bathrooms, the teachers' lounge, and share the grass cutting duties. Nevertheless, while this supports a finding that the position held by Ms. Neff was misclassified, Grievant cannot prevail on a discrimination/favoritism claim because he and Ms. Neff held different classifications, and were not similarly situated.

The following conclusions of law support the decision reached.

Conclusions of Law

1. Because a misclassification grievance is non-disciplinary in nature, Grievant has the burden of proving his case by a preponderance of the evidence. Midkiff v. Lincoln County Bd. of Educ., Docket No. 95-22-262 (Mar. 3, 1996); Perdue v. Mercer County Bd. of Educ., Docket No. 92-27-280 (Mar. 29, 1993).

2. In order to prevail on a claim that his position of misclassified, an employee must establish, by a preponderance of the evidence, that his duties more closely match those of another classification defined by W. Va. Code § 18A-4-8, other than that under which his position is categorized. Pope v. Mingo County Bd. of Educ., Docket No. 91-28- 068 (July 31, 1992).

3. Grievant has not established by a preponderance of the evidence that he was misclassified as a Custodian I. 4. In order to prove a prima facie case of discrimination or favoritism, pursuant to W. Va. Code §§ 18-29-2(m) and (o), Grievant must establish by a preponderance of the evidence: (a) that he is similarly situated in a pertinent way, to one or more other employee(s);

(b) that the other employee(s) has/have been given advantage or treated with preference in a significant manner not similarly afforded him; and,

(c) that the difference in treatment has caused a substantial inequity to him and that there is no known or apparent justification for this difference.

Hays v. W. Va. Div. of Employment Security, Docket No. 91-ES-505/92-ES-003 (Dec. 31, 1992); Prince v. Wayne County Bd. of Educ., Docket No. 90-50-281 (Jan. 28, 1990). Once Grievant establishes a prima facie case of discrimination or favoritism, Respondent can then offer a legitimate reason to substantiate its actions; thereafter, Grievant must show that the offered reasons are pretextual. Prince, supra.

5. Grievant has failed to establish a prima facie case of discrimination or favoritism.

Accordingly, this grievance is **DENIED** .

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

DATE: FEBRUARY 25, 2004 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1 *Grievant's undisputed testimony was that Ms. Neff was allowed to change her work schedule twice, finally settling on the hours of 8:00 a.m. to 4:00 p.m.*

Footnote: 2

[2]Grievant's present duties were not made part of the record, therefore, this decision is limited to determining whether Grievant was misclassified during his full-time assignment at GBHS.

Footnote: 3

[3]W. Va. Code § 18A-4-8(l) provides that "county boards shall review each service personnel employee job classification annually and shall reclassify all service employees as required by the job classifications."