**THE WEST VIRGINIA PUBLIC EMPLOYEES**

**GRIEVANCE BOARD**

**JOHN HAUGHT and ALLEN FLUHARTY,**

**Grievants,**

**v.**

**DOCKET NO. 07-24-391**

**MARION COUNTY BOARD OF EDUCATION,**

**Respondent.**

**DECISION**

This grievance was filed on April 26, 2007, by Grievants, John Haught and Allen Fluharty. The statement of grievance reads:

> Grievants are regularly employed custodians. They contend that Respondent failed to post a vacancy created by the transfer of a custodian at Mannington Middle School. Instead, the position was filled by an employee already at the school in a temporary position. Grievants contend that this failure to post and fill the position violates *West Virginia Code §§* 18A-4-15(a) & 18A-4-8b. (The employee in question had less regular seniority than either of the Grievants.)

The relief sought by Grievants is:

> posting of the position of custodian at Mannington Middle School. If one of the Grievants is the successful applicant, he seeks instatement into the position and compensation for any lost wages and benefits lost as a result of the failure to post and timely fill the position in question. Grievants also seek interest on all sums to which either is entitled.

Grievants' supervisor denied the grievance, and Grievants appealed to level two. After a level two hearing was held on July 16, 2007, the grievance was denied at that level on August 28, 2007. Grievants bypassed level three, appealing to level four on September 5, 2007. A level four hearing was held before the undersigned administrative law judge on January 8, 2008, in the Grievance Board's Westover office. Grievants were representedby John Everett Roush, Esquire, West Virginia School Service Personnel Association, and Respondent was represented by Stephen R. Brooks, Esquire, Flaherty, Sensabaugh & Bonasso, P.L.L.C. This matter became mature for decision on February 13, 2008, upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law.

## Synopsis

In the fall of 2006, a temporary custodian vacancy was created at Mannington Middle School. The Marion County Board of Education posted at that time a permanent custodial position at that school, rather than a temporary position. This posting mistake created six custodial positions, when the school only needed five positions. The posted position was filled by Amie Glover. Sometime later this error was discovered, and in the spring of 2007, Ms. Glover was placed on the transfer list. Before the transfer was effective, the custodian who worked the mid-day shift at the school took a position at another school. The mid-day shift was eliminated at the school, and Ms. Glover was not transferred.

Grievants argued the board of education could not leave Ms. Glover at Mannington Middle School. They argued the mid-day custodial shift, which apparently is the only shift in which they had an interest, had to be posted. Respondent argued Grievants were so far down on the seniority list that they were not entitled to the relief requested because it was too speculative.

Boards of education are not required to post custodial positions as shift specific, and have the discretion to eliminate shifts which are not needed. The board of education was not required to post a position. The following Findings of Fact are made based upon a preponderance of the evidence presented at levels two and four.

## Findings of Fact

1. Grievants are employed by the Marion County Board of Education ("MBOE") as custodians on a full-time, regular basis.

2. Alicia Sapp was employed as a custodian at Mannington Middle School ("MMS"), when she bid upon a temporary vacancy at the Marion County Technical Center, and was the successful applicant. She moved from MMS to the temporary position at Marion County Technical Center on October 2, 2006.

3. MBOE did not post Ms. Sapp's position at MMS as a temporary vacancy. MBOE posted a permanent, full-time custodial position at MMS shortly after Ms. Sapp was assigned to the Marion County Technical Center. Amie Glover bid upon and received the position, (See footnote 1) and began working in the position at MMS shortly after October 2, 2006. This increased the number at custodial positions at MMS from five to six.

4. It was a mistake to post a permanent position at MMS. This mistake was not immediately discovered.

5. MMS did not have a need for six custodians. Ms. Glover was placed on the transfer list in the spring of 2007.

6. On March 19, 2007, Phillip Sims retired from his custodial position at Blackshere Elementary School. 7. Mr. Sims' position was posted, and Everett Martin, a custodian at MMS, was the successful applicant.

8. Mr. Martin had worked a mid-day (11:00 a.m. to 6:30 p.m.) shift at MMS. MMS also had one custodian on the day shift (6:00 a.m. to 1:30 p.m.). The principal at MMS decided that he did not need two custodians working during the day.

9. On May 7, 2007, MBOE eliminated one custodial position at MMS, and Ms. Glover was removed from the transfer list.

10. After elimination of this custodial position, MMS had five full-time custodial positions, none of which was assigned a mid-day shift. One position was a day shift position, and the other four were afternoon (3:10 p.m. to 10:30 p.m.) shift positions.

## Discussion

Grievants have the burden of proving their grievance by a preponderance of the evidence. *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. (See footnote 2) "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 & Human Res.*, Docket No. 92-HHR-486 (May 17,1993). Where the evidence equally supports both sides, the employee has not met his burden. *Id*.

It appears from the record that the only reason Grievants believe Ms. Glover should been transferred from her position at MMS, and Mr. Martin's position should have been posted, is that they were interested in the mid-day shift which Mr. Martin worked. Even if Grievants were to prevail in their request that MBOE post a position at MMS, the undersigned could not require the position to be posted as a mid-day shift, and indeed, that shift no longer exists. The Grievance Board has made clear 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* [*Myers and Cain v. Wetzel County Bd. of Educ.*, Docket No. 94-52-325 (Oct. 10, 1994)]; *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.. . . 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*; [*SER Hawkins v. Tyler County Bd. of Educ.*, 275 S.E.2d 908 (W. Va. 1981)] at 911-12." *Thomas v. Wetzel County Bd. of Educ.*, Docket No. 96-52-268 (Oct. 31, 1996)(shift change of five hours, completely changing Grievant's shift from a day shift he had worked to get through his seniority, to an evening shift, without a good reason, found to constitute a transfer).

Due to its error in the fall of 2006, MBOE had six custodial positions at MMS when it only needed five positions. To correct this problem, Ms. Glover was placed on thetransfer list. Then, Mr. Martin left, and his position was eliminated. “When a position is vacated, it is within the board's discretion to determine whether or not the position is still needed, and, if not, to assign duties previously performed by that individual to qualified employees with their consent and without additional pay. *Richardson v. Putnam County Bd. of Educ.*, Docket No. 97-40-189 (Oct. 15, 1997)[(*aff'd* Putnam County Cir. Ct., Appeal No. 97-C-372 (June 29, 1998))]. Respondent had no obligation to post a

vacancy for a position which no longer existed. *See Id*." *Vance v. Jefferson County Bd. of Educ.,* Docket No. 02-19-123 (Sept. 20, 2002).

Once Mr. Martin left MMS for a position at another location, there was no longer a need to transfer Ms. Glover. County boards have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. *Dillon v. Bd. of Educ. of County of Wyoming*, 351 S.E.2d 58 (W. Va. 1986). MBOE was not required to post a vacant position at MMS.

The following Conclusions of Law support the decision reached.

**Conclusions of Law**

1. Grievants have the burden of proving their grievance by a preponderance of the evidence. *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.

*2.* The Grievance Board has made clear that "service personnel positions do not have to be posted as shift specific, and that principals have some latitude in assigningduties and working hours to service personnel at their schools. *See* [*Myers and Cain v. Wetzel County Bd. of Educ.*, Docket No. 94-52-325 (Oct. 10, 1994)]; *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.. . . 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*; [*SER Hawkins v. Tyler County Bd. of Educ.*, 275 S.E.2d 908 (W. Va. 1981)] at 911-12." *Thomas v. Wetzel County Bd. of Educ.*, Docket No. 96-52-268 (Oct. 31, 1996).

3. "When a position is vacated, it is within the board's discretion to determine whether or not the position is still needed, and, if not, to assign duties previously performed by that individual to qualified employees with their consent and without additional pay. *Richardson v. Putnam County Bd. of Educ.*, Docket No. 97-40-189 (Oct. 15, 1997)[(*aff'd* Putnam County Cir. Ct., Appeal No. 97-C-372 (June 29, 1998))]. Respondent had no obligation to post a vacancy for a position which no longer existed. *See Id*." *Vance v. Jefferson County Bd. of Educ.,* Docket No. 02-19-123 (Sept. 20, 2002).

4. County boards have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious. *Dillon v. Bd. of Educ. of County of Wyoming*, 351 S.E.2d 58 (W. Va. 1986). 5. The Marion County Board of Education was not required to transfer Ms. Glover from her position at Mannington Middle School, and post a custodial position at that school as a mid-day shift.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Marion County. Any such appeal must be filed within thirty (30) days of receipt of this decision. *W. Va. Code §* 18-29-7 (repealed) (*but see Executive Order No. 2-07*, May 8, 2007). Neither the West Virginia Public 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 Grievance 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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**BRENDA L. GOULD**

**Administrative Law Judge**

**Date: March 21, 2008**

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Footnote: 1

*Apparently, neither Grievant applied for the position.*

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Footnote: 2

*In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former*

*statutes, which continue to control the proceedings in this case.*