JOHN PHILLIPS and

CAROLYN CALES

v. **Docket No. 93-45-105**

SUMMERS COUNTY BOARD OF EDUCATION

DECISION

The grievants, John Phillips and Carolyn Cales, are employed by the Summers County Board of Education (Board) as Custodians assigned to Hinton High School (HHS). They filed a joint grievance at Level IV March 19, 1993, protesting their suspensions without pay for insubordination and willful neglect of duty. A hearing was held September 13, 1993, (See footnote 1) and the parties submitted proposed findings of fact and conclusions of law by November 2, 1993.

The events which precipitated the grievants' suspensions occurred on November 10, 1992, and much of what transpired on that date is not in dispute. The grievants work a 3:00 p.m. to 11:00 p.m. shift but generally report to HHS Head Custodian Carl Wills at 2:30 p.m. to be briefed on any special tasks which need to be performed on their shift. At approximately 3:00 p.m. on the datein question, Grievant Phillips interrupted a meeting between HHS Principal Garnette Crowder and HHS Assistant Principal James Withrow to report that students had vandalized a portion of one of the bathrooms in the school. As the three proceeded to the bathroom to inspect the damage they were joined by HHS teacher Steve Pack. (See footnote 2) During their inspection of the damage, Grievant Phillips became very upset and, in a very loud voice, intimated that the damage could have been prevented if Ms. Crowder and other professionals at the school would do their jobs during the day. Ms. Crowder responded that it was not the grievant's place to criticize her or others, and that his job was merely to report such damage and continue with his cleaning tasks.

At approximately 3:10 p.m., the grievants reported to Mr. Withrow's office and advised him that they needed to be excused for the remainder of the shift for health reasons. Mr. Withrow informed Ms. Crowder who subsequently approved their use of sick leave. Substitutes were eventually called to fill in for the remainder of the shift.

At approximately 6:00 p.m. that evening, Grievant Phillips took his daughter to a basketball game at HHS. While there he secured one of the doors to the school's gymnasium because he suspected that the substitute custodian serving in his place might not have access to the key to the door. Superintendent of Schools Richard Rodes, who apparently resides near the school, witnessed Grievant Phillips going into the gym. Ms. Crowder and Mr. Pack also saw him sitting in his car outside the gym that evening. Ms. Crowder subsequently advised Superintendent Rodes that she considered Grievant Phillips' remarks to her in the HHS bathroom to be insubordinate and that his and Grievant Cales' departure from the school shortly thereafter constituted willful neglect of duty.

Grievant Phillips' suspension letter, dated November 13, 1992, from Superintendent Rodes provided,

> On November 10, 1992, you reported to work at Hinton High School. Ms. Crowder thereafter met with you and counseled with you concerning custodial duties for those on the afternoon shift. Ms. Crowder has the overall responsibility for the condition of the building and grounds and was certainly well within her authority to make direct assignments to custodians. Subsequently, you disagreed with the directions given by Ms. Crowder.
>
> Shortly thereafter both custodians on the afternoon shift advised Mr. Withrow they were ill and left their duties. In so doing, you have willfully neglected your duties in breach of your employment contact and have been insubordinate.
>
> Pursuant to 18A-2-7 you are hereby suspended from your employment duties, without pay, for a period of five days. Your suspension will begin on Monday, November 16, 1992, and run consecutively for 5 days. Upon returning to work, you shall report directly to Ms. Crowder. I will present these charges to the board at their next regularly scheduled meeting on December 10, 1992.

Grievant Cales' suspension letter of the same date provided,

> On November 10, 1992, you reported to work at Hinton High School. Ms. Crowder thereafter met with Mr. John Phillips and counseled with him concerning custodial duties for those on the afternoon shift. Ms. Crowder has the overall responsibility for the condition of the building and grounds and was certainly well within her authority to make direct assignments to custodians. Mr. Phillips disagreed with the directions given by Ms. Crowder.
>
> Shortly thereafter both custodians on the afternoon shift advised Mr. Withrow they

> were ill and left their duties. In so doing, you have willfully neglected your duties in breach of your employment contract and have been insubordinate.
>
> Pursuant to 18A-2-7 you are hereby suspended from your employment duties, without pay, for a period of two days. Your suspension will begin on Monday, November 16, 1992 and run consecutively for 2 days. Upon returning for work, you shall report directly to Ms. Crowder. I will present these charges to the board at their next regularly scheduled meeting on December 10, 1992.

By letters dated March 12, 1993, Superintendent Rodes advised the grievants that the Board, on March 11, 1993, had upheld the suspensions. (See footnote 3) The grievants were also docked a day's pay for November 10.

At Level IV, the Board presented the testimony of Ms. Crowder, Mr. Withrow, Mr. Pack and Superintendent Rodes. The grievants presented their testimony in rebuttal. At the conclusion of the presentation of evidence, the undersigned made the following conclusions of law. (See footnote 4)

1) In cases involving disciplinary measures against a school employee, the burden is upon the county board of education to prove the charges against the employee by a preponderance of the evidence. See, e.g., Allen v. Monroe County Bd. of Ed., Docket No. 90-31-021 (July 11, 1990).

2) The evidence was insufficient to establish that Grievant Cales was insubordinate or neglected her duties, willfully or otherwise, on the day in question.

3) The evidence was insufficient to establish that Grievant Phillips neglected his duties, willfully or otherwise, on the date in question.

4) The evidence was sufficient to establish that Grievant Phillips was insubordinate during his encounter with Principal Crowder in the HHS bathroom on the day in question. (See footnote 5)

Given the opportunity to present evidence on the issue of whether, in light of the above rulings, the five-day suspension imposed on grievant Phillips was too severe, the Board offered the further testimony of Superintendent Rodes. Mr. Rodes indicated that he "probably" would have imposed the same penalty had there been no neglect of duty on grievant Phillips' part. He also unequivocally stated, however, that the five days were imposed on both charges and that it was "hard to separate them out." The parties submitted memoranda of law on the issue of the propriety of the penalty. After a thorough review of the positions outlined therein and the evidence presented, the undersigned makes the following additional conclusions of law.

1) In cases in which more than one charge is brought against an employee of a county board of education and one or more are not substantiated by a preponderance of the evidence, the Grievance Board will generally remand the matter to the board for reconsideration of the penalty imposed on the employee. Grooms v. Raleigh County Bd. of Educ., Docket No. 90-41-482 (April 30, 1991).

2) The Grievance Board is also empowered to fashion relief which is "deemed fair and equitable" in the circumstances of a particular case. W.Va. Code 18-29-5(b). The authority to mitigate the punishment imposed on a school employee is encompassed by the statute. Bell v. Kanawha County Bd. of Ed., Docket No. 91-20-005 (April 9, 1991).

3) When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties imposed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved. Parham v. Raleigh County Bd. of Ed., Docket No. 91-41-131 (Nov. 7, 1991).

4) In the present case, since the record supports that it was both the alleged willful neglect of duty and insubordination and not one or the other which prompted the five day suspension imposed on Grievant Phillips and that the penalty would have been less had there been no charge of neglect of duty, mitigation of the punishment is in order.

5) A three day suspension without pay is proportionate to Grievant Phillips' insubordinate conduct and otherwise consistent with the evidence of record relevant to the considerations listed in Conclusion of Law 3.

Accordingly, the grievance is **GRANTED** to the extent that the Summers County Board of Education is hereby **ORDERED** to reimburse Grievant Cales for any loss of pay or benefits incurred, plus interest; to remove any and all references to the suspension from her personnel file; to reimburse Grievant Phillips for the loss of three days pay, plus interest; and to remove any and all references to the charge of willful neglect of duty from his personnel file.

Any party may appeal this decision to the Circuit Court of Kanawha County or the Circuit Court of Mercer 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 intent to appeal and provide the civil action number so

that the record can be prepared and transmitted to the appropriate court.

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JERRY A. WRIGHT

CHIEF ADMINISTRATIVE LAW JUDGE

Dated: March 31, 1994

Footnote: 1

Several hearings were continued for good cause shown.

Footnote: 2It appears that Mr. Pack serves as an unofficial dean of students for the seventh and eighth grades at HHS and is responsible for maintaining "security" in the area in which the bathroom was located.

Footnote: 3The Board held a pre-deprivation hearing on that date but it was not recorded. It is not clear whether the grievants appeared at the hearing. In any event, they do not make any claims of a lack of due process and none are found.

Footnote: 4The testimony presented was often conflicting and several significant credibility determinations were necessary. Those determinations were based on the undersigned's observations of the various witness' demeanors, the consistency of their statements, the extent to which their assertions were corroborated by other reliable and credible evidence and their responsiveness or lack thereof to questions posed them.

Footnote: 5This ruling is in accord with Sexton v. Marshall University, Docket No. BOR-88-029-4 (May 25, 1989) in which it was held that, while insubordination generally involves a lawful order and subsequent refusal to obey, an employee may also commit the offense through aggressive and confrontational conduct toward a superior. The holdings in Sexton were ultimately affirmed by the West Virginia Supreme Court of Appeals in Sexton v. Marshall University, 387 S.E.2d 529 (W.Va. 1989).