THOMAS DANCY

v. **Docket No. 95-41-168**

RALEIGH COUNTY BOARD OF EDUCATION

DECISION

The grievant, Thomas Dancy, is employed by the Raleigh County Board of Education (Board) as a Custodian assigned to Coal City Elementary School (CCE). He filed this complaint February 3, 1995 protesting a January 31, 1995 personnel evaluation performed by CCE Principal Jerry Redden. Mr. Redden denied the grievance as did the evaluator at Level II following a hearing held March 10, 1995. The Board, at Level III, declined to address the matter and appeal to Level IV was made April 25, 1995. On July 12, 1995, at a scheduled Level IV hearing, the parties agreed to submit the case for decision on the record developed at Level II. Proposed findings of fact and conclusions of law were received by August 7, 1995.

There is no dispute over the facts of the case. The grievant has been employed as a Custodian for approximately twenty years, most of which has been served at CCE. Prior to January 1995, his overall performance was consistently rated as "Effective" or "Highly Effective," although his principal occasionally noted minorweaknesses. He has not been the subject of any disciplinary action.

An on the job injury caused the grievant to take an extended leave of absence beginning on November 13, 1993. At that time CCE's policy governing the hours of its Custodians on days on which winter weather prohibited student attendance was rather flexible. They were to report to the school only for the purpose of clearing snow and ice from walkways. They were free to return home when these tasks were completed. If one custodian performed the chores, others were not even required to report, despite that all were paid for the entire day. (See footnote 1)

According to the grievant, it was his usual practice on any day on which snow was a problem, to report at or before the beginning of his regular 6:00 a.m. to 2:30 p.m. shift and see that the school's walkways were cleared. He also cleared snow at night when necessary. There is no evidence of record that the grievant or other custodians ever failed to remove snow prior to the arrival of faculty or students.

During the grievant's absence, Mr. Redden instituted a new snow day policy for Custodians which required them to report to the school at various starting times and remain at the school for at least three hours. The policy directed the Custodians to clean and dust areas of the school once snow removal and furnace inspection were completed. The policy, which was posted prominently, (See footnote 2) specifically required the grievant to work from 8:00 a.m. to 11:00 a.m. on all snow days. (See footnote 3)

The grievant returned to work on January 19, 1995. After reviewing the policy, he concluded, based on information given him by his local union representative some years earlier, that Mr. Redden did not have the authority to initiate such a policy and that he was, therefore, free to ignore it. (See footnote 4) It appears that the representative advised that it was unlawful to schedule Custodians and not other service personnel to work on snow days and that, in any event, only the county board could promulgate such policy.

January 30, 1995 was a snow day. The grievant, exercising what he believed to be his right not to work as scheduled, did notreport to the school. (See footnote 5) Rather, he went there at 9:00 p.m. and confirmed that the walkways were cleared of snow and ice. On January 31, 1995, Mr. Redden presented the grievant an evaluation in which he was rated "Unsatisfactory" in the areas "Observance of work hours" and "Meeting Schedules." He was rated "Needs Improvement" in the areas "Work judgments," "Accepts responsibility" and "Follows instructions." The grievant was not given scores in the remaining fifteen categories on the evaluation form and was rated overall as "Needs Improvement." Mr. Redden made the following written comments on the evaluation.

> Keep a closer check on shower room and keep clean;
>
> Garbage cans must be kept clean and odor free - wash out every day or two along with changing bags;
>
> If snow day exists - report to work as assigned (Otherwise make call to Principal to adjust hours);

Evaluation will take place again by March 1, 1995.

Did not follow schedule for 1-30-95

Did not attend work 1-30-95 - No phone call to Principal

Boys-Girls shower rooms not cleaned recently as schedule indicates-it should be by work judgment

Lunchroom garbage cans must be kept clean and odor free as indicated by schedules

Mr. Redden held a conference with the grievant on the same date in which he explained each item on the evaluation. He specifically advised the grievant that he was required to adhere to the snow day schedule or call with an explanation. The grievant was asked to acknowledge receipt by signing the evaluation but refused. He was docked one-half day's pay for failing to report on January 30.

February 6, 8, and 9, 1995, were snow days. The grievant intentionally did not follow the schedule on those dates and did not call Mr. Redden. His pay was again docked. (See footnote 6)

The grievant advances the following arguments,

Grievant contends that it is unfair to evaluate an employee after only two weeks on the job following a long absence. This is too small a period of time upon which to base an evaluation and it is a time period when an employee is likely not to be at his best.

Grievant contends that his evaluation on January 31, 1995 was a direct result of his failure to follow the snow day schedule on the previous day and that the evaluation was in reprisal of said previous day's action. In short, the evaluation was not an attempt to apprise Grievant of his supervisor's opinion of his performance. It was an attempt to punish him for his failure to follow the principal's directive concerning the snow day schedule.

Although, the Respondent may be correct that the principal had the right to prepare a special snow day schedule, it is still clear that at the time Grievant believed this schedule was contrary to county policy. He based this belief (a) on his twenty years of custodial experience during which time the old practice was observed and (b) on the advice of his local representatives.

The Board maintains that it was not improper for Mr. Redden to use the evaluation process to "remediate" very real problems in the grievant's performance during the first several days of his return

to work. The Board further asserts that the evidence in the case fully supports that the grievant was insubordinate on January 30and that Mr. Redden was correct in his determination that the grievant did not adequately perform the tasks noted in the written comments on the evaluation.

As a rule, in cases involving a protest over a negative evaluation, the grievant bears the burden of establishing, by a preponderance of the evidence, that there was such an abuse of discretion on the evaluator's part that the primary purpose of the evaluation process was confounded. See, Higgins v. Randolph County Bd. of Educ., 286 S.E.2d 682 (W.Va. 1981); Jarrell v. Raleigh County Bd. of Educ., Docket No. 93-41-341 (Sept. 16, 1994); Oni v. Bluefield State College, Docket No. 93-BOD-515 (Dec. 30, 1994). The holding recognizes that the purpose of most evaluations is to correct and not discipline. Oni.

Here, it is apparent that Mr. Redden used the January 31, 1995 evaluation for both purposes, particularly that portion related to the grievant's alleged insubordination. Thus, it is not contrary to the above-cited cases to hold that the Board bears the burden to show that the grievant was insubordinate and deficient in his duties. (See footnote 7) For the reasons set forth below, the undersigned concludes that the Board has fully met its burden.

Insubordination is defined as the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Pine v. W.Va. Dept of Health and Human Resources, Docket No. 95-HHR-066 (May 12, 1995); Maxey v. W.Va. Dept. of Health andHuman Resources, Docket No. 93-HHR-424 (Feb. 28, 1995). The employer must demonstrate that the conduct was sufficiently intentional to constitute defiance of authority. Pine, at 21.

It is clear that the grievant intentionally disobeyed an order of his superior. The undersigned doubts generally that he refused to comply because he believed the order invalid. It seems more plausible that he was simply displeased with the change in schedules and that his refusal to comply was his means of expressing the displeasure. (See footnote 8) There is also evidence of record which suggests that there was a certain amount of friction between the grievant and Mr. Redden prior to the grievant's leave of absence and that this may have colored his reaction to the new schedule. Nevertheless, to the extent that the grievant did believe that Mr. Redden did not have the authority to issue such directives, the undersigned finds that his belief was unreasonable.

A principal's authority over his or her school is statutory. W.Va. Code §18-2-9, in pertinent part, provides, "Upon the recommendation of the county superintendent of schools, the county board of

education shall employ and assign, through written contract, public school principals who shall supervise the management and the operation of the school or schools to which they are assigned." The undersigned finds that this broad language gives a school principal the authority to establish inclement weather schedules for school service personnel unless the countyboard or superintendent has promulgated some superseding policy or otherwise restricted the principal's discretion.

Here, the grievant has not established the existence of any policy, informal or formal, which conditioned Mr. Redden's authority in scheduling. Rather, the Board's extensive job description for Custodians was the only "policy" evidence submitted on this issue, and it is clear in its pronouncement that while the "Supervision and guidance may also be given by the Superintendent, Assistant Superintendent and Director of Maintenance," the Custodian's "primary supervision and evaluation shall come from the building principal." The description further provides that, "A daily routine of duties shall be worked out by the principal and the custodian. . ." Clearly, Mr. Redden was acting with actual authority to develop and implement the new schedule.

Moreover, the question of whether it was reasonable for an employee to believe that a superior was without authority to issue a particular order should not be based, at least not entirely, on a subsequent legal analysis of whether the superior had actual authority at the time the directive was given. Rather, the focus should be on whether, under the circumstances in which the order was given, a reasonable person would conclude that the superior was acting with apparent authority. Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989).

The undersigned finds that Mr. Redden, in exercising control over the schedules of the employees of his school, was performing such an integral and obvious function of his position that anydoubts the grievant may have had regarding his authority in that area were unreasonable. The grievant's own testimony at Level II establishes that Mr. Redden had made adjustments in his schedule when unexpected personal needs such as medical appointments arose. It is telling that the grievant believed him to have the authority to make adjustments to his benefit but not to his detriment. The record will not support that there was a rational basis for the grievant to assume that work schedules on snow days were the sole province of the Board's central office.

The short answer to the grievant's assertions regarding his reliance on advice from his union representative is that it was not reasonable to disregard a direct order of a supervisor on the counsel of someone who did not occupy a position of authority in the school system. Simply stated, reliance

on a union representative does not excuse a violation of the general rule that an employee must obey the order of a superior and then grieve its validity. See, Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990).

Moreover, the grievant was noticeably vague concerning the nature of the advice received and, as previously noted, the advice was given some years earlier. Again, the undersigned doubts that the decision to disobey was predicated on information gained from the representative. It is significant and telling that the representative was not called upon to confirm the grievant's assertions or explain the basis for her conclusion that Mr. Reddenwas without authority to require the grievant to work three hours on a day for which he was to be paid for eight.

The Board has also substantiated, through Mr. Redden's persuasive and credible testimony, that the grievant was deficient, although in minor detail, in those cleaning tasks discussed in the written comments on the evaluation. While the grievant's testimony on this issue was no less credible or convincing, it tended to discount the extent of the deficiencies rather than establish that Mr. Redden had contrived them.

Finally, Board policy on evaluations (See footnote 9) did not prohibit an evaluation within the short period following the grievant's return to work. The policy specifically provides that a school principal may evaluate an employee "whenever deemed necessary. . .to improve job performance or to recognize outstanding performance." The undersigned agrees, however, with the grievant's assertion that the evaluation process was otherwise violative of the policy, and finds that he is entitled to some minimal relief.

The most troubling aspect of Mr. Redden's "on-the-spot" evaluation was that it was necessarily focused on the grievant's insubordinate behavior and minor work deficiencies to the exclusion of all other areas of performance and, therefore, does not represent his total performance for the short period in question. As noted, the grievant was ranked in only five of a total of twenty different areas of performance. This approach seems consistent with that portion of the evaluation policy which provides that they may be used for "clarification of duties and responsibilities" but directly contrary to those portions which provide, "The observed performance of the employee should be evaluated according to each rating factor established for the position of that employee" and "Undue emphasis should not be given isolated instances of poor or outstanding performance." In the undersigned's opinion, Mr. Redden's failure to rate in all categories was a substantive violation of the Board's policy.

Because the Board has substantiated the deficiencies noted in the evaluation and in keeping with the general rule that deference should be afforded administrators in such matters, see, Jarrell, supra, it is concluded that the grievant is not entitled to removal of the evaluation from his records, as requested, but that he should be given rankings in the remaining categories of the evaluation. Since his evaluation for the rating period immediately prior to his leave of absence and, with minor exception, those for preceding years, indicate a rating of "Effective" in all areas omitted, and there is otherwise no evidence of record that he was deficient in those areas, he is entitled to the same score. (See footnote 10)

Accordingly, the grievant's request for the removal of the January 31, 1995 personnel evaluation is **DENIED**. The RaleighCounty Board of Education is, however, **ORDERED** to revise the evaluation to reflect scores of "Effective" in all areas save those in which the grievant is already ranked.

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

ADMINISTRATIVE LAW JUDGE

Dated: September 7, 1995

Footnote: 1In a handwritten twelve-page attachment to his Level I grievance form, the grievant implies at one point that he believed the new policy called for him to perform work for which he was not paid, but then states that he told Mr. Redden that he would protest over being docked for January 30. The record otherwise conclusively establishes that CCE employees were paid eight hours wages for snow days under the old policy and are receiving the same amount under the new schedule. The grievant's Level IV proposals make no mention of the issue.

The undersigned finds it implausible that the grievant believed that he was being required to work for no pay. The inconsistencies in the written statement are supportive of this conclusion.

Footnote: 2The record reflects that it was displayed in "the Custodians' room" but does not reveal where the room was located.

Footnote: 3The schedule specifically named the grievant. During the grievant's absence, a substitute worked during the hours designated as his shift on snow days.

Footnote: 4Mr. Redden testified credibly at Level II that he gave the grievant a copy of the schedule on the morning of his return from leave. The grievant denied that he did. It is not necessary to resolve this conflict since the grievant concedes that he read the schedule and fully understood its terms.

Footnote: 5There is no evidence of record that the grievant was prevented from reporting because of the severity of the weather conditions.

Footnote: 6Obviously, since the complaint was filed over the January 31 evaluation, the grievant's actions subsequent to that date are not the focus of the decision. The undersigned disagrees, however, with the grievant's assertion that his continued refusal to abide by the schedule is wholly irrelevant. His failure to report on the February 1995 snow days has been afforded weight to the extent that it corroborates that his initial disregard for the schedule was intentional and willful.

Footnote: 7It is also noted, that since the parties agree on most if not all of the operative facts of the case, there are no close evidentiary questions.

Footnote: 8It should be noted that even under the new policy, the grievant would work only three hours yet be paid for eight.

Footnote: 9The policy, Board Exhibit No. 2, is entitled, "A Guide to Performance Evaluation for Service Personnel." The policy contains no indication that it was formally adopted by the Board. The Board's representative at Level II, however, relied upon it heavily and, at least by implication, asserted that Mr. Redden was bound by its provisions. The undersigned has given it the same effect.

Footnote: 10Under W.Va. Code §18-29-5(b), Level IV Administrative Law Judges are empowered to "provide such relief as is deemed fair and equitable."