WAYNE JONES, .

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Grievant, .

.

v. . Docket No. 95-29-151

.

MINGO COUNTY BOARD OF EDUCATION, .

.

Respondent. .

D E C I S I O N

On April 12, 1995, Wayne Jones (Grievant) appealed his dismissal by the Mingo County Board of Education (MCBE) directly to Level IV as authorized by W. Va. Code § 18A-2-8. An evidentiary hearing was held in this Board's office in Charleston, West Virginia, on June 8, 1995. Both parties made oral closing arguments at the conclusion of the hearing. Thereafter, this matter became mature for decision on July 14, 1995, following timely receipt of Grievant's post-hearing submission. (See footnote 1) **Consistent with W. Va. Code § 18A-2-8 and the practice of this Grievance Board, this disciplinary action has been advanced on the docket for an expedited decision.**

Grievant was employed by MCBE as a custodian at Williamson High School (WHS). Grievant was advised of his proposed dismissal in a March 13, 1995, letter from MCBE Superintendent Everett Conn, as follows:

> **This is to advise that I do suspend you, without pay, from your employment as a custodian at Williamson High School until the regular Board of Education meeting to be held on April 6, 1995, at 7:30 o'clock P.M., and at that time I will recommend to the Board your dismissal under WV 18A-2-8. The charges are:**

1. Wilful neglect of duty

2. Insubordination

3. Failure to maintain a clean and safe work place

4. Violation of health standards

R Ex 17.

In support of the foregoing charges, WHS Dean of Students Deborah Harris provided testimony that she served as Acting Principal for WHS at the beginning of the 1993-94 school year. In that capacity, she was responsible for opening school at the beginning of the year. According to Ms. Harris, that portion of WHS for which Grievant was responsible was in "terrible condition" when she inspected the facility prior to the opening of school. On at least one occasion, she accompanied Grievant from room to room during his 3:00 to 11:00 P.M. shift in order to establish a schedule for him to clean his area. See R Ex A.

Despite specific direction from Ms. Harris, Grievant never appeared to clean the hallway garbage cans, beyond emptying trash, and allowed urine and excrement to remain in the bathrooms without any cleaning effort, other than dumping various chemical cleaners in the commodes. Ms. Harris further observed that Grievant wouldsweep around school chairs and furnishings, instead of moving them and rearranging them to clean thoroughly as required. She described Grievant's janitorial closet as filthy and disorganized. Although Grievant's schedule called for him to clean the "Little Theater" area once each week, Ms. Harris noted that this facility was never cleaned.

She observed that Grievant spent most of his time in Mrs. Turk's classroom which contained a television. When Ms. Harris returned to the school during Grievant's shift, she would find Grievant in that room watching television and eating. She also observed Grievant at various places outside the school, including ball games. When questioned by her, Grievant consistently indicated that he was on his "lunch" on each occasion, although this was not

consistent with his assigned schedule. Moreover, she could not recall a single occasion when she returned and found Grievant performing his custodial duties.

WHS Principal James Williamson testified that Grievant had not been performing his custodial duties in a satisfactory manner since his initial employment in 1992-93. On May 14, 1993, Mr. Williamson issued an improvement plan to Grievant. R Ex 1. Between May 20 and 24, 1993, only a marginal improvement in Grievant's performance was observed. See R Ex 2, 3 & 4. Shortly after the beginning of the 1993-94 school year, Mr. Williamson noted similar problems in Grievant's performance. See R Ex 5.

Mr. Williamson testified that, prior to September 26, 1994, he had instructed Grievant that no one other than WHS employees shouldbe in the building with Grievant. Ms. Harris indicated that she observed "Butch" Gregory and another individual, neither of whom was a WHS employee, in the building with Grievant on several occasions. On September 26, 1994, Mr. Williamson renewed this instruction to Grievant, emphasizing that Tim "Hamilton" [Hampton] was not to be in the building. Nonetheless, on September 30 and October 14, 1994, Mr. Williamson again encountered Mr. Hampton in the school building. On the latter occasion he overheard Grievant and Mr. Hampton discussing Amway products, subsequently returning to find them listening to a ball game in Mrs. Turk's room. See R Ex 6.

On December 1, 1994, Grievant was placed on an "emergency" improvement plan which specifically noted a problem with "[a]llowing people to come into the Williamson High School during your work time." R Ex 7. In addition, a conventional improvement plan dealing with the performance of Grievant's custodial duties was established that same day. R Ex 8. This latter plan was scheduled to cover the period from December 1 to December 31, 1994, but Mr. Williamson agreed to extend the plan through January 31, 1995. On December 2, 1994, Grievant was advised that failure to follow these plans of improvement would result in a request that the Board of Education terminate his employment. R Ex 9.

MCBE introduced photos taken by Mr. Williamson on March 2, 1995, which indicated that Grievant made no significant effort to clean the area for which he was responsible. See R Ex 14A through 14Y & 15A through 15J. These photos were taken early in themorning before school opened and after Grievant should have cleaned the building during his evening shift the previous day. Mr. Williamson observed that Grievant never cleaned windows as he had

been repeatedly instructed to do. During the pre-termination hearing, Mr. Williamson noted that Grievant's janitorial closet was "written up" by the Fire Marshall during a safety inspection. See R Ex 15H & I. He also indicated that he observed Mr. Hampton and Mr. Gregory in the school building on several occasions after Grievant was instructed in writing not to allow such individuals into WHS.

Sonya Picklesimer, a teacher at WHS, testified that the cleanliness of her biology classroom declined significantly after Grievant became the custodian responsible for cleaning her area. She noted that the furniture was not moved to sweep the floor. The furniture was never dusted.

John Fullen, MCBE Assistant Superintendent of Schools, testified that he personally inspected the area for which Grievant was responsible on at least two occasions. He indicated that the area needed a "lot of work." Mr. Fullen directly counselled Grievant, telling him to "get to work." Everett Conn, MCBE Superintendent of Schools, testified regarding his personal observations of the area at WHS for which Grievant was responsible, noting several perceived deficiencies.

Prior to his termination, Grievant was not given a formal evaluation of his performance for the 1994-95 school year.

Grievant testified at Level IV, denying that he allowed any unauthorized persons into the school building after he was given the written "plan of improvement" covering that matter on November 29, 1994. Grievant explained that he did not clean a sink in one classroom depicted in R Ex 14P and 14Q because it was rusty. He also noted that graffiti on the lockers would not come off with any of the cleaning materials he was provided. Grievant testified that he assisted a substitute custodian in washing windows during 1993 which MCBE claimed had not been cleaned since 1992. He also claimed to have stripped and waxed all classroom floors in his work area during the 1994-95 school year before he was terminated. Grievant stated that he came in on the weekend on his own time to strip and wax floors.

On cross-examination, Grievant acknowledged that there was paper and trash in the rusty sink but indicated that he did not remove those items since he had no idea what sort of chemicals had caused the rust. See R Ex 14P & Q. However, he could not recall making any inquiry to the teacher responsible for the science lab in order to determine what chemicals

had been in the sink. Grievant also testified that he did not remove the items in another sink depicted in Respondent's Exhibit 14R because he assumed they were "part of an experiment." He claimed to have dusted the area depicted in Respondent's Exhibits 14D and 14E despite an apparent accumulation of substantial amounts of white dust shown in the photo. Grievant further claimed to have cleaned the windows from time to time since 1993, noting this was not a duty he was requiredto perform on a daily basis. Grievant stated that it was difficult to reach the window sill area depicted in Respondent's Exhibits 14I and 14J. Similar dust was shown in Respondent's Exhibits 14U and 14V, located in an area that appears readily accessible.

Grievant testified that Mr. Gregory assisted him in stripping and waxing floors. This was during the time Grievant was under the improvement plans initiated on December 1, 1994. Both Mr. Williamson and Mr. Conn observed Mr. Gregory going in or out of the building on separate occasions after December 1, 1994. Grievant admitted that Mr. Hampton had been in the building on "two or three" occasions, but not after the improvement plan was issued on December 1, 1994.

DISCUSSION

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). "County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel so long as that discretion is exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." Kitzmiller v. Webster County Bd. of Educ., Docket No. 90-51-352 (Dec. 28, 1990), citing Dillon v. Bd. of Educ., 351 S.E.2d (W. Va. 1986); Albani v. Mineral County Bd. of Educ., Docket No. 90-28-016 (Nov. 30, 1990). Moreover, the authority of a countyboard of education to discipline an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). See Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

In this regard, W. Va. Code § 18A-2-8 provides, in pertinent part:

> Notwithstanding any other provisions of law, a board may suspend any person in its employment at any time for: Immorality, incompetency, cruelty,

> **insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea of nole contendre to a felony charge. A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article.**

The dismissal notice in this matter indicates that Grievant was terminated for insubordination and willful neglect of duty. Insubordination involves the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Riddle v. Bd. of Directors, So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). In order to establish insubordination, the employer must not only demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, but that the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan.31, 1995). (Cf. Rogliano v. Fayette County Bd. of Educ., Docket No. 94-10-164 (Oct. 25, 1994), where it was determined that "Grievant was given ample opportunity and notice that disciplinary action would be taken against him . . . .") Likewise, to prove willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). See Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990).

In the context of this matter, Grievant was clearly on notice of the duties he was expected to perform as a custodian at WHS. "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990), citing Meads v. Veterans Admin., 36 M.S.P.R. 574 (1988); Daniel v. U.S. Postal Serv., 16 M.S.P.R. 486 (1983); Davis v. Smithsonian Inst., 13 M.S.P.R. 77 (1983). The testimonial evidence at Grievant's termination hearing and at Level IV, as well as the demonstrative evidence introduced at both levels, convincingly demonstrate that Grievant ignored clear instructions and failed to make a good faith effort to perform his assigned duties. See Sexton v. Marshall Univ., Docket No. BOR2-88-

029-4 (May 25, 1988). Moreover, despite clear instructions from Mr. Williamson that no one other than a WHS employee was to come in the WHS building, Grievant admitted that a person (Mr. Gregory) not a WHS employee had assisted him in stripping and waxing floors.

Similarly, there is abundant circumstantial evidence that Grievant's failure to perform certain tasks, despite repeated requests from Mr. Williamson, as well as Assistant Superintendent Fullen, constituted willful neglect under the circumstances presented. Grievant's claims that he attempted to improve his performance are effectively contradicted by MCBE's photographic evidence. The deficiencies noted in these photos go well beyond any mere negligence or substandard performance, particularly in view of the extensive remedial efforts directed toward Grievant since the beginning of the 1993-94 school year. MCBE demonstrated by a preponderance of the credible evidence of record that Grievant performed only a token portion of his custodial duties by emptying the trash, mopping the floor with a dust mop and washing chalkboards. The remainder of his duties, including cleaning debris from sinks, dusting window sills and shelves, and washing windows were knowingly and intentionally ignored. See Chaddock, supra. Grievant's employer initially attempted to improve Grievant's performance through a formal plan of improvement. However, once it became apparent that Grievant's deficiencies were the result of a deliberate refusal to expend effort or comply with clear and proper instructions from his supervisor, MCBE was not required to conclude the improvement period with a formal evaluation. Accordingly, rather than complete the process whereby Grievant could be dismissed for unsatisfactory performance, MCBE elected to pursue charges of insubordination and willful neglect of duty. As required by W. Va. Code § 18-29-6, MCBE proved such charges by apreponderance of the evidence. Therefore, Grievant's termination was both substantively and procedurally correct.

In addition to the foregoing discussion, the following findings of fact and conclusions of law are appropriate in this matter.

FINDINGS OF FACT

1. Grievant was employed by the Mingo County Board of Education (MCBE) as a custodian at Williamson High School (WHS), commencing in August 1992.

2. At no time since his employment did Grievant perform his assigned custodial duties in a

satisfactory manner.

3. Grievant was given explicit directions on the duties he was expected to perform by Deborah Harris, WHS Dean of Students and Acting Principal at the beginning of the 1993-94 school year.

4. Grievant was given additional direction by WHS Principal James Williamson on numerous occasions during the 1993-94 and 1994-95 school years.

5. Grievant was placed on an improvement plan on May 14, 1993. Only a marginal improvement in Grievant's performance was noted prior to the end of the school year.

6. On September 26, 1994, Mr. Williamson reiterated specific instructions to Grievant that no one other than WHS employees should be in the WHS building during his work hours.

7. The prohibition on allowing outside persons into the building was formalized in a so-called "emergency" improvement plan issued to Grievant by Mr. Williamson on or about December 1, 1994.

8. After December 1, 1994, Grievant knowingly allowed a Mr. Gregory to assist him in stripping and waxing floors in his assigned area of responsibility at WHS. Mr. Gregory was not a WHS employee.

9. On the morning of March 3, 1995, following Grievant's regular evening shift on March 2, 1995, the area at WHS for which Grievant was responsible was in such deplorable condition, including visible dust, debris and dirt, as to indicate that no meaningful cleaning effort had been made by Grievant.

CONCLUSIONS OF LAW

1. The employer must establish the charges in a disciplinary matter by a preponderance of the evidence. W. Va. Code §18-29-6; Froats v. Hancock County Bd. of Educ., Docket No. 91-15-159 (Aug. 15, 1991); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989).

2. Insubordination and willful neglect of duty are among the causes listed in W. Va. Code § 18A-2-8 for which an education employee may be disciplined. See Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

3. Insubordination includes "willful failure or refusal to obey reasonable orders of a

superior entitled to give such order." Riddle v. Bd. of Directors, So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989).

4. In order to establish insubordination, the employer must demonstrate that the employee's failure to comply with a directivewas sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995).

5. To prove willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). See Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990).

6. MCBE proved by a preponderance of the evidence that Grievant was insubordinate in that he ignored clear instructions to perform certain tasks and failed to make a good faith effort to perform his assigned duties. See Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988).

7. MCBE also proved by a preponderance of the evidence that Grievant was insubordinate in that he admittedly ignored clear instructions not to have outside personnel in the building by allowing Mr. Gregory to assist him in stripping and waxing floors in his area of responsibility at WHS. See Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990).

8. MCBE further proved by a preponderance of the evidence that Grievant knowingly and intentionally ignored certain duties he was required to perform, thereby willfully neglecting such duties. See Chaddock, supra.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mingo 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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LEWIS G. BREWER

Administrative Law Judge

Dated: August 24, 1995

Footnote: 1*MCBE's post-hearing submission was not received until August 22, 1995, well past the established time limit for submissions established at the hearing. Accordingly, MCBE's submission was not considered in deciding this grievance.*