JACKSON VIA

v.

Docket No. 97-31-281

MONROE COUNTY BOARD OF EDUCATION

DECISION

The grievant, Jackson Via, is employed by the Monroe County Board of Education (Board) as a Custodian assigned to Peterstown Middle School (PMS). He filed a grievance at Level IV, on June 9, 1997, protesting a one-day suspension without pay. A hearing was held July 30, 1997, and the parties submitted proposed findings of fact and conclusions of law by September 8, 1997.

Background

The grievant has been employed by the Board as a Custodian for approximately twelve years. There is no indication, evidentiary or otherwise, that, prior to the suspension, he was ever disciplined or advised that his performance was unsatisfactory.

On March 5, 1997, the grievant was directed to the PMS gymnasium to clean an area in the bleachers where a student had vomited. He first covered the area with a dry sweeping compound and brushed it into a trash container. He then mopped the area with full strength bleach, and discarded the mop head. Later, at least two students reported to PMS Principal Jim Gore that they had been sitting several tiers below the area that was cleaned, and were splashed with bleach. Mr. Gore advised Superintendent of Schools Lyn Guy that parents were angry over the damage to the students' clothing.

After conducting a thorough investigation of the matter, Superintendent Guy concluded that the teacher in charge of the gymnasium at the time had been remiss in not directing all students awayfrom the area to be cleaned. The teacher received a written reprimand which held him accountable for the students' presence in the area, but not for the damage to their clothing.

Superintendent Guy ultimately determined that the grievant had violated Board policy which called

for a mixture of one and one-half cups of bleach per gallon of water for cleaning up bodily fluids. She also concluded that his carelessness had caused the damage to the students' clothing. The grievant received the following March 24, 1997 suspension letter:

On March 5, 1997, as you were cleaning the bleachers that morning during bus hall as a result of a student being ill, the full-strength bleach you used in the process damaged the clothing of five separate students. After a full investigation into this matter, I believe these students and their parents are entitled to full restitution for the garments so damaged.

I also believe that you have been negligent and careless as you handled this matter and that disciplinary action is warranted. For this reason, I am suspending you for one full day without pay as per [W.Va. Code] §18A-2-8 for incompetence and willful neglect of duty. I am also instructing Mr. Gore to develop an improvement plan regarding your performance as a custodian with respect to following county school policies and regulations, safety practices, work judgments, and knowledge of your work as a custodian.

On June 4, 1997, after reviewing evidence presented by Superintendent Guy and the grievant's counsel, the Board approved of the suspension. It does not appear that a written decision was issued. The evidence suggests, but does not confirm that the students involved were subsequently compensated for the damage to their clothing.

Argument

The Board does not seriously contend that the grievant's failure to use the proper proportions of bleach and water, in and of itself, warranted discipline. There is no allegation on the Board's part that a weaker solution would not have ruined the student's garments. It is clear that the grievant wassuspended for careless mopping. It appears that, to some degree, the suspension was viewed as a means of recovering any compensation that was paid or would be paid to the students.

The grievant concedes that he violated Board policy by using full strength bleach, but asserts that his failure to use the proper solution was an oversight and not willful. The grievant also disputes that he was careless when pouring the bleach and/or mopping the area in question. He suggests that students returned to and sat in the area after he cleaned it and before it had dried.

Findings and Conclusions

It is specious for the Board to characterize the grievant's conduct as willful neglect of duty. That charge typically encompasses an “intentional and inexcusable failure to perform a work-related responsibility.” Grooms v. Raleigh County Bd. of Educ., Docket No. 90-41-482 (April 30, 1991). Simply stated, there is no evidence whatsoever that the grievant's failure to use a weaker bleach solution was intentional. He was credible in his representation that he merely forgot the pertinent policy provisions. His concessions on that portion of his conduct are accepted as an admission to negligence.

Given the weight of the evidence, it is also specious for the grievant to contend that he was not negligent while pouring the bleach and/or mopping the area in issue. The Board established by a preponderance of the evidence that the damage to the students' clothes was the direct result of his carelessness with the bleach and/or mop. Nevertheless, the undersigned finds that the suspension was impermissible and unwarranted.

W.Va. Code §18A-2-8, (See footnote 1) confines disciplinary actions against employees of county boardsof education to the causes listed therein. DeVito v. Bd. of Educ., 285 S.E.2d 411 (W.Va. 1981). Unless the employee's conduct conforms to generally accepted definitions of those causes, he or she cannot be charged with any offense. Simple negligence is noticeably excluded from the statute. (See footnote 2) Negligence is not tantamount to incompetence. See, McComas v. Mingo County Bd. of Educ., Docket No. 94-29-1045 (March 14, 1995). Moreover, a single instance of negligence does not warrant a penalty as severe as suspension when the employee involved has no prior history of unsatisfactory behavior. Id. Notwithstanding that it may have incurred a financial loss by compensating the students for the damage to their clothing, the undersigned summarily finds that it was arbitrary and capricious for the Board to suspend an employee with no previous record of misconduct or less than satisfactory service, simply because he was careless on one occasion.

Accordingly, the grievance is **GRANTED**, and the Monroe County Board of Education is hereby **ORDERED** to reimburse the grievant for any loss of income and benefits he may have incurred, and remove all records of the suspension and improvement plan from his personnel file.

Any party may appeal this decision to the Circuit Court of Kanawha County or the Circuit Court of Monroe 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 thecivil 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: November 19, 1997

Footnote: 1 *"Notwithstanding any other provisions of law, a board may suspend or dismiss 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 aguilty plea or a plea of nolo contendere 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."*

Footnote: 2 *It is clear that the grievant was not charged pursuant to the statute's special provision for "unsatisfactory performance." There is no evidence that the suspension was the result of a performance appraisal conducted in accordance with W.Va. Code §18A-2-12.*