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SECRETARY OF STATE

**WEST VIRGINIA EDUCATION  
EMPLOYEES GRIEVANCE BOARD**

**ARCH A. MOORE, JR.**  
Governor

**Offices**  
240 Capitol Street  
Suite 508  
Charleston, WV 25301  
Telephone: 348-3361

TRAVIS H. CARRELL

v.

Docket No. 20-87-073-1

KANAWHA COUNTY BOARD OF EDUCATION

DECISION

Grievant, Travis H. Carrell, a custodian at Dupont High School, was suspended without pay on February 11, 1987, for neglect of duty arising from absenteeism.<sup>1</sup> On March 2, 1987, grievant was suspended with pay for absenteeism pending a pretermination hearing conducted on March 17, 1987. On March 31, 1987, the school board followed the recommendation of Superintendent of Kanawha County Schools Trumble and terminated grievant's employment; grievant

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<sup>1</sup> This five day suspension was upheld on appeal to the Education Employees Grievance Board in a decision dated April 8, 1987. Travis H. Carrell v. Kanawha County Board of Education, Docket No. 20-87-036-1. This transcript of evidence was admitted into evidence in the instant grievance proceeding.

appealed to the Education Employees Grievance Board on April 7 and an evidentiary hearing was conducted on May 8, 1987.<sup>2</sup>

Grievant has been employed as a Custodian I at Dupont High School since March, 1986, and was previously employed at Dunbar High School for three years as a custodian. He received two evaluations at Dunbar High School in 1984 and 1985 and received satisfactory or better ratings. (Grievant's Exhibits 1 and 2).<sup>3</sup>

On February 11, 1987, Superintendent Trumble suspended grievant for five days without pay beginning on February 10 through February 16; grievant was to return to work on February 17, 1987.<sup>4</sup> Grievant returned to work on February 17 and worked that day and February 20; however, he was absent on February 18, 19, 23, 24, 25, 26 and 27 and did not report the absences as he had been directed (T.9).

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<sup>2</sup> The hearing had initially been set for April 17 and continued by counsel for the grievant.

The transcript of evidence of the March 17, 1987, level two hearing was filed (T. ) and the only additional evidence adduced at level four was supplemental testimony of grievant and the principal, William A. Deardorff. Memoranda of law were submitted by the school board on May 18 and by counsel for grievant on May 26, 1987.

<sup>3</sup> On the March 21, 1985, evaluation the supervisor checked thereon that he recommended continued employment "with reservations." No attempt was made to elaborate upon or to explain this notation.

On the April 18, 1984, evaluation the summary evaluation was marked "commendable" as an overall appraisal of grievant's performance.

<sup>4</sup> In the suspension letter it was noted that further incidents of misconduct or neglect would result in additional disciplinary action, including termination of employment.

On February 26, 1987, Principal Deardorff wrote Superintendent Trumble requesting that grievant's employment be terminated.

Throughout the course of these proceedings grievant has admitted that he was absent from work on the days in question but testified that he had suffered back trouble on some of the days and had personal problems on February 23, 24 and 25.<sup>5</sup> He stated that he had tried to call the school but there was no answer. (T. 14, 17). Grievant testified that he had not received a formal evaluation of his work at Dupont High School (T. 14) but that he had found an evaluation form dated June 10, 1986, in his personnel file at the board of education subsequent to his previous level four hearing in March. This evaluation form rated grievant "unsatisfactory" in every category and recommended against continued employment; it was signed by vice-principal Watkins but not countersigned by grievant (Grievant's Exhibit 3).<sup>6</sup>

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<sup>5</sup> At level two grievant did not testify about the personal problems but asserted that at the level four hearing.

<sup>6</sup> Grievant stated that the evaluation had not been reviewed with him or brought to his attention at any time.

Mr. Deardorff stated that it had been difficult to "catch Travis in order to go over it with him"; that Mr. Watkins was in charge of custodial staff evaluations. (T. 11, 12).

As to the invalidity of the "oral" evaluations given to grievant by Mr. Deardorff, see the decision of the State Superintendent in Shelia Quinn v. Wetzel County Board of Education, October 31, 1983; as to the necessity that grievant receive a copy of the evaluation, see a decision dated December 7, 1983, of the State Superintendent. These decisions are considered as persuasive authority unless clearly wrong. Smith v. Logan County Board of Education, 341 S.E.2d 685 (W.Va. 1985).

Counsel for grievant contends that grievant did not receive an evaluation of his service during the 1986-87 school year or the last two months of the 1985-86 school year and this failure to follow Policy 5300(6)(a) and (b) prohibits the school board from terminating grievant's employment for correctable misconduct; that his supervisors at Dupont High School were required to evaluate him on a more regular basis than an annual basis and grievant was entitled to an opportunity to improve.<sup>7</sup>

Counsel for the board contends that the subject of the grievant's absenteeism and failure to provide proper notification of absences are objective matters which were made known to grievant and he was given an opportunity to improve; that improvement, therefore, was a matter of decision between acceptable and unacceptable behavior. Finally, counsel contends that grievant's misconduct amounted to a failure to perform the most fundamental of duties, i.e., the duty to come to work or provide proper notification of an anticipated

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<sup>7</sup> Mr. Deardorff had testified that the evaluations were only appropriate once a year and by May 1 of each year and it was not due at the time of grievant's disciplinary problems. See, however, Lipan v. Hancock County Board of Education, 295 S.E.2d 44 (W.Va. 1982). Cf. Don Williams v. Roane County Board of Education, Docket No. 44-86-160-1; James White v. Logan County Board of Education, Docket No. 23-86-361-1.

absence.<sup>8</sup>

In addition to the foregoing factual recitation, the following specific findings of fact and conclusions of law are appropriate.

#### FINDINGS OF FACT

1. Grievant was employed at Dupont High School as a Custodian I in March, 1986, and previously served three years in that position at Dunbar High School. He worked the 11:00 p.m. to 7:00 a.m. shift.

2. While at Dunbar High School grievant received two evaluations, one on April 4, 1984, and another on March 21, 1985. On these evaluations grievant had been rated "satisfactory" in most areas and "commendable" in several.

3. While at Dupont High School grievant experienced problems with attendance and on several occasions was cautioned on the necessity of notifying the school by 3:00 p.m. of anticipated absences. However, on February 11, 1987, grievant was suspended without pay for five days for absenteeism and returned to work on February 17, 1987.

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<sup>8</sup> Counsel also cites Kidd v. Kanawha County Board of Education, Docket No. 20-86-096 and Allison v. Kanawha County Board of Education, Docket No. 20-86-273-1 as authority for the proposition that discipline for willful misconduct is not predicated on formal evaluations. However, Policy 5300 (6) (a) was not discussed or addressed in those grievances and the decisions are inapposite.

4. On February 26, 1987, principal Deardorff recommended to Superintendent Trumble that grievant's employment be terminated for unauthorized absences on February 18, 19, 23, 24, 25 and a pretermination hearing was conducted on March 17, 1987. At the pretermination hearing and the level four appeal it was established that grievant had never received an evaluation as required by Policy 5300 (6)(a) while at Dupont High School.

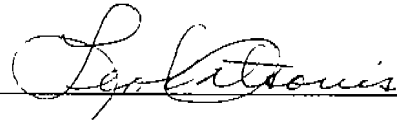
#### CONCLUSIONS OF LAW

1. Failure by a board of education to follow the evaluation procedure in West Virginia Board of Education Policy No. 5300 (6)(a) prohibits the board from discharging an employee for reasons having to do with prior misconduct that has not been called to the attention of the employee in an evaluation and which is correctable. Don Williams v. Roane County Board of Education, Docket No. 44-86-160-1.

2. The provisions of Policy No. 5300 (6)(a) must be strictly construed in favor of the employee to ensure that the employee receives the full guarantee of protection intended to be encompassed by the Policy. Wilt v. Flannigan, 294 S.E.2d 189 (W.Va. 1982).

Accordingly, the grievance is GRANTED and grievant is reinstated to his former position with back pay, less any appropriate set-off.

Either party may appeal this decision to the Circuit Court of Kanawha County and such appeal must be filed within thirty days of receipt of this decision. (W.Va. Code, 18-29-7). Please advise this office of your intent to do so in order that the record can be prepared and transmitted to the Court.



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LEO CATSONIS

Chief Hearing Examiner

Dated: June 30, 1987