

**REPLY TO:**

111 - 19th Street  
Wheeling, WV 26003  
Telephone: 233-4484

**Offices**

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

**Members**

James Paul Geary  
Orton A. Jones  
David L. White

**WEST VIRGINIA EDUCATION  
EMPLOYEES GRIEVANCE BOARD**  
**ARCH A. MOORE, JR.**  
Governor

JOSEPH GARCIA

v.

Docket No. 25-87-274-3

MARSHALL COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant, Joseph Garcia, was employed by the Marshall County Board of Education as a custodian on a probationary regular contract until his dismissal in October 1987 on the grounds of willful neglect of duty. Pursuant to W.Va. Code, 18A-2-8, a level four appeal was filed by grievant on November 2, 1987 protesting his termination of employment; a level four hearing was conducted November 24, 1987. Grievant's counsel filed a supporting brief on December 3, 1987; the board's brief was received December 16, 1987.

Grievant testified that he had originally begun employment with the board of education as a substitute custodian in October 1982. He was regularly employed by the board as a Custodian III in July 1985 and spent approximately two weeks at John Marshall High School prior to a permanent assignment to Moundsville Junior High School. Neither grievant's original substitute contract nor his probationary regular contract was offered into evidence, thus, exact dates are not known.

Grievant was initially evaluated in October 1985 and showed no deficiencies. On March 14, 1986 his second evaluation at the junior high was completed for the 1985-86 school year. The evaluation indicated that grievant had met standards in most areas of performance, had exceeded on at least three but did not meet standards in the area of attendance. An improvement program was appended to the evaluation; that document reiterated that the attendance standard was not met. The evaluator noted, "as a first year employee, an absence of 22 days conflicts with the establishment of reliable work habits as well as consistent building maintenance." The second page of the improvement program stated that grievant agreed to concentrate his efforts to improve attendance at work and that grievant's attendance should be assisted by the completion of external obligations that contributed to the need to miss work.

Grievant's 1986-87 evaluation was issued on February 27, 1987. Again, most of the standards were met and, again, grievant had several standards in which he had exceeded. However, he did not meet standards indicating compliance with policies, regulations and rules, attendance, safety practices, and follows instructions. Thus grievant not only failed to meet the terms of his improvement plan rendered the previous year but added further deficiencies to his work performance.

The February 1987 evaluation included another improvement program. The evaluator cited the performance standards that were not met and noted that grievant had been counseled not to use students or non-board of education people to help him perform his assigned duties. Another notation stated that grievant's performance as a second year employee included excessive absences from work which conflicted with the ability to establish reliable work habits and consistent building maintenance. On the second page the evaluator noted that grievant felt that his problem was due to influences outside of work. With respect to recommendations for grievant's continued employment, the evaluator wrote that grievant "also understands that if significant improvement does not occur he will not be recommended for reemployment by the end of the 1987-88 school year."

After the start of the 1987-88 school year, but nearly seven months after the second improvement program was rendered, grievant was issued a final evaluation on October 12, 1987. Grievant had not meet two standards, compliance with policies, regulations and rules and attendance. The second page of the evaluation noted that grievant would not be recommended for reemployment; both grievant and the evaluator added comments to this page.

The supervisor/evaluator commented that the recommendation not to employ was based on grievant's absence beyond normal expectations, non-compliance to an agreed upon improvement plan and dereliction of duty by not reporting to school officials when taking days off work. Another document was appended to the evaluation instrument. The addendum summarized grievant's four evaluations conducted since June 1985 and cited the number of days, 42.5, that he had missed beyond earned personal leave in his period of employment.

Grievant commented on the evaluation document that subsequent to his promise to stop missing so much work, he injured himself in the summer and had a doctor's excuse for all the time he missed. He noted that he had tried since the beginning of school to improve his attendance and promised that his attendance would improve if he could remain employed.

By letter dated October 16, 1987 the superintendent notified grievant that he would recommend to the board of education on October 27, 1987 that he (grievant) be dismissed from his duties on charges of willful neglect of duty. A follow-up letter dated October 28, 1987 informed grievant that the board had acted on the superintendent's recommendation and that effective October 28, 1987 he was dismissed from his position of Custodian III at Moundsville Junior High School on the grounds of willful neglect of duty. He was informed that he could appeal the decision by requesting a level four hearing within five days.

Grievant testified that extenuating circumstances such as a pending divorce contributed to his attendance problems. He stated that he did not have a telephone, but, with few exceptions, had always contacted school officials to report off work. In addition to a ten day absence due to a work related injury, grievant claimed numerous illnesses during the few months from the inception of the 1987-88 school term until the October 1987 final evaluation.

A school official testified that grievant's probationary status was ending soon and that situation, as well as cause, prompted the October dismissal. He stated that there was no written attendance policy but that an acceptable level of employee absence was probably no more than one and one-half days per month, the paid personal leave ratio established by law.

The board contends that it met the State policy requirements that grievant be evaluated and given an opportunity to improve his work performance deficiencies prior to his termination. Grievant, it argues, was dismissed for his "failure to perform the most fundamental of duties...the duty to come to work." The board urges that it was its duty to monitor grievant's progress while yet a probationary employee and to terminate him before he reached continuing contract status when he repeatedly failed to correct his absenteeism.<sup>1</sup>

Grievant argues that he did improve during his last improvement period and prior to his last evaluation and, therefore, should not be terminated. He maintains that exclusive of time lost on a work related injury, his absences had averaged one and one-half days per twenty days of employment.<sup>2</sup> This frequency, he argues, was deemed acceptable by school officials as it conformed to the allotted paid personal leave days established by W.Va. Code, 18A-4-10.

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<sup>1</sup> The board cites W.Va. Code, 18A-4-10 which, in part, states: "If an employee should use personal leave which the employee has not yet accumulated on a monthly basis and subsequently leaves the employment, the employee shall be required to reimburse the board for the salary or wages paid to him for such unaccumulated leave." The board's point is well taken that grievant had used more leave than he earned and if the board allowed this situation to continue until the end of the probationary period, greater financial liability for grievant could result.

<sup>2</sup> Attendance records indicate a higher frequency of absences than grievant claims.

Grievant finally argues that the board did not abide by the terms of the second improvement program it devised since it did not allow him the entire 1987-88 school year to show improvement.<sup>3</sup> Grievant requests reinstatement to his position and an award of back wages.

In addition to the foregoing narration the following findings of fact and conclusions of law are appropriate.

#### FINDINGS OF FACT

1. In July 1985 grievant was employed by the board and assigned as a custodian to Moundsville Junior High School under a probationary contract of employment.

2. Grievant's first evaluation was conducted October 31, 1985 and he met all performance standards. A second evaluation issued March 14, 1986 noted that grievant did not meet standards for attendance and had missed 22 days of work thus far in the school year. An improvement program was appended to the evaluation noting that grievant had been counseled and that he agreed to concentrate his efforts to improve attendance at work.

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<sup>3</sup> The actual wording on the February 27, 1987 evaluation was that without significant improvement grievant would not be recommended for reemployment at the end of the 1987-88 school year. It did not specifically state that grievant would be given until the end of that school year in which to show the significant improvement the school board demanded and expected.

3. A third evaluation was issued February 27, 1987; grievant did not meet in four performance standard indicators, one being attendance, thus he failed his improvement program and added more deficiencies to his work performance. Another improvement program was appended to the evaluation document noting that grievant's attendance must improve significantly or he would not be recommended for reemployment at the end of the 1987-88 school year.

4. Grievant's entire work attendance history was chronicled via a daily/monthly/yearly schedule for each school year. Subsequent to the February 1987 evaluation and second issued improvement plan his schedule reflected that in March 1987 he missed two days work and in May and June, one day each. On July 2 grievant took a sick leave day; beginning July 6 he missed ten consecutive work days. This absence was attributed to a work related injury said injury ruled compensable by the Workers' Compensation Fund. Grievant missed an additional five days in the week following due to a tonsillitis infection. In August, grievant was absent one and one-half days; in September he again missed three and one-half consecutive days beginning September 8.



5. A final evaluation was issued on October 12, 1987 recommending that grievant not be recommended for reemployment because of the number of his absences.

6. At the time of the evaluation grievant had taken leave time in excess of earned or accrued personal leave. An employee who has been paid for unearned leave time must repay a school board if he leaves the board's employ as per W.Va. Code, 18A-4-10. Continued employment and additional absences could have caused greater financial liability for grievant.

7. Excluding time off for work due to a work related injury, grievant's fifteen days of absences from March 1, 1987 through September 1987 exceeded the allowable one and one-half days per month or total 10.5 leave days he would acquire per W.Va. Code, 18A-4-10. Grievant's high rate of absence in September 1987, three and one-half days, did not demonstrate a commitment to honor his continuing promises to improve his job attendance.

8. The failure of a custodian to report for work causes understaffing or the need to employ a substitute, adversely affects efforts to keep the building consistently maintained and impacts upon school finances.

9. Grievant's failure to keep his promise to resolve his personal difficulties and to significantly improve his attendance at work over a period of several years during which he was duly evaluated, admonished, counseled and given opportunity to improve amounted to willful neglect of his duties as a custodian.

#### CONCLUSIONS OF LAW

1. A board of education may suspend or dismiss any person in its employment at any time for willful neglect of duty and such charges must be proven by a preponderance of the evidence. W.Va. Code, 18A-2-8; Shillingburg v. Mineral County Board of Education, Docket No. 28-86-135-2.

2. Pursuant to State Board Policy 5300 every school employee is entitled to be apprised of and given opportunity to correct prior misconduct or incompetency prior to dismissal from employment by a board of education. Wilt v. Flanigan, 294 S.E.2d 155 (W.Va. 1982); Holland v. Board of Education of Raleigh County, 327 S.E.2d 155 (W.Va. 1985); Carrell v. Kanawha County Board of Education, Docket No. 20-87-073-1 (dismissal of custodian for excessive absences overturned because the board failed to evaluate or provide improvement period).

3. Neither statute, case law or policy requires that a board of education provide an employee with unending improvement opportunities when the work performance offenses are repeated and met with more broken promises to improve.

4. The respondent board herein complied with the requirements of State Policy 5300 and grievant's refusal to honor his improvement plans and promises to improve his attendance at work constituted willful neglect of duty. Shillingburg v. Mineral County Board of Education, supra; Belcher v. Barbour County Board of Education, Docket No. 01-86-001.

5. The board of education has shown by a preponderance of the evidence that grievant was subject to dismissal for willful neglect of duty. Belcher v. Barbour County Board of Education, supra. Curry v. West Virginia University, Docket No. 30-86-128-2.

Accordingly, this grievance is **DENIED** and the board's termination of grievant for willful neglect of duty is affirmed.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Marshall County and such appeal must be filed within thirty (30) 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.

DATED:

December 29, 1987

Nedra Koval

NEDRA KOVAL  
Hearing Examiner