



REPLY TO:
101 Harper Park Drive
Suite D
Beckley, WV 25801
Telephone: 255-6155

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

Members
James Paul Geary
Orton A. Jones
David L. White

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

ROBERT BARTRUM

v.

Docket No. 06-88-075

CABELL COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant, Robert Bartrum, is employed by the Cabell County Board of Education as a custodian assigned to the Cabell County Vocational-Technical Center. Mr. Bartrum filed a grievance on May 3, 1988 protesting a ten (10) day suspension. A Level IV evidentiary hearing was held on June 2, 1988.

The parties disagree on certain facts of the case but generally the events leading to grievant's dismissal are undisputed. Mr. Albert Tenney, Jr., Principal of the Vo-Tech Center had been displeased with the quality of janitorial service there for some time and at approximately 4:30 a.m. on April 11, 1988 he arrived at the Center and found the lights turned down throughout the

building. He conducted an inspection of certain areas and initially could not locate any of the custodians but eventually went to the faculty lounge and found it locked. When he used his key to open the door, he found the room dark and using a flashlight he discovered the grievant in a chair with his eyes closed. Mr. Tenney made a remark to the effect that grievant should go home if he wanted to sleep and continued through the building. Mr. Tenney then had a conversation with the other custodians, giving them directions on certain tasks that needed to be done. In a memorandum dated April 14, 1988, he related the incident to Mr. Henry Watkins, Assistant Superintendent of Building and Grounds, and grievant subsequently received a letter from Superintendent of Schools, Dr. Robert Frum, dated April 29, 1988 indicating he was suspended for ten (10) days for willful neglect of duty. (Board's Exhibit D)

Grievant contends he was not asleep when Mr. Tenney came into the lounge but merely resting after taking aspirin for a headache and moreover was using his regularly allotted free time during which he could have slept if he wished to do so. He asserts that even though employees on the evening shift at the center are given a written schedule designating times for two fifteen (15) minute breaks and a thirty (30) minute lunch period, this schedule has been considered extremely flexible by both the supervisors and the employees and these breaks are normally taken when the employee chooses. (T. __)

W.Va. Code, 18A-2-8 authorizes a county board of education to suspend an employee for causes stated therein but the grounds must be established by a preponderance of the evidence, Raines v. Jackson County Board of Education, Docket No. 20-86-080; Cook v. Logan County Board of Education, Docket No. 23-86-112, and the circumstances of the present case necessarily required the Board to prove grievant was not on his own time when Mr. Tenney discovered him in the lounge or establish the existence of a policy which prohibited employees from sleeping during their shifts. There was no evidence of any such policy produced by the Board and there was a great deal of testimony from employees, including Mr. Tenney and Mr. Larry Stratton, Head Custodian at the Vo-Tech Center, that employees could do anything they liked during the two breaks and lunch period as it was their own time. (T.___) Similarly, the same persons testified that the schedule for nightshift employees at the Center were very flexible and employees had a great deal of latitude to decide when they would take a break or lunch period. (T.___) The Board submitted a schedule for the 1983-84 school term (Board's Exhibit AV) which indicates grievant was to take his first break from 12:00 a.m. to 1:00 a.m. and lunch from 2:30 a.m. to 3:00 a.m. and the second break from 4:30 a.m. to 4:45 a.m. but there was no evidence adduced that this schedule was enforced during that school term or the 1987-88 term.

The evidence presented by the Board was sufficient to prove grievant was asleep at the time he was discovered in the faculty lounge despite his testimony that he was merely resting. Absent any showing, however, that the practice was prohibited by county policy or that he was not on a break or lunch period, a finding that his actions constituted a willful neglect of duty would be contrary to the evidence presented.

In addition to the foregoing, the following findings of fact and conclusions of law are made.

FINDINGS OF FACT

1. Grievant, Robert Bartrum, is employed by the Cabell County Board of Education as a custodian at the Cabell County Vocational-Technical Center and is presently assigned to the 10:30 p.m. to 6:30 a.m. shift.

2. On April 11, 1988 the principal at the Center, Mr. Albert Tenney, arrived at the Center at approximately 4:30 a.m. and discovered the grievant asleep in the faculty lounge with the lights out and the door locked.

3. Grievant was subsequently suspended for ten (10) days without pay beginning on May 4, 1988.

4. The duty schedule for custodians on the nightshift at the Cabell County Vo-Tech Center has been implemented for the past several years in such a way that employees are given a great deal of flexibility as to when they may take allotted fifteen (15) minute breaks and a thirty (30) minute lunch period.

5. The Cabell County Board of Education has no policy, written or otherwise, prohibiting an employee from sleeping during breaks or lunch periods.

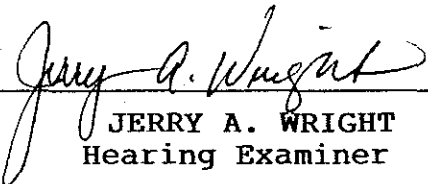
CONCLUSIONS OF LAW

1. W.Va. Code, 18A-2-8 authorizes a county board of education to suspend an employee for causes stated therein but the grounds must be established by a preponderance of the evidence. Raines v. Jackson County Board of Education, supra; Cook v. Logan County Board of Education, supra.

2. The Cabell County Board of Education failed to establish by a preponderance of the evidence that on April 11, 1988 grievant was in violation of any written or unwritten board policy or failing to carry out any assigned responsibilities and therefore guilty of willful neglect of duty.

Accordingly, the grievance is **GRANTED** and the Cabell County Board of Education is hereby **ORDERED** to reimburse the grievant, Robert Bartrum, for any loss of pay he may have incurred due to the improper ten (10) day suspension and remove any and all documents, letters, memorandum or other references to said suspension from his personnel file.

Either party may appeal this decision to the Circuit Court of Cabell County or the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of said decision. (W.Va. Code, 18-29-7) Please inform this office of your intent to do so in order that the record can be prepared and transmitted to the Court.


JERRY A. WRIGHT
Hearing Examiner

Dated: July 13, 1988