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**WEST VIRGINIA EDUCATION AND  
STATE EMPLOYEES GRIEVANCE BOARD**  
GASTON CAPERTON  
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**DENNIE KIRK**

**v.**

**Docket No. 89-29-99**

**MINGO COUNTY BOARD OF EDUCATION**

**DECISION**

Grievant, Dennie Kirk, was employed by the Mingo County Board of Education (Board) as a watchman/custodian assigned to Tug Valley High School (TVHS) until his dismissal on March 10, 1989. Pursuant to the provisions of W.Va. Code §18A-2-8, he filed a Level IV appeal of that action March 15, 1989. A hearing was held June 1, 1989<sup>1</sup> and the parties submitted proposed findings of fact and conclusions of law by June 12, 1989.

By letter dated February 25, 1989, Mr. William Totten, Principal at TVHS, reprimanded grievant for failure to perform his duties as "watchman/custodian"<sup>2</sup>. Mr. Totten noted he had

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<sup>1</sup>Hearings scheduled for April 4 and May 9, 1989 were continued for good cause shown.

<sup>2</sup>W.Va. Code §18A-4-8 defines "Custodian II" as

(Footnote Continued)

conducted an inspection of grievant's assigned work area at 6:30 a.m. February 24, 1989 and found it was not properly cleaned. Grievant was also informed that someone had broken into the building on February 23, 1989 and vandalized sections of the school. Grievant was directed to report to the office of the Superintendent of Schools, Harry J. Cline, February 27, 1989 so that his "job performance and acts of insubordination" could be discussed. Subsequent to that discussion, grievant received a letter from Mr. Cline informing him that he was suspended without pay until March 10, 1989, at which time a recommendation of dismissal for willful neglect of duty would be made to the Board. Grievant, who was advised he could appear with counsel, appeared at the Board meeting on that date and presented his own defense to the charges. The Board then voted unanimously to uphold his suspension and accept Mr. Cline's recommendation for dismissal.

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(Footnote Continued)

personnel employed as a watchman or groundsman.

and "Watchman" as

personnel employed to protect school property against damage or theft. Additional assignments may include operation of a small heating plant and routine cleaning duties.

Inasmuch as there is no job "watchman/custodian" contained therein, it is assumed that grievant was given such pursuant to the provisions for "multi-classified" positions. The testimony at the Level IV hearing revealed grievant was required to clean a particular area at TVHS during his shift and was responsible for security at the whole school during that shift.

At Level IV the Board relied on the testimony of Mr. Totten and Jim May, Principal at Gilbert High School, where grievant previously worked. Mr. May testified that grievant was assigned to his school during the 1987-88 school term and shortly after the beginning of the term, teachers began making complaints about the appearance of their rooms. According to Mr. May, grievant was unresponsive during their conversations about the complaints and, after discovering that grievant was making false representation on a chart of duties to be performed, he warned him that his performance had to improve. Mr. May further stated that, shortly after their last talk, grievant was injured on the job and, upon his receipt of workers' compensation benefits, did not return to Gilbert.<sup>3</sup> Mr. May completed an evaluation on grievant's performance on February 22, 1988, which noted fourteen areas which needed improvement but he testified that he could not reach grievant to inform him of his findings. The evaluation was nonetheless submitted to the Board's central office and placed in grievant's personnel file.

Mr. Totten testified that grievant was transferred to his school April 18, 1988, but between the beginning of the 1988-89 school term and the time of his dismissal, grievant worked only thirty-four days due to his injury, other reported illnesses and his inability to get transportation. Mr. Totten stated grievant

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<sup>3</sup>It is not entirely clear from the record but it appears grievant was injured in either December 1987 or January 1988 and began receiving benefits in February 1988.

did not always call when he was going to be absent and his work was inadequate when he was present. Mr. Totten related an incident where grievant reported he had sustained an on-the-job injury to an eye and requested sick leave for a couple of days. Several days later grievant was notified by Mr. Totten that no substitutes were available to cover his shift and he would have to report to work. According to Mr. Totten grievant inexcusably failed to report to work as instructed. A January 27, 1989 written reprimand to grievant from Mr. Totten informed grievant that an inspection of his assigned section of the school on that date revealed deficiencies in approximately sixteen listed areas. Grievant was advised that a failure to improve would result in a recommendation for his suspension or termination.

It was Mr. Totten's testimony at the March 10, 1989 Board meeting that he had instructed grievant to report for work at either 9:00 or 10:00 p.m. and leave at either 5:00 or 6:00 a.m. so that persons seeking to vandalize the school would be unable to discern his schedule. After giving these instructions, Mr. Totten noticed grievant was present at the school January 19, 1989 at approximately 5:30 p.m. and he admonished him to follow his schedule. According to Mr. Totten grievant was present on February 16, 1989 at approximately 6:00 p.m. despite his warning. Finally, Mr. Totten testified that he received a telephone call at approximately 6:05 a.m. February 24, 1989 from one of the cooks at TVHS informing him that there had been a break-in at the school. A state police officer and Mr. Totten arrived shortly thereafter and it was determined that entry had been gained by

breaking a window in one of the rooms in grievant's assigned cleaning area. Losses due to destruction of property and stolen equipment or supplies was assessed at \$8,000.00. Mr. Totten stated the extensive damage and/or thefts in or near grievant's janitorial work area led him to conclude that grievant was not present during his assigned hours.

Grievant, appearing pro se, provided little rebuttal to Mr. May's and Mr. Totten's assessments of his work performance. He stated that he felt his work was good but he did not disagree with the testimony of the two principals.<sup>4</sup> He did deny his absence due to an eye injury was unexcused and provided a copy of a doctor's statement for the date in question. At the hearing before the Board, grievant testified that on the date of the break-in at TVHS, he had reported for work at approximately 6:00 p.m. and left at approximately 5:00 a.m. (T.11). He provided no explanation as to why he did not report at his designated time and expressed an opinion that the break-in could have occurred prior to 6:00 p.m., although he noticed nothing unusual upon his arrival at the school. At Level IV grievant stated he was present during his regular hours but did not hear anything. He avoided questions on cross-examination and essentially asserted it could not be proven that he was not present because there were no witnesses.

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<sup>4</sup>The undersigned explained to grievant several times that he could cross-examine Mr. May and Mr. Totten in an effort to elicit information not offered in direct testimony or discredit that testimony, but he declined to do so.

Although the evidence presented in support of the charge that grievant did not perform his janitorial duties satisfactorily at either GHS or TVHS is sufficient for a finding to that effect, the transcript of the March 10, 1989 hearing reveals the Board did not make its decision to dismiss for that reason. There was minimal discussion concerning grievant's job performance during that hearing and nearly all testimony was centered on the allegation that grievant was absent without authority when the break-in occurred. Accordingly, the evidence related to grievant's work practices has been considered herein only to the extent that it is relevant to the question of grievant's attitude toward the duties and responsibilities of his position.

The evidence in support of the charge that grievant was not present when the break-in occurred is, as the grievant suggests, somewhat circumstantial, but the conclusion that he was absent is inescapable. Pictures taken of various parts of the school (Board's Exhibit No.7) and the police report show the damage to be extensive. The report reveals property, including two television sets and two VCR's, was stolen from at least four different rooms in the school. The pictures show that great force was used to open metal drawers and cabinets. They also show glass was broken in the front of the office/reception area. It can easily be concluded that the intruders moved freely throughout the school and caused sufficient disturbance to alert anyone present, particularly someone whose duty it was to patrol the school for security reasons.

Grievant's own testimony is also highly supportive of the Board's allegation. He maintained he was present at the school for approximately eleven hours on the night in question yet provided no explanation as to why he worked four hours beyond his regular shift. His testimony before the Board and at Level IV was very evasive. Direct questions concerning his whereabouts during the break-in were either not answered or avoided with assertions that the Board has no witnesses who could verify he was not present in the school. Grievant's past work history, his prior refusal to comply with Mr. Totten's directive that he stop reporting to work early, and his testimony all lead to the conclusion that he abandoned his duties as night watchman. His actions can be construed as either insubordination or willful neglect of duty.

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

#### FINDINGS OF FACT

1. Grievant, a watchman/custodian, was assigned to TVHS at the beginning of the 1988-89 school term. His schedule there entailed the hours between 9:00 p.m. to 5:00 a.m. or 10:00 p.m. to 6:00 a.m. The hours were varied in order to deter intruders.

2. On January 19, 1989 and again on February 16, 1989 grievant's principal, upon discovering him at the school prior to his regular starting time, admonished him to adhere to his schedule for security reasons.

3. At approximately 6:00 a.m. February 24, 1989, cooks at TVHS discovered that persons had broken into the school. A subsequent inspection revealed extensive damage to various parts of the school and missing property.

4. Grievant was either absent during part or all of his assigned February 24-25, 1989 shift. No such absence was authorized by grievant's immediate supervisor, Mr. Totten.

#### CONCLUSIONS OF LAW

1. A county board of education may suspend or dismiss any person in its employment for willful neglect of duty. W.Va. Code §18A-2-8; Putnam v. Braxton County Board of Education, Docket No. 04-88-022-4 (May 13, 1988); Garcia v. Marshall County Board of Education, Docket No. 25-87-274-3 (December 29, 1987).

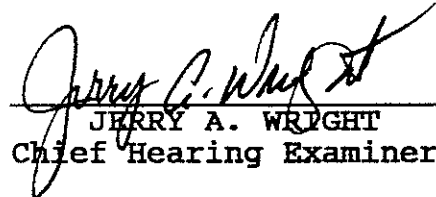
2. Upon a dismissed employee's appeal to the West Virginia Education and State Employees Grievance Board, a county board of education must prove, by a preponderance of the evidence, the charges against said employee. Webb v. Mason County Board of Education, Docket No. 26-89-004 (May 1, 1989).

3. The Board has proven by a preponderance of the evidence the charge of willful neglect of duty against the grievant.

Accordingly, the grievance is **DENIED**.



Either party may appeal this decision to the Circuit Court of Mingo 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. Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate Court.

  
JERRY A. WRIGHT  
Chief Hearing Examiner

Dated: September 12, 1989