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**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**

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WILLIAM H. COFFMAN

v.

Docket No. 89-20-678

KANAWHA COUNTY BOARD OF EDUCATION

D E C I S I O N

William H. Coffman grieved as follows November 21,
1989:

I was suspended from my position as Custodian III at [Kanawha County Schools'] Bonham Elementary for ten days without pay and transferred from the day shift (7:00 a.m.-3:00 p.m.) to the night shift (4:00 p.m.-12:00 midnight).

Grievant first submitted this complaint at Level IV pursuant to the expedited procedure of W.Va. Code §18A-2-8, which permits bypass of lower-level administrative steps when certain personnel actions, including suspensions, are involved. Level IV hearing was conducted January 23, 1990; thereat, Grievant abandoned any request for backpay, limiting the relief sought to a return to day shift.¹ With the

¹ Grievant's release of the suspension-related count removes his case from the allowance of Code §18A-2-8 expedited treatment, and dismissal with leave to re-file his shift-change claim at Level I is indicated. However, since the Level IV hearing was near completion when Grievant effected this withdrawal, requiring lower-level action on
(Footnote Continued)

parties' filing of fact-law proposals² by February 13, the matter is ready for decision.

Many of the basic facts are not in dispute. At around 7:15 a.m. on Friday, September 29, 1989, Julia Hedge, Bonham Principal for the past few years, went to the school cafeteria, where Grievant was, and asked him to come to her office. In a closed-door meeting, Ms. Hedge advised Grievant, a custodian at the school for several years, she had received complaints from many of the faculty members about the quality of his work, although she did not divulge the names of those teachers. At some point, at least Grievant became upset and exited the office. Ms. Hedge shortly thereafter followed Grievant and eventually directed him to leave the building; as he was departing, he told several persons, including Bonham staff and students' parents, about Ms. Hedge's order.

(Footnote Continued)

the remainder of his complaint would unduly and unfairly overburden the record and delay disposition. See State ex rel. Bd. of Educ. v. Casey, 349 S.E.2d 436, 438 (W.Va. 1986). In arriving at this conclusion, that Grievant's schedule change was attendant to his suspension and clearly for purely disciplinary reasons was held significant as well.

² Respondent announced reliance on findings and conclusions contained in a part of its Exhibit 7, i.e., an October 23, 1989, memorandum regarding Mr. Coffman's situation which was penned by its agent, N. Michael Slater, supplemented by narrative "argument and authority."

Grievant's abandonment of his backpay request will in no way be considered a concession that he deserved suspension or any other discipline.

On that same day, Ms. Hedge authored and sent a letter to Respondent's Superintendent of Schools, Dr. Richard Trumble. In pertinent part, it reads, "I recommend disciplinary action be given to William H. Coffman before Monday, October 2, 1989. He has verbally abused me in front of employees, parents and students." Resp. Ex. 1. Attached to this letter was and is the following "documentation" memorandum:

Documentation: Bill Coffman - Incidents occurring during and after a meeting with him 9-29-89.

Friday, September 29, 1989: At 7:15 a.m., Mr. Coffman was talking in the kitchen instead of going about his morning duties. I motioned for him so that I could talk to him. I took him to my office for a brief conference.

I discussed with him the following concerns:

1. I needed him to follow his new schedule that I gave him this year for Mondays, Wednesdays and Fridays.

2. Teachers have stated that he was not cleaning students desks and was not coming into their classrooms to clean during physical education period, as his schedule states.

He responded as follows:

1. He screamed at me, saying that he would go and ask every teacher in the building who complained to me.

2. I told him that he would not be disrupting the building, and that I would not tolerate the disruption.

3. He screamed and said to me that I was trying to get rid of him and that I was harrassing [(sic)] him and. . .[another staff member]. I told him that I was going to call. . .[Asst. Supt. Joe] Godish to report his behavior. He screamed and said that he was getting his lawyer, and that he was going to sign the petition against me. He got up and slammed my door as he left (my secretary was sitting at her desk during this conversation and heard everything).

4. Mr. Coffman immediately ran back to the kitchen. In the kitchen and lunchroom area the

following people were present: Phyllis Feldhaus, Carol Taylor, Ruby Carney, 2 students and approximately 20 students waiting at the tables for school to start. He began screaming (you could hear him in the hallway), saying that I was harassing him and that he was going to see his lawyer. He continued screaming and saying that he was going to the Board [of Education] and that he was going to get that petition against me and sign it. I told him at this point to leave the building and go home. He continued screaming. He went through the building, stopping the student teachers, teachers and parents, telling them that I had fired him and that I have been harassing him and that he was signing that petition. He also tried to intimidate the teachers - asking who had been complaining. I caught him in the hallway and he began screaming again in front of students in the hallway, a parent, Mrs. Barnes, a teacher [and Librarian], and Mrs. McGill, my secretary. He again repeated the same accusations. Before Mr. Coffman went home, he stood outside the school, stopping each parent who brought their child to school, each teacher and each student teacher, repeating his accusations. Mrs. Cox, a parent, came to tell me he was doing this (he had stopped her).

I called [Respondent's Personnel Director] Cy Faris and Joe Godish immediately to report these incidents.

Resp. Ex. 1.

Also on September 29, Dr. Trumble suspended Grievant from employment with pay, effective immediately, "pending further investigations and a hearing upon whether I should recommend disciplinary action to the Kanawha County Board of Education." Resp. Ex. 2. The hearing referenced was convened on October 13 by N. Michael Slater, Respondent's Director of Data Processing, and Grievant was given appropriate notice of the same and his right to be represented there by counsel. Resp. Ex. 3. Following the hearing, Mr. Slater issued findings of fact and conclusions of law, Resp. Ex. 7, and a

recommendation that Grievant be suspended without pay for ten days and moved to an evening shift so as to limit exposure to students, staff and parents. Dr. Trumble concurred with and adopted Mr. Slater's recommendation, and he announced this decision to Grievant in an October 25 letter. Id. This suspension was approved, and Mr. Slater's findings and conclusions adopted, by Respondent on November 16. Resp. Ex. 8. Upon Grievant's return to duty, he was reassigned to the 4:00 p.m.-midnight tour.

Mrs. Hedge appeared at Level IV and provided testimony mirroring her documentation except in very minor particular, e.g., at the hearing, she added the name of student teacher Mike Gatens to the list of those in the kitchen when Grievant returned there from her office. She further denied that she had lost her temper or threatened Grievant's firing. She added she had not slammed her office door prior to their conference and added that the door does not even generally make a loud noise upon closing. She explained she had not supplied Grievant with the names of those teachers complaining about their rooms since she feared he would "blow up at them" and since "all rooms needed his attention."³ She opined that one possible reason for Grievant's apparent inability to adapt to her as a supervisor was that

³ Throughout this Decision, the undersigned has attempted to capture the essence of testimony as opposed to reproducing it verbatim.

she is many years his junior. She also presented a March 17, 1989, "conference memo" (Resp. Ex. 6), an April 4, 1989, initial, informal 1988-89 evaluation (Resp. Ex. 5), and a May 8, 1989, final and formal 1988-89 evaluation (Resp. Ex. 4).

Resp. Ex. 6 is a memorandum from Ms. Hedge to Grievant, drafted as a follow-up to a March 15 meeting between the two. According to the document, at that meeting Ms. Hedge "advised. . .that I have received various complaints from faculty and staff members concerning gossiping, rumors about following staff members after work hours, and grabbing and playing with students." The memo notes Grievant's denial of the accusations, but provides, "If your behavior continues in this manner, I will be forced to take appropriate disciplinary action." In addition, it offers five directives of "appropriate work behavior," including "Flares of temper and verbal assaults on other staff members cannot be tolerated." Ms. Hedge explained that she gave Grievant a copy and went over it with him on or about March 17.

Resp. Ex. 5 reveals that, as of April 4, 1989, Grievant was rated Outstanding in two of twenty-two categories of performance, Commendable in five others, Satisfactory in six, and Unsatisfactory in nine, specifically, "meeting schedules," "accepts change," "attitude," "planning and organizing," "follows instructions," "public relations," "employee relationships," "efficiency under stress," and

"work coordination." Narrative on "Work Performance Areas Requiring Improvement or Correction" appears as follows:

Bill needs to learn to accept change willingly. He needs to adapt to me as his supervisor. He needs to follow all of my instructions and orders without challenging instructions, gossiping, and complaining to other employees. Bill needs to be discreet in publicly discussing school problems with parents, employees, maintenance men, bus drivers, community members, etc. His work efficiency and productivity could be greatly increased if he would stay on task. His schedule has been revised in order that productivity be increased. He needs to follow his schedule as closely as possible. Final evaluation will be given on May 8, 1989. This document [(illegible)].

Resp. Ex. 4 indicates improvement as of May 8, 1989, but that Grievant was still Unsatisfactory in "follows instructions," "public relations," "employee relationships," and "work coordination." Remarks in the AREAS FOR IMPROVEMENT section are:

Bill needs to be discreet in publicly discussing personal and school problems with parents, employees, community members, etc. All of my instructions and orders need to be followed. Bill's work behavior needs to be consistent.

Grievant's signature appears on the document, over a proviso that he could, if he desired, submit a letter disagreeing with the evaluation, said letter to be placed in his personnel folder.⁴ Finally, Ms. Hedge wrote the following

⁴ Apparently, Grievant did not take advantage of this invitation.

statement at the bottom of the form: "This is a private document and is not be shared with others."

Carol Taylor, Cook at Bonham since 1978, testified that she was in the kitchen on the morning of September 29 and was among those chatting with Grievant when Ms. Hedge "hollered at him and said, Mr. Coffman, I'd like to see you in my office please." Ms. Taylor described the "holler" as being not "loud or cruel" or with a raised voice, adding "she talks the same way to us all the time." She did state the "holler" was made from a distance of "maybe not quite twenty or twenty-five feet." Ms. Taylor continued that Mr. Coffman came back into the kitchen a few minutes later, obviously upset, and began telling those gathered what had occurred in Ms. Hedge's office. She opined, "He had lost his temper. He has one." She related that another cook, Ruby Carney, warned Grievant Ms. Hedge was approaching and calling to him, and that he should curtail his comments, to which Grievant's reply was, "I don't give a damn where she is." Ms. Taylor said that when Ms. Hedge came into the kitchen, both she and Grievant were angry but that Grievant was loud. She added that Ms. Hedge pointed her finger and gritted her teeth when Grievant first refused to leave the kitchen after her direction that he do so, and that she then placed her hands squarely on a table and firmly ordered him to "Get out of the kitchen and go home." Finally, she said that the two students in the kitchen left upon seeing Grievant's state, and that the children in the cafeteria

questioned him about being fired as he exited. She did not recall his giving them any answer, or what, specifically, Grievant said in response to Ms. Hedge.

Bonham Chapter I Reading Teacher Brenda McQuary stated she had just walked into the building on September 29 and was going into her room, near the school office, when she heard a commotion. She claimed familiarity with Grievant and his voice, gained from her previous co-working experience with him at the school, and reported, "I heard Mr. Coffman yelling and a door slam. He was in the office." She denied hearing any loud voices besides Grievant's, or being able to discern specifics of what he was saying. She concluded by remarking she saw Grievant on September 29 and that he did not stop and talk to her about the incident in question in this grievance.

Carol Cox, a parent-volunteer at Bonham, testified that around 7:20 or 7:30 a.m. on September 29, she had arrived at the school to drop off her two children when she encountered Grievant "coming across the parking lot." She attested that Mr. Coffman had always been friendly with her in the past, but she discerned that he was extremely angry on this occasion. She described Grievant as "waving his hands. . .very, very upset. . .wild-like. . .flaring his arms, talking fast, pointing. . .hands in and out of pockets." She reported that he asked her if she had heard Ms. Hedge had fired him, and that he related to her his intentions to "take her [Ms. Hedge] to the Board [of Education]." She

continued that after she entered Bonham, she observed Grievant accost "Susan," a student teacher, and "Marie," the physical education instructor, and that she assumed he was discussing the matter with them as well. She added that she proceeded to the office, told Secretary McGill what had occurred and, at her suggestion, reported the situation to Ms. Hedge.

Debbie McGill, Bonham Secretary, testified that, on the morning of September 29, she was in the hallway to plug in her computer when Ms. Hedge travelled from the office to the nearby cafeteria to retrieve Grievant for a conference. Ms. McGill remembered that she saw Ms. Hedge motion for Grievant but was unsure whether the principal actually called his name. She stated that she was at her desk and on the phone with a parent when Grievant and Ms. Hedge were meeting behind the closed door of the inner office and that the parent could hear Grievant's raised tones. Ms. McGill recalled that Grievant threatened to "go from room to room to see who complained" and to "file a grievance against Julie" before he "stormed out and passed my desk." She also said that she, apparently at some point shortly thereafter, went "across the hall" to Ms. McQuary's room, where Ms. McQuary was "braiding my hair" when she, Ms. McGill, heard Grievant in the hallway and went out to see if she could lend assistance. She claimed Grievant was at a "snack table" in the hall, that Ms. Hedge approached, and that there was an "encounter in front of the kids." She reported that Ms.

Hedge was angry but did not raise her voice; that Grievant repeated statements he had made in the office; and that Ms. McQuary "saw and heard what happened at the snack table." She added that parents and students later told her Grievant was "going around" saying that Ms. Hedge had terminated him.

Ruby Carney, Cook II, testified that she did not see Grievant before his conference with Ms. Hedge on September 29 because she was setting-up for breakfast. She opined that when he returned to the kitchen that morning, he was "running his mouth about Ms. Hedge, she'd been on him since she got there, he was going to file a grievance, etc." She admitted that, when she saw Ms. Hedge coming, she told Grievant to "shut up" and he responded, "I don't give a damn." Ms. Carney confirmed that Ms. Hedge had told Grievant to "get out" and that she had done so in a "normal tone." She first characterized Grievant as a "little bit loud," then as "insane or wild." She said he told Ms. Hedge he did not have to leave the kitchen; that the principal then ordered him to leave and go home; and that he did, indeed, depart the premises.

Phyllis Feldhaus, a teacher at Bonham, explained she had worked at the school with Ms. Taylor and Grievant for a number of years and that it was their custom to meet in the kitchen early each day for conversation. She said at some point the morning of September 29 Grievant "jumped" her about complaining about the quality of his services, and she "told him I hadn't complained, I never complain."

Apparently, this was after the conference with Ms. Hedge, although Ms. Feldhaus seemed unsure of the timing. At any rate, she did recall Grievant's leaving the kitchen to see the principal, but not which of them initiated the meeting. She stated he was gone ten or fifteen minutes and came back upset, talking loudly and waving his hands. She continued that she thereafter heard Ms. Hedge say, "Mr. Coffman, come back," and that he said, "I won't" and told her, with increasing volume, she needed to get off his back, "and now." She said Ms. Hedge's response was, "I want you to go home and calm down until we can see what can be done." She admitted that Ms. Hedge gritted her teeth and shook her finger, and "I suppose her voice rose a tone or two louder" than her normal soft-spoken level. She concluded that, while she was "not here to condemn either Ms. Hedge or Mr. Coffman, . . . he often speaks before thinking, and I've said this to him many times."⁵

Grievant testified in his own defense. He commenced by explaining his current schedule and how it had been changed without his consent and otherwise as related in his statement of claim, see p. 1. He declared that for the past eleven years, he has given an extra one or two hours per day, at the beginning thereof, to his job "because I'm dedicated to it." He reported that on September 29 he

⁵ Ms. Carney and Ms. Feldhaus were called by Grievant as witnesses on his behalf.

arrived around 5:30 a.m. and buffed the offices, opened all faucets for five minutes, and tested all gas pipes for leaks, consistent with his normal routine. He continued that about 6:55 a.m. he arrived at the kitchen and engaged in conversation with the cooks and Ms. Feldhaus, as was his habit. He explained that his schedule required him to distribute breakfast milk on the tables at 7:05 a.m. and so it was appropriate for him to be in the cafeteria area about that time anyway. He recalled that "two or three" students were sitting outside the kitchen and that two pupils were inside, although "not supposed to be." He claimed he was by the kitchen window, twenty to thirty yards away from the door, when Ms. Hedge appeared in the doorway and yelled, "You get to the office right now," in a rough voice. He denied that she motioned for him, but stated he remarked to the cooks, "She's on me again," to which they responded with advice that he keep a cool head. He continued that he went into Ms. Hedge's office and that she slammed the door behind him, although he allowed that the door tended to make a loud noise when closed anyway. He reported that Ms. Hedge then told him, "I'm changing your work habits again," offering as justification complaints from all of Bonham's teachers that their rooms were dirty. He stated he then asked Ms. Hedge who, specifically, was troubled, and she refused to disclose that information, to which he responded by telling her he would ask the faculty himself. He added, "I got up after she told me I wasn't going to talk to the teachers." He admitted

he was loud in the office, but protested that she was equally loud. He opined, "If she shouts at me, I think I've got the right to shout back at her."

Grievant said he left the office at some point thereafter. He denied slamming the door. Although he admitted Ms. Hedge did not give him permission to exit the room, he explained, "I didn't want to hear any more of her tone and voice. I'd had enough of it over the last three or four years." He stated he went to the front entrance to the school, near the snack table, and "She came up and hollered clear across the hall," and told him to "get out," to which he replied, "I'm fired, huh? That's good, you can't fire me." He recalled that Ms. McGill and Bonham's Librarian, Ms. Barnes, were the only two persons in the area, and that he did not see how Ms. McQuary, three or four rooms away, could possibly have heard him. Grievant next related that Ms. Hedge then travelled to the kitchen, where he had gone, according to him after the encounter in the hall. Once he was there, he remembered, he told the cooks, "She's thrown me out of school, and that's just like being fired." He continued that Ms. Hedge, when she arrived, ordered him out of the kitchen, and he told her he had a right to be there and, indeed, an obligation under the terms of his duty schedule. He claimed pupils then asked him if he had been fired, "because of hearing Ms. Hedge's voice;" he conceded, however, that he was upset but that his voice was "no louder than hers." Grievant said that he left the cafeteria,

retrieved his jacket from a closet and went home. Once outside, Grievant related that he saw a parent, Ms. Cox, and the physical education teacher, Ms. Underwood, and that each initiated a conversation with him, inquiring where he was going. He said he responded that he had been fired, and they both exclaimed, "Oh, my God!"

Grievant rejected claims that he had used bad language or threats on September 29, although he admitted he told the cooks he "didn't give a damn" when they opined to him that Ms. Hedge was going to get rid of him sooner or later. He explained he had mentioned filing a grievance and other actions to Ms. Hedge because she had called him into the office one day before September 29 and, in his opinion, unfairly reprimanded him because she understood he planned to sign a parent-generated petition for her ouster.⁶ He continued that he denied any such intent but that he had gotten upset at Ms. Hedge's accusation and left her office abruptly. He also expressed outrage at Ms. Hedge's direction that he not discuss personnel matters, such as his evaluations, with others, and related that he told her, "I have my rights too."

Grievant claimed his move to night shift has "wrecked everything." He blamed marital problems on the change, noting, "it's tearing us apart." He denied ever contacting

⁶ It was never clearly established whether such a petition ever existed or was actually contemplated.

anyone at Respondent's central office to complain about Ms. Hedge or this specific situation. He finally protested that the alteration should not stand because it does not accomplish its stated intended purpose, since sports teams, scouting organizations, and other groups are frequently at Bonham during evenings and "I have more contact with them than I did on day shift."

On cross-examination, Grievant admitted he had not always held closely to his daily cleaning regimen because "it's impossible. . . I can't quit the job I'm doing at the time" to move on to the next one at a set, planned moment. He denied mentioning the parents' petition during the September 29 conference; he also denied ever flailing his hands while talking to Ms. Cox and Ms. Underwood, claiming they were in his jacket pockets once he departed the school. Ms. Hedge rebutted briefly with testimony that the hallway encounter was after she had travelled to the kitchen the second time, when she initially ordered Grievant to leave the building. She explained she did not see him again once he left her office until she located him back in the kitchen.

Respondent's attorney closed by opining that all witnesses, save Grievant, presented essentially consistent testimony, "unanimously" damaging to Grievant. He reminded the undersigned that Grievant had been warned prior to September 29 about temper tantrums, and that he could have justifiably been dismissed from employment for his actions

on that date. Respondent promoted a holding that it had authority to fashion reasonable punishment, i.e., a disciplinary shift-change, less intrusive than termination, without complying with Code §18A-2-7, the service personnel transfer statute, or Code §18A-4-8a. In the alternative, counsel, characterizing Grievant's remaining on day shift an "intolerable circumstance because of his tantrums," urged, "in the context of this case," "affirmation of the Board of Education's power, upon the Superintendent's recommendation, for a schedule change," again without reference to §§18A-2-7 or 18A-4-8a.

Grievant's counsel admitted that the testimony revealed his client as excitable, but contended Grievant was justifiably upset in these circumstances, especially Ms. Hedge's fury. He stated Grievant was well within his rights to file a grievance, consult with a lawyer, or even sign an ouster petition, and that it was inappropriate for Ms. Hedge or Respondent to penalize him for voicing any such desires. He challenged Respondent's characterization of the testimony of all witnesses besides Grievant as being consistent, pointing to Ms. McQuary's statement of not observing anything "at the snack table or in the hallway," Ms. Hedge's denial of being upset when others said her teeth were gritted and that she was "furious," and Ms. Taylor's and Grievant's testimony about Ms. Hedge "hollering across the cafeteria." He concluded that there was no allowance in Code §18A-2-8 for a county board of education to impose a shift-change, which he

characterized a transfer, as discipline and therefore, especially in light of the suspension also levied, Grievant must be returned to his original schedule.

W.Va. Code §18A-2-7 provides, in pertinent part:

The superintendent, subject only to approval of the board [of education], shall have authority to. . .transfer. . .school personnel. . .However, an employee shall be notified in writing. . .on or before the first Monday in April is he is being considered for transfer or to be transferred. Any . . .employee who desires to protest such proposed transfer may request. . .a statement of reasons. ⁷ .[and] may make. . .demand. . .for a hearing... .

Code §18A-2-8 reads, in part, as follows:

[A] board [of education] may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance or willful neglect of duty, but the charges shall be stated in writing served upon the employee within two days of presentation of said charges to the board [of education]. The employee so affected shall be given an opportunity. . .to request. . .a hearing. . .[before the West Virginia Education and State Employees Grievance Board]. . .⁸

Code §18A-4-8a states, "No service employee shall have his daily work schedule changed during the school year without his written consent. . ."

⁷ For transfers to be effective school year 1989-90, the timeframes of Code §18A-2-7 were extended somewhat.

⁸ Despite the procedure the statute appears to provide, an employee is not entitled to a hearing before this Grievance Board until his employer has actually levied discipline against him and thus created a "grievable act." Duncan v. Lincoln Co. Bd. of Educ., Docket No. 89-22-048 (Mar. 27, 1989).

Many of Grievant's points are simply not persuasive. Ms. McQuary, for instance, did not deny witnessing the snack-table incident; it is true she did not mention it, but she was not directly asked about it. And, while it is clear that Ms. Hedge was more upset than her testimony would indicate, no one characterized her as "furious" or inappropriate in her temperament at any time, save Grievant. The colloquial term "holler" was used by Ms. Taylor, but in context it is readily apparent she did not mean a scream or shout but rather a call. Ms. Hedge apparently is mistaken in her recollection that she did not call aloud for Grievant when she first entered the kitchen, but merely motioned for him to approach her; however, the discrepancy is of little consequence and does not damage her overall credibility, which was quite high. Further, it is noted every witness save Grievant offered essentially consistent and believable testimony on the major particulars of this situation.

Certain specifics of this scenario, however, are troubling with regard to Grievant's treatment. First of all, it is unlikely that Respondent or its agents can appropriately require one of its staff members to refrain from merely discussing his evaluations and other personnel matters with fellow workers and friends. Normally, when information is deemed confidential, it is for the protection of the affected party, in a personnel context, the employee. But cf. Code §18-29-3(r) (certain items of lower-level grievance information to be kept confidential unless all

parties effect written release). Likewise, any ill-will directed toward Grievant by Respondent as a result of his utilization of the grievance procedure, conference with an attorney, support of a petition for the ouster of Ms. Hedge, or statements of intent with regard to any of these, without more, would be clearly inappropriate. It would at least create a "chilling effect" on Grievant's execution of certain rights, see Slone v. Putnam Co. Bd. of Educ., Docket No. 89-40-665 (Feb. 7, 1990), at 12, 15, and perhaps even circumstances constituting reprisal, which is prohibited by Code §18-29-3(h).

However, the manner in which an individual conducts himself, even in the exercising of protected rights, is certainly not an item his employer need ignore. The record suggests and his own counsel confirms that Grievant is an excitable individual. Further, Grievant has a documented history of emotional outbursts, including those on September 29, 1989. His own testimony was that he had complained repeatedly and forcefully to several Bonham staffers and others, but no one in authority, about Ms. Hedge over a long period. Even if Ms. Hedge had been totally unreasonable in her treatment of Grievant,⁹ he had no "right" to respond directly to her in like fashion, as he contends. Rather, if her behavior had been as outrageous as Grievant

⁹ The record certainly does not suggest this to be true.

characterizes it for the three or four years she has served Bonham, Grievant could have exercised a true right, i.e., to grieve or complain to Respondent's central office much earlier. Finally, again assuming Ms. Hedge "roughly yelled" at him in front of students and other staff, his admitted "screaming back" at her in that setting is, in and of itself, justification for removing him from all but marginal contact with children. Grievant's contention that he sees more people now than when he was on day shift is summarily rejected. While it is recognized that schools generally host evening programs on a not-infrequent basis, it is likewise noticed that it is unlikely that such would occur every schoolday or that these activities would often if ever last the entirety of Grievant's new shift, 4:00 p.m. to midnight. In short, there is no hard evidence of reprisal or inappropriate consideration of Grievant's free exercise of his rights.

In these very unusual circumstances, Respondent's power to reassign Grievant to the night shift, upon its Superintendent's recommendation, will be affirmed. Code §18-4-10(10) permits a county superintendent of schools to "Act in case of emergency as the best interests of the schools demand." "In general, the essential elements of an emergency are that the condition be unforeseen or unanticipated and that it call for immediate action." Randolph Co. Bd. of Educ. v. Scalia, 387 S.E.2d 524, 527 (W.Va. 1989). Even though Grievant had previously exhibited outbursts of

emotion, September 29, 1989, was apparently the most intense occasion and the first one with students present; therefore, it is reasonable to define it as an "unforeseen or unanticipated" condition "call[ing] for immediate action," i.e., immediately separating Grievant from contact with students to the extent feasible.¹⁰ The fact that Grievant did not agree to the shift change, which may fairly be considered an "emergency" measure, in writing per Code §18A-4-8a must therefore be found insignificant.¹¹

As noted by Respondent, the alternative would have been to terminate Grievant; rather, it decided to take less drastic steps and preserve Grievant's job. Furthermore, Respondent's responsibility to preserve the integrity of its schools is paramount, see James v. W.Va. Board of Regents, 322 F.Supp. 217 (S.D.W.Va.), aff'd 448 F.2d 785 (4th Cir. 1971), and its actions herein eminently reasonable in light

¹⁰ In arriving at this conclusion, the undersigned has not found it insignificant that Bonham students are of tender age.

This Decision should not be read to indicate that county boards of education or their superintendents will easily be able to circumvent statutes such as Code §§18A-2-7 and 18A-4-8a by reference to Code §18-4-10(10).

¹¹ Due to the outcome herein, neither Respondent's "lesser-included punishment" Code §18A-2-8 argument, see Rike v. Committee, 494 A.2d 1388 (Pa. 1985), nor Grievant's contention of §18A-2-7 transfer violation need be addressed. Even if the latter had merit, it would not offer Grievant a valid defense, in light of Code §18-4-10(10).

of that duty and, additionally, an obvious concern for Grievant's welfare.¹²

The remainder of this Decision will be presented as formal findings of fact and conclusions of law.

FINDINGS OF FACT

1. Grievant, a custodian at Respondent's Bonham Elementary School, has a history of at least occasional inappropriate emotional outbursts on the job. He was counseled about these by his immediate supervisor, Principal Julia Hedge, during Spring 1988 and perhaps prior to that as well.

2. Early on September 29, 1989, Ms. Hedge convened a closed-door conference with Grievant in her office. The subject of this meeting was complaints received by Ms. Hedge about the quality of Grievant's services to teachers. Grievant unjustifiably became irate, left the scene in a huff, and commenced complaining in inappropriate tone and language to other Bonham staff and some of the students' parents about Ms. Hedge's comments. Two other encounters with Ms. Hedge also occurred on this morning, both in public areas of the school. During at least part of this time, students were present, which had never been true during Grievant's pre-September 29 tantrums. Further, Grievant's

¹² Grievant is apparently nearing the point at which he may retire from employment with Respondent.

September 29 outburst was more intense and sustained than his previous ones.

3. As a result of his behavior, Grievant was suspended for ten days without pay and moved from day shift to night shift. He subsequently filed this grievance and now seeks return to day shift as his only relief.

CONCLUSIONS OF LAW

1. Code §18A-4-8a prohibits change in a service employee's daily schedule once a school year has begun unless that employee agrees to the amendment in writing. However, a county superintendent of schools has authority to "Act in case of emergency as the best interests of the school demands." Code §18-4-10(10).

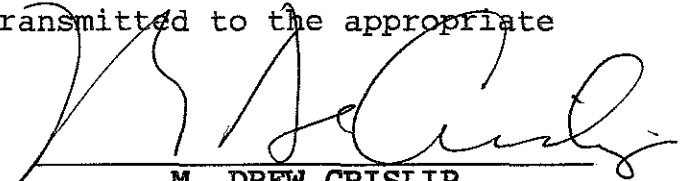
2. A county board of education has a duty to preserve the integrity of its schools. James v. W.Va. Board of Regents, 322 F.Supp. 217 (S.D.W.Va.), aff'd 448 F.2d 785 (4th Cir. 1971); see also Code §18-4-10(10). Therefore, a county board of education through its superintendent of schools may, in an emergency situation, unilaterally change the work-shift of a staffer during the school year, if, for example, there is an immediate and reasonable need to minimize that person's contact with people, especially young children. No violation of Code 18A-4-8a results.

3. "In general, the essential elements of an emergency are that the condition be unforeseen or unanticipated and that it call for immediate action." Randolph Co. Bd. of Educ. v. Scalia, 387 S.E.2d 524, 527 (W.Va. 1989).

4. Grievant was "insubordinate" when he lost control of his emotions and otherwise reacted inappropriately, which had happened before and about which he had previously been admonished by Respondent's authorized agent, on September 29, 1989. See Webb v. Mason Co. Bd. of Educ., Docket No. 26-88-206 (Jan. 5, 1989).¹³ And, although he had engaged in tantrums at work before this date, the fact that the September 29 incident was more intense than the others and was the first witnessed by students rendered it a "condition. . . unforeseen or unanticipated and. . . call[ing] for immediate action." Code §18-4-10(10).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha 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 Hearing Examiners is a party to such appeal, and should not be so named. This office should be advised of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.


M. DREW CRISLIP
Hearing Examiner

Date: March 23, 1990

¹³ Implicit in this conclusion is that Grievant's ten-day suspension without pay was reasonable.