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

GASTON CAPERTON
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GORDON PATTERSON

v.

Docket No. 89-35-59

OHIO COUNTY BOARD OF EDUCATION

DECISION

Grievant, Gordon Patterson, had been employed by respondent Ohio County Board of Education (OCBE) as a custodian for over four years until his dismissal February 14, 1989. He filed a grievance at level four and, after many scheduling delays due to conflicts of time on the part of the parties and witnesses, the matter was heard on March 29, 1989. Additional evidence was filed in July 1989,¹ and the parties' submissions of proposed

¹One of grievant's witnesses, Kenneth Walker, did not respond to a subpoena issued for his appearance. At the conclusion of the hearing the parties agreed to keep the record open pending efforts to either compel Mr. Walker's appearance or submit some other form of testimonial or documentary evidence. Grievant's counsel obtained permission from Mr. Walker to submit his work evaluations from 1982 to July 1988, and those documents were received July 14, 1989.

findings of fact, conclusions of law and arguments were completed September 25, 1989.

OCBE dismissed grievant on charges of willful neglect of duty and insubordination after it was discovered that he altered his work schedule without authorization and submitted inaccurate time cards contrary to previous directives from school officials about those practices. OCBE relies on W.Va. Code §18A-2-8 which provides that a county board of education may dismiss personnel for, among other things, neglect of duty and insubordination. Grievant, on the other hand, challenges the dismissal and contends that OCBE's notice to him under Code §18A-2-8 was insufficient as the charges were not specific enough for him to properly defend himself. Grievant also argues that the dismissal fails because OCBE did not follow the mandates of State Board of Education Policy No. 5300 (SBE Policy §5300 or §5300) and provide him a formal evaluation and opportunity to improve prior to the dismissal.

Facts and Evidence

The basic facts about grievant's employment with OCBE are not controverted. Grievant commenced employment in 1984 and was initially assigned to Wheeling Park High School. In September 1988, grievant successfully bid on a Custodian III position with split assignment between Clay Elementary School and Wheeling Junior High School (WJHS). Grievant had an evening-night shift and was required to first report for duty at Clay between 7:00 and 10:30 p.m. Scheduled work hours at WJHS commenced at 11:00 p.m. and ended at 3:00 a.m. School officials testified that the

work hours were set, in part, for security purposes. Grievant's salary was supplemented five cents per hour for the evening shift and eight cents per hour for work performed after midnight in accordance with OCBE's policy on shift-differential wages.

WJHS Assistant Principal Dan Coram testified about events leading to the dismissal action. On October 12, 1988, school officials noticed that grievant was performing duties at WJHS at 9:00 p.m. Grievant nonetheless submitted a signed time card which denoted that he worked his scheduled hours. Mr. Coram stated that during school hours on October 13, when he called grievant at home about working the previous evening prior to his scheduled work hours, grievant was not cooperative. In any event, a meeting was set with grievant² for October 17 about the matter.

²Grievant's response to the October 13 telephone call was highlighted during cross-examination. Grievant was asked if he recalled Mr. Coram's telephone call to set up a meeting about his being at the school before his scheduled time the previous evening:

A: Yes. He called me at ten in the morning and I just got up. My wife had to come up the stairs and get me up. You get done at three in the morning, you don't want nobody call you at 10:00. . . .

. . . .

Q: The way it developed, you weren't working at 3:00 [a.m.]. You left the building at 1:00 [a.m.].

. . . .

A: I just didn't feel like talking to him on the phone and he's the one that called me, I didn't call him.

Grievant admitted that he voiced objections to Mr. Coram about having to attend the meeting and that he told him, "[W]hy don't you come out at my time when I'm here at 11:00 [p.m.]." T.87, 88.

WJHS principal Thomas Innocenti, head custodian John Sharp, grievant's custodial-employee representative Jerry Ames, Mr. Coram and grievant attended the meeting. According to Mr. Coram, every effort was made to convey to grievant the seriousness of the situation. Mr. Coram and Mr. Ames counseled grievant about the necessity for honest and accurate reporting of his work hours because his salary was based on the information he submitted, and advised him to fill out his time card to reflect actual hours worked. Mr. Ames, in an effort to help grievant with his reporting duties, instructed him on the proper manner to fill out his time card.³ Mr. Coram warned grievant that he must obtain advance approval about schedule changes. He was directed to notify Mr. Sharp or other school officials if, for any reason, he would not be on duty when scheduled. Mr. Coram informed grievant that a written memorandum would be placed in his file about the incident and, if he repeated the infraction, he would be subject to dismissal.

Mr. Coram stated that on the night of November 22, Mr. Sharp telephoned him to report that there were no lights on at WJHS and no automobile parked at the building. Mr. Sharp told Mr. Coram he had not entered the building because he did not have his keys with him. Mr. Coram said that he drove by the next night shortly after midnight and also found the building

³Mr. Coram said that Mr. Ames pointed out that grievant had difficulties with reading and writing and that his wife had been filling out his time cards.

darkened. He entered the building and telephoned Mr. Sharp to come to the school and assist him with a building inspection. The two men remained in the building until 2:00 a.m., but grievant was not on duty. Principal Innocenti was apprised of the situation. He told Mr. Coram to continue his investigation and watch the situation. Mr. Coram stated that he wanted to determine if grievant's absence was a one-time incident or a pattern of early departures. The time card grievant submitted for the night of November 23 indicated he completed his scheduled work hours at 3:00 a.m.

Mr. Coram testified that he conducted another building check on the night of December 6- morning of December 7 at 1:30 a.m. and again ascertained that grievant was not on duty at that time and at least until 2:30 a.m.⁴ As a result of the latest discovery, Mr. Coram arranged another meeting with grievant during school hours on the 7th. According to Mr. Coram's testimony, he first inquired of grievant whether he was having any problems about getting his work done. Mr. Coram said that grievant remarked that he did not have enough time to complete all of his tasks. Mr. Coram next asked grievant if his time cards were correct for November 23 and December 6 and grievant responded that they were. Mr. Coram then told grievant that he had inspected the building on those two nights and he knew grievant had left early. Mr. Coram testified that grievant said

⁴Mr. Sharp was again present during the second building search. His testimony corroborated Mr. Coram's.

that that was a lie, that he was on duty and had parked his car around the block. The conference apparently ended on that note, but Mr. Coram testified that grievant later called him and admitted that he left early and stated that he did not want to lose his job. Grievant was advised of the necessity for another meeting with Mr. Innocenti present.

Mr. Innocenti testified that after he noticed grievant working at WJHS at 9:00 p.m. on October 12, he called Clay School to see if there had been a change in grievant's schedule, but Clay's principal did not know of a change.⁵ Mr. Innocenti affirmed that he had placed a letter of warning in grievant's files subsequent to the first meeting and counseling session. He agreed that after it was reported to him in November that the building appeared to be dark during grievant's work hours, he instructed Mr. Coram to investigate the situation. He called a meeting when he learned of the November 23 and December 6 incidents and grievant's falsehood when questioned about those events.

School officials, including Mr. Innocenti, again met with grievant and Mr. Ames on January 9, 1989. Mr. Innocenti later told grievant that he was going to recommend to the school superintendent that he be discharged from his employment for

⁵Under cross-examination, grievant gave a different account of the October 12 incident. He related that on the day in question he reported to work early at Clay, at that principal's request, and subsequently arrived and departed from WJHS earlier than scheduled to balance his time.

willful neglect of duty and insubordination because he falsified his work documents. Mr. Innocenti followed the verbal notice with a written memorandum to that effect:

During our meeting of January 9, 1989, it was confirmed that you left work without permission on November 23, 1988 and December 6, 1988 and did not reflect the lost time on your time cards. Therefore, pursuant to WV Code and the [October] letter placed in your file . . . , I am recommending . . . that you be dismissed from your position . . . for willful neglect of duty and insubordination.

Subsequently, Dr. Henry Marockie, then Superintendent of Ohio County Schools, notified grievant by letter dated February 8, 1989, that he would implement Mr. Innocenti's recommendation and present it to OCBE at its February 13, 1989, meeting. The letter stated, in part: "The reasons for this dismissal are: 1) willful neglect of duty, and 2) insubordination as discussed with you by Mr. Innocenti." OCBE approved the dismissal action at its February 13th meeting.

Grievant testified on his own behalf. He stated that on the night of November 23 he started to perform his duties, but that he "just left" about midnight because he did not "feel good." He said he did not report his departure because he did not want to get anyone out of bed. He said when he got home he forgot to put it on the time card.⁶ He also related that on

⁶Grievant testified that because of his difficulty in reading and writing, his wife filled out his time and trip sheets. He said he did not tell the officials at WJHS about it because "they never did ask me."

The presumed intent of the testimony was to shift the blame about the erroneous time cards. However, this testimony was
(Footnote Continued)

December 6 he completed his work then recalled that he had an hour-and-a-half compensatory time coming to him. He stated that "the other ones" just took their time, "so I thought, I got my work done . . . so I'll just leave." He claimed that he locked up the building and did not contact anyone because it was 1:30 a.m.⁷

Grievant stated that when he met with Mr. Coram and Mr. Sharp in December and they started asking questions, "I thought they were trying to do something." He said he told them his car was at the school, although that was not true. According to grievant, he called Mr. Ames as soon as he got home to tell him "what was going on." He said at the next meeting he told Mr. Innocenti that he left early on November 23 because he was sick.

Responding to questions about his previous assignment at the high school, grievant discussed how he had been evaluated in the past and noted that when he was at the high school he had been placed on a plan of assistance because his work areas were not clean. He said his "boss" on night turn had constant meetings with him until he was taken off the plan after a year.

(Footnote Continued)

contrary to grievant's admission in cross-examination that he could understand and write numbers; to Mr. Coram's previous testimony that school officials were apprised by Mr. Ames in October about grievant's reading difficulty and had encouraged a training session for him; and to Mr. Ames' later testimony that, after the October meeting and training session, he felt grievant knew he must accurately report his work hours, T.103, see also n. 2.

⁷Grievant gave no explanation as to why he did not at least report the December 12-13 work hours correctly.

He said he had not been evaluated or put on a plan of assistance at WJHS. Grievant also told his counsel, in essence, that he had never been counseled while at the high school for reporting for work early and leaving early.

Under cross-examination grievant recalled that he had been accused of leaving work early at the high school, T.79, but he could not remember the details. He agreed that a letter had been placed in his file in August 1987 about his taking excessive sick leave days. He said his boss directed him to bring a doctor's slip when he called off sick, but that he had told her he did not "feel good" and did not think he should have to bring a doctor's slip for one day.

With regard to his Clay-WJHS assignment, grievant responded affirmatively that he knew his work hours at WJHS were from 11:00 p.m. until 3:00 a.m. Likewise, he agreed that, after the October 1988 counseling,⁸ he knew that he was not to make schedule changes on his own initiative but was to always contact school authorities about such matters; that providing wrong information on his time cards was fraudulent reporting and could

⁸While grievant did not bring up the October 12 incident during direct examination, his counsel had earlier called Clay Elementary custodian Bryan Walker to discuss scheduling variances at that facility. Mr. Walker recalled that Clay's principal did require grievant to come to work early on one occasion and to work some hours on a Saturday for special projects, but he established that those occasions occurred "around the holidays" probably late December 1988 or early January 1989. Thus it appears that Mr. Walker could not account for any former time grievant may have had reason to appear early for work at WJHS to balance his time, specifically, the October 12-13 instance. See n. 5.

subject him to legal action; and that if he did it again, there would be problems.

Mr. Ames testified about some matters pertaining to the various meetings held in October and December 1988. He verified that he did not attend the December 7 meeting and recalled grievant's call to him about it later. Mr. Ames said that after hearing grievant's story about what he had told school officials, he told him "that is the wrong thing to do" and instructed him to call Mr. Innocenti or Mr. Coram and tell the truth. T.104.

Discussion and Determinations

The initial issue which must be resolved is whether grievant's actions constituted insubordination and willful neglect of duty. OCBE met its burden of proof in this regard. The evidence clearly demonstrated that grievant acted on his own initiative and contrary to the direct orders of his superiors. Moreover, his inaccurate reporting of work hours had the effect of his vouching for shift-differential wages to which he was not entitled. While grievant may have had cause to adjust his schedule and to leave work early in November and December, he chose to implement his own rules for departure and not the rules he was directed to obey. Furthermore, the reasons he did give for not reporting his departure and actual work hours were unacceptable considering the prior notice he had been given on those matters and his admission that he understood the significance of the requirements of reporting.

The next matter to be addressed is whether OCBE's notice of dismissal was sufficient. Grievant's complaint that he was not fully apprised of the specifics of the dismissal charges prior to OCBE's meeting and action on the matter can be disposed of summarily because it is without merit. In addition to the documentary evidence in this case, grievant's own testimony establishes that his due process rights were not compromised. Grievant affirmed that when he first met with WJHS officials he knew and understood that the consequences of his failing to heed directives for proper reporting of his work activities could result in a recommendation for his dismissal. He also agreed that when he last met with WJHS officials about the November and December instances of altering his schedule without notice and submitting false time sheets, he knew exactly why the recommendation would be made by them for his dismissal. See T. 89, 98. Therefore, grievant was not disadvantaged when OCBE met to hear the recommendation as he suggests because he admittedly knew the specifics of the charges. See Snyder v. Civil Service Commission, 238 S.E.2d 842 (W.Va. 1977).

Also at issue is whether OCBE was prohibited from terminating grievant's employment because he had not been formally handed a written evaluation and placed on a plan of improvement pursuant to SBE Policy §5300 as he argues. In support of his contention and argument that his actions prior to dismissal were subject to the requirements of §5300, grievant cites Mason Co. Bd of Educ. v. State Sup't of Schools, 274 S.E.2d 435 (W.Va. 1981) and Trimboli v. Bd. of Educ. of the Co. of Wayne, 254

S.E.2d 561 (W.Va. 1979). Grievant urges that he had been accused of "only two specific incidents of leaving work early," and such conduct "is at the very least conduct which is easily remedied by a plan of improvement," Gr. Proposals at 10 and 14.⁹

The evidence does not support a finding that grievant's misconduct was performance-based, or that OCBE's charges against him involved competency. OCBE concedes that §5300 must be followed before there can be a dismissal for incompetency or other correctable performance-related misconduct, and that an improvement period is required under those circumstances. However, OCBE persuasively distinguishes grievant's misconduct and the charges which led to his dismissal in this case:

[G]rievant is now charged with, among other things, neglect of duty and insubordination in that he deliberately falsified his time records reflecting that he actually was working when indeed he was not. This charge is not of a type involving competency. It involves acts of immorality and willful neglect of duty which cannot be corrected by being afforded a 5300(6)(a) evaluation notifying the grievant of a deficiency and giving him an opportunity to improve.

OCBE Proposals at 10. OCBE correctly relies on the recent case of Rovello v. Lewis Co. Bd. of Educ., 381 S.E.2d 236 (W.Va. 1989), in support of its argument that the requirements of §5300

⁹Grievant also relies on Carrell v. Kanawha Co. Bd. of Educ., Docket No. 20-87-073-1 (June 30, 1987). The grievant-custodian in Carrell was orally counseled for failure to report off from duty and for excessive absenteeism which seriously affected his work performance and school officials' ability to maintain the assigned school. The grievant therein prevailed because no written evaluation had been issued to him prior to the initiation of formal dismissal proceedings on charges of a correctable misconduct, neglect of duty due to absenteeism.

need not be met when the basis for dismissal involves acts which do not involve issues of competency, the essence of the Policy. On the strength of Rovello and the determinations heretofore made on the matter, it cannot be found that OCBE erred when it did not formally evaluate grievant prior to the dismissal action.¹⁰

The Court in Rovello, however, reiterated the oft-stated "basic rule" which requires a board of education to reasonably exercise its authority to dismiss personnel under W.Va. Code §18A-2-8.¹¹ The Court then examined and discussed the

¹⁰The case at bar can be distinguished from Holland v. Board of Educ. of Raleigh County, 327 S.E.2d 155 (W.Va. 1985). In Holland, the Court examined the propriety of a school board's disciplinary transfer of several teachers. The Court declared that an insubordination charge upon which the transfers were predicated "is a charge of prior misconduct" subject to the requirements of §5300, as school officials admitted. Holland made clear that disciplinary transfers based on substandard performance not brought to the attention of the employees for remediation was violative of the protections afforded under §5300. The Court then affirmed that "it is the conduct forming the basis for action that and not the label placed on such action that is determinative." Holland at 157, citing Syllabus Point 4 of Mason Co. Bd. of Educ. v. State Sup't of Schools, 274 S.E.2d 435 (W.Va. 1980). It determined that all of the teachers involved had excellent evaluations and their alleged insubordination was for activities conducted during non-school hours on a grievance matter against their principal. The Court concluded that there never were allegations of direct insubordination and that the transfers smacked of retaliatory motivation.

Such is not the case herein. Grievant's failure to heed school officials' instructions and his local employee representative's advice and offer of help demonstrated a lack of respect for authority and non-correctable insubordination on his part.

¹¹The Rovello court cited Beverlin v. Bd. of Educ. of Lewis Co., 216 S.E.2d 554 (W.Va. 1975).

reasonableness and propriety of a school employee's dismissal for fiscally-related misconduct not involving professional performance or competence and not subject to the requirements of §5300.¹² The dismissal was not upheld because it was found and determined that the board of education did not have a clear-cut policy relating to the employee's infraction and the conduct could not be construed as willful; the employee had a twenty-five year history with unblemished meritorious service; and the harm to the school system was minimal since the employee could make restitution. The analysis in Rovello is instructive.

In the instant case, the evidence reveals that grievant was apprised of the need to accurately report and record his actual work hours. Moreover, the record supports a finding that he fully understood the regulation, was fully capable of compliance and was fully aware of the consequences of noncompliance. Besides willfully repeating his infraction a second and third instance after warning, grievant did not have a totally unblemished work record during his four-year tenure with OCBE as he

¹²In Meckley v. Kanawha County Bd. of Educ., 383 S.E.2d 839 (W.Va. 1989), another recent case involving charges of insubordination and willful neglect of duty against a teacher who was dismissed, the Court was silent on Policy 5300 but again tested the reasonableness of the school board's action. The Court, in upholding the dismissal, viewed the teacher as an employee "who made her own rules and then followed those rules." Meckley at 842.

Grievant also appeared to want to make the rules, i.e., determine his own work hours; require Mr. Coram, his supervisor, to conduct their meeting at his time, 11:00 p.m.; and decide on the appropriate evening cut-off time after which school authorities could no longer be contacted about schedule changes.

had been placed on a plan of assistance at his former assignment because his work was not up to standards. While that problem did involve his work performance and was brought to light via written evaluation, grievant was also counselled about absenteeism occurring before and after weekends and, on at least one occasion, because of leaving work early, T.79,80. See also OCBE Exhibit 10.

Finally, while restitution could be had in this case, and indeed grievant was docked some time for the hours he did not work, the harm to the school system is substantial because grievant's unreliability, history of disobeying rules and dishonesty would impose an undue administrative burden on school officials. There was nothing in grievant's demeanor or testimony suggesting remorse for his misconduct or assurances on his part that he would not repeat his infractions. If grievant were to remain an employee, OCBE would have to repeatedly verify that grievant was on duty when scheduled and otherwise scrutinize his time cards for accuracy in order that he be paid only the wages to which he was entitled.

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

FINDINGS OF FACT

1. On October 13, 1988, soon after grievant's assignment to WJHS, he altered his work hours and submitted an inaccurate

time card. Grievant received instructions on the proper manner to fill in a time card with his work hours. His service-personnel representative was satisfied that grievant was capable of accurate reporting.

2. Grievant also received warnings from school officials that he was not authorized to adjust his own work hours without permission or notification, and that if he again submitted a false time card he would be subject to dismissal. The evidence preponderates that grievant fully understood what was expected of him about his reporting duties and what the consequences would be if he repeated his initial infraction.

3. On two subsequent occasions grievant altered his work hours, submitted false time cards and initially lied about the matter when questioned by his supervisor. While it cannot be said that grievant did not have cause to alter his schedule on November 23 and December 6, 1988, his failure to notify school officials about his absences from the school and his submissions of inaccurate time cards can only be construed as willful insubordination.

CONCLUSIONS OF LAW

1. A board of education may suspend or dismiss any person in its employment for insubordination and neglect of duty, and such charges must be proven by a preponderance of the evidence, see W.Va. Code §18A-2-8 and Hastings v. Ohio Co. Bd. of Educ. Docket No. 35-87-304 (April 29, 1988). However, the authority

of a board of education to dismiss an employee under Code §18A-4-8 must be based upon the just causes listed therein and must be exercised reasonably, not arbitrarily or capriciously. Rovello v. Lewis County Bd. of Educ., 381 S.E.2d 237 (W.Va. 1989).

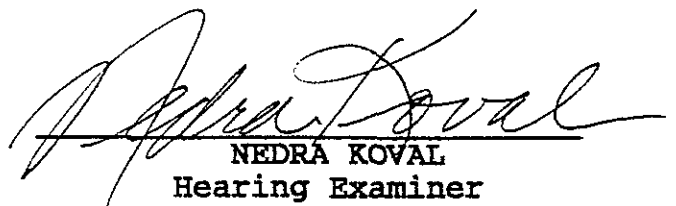
2. OCBE established by a preponderance of the evidence that grievant's insubordination and willful neglect of duty when he failed to heed work regulations was not competency-based misconduct subject to SBE Policy §5300.

3. OCBE properly exercised its authority to dismiss grievant for insubordination and willful neglect of duty pursuant to W.Va. Code §18A-2-8.

Accordingly, the grievance is **DENIED**.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Ohio 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. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate court.

DATED: January 31, 1990


NEDRA KOVAL
Hearing Examiner