**PATRICIA RANDALL**

**v. Docket No. 95-17-332**

**HARRISON COUNTY BOARD OF EDUCATION**

**DECISION**

Grievant, Patricia Randall, was employed by the Harrison County Board of Education (Board) as a custodian assigned to South Harrison High School (SHHS) until her dismissal, effective July 18, 1995. Ms. Randall filed an appeal directly to level four on July 31, 1995. Both parties waived the right to file proposed findings of fact and conclusions of law and the matter became mature for decision following an evidentiary hearing on October 2, 1995.

The essential facts of this matter are not in dispute. On May 26, 1995, Grievant had been regularly employed by the Board as a custodian, assigned to the 10:00 p.m. to 6:00 a.m. shift, at SHHS for approximately one and one-half years. Charles Reider, Custodial Coordinator, testified that he received a phone call at his home at approximately 9:00 p.m. that evening advising that Grievant was asleep at work. Mr. Reider met Administrative Assistant Victor Gabriel at SHHS at approximately 10:30 p.m. and began to look for Grievant.

Eventually, Grievant was found, locked in the unlit teachers' lounge, asleep. She did not awake to verbal cues but responded when her foot was shaken. Mr. Reider observed that she walked in an unstable manner but he could not be sure if the situation should be attributed to alcohol or her recent state of sleep. After Grievant admitted to drinking five or six beers earlier in the evening, she submitted to a breath test which was administered at approximately 11:30 p.m. That test established a .009 level of alcohol in her system. Grievant was suspended without pay until July 18, 1995, when her employment was terminated for willful neglect of duty and reporting to work under the influence of alcohol, a violation of the Board's Drug-Free Workplace Policy.

Appearing pro se, Grievant testified that she had attended a family celebration for Memorial Day from 10:00 a.m. to 2:30 p.m. It was during this time she consumed the five or six beers. After a brief

nap, she went to the hospital at 3:45 p.m. and sat with her grandmother until 9:00 p.m. When she arrived at work she was so tired that she unintentionally went to sleep. Grievant denies that she was under the influence of alcohol when she reported for work. Grievant submitted Board Policy GAP, the drug and alcohol testing policy for transportation employees, and argued that if a bus operator was permitted to work with an alcohol concentration of less than 0.04, her concentration of .009 was insignificant.

Harrison County Board of Education Drug-Free Workplace Policy GAN-R generally prohibits the "unlawful manufacture, distribution, dispensing, possession or use of a controlled substance . . . inthe workplace." The policy is mandatory in directing that employees "shall not report for work whether on-site or in the field, while under the influence of alcohol and/or an illegal drug." Grievant signed a verification statement agreeing to abide by this policy on February 8, 1994.

Although the Board correctly argues that Policy GAP does not apply to Grievant, it does provides some insight into the evaluation of an employee. Under Policy GAP, or other reasonable standards, Grievant's alcohol concentration was low. Even if it is accepted that the test was not highly accurate, it cannot be determined that the results were substantially higher than Grievant's condition would indicate. Finally, finding Grievant in a deep sleep may or may not be indicative that she was under the influence of alcohol. Based upon the foregoing evidence, it cannot be found that Grievant violated the Board's Drug-Free Workplace Policy by reporting for work while under the influence of alcohol.

Grievant's explanation that she was tired and inadvertently went to sleep is not accepted. Mr. Reider's undisputed testimony that the lights were out and the door to the teachers' lounge locked, substantiate an intent by Grievant not to complete her duties that evening, and not to be found. (See footnote 1)

In addition to the foregoing narration it is appropriate to make the following formal findings of fact and conclusions of law.

## FINDINGS OF FACT

1. Grievant has been regularly employed by the Harrison County Board of Education as a

custodian assigned the 10:00 p.m. to 6:00 a.m. shift, at South Harrison High School for approximately one and one-half years.

2. On Friday, May 26, 1995, Custodial Coordinator Charles Reider received a telephone call advising that Grievant was asleep at work.

3. Mr. Reider and Administrative Assistant Victor Gabriel found Grievant asleep in the teachers' lounge at approximately 10:42 p.m. The door to the lounge was locked and the lights were not on.

4. Grievant submitted to a preliminary breath test at approximately 11:30 p.m. The test indicated a .009 level of alcohol concentration in Grievant's system.

5. Grievant admits to consuming five or six beers prior to 2:30 p.m.

## CONCLUSIONS OF LAW

**1. The employer must establish the charges in a disciplinary matter by a preponderance of the evidence. W.Va. Code §18-29-6; Bailey v. Logan County Bd. of Educ., and W.Va. Dept. of Educ., Docket No. 93-23-383 (June 23, 1994).**

**2. A board may suspend or dismiss an employee for immorality,incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty pleas or a plea of nolo contendere to a felony charge. W.Va. Code §18A-2-8.**

**3. In order to prove willful neglect of duty under W.Va. Code §18A-2-8, the employer must establish that Grievant's conduct constituted a knowing and intentional, rather than a negligent, act. See Bd. of Educ. of County of Gilmer v. Chaddock, 398 S.E.2d 120 (W.Va. 1990); Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994).**

**4. The Board has proven by a preponderance of the evidence that Grievant acted in a knowing and intentional manner to willfully neglect her duties as custodian.**

**5. The Board has failed to prove by a preponderance of the evidence that Grievant reported to work under the influence of alcohol.**

**Accordingly, the grievance is DENIED.**

**DATED 10/31/95 SUE KELLER, SENIOR ADMN. LAW JUDGE**

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***Footnote: 1****Although not a basis for the dismissal, it is noted that Grievant, a probationary employee, had*

***received a written reprimand dated October 31, 1994, when she used personal leave without obtaining prior approval.***