

WANDA YORK,

Grievant,

v.

MINGO COUNTY BOARD OF EDUCATION,

Respondent.

Docket No. 95-29-519

D E C I S I O N

On November 22, 1995, Wanda York (Grievant), an employee of the Mingo County Board of Education (MCBE or Respondent), advanced the following complaint to Level IV:

Grievant, a regular custodian, seeks additional assistance at her school either in the form of additional custodians or in security personnel to prevent vandalism and enforce prohibitions against the use of tobacco products by students on school property. The lack of such help makes grievant's work circumstance intolerable.

A Level IV hearing in this matter was conducted in the Charleston office of this Grievance Board on February 15, 1996. This matter became mature for decision on March 11, 1996, following receipt of the parties' post-hearing submissions.

The pertinent facts in this matter are not in dispute. Accordingly, the following Findings of Fact have been derived from the record created at Levels II and IV.

FINDINGS OF FACT

1. Grievant is employed by the Mingo County Board of Education (MCBE) as a Custodian III at Tug Valley High School (TVHS).

2. TVHS has 660 students and 4.5 custodians work at the school. The student population at TVHS increased over 30% at the beginning of the 1995-96 school year when ninth grade students were added to the school. Unlike some other schools in the county, TVHS is a "closed campus" where the students are not ordinarily permitted to leave the campus during school hours.

3. Grievant's working hours are from 7:00 a.m. to 3:00 p.m. A second custodian reports for duty at 11:30 a.m. No other custodians are present while school is in session.

4. Grievant's duties include mopping up spills during breakfast in the school cafeteria, taking out the garbage and sweeping the cafeteria when breakfast is concluded, sweeping the entrances and cleaning four bathrooms, two of which are student bathrooms.

5. During the 1995-96 school year, Grievant's ability to complete her assigned duties has been chronically impeded by student misconduct, including but not limited to, use of tobacco products, deliberate discarding of trash and tobacco products in sinks and commodes, as well as on floors, spitting tobacco juice (primarily from smokeless tobacco or snuff) on the floors, defecating on bathroom floors, placing graffiti on various

surfaces, and related acts of vandalism, extending to breaking sinks and commodes, and initiating false fire alarms.

6. Pursuant to W. Va. Code § 16-9A-1, the West Virginia State Board of Education has adopted Policy 2422.5A, which prohibits the use of tobacco products by any person in any building or other property owned or operated by any county board of education. See Rogliano v. Fayette County Bd. of Educ., Docket No. 94-10-164 (Oct. 25, 1994).

7. TVHS Dean of Students Doug Ward estimates that 5 per cent of TVHS students are responsible for 95 per cent of the activities described in Finding of Fact Number 5. Mr. Ward acknowledged that disciplinary measures taken against students who engaged in such conduct have not been particularly effective in controlling the problem.

8. Due to health considerations in dealing with such items as expectorants and fecal matter, Grievant must wear appropriate protective clothing, such as waterproof, rubber gloves. These materials are provided by her employer.

DISCUSSION

In grievances of this nature, Grievant has the burden of proving her allegations by a preponderance of the evidence. Stout v. Harrison County Bd. of Educ., Docket No. 93-17-081 (Apr. 12, 1994); Randolph v. Harrison County Bd. of Educ., Docket No. 17-88-001-2 (June 30, 1988). As previously noted, there is no real dispute concerning the facts. Although MCBE recognizes that a problem exists at TVHS, especially with regard to use of tobacco

products and smokeless tobacco in particular, the Respondent contends that Grievant has not established any entitlement to specific legal relief nor has Grievant established a violation of any statute, policy, rule, regulation, or written agreement entitling her to specific legal relief.

As indicated in the Findings of Fact, Grievant has demonstrated that a situation has developed at TVHS which directly impacts on her "conditions of employment." See W. Va. Code § 18-29-2(a); Dooley v. W. Va. Dept. of Transp., Docket No. 95-DOH-214 (Jan. 23, 1996). See also Ford Motor Co. v. NLRB, 441 U.S. 488 (1979). Not only does the misconduct of a small minority of the student population at TVHS make Grievant's job inherently more difficult than it needs to be, these actions create a health and safety concern for Grievant, other school employees and the students themselves. Thus, Grievant has established that MCBE's failure to take effective action regarding this pattern of conduct constitutes "a substantial detriment to or interference with . . . job performance or the health and safety of students or employees." See W. Va. Code § 18-29-2(a); Guerin v. Mineral County Bd. of Educ., Docket No. 92-28-422/459 (Jan. 31, 1996). Therefore, the only controversy remaining to be resolved is what remedy, if any, may be granted based upon the situation described.

W. Va. Code § 18-29-5 provides that "[h]earing examiners are hereby authorized and shall have the power to . . . provide such relief as is deemed fair and equitable in accordance with the provisions of this article, and such other powers as will provide

for the effective resolution of grievances not inconsistent with any rules or regulations of the board or the provisions of this article." This provision was construed by the Supreme Court of Appeals of West Virginia in Graf v. West Virginia University, 189 W. Va. 214, 429 S.E.2d 426 (1992), as follows:

Clearly the Legislature intended to give the examiners who hear the grievances the power to fashion any relief they deem necessary to remedy wrongs done to educational employees by state agencies.

* * *

The Legislature's purpose in establishing the entire Educational Employees Grievance Board was to provide a relatively quick, yet fair procedure to resolve disputes between state educational employees and the State's educational institutions so that "effective job performance may be enhanced and the citizens of the community may be better served." W. Va. Code 18-29-1 [1992]. Furthermore, the grievance procedure was established "to provide a simple, expeditious and fair process for resolving problems ... and shall be construed to effectuate that purpose." W. Va. Code 18-29-1 [1992].

The Legislature has made the determination that the state is better served by allowing hearing examiners to determine "fair and equitable" relief in a simple and quick setting. This system is designed to invest scarce government resources in solving problems rather than investing those resources in an army of lawyers to go to court to defend against every employee complaint.

Id. at 220-21, 502-03.

Consistent with this authority, this Grievance Board recently directed a school board to schedule cleaning and maintenance of the air conditioning system and classroom at a grievant's school "consistent with industry standards." Guerin, supra. In another matter, a school board was directed to select an "appropriate employee," other than the grievant's principal, to render an

independent evaluation of a grievant's performance. Burdette v. Summers County Bd. of Educ., Docket No. 45-86-280-4 (Dec. 16, 1986). This Board has also granted relief to an employee assigned to a position for which she was not qualified. Roth v. Ohio County Bd. of Educ., Docket No. 35-89-025 (Feb. 28, 1990). Likewise, relief has been extended to an employee who was improperly dissuaded from intervening in a grievance. Stroud v. Mingo County Bd. of Educ., Docket No. 94-29-621 (June 30, 1995), appeal pending, Cir. Ct. of Mingo County (Civil Action No. 95-CAP-23). Equitable doctrines were cited in restoring sick leave to an employee whose misdiagnosis during an employer-directed medical examination had resulted in loss of 25 days' sick leave. Toney v. Lincoln County Bd. of Educ., Docket No. 22-87-047-1 (Apr. 30, 1987). Finally, this Board has denied the remedy being sought by a grievant (instatement to a coaching position), substituting an alternate remedy (reposting and re-evaluation). Giammerino v. Raleigh County Bd. of Educ., Docket No. 41-86-165-1 (Dec. 11, 1986).

As relief here, Grievant asks that MCBE be directed to either hire additional custodial personnel at TVHS to assist in cleaning up the facility, or employ security personnel¹ to enforce existing rules to prevent these conditions from arising. Alternatively, Grievant solicits an order compelling MCBE to enforce existing

¹W. Va. Code § 18A-4-8 establishes the school service personnel job classification of "watchman," a person "employed to protect school property against damage or theft." This appears to represent the type of "security personnel" Grievant is asking for through this grievance.

rules against the use of tobacco products and other misconduct, particularly vandalism.

It is recognized that "[c]ounty boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel." Syl. Pt. 3, Dillon v. Bd. of Educ., 177 W. Va. 145, 351 S.E.2d 58 (1986). Further, a government agency's determination regarding matters within its expertise is entitled to substantial weight. Princeton Community Hosp. v. State Health Planning, 328 S.E.2d 164 (W. Va. 1985). See also Lincoln County Bd. of Educ. v. Adkins, 188 W. Va. 430, 424 S.E.2d 775 (1992); Smith v. Bd. of Educ. of County of Logan, 176 W. Va. 65, 341 S.E.2d 685 (1985).

While Grievant's evidence indicates that the health and safety of employees and students could be marginally improved by hiring additional custodians, this remedy does not appear warranted where there are no objective standards to indicate how many custodians are required to support a facility of a specific size with a certain number of occupants. Moreover, this remedy simply deals with a symptom of the problem at TVHS without alleviating the cause. Finally, W. Va. Code § 18A-4-8b does not restrict county boards of education from determining the number of service personnel needed to work in the schools. Therefore, although MCBE is not precluded from hiring new custodial or security employees, that specific remedy, as requested by Grievant, will not be ordered to resolve this matter.

It is noted that a certain amount of misconduct and vandalism may be anticipated at a public high school. The undersigned administrative law judge is mindful that today's high school students are capable of fooling some of the people some of the time, but it does not appear that these students are so clever that they can necessarily defeat the combined wisdom of the board of education and its administrators, and thereby continue to make a mockery of the state's tobacco-free schools policy. Certainly, there has been no showing that other schools in Mingo County, or anywhere else in this state, have permitted conditions to attain the low point of student discipline reflected by the record in this case.

Therefore, in order to rectify conditions within MCBE's control which contravene Grievant's rights under W. Va. Code § 18-29-2(a), MCBE will be ordered to vigorously enforce State Board of Education Policy 2422.5A and increase efforts to prevent vandalism at Tug Valley High School. Such enforcement shall include, but not be limited to, developing an effective procedure to monitor student bathrooms and hallways during school hours to insure that students are out of class and in common areas, such as bathrooms, only when specifically authorized.

In addition to the foregoing discussion, the following Conclusions of Law are appropriate in this matter:

CONCLUSIONS OF LAW

1. Grievant has the burden of proving each element of a grievance of this nature by a preponderance of the evidence. Stout

v. Harrison County Bd. of Educ., Docket No. 93-17-081 (Apr. 12, 1994); Randolph v. Harrison County Bd. of Educ., Docket No. 17-88-001-2 (June 30, 1988).

2. Grievant established by a preponderance of the evidence that MCBE's failure to control student conduct involving vandalism, littering and use of tobacco products prohibited by State Board of Education Policy 2422.5A, constitutes "a substantial detriment to or interference with ... job performance or the health and safety of students or employees." See W. Va. Code § 18-29-2(a); Guerin v. Mineral County Bd. of Educ., Docket No. 92-28-422/459 (Jan. 31, 1996).

3. The West Virginia Education and State Employees Grievance Board has authority to "provide such relief as is deemed fair and equitable" in grievances arising under W. Va. Code §§ 18-29-1 et seq. W. Va. Code § 18-29-5. See Graf v. W. Va. Univ., 189 W. Va. 214, 429 S.E.2d 426 (1992); Guerin, supra.

Accordingly, this grievance is **GRANTED IN PART**. The Mingo County Board of Education is hereby **ORDERED** to vigorously enforce State Board of Education Policy 2422.5A and increase efforts to prevent vandalism and use of tobacco products at Tug Valley High School. Such enforcement shall include, but not be limited to, developing an effective procedure to monitor bathrooms and hallways during school hours to insure that students are out of class and in common areas, such as bathrooms, only when specifically authorized. MCBE shall retain discretion, consistent with W. Va. Code, Chapters

18 and 18A, to determine such matters as the number and classifications of employees to be employed in accomplishing this task. Consequently, all other relief requested by Grievant is **DENIED**.

Any 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 this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

LEWIS G. BREWER
Administrative Law Judge

Dated: April 23, 1996