DELENE HIGGINS, et al.,

Grievants,

v. **Docket No. 02-24-040**

MARION COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievants (See footnote 1) , employed as custodians at North Marion High School, initiated this proceeding on October 25, 2001, seeking compensation for working on September 27, 2002, when the school was closed. The grievance was denied at level one on October 25, 2001, and a level two hearing was held on January 23, 2002. A level two decision, denying the grievance, was issued on February 4, 2002. Level three consideration was waived, and Grievants appealed to level four on February 12, 2002. A hearing was held in the Grievance Board's office in Morgantown, West Virginia, on June 21, 2002. Grievants were represented by counsel, John E. Roush, and Respondent was represented by counsel, Stephen R. Brooks. This matter became mature for consideration upon receipt of the parties final fact/law proposals on July 29, 2002.

The following findings of fact are made based upon a preponderance of the credible evidence of record.

Findings of Fact

1. Grievants are regularly employed as custodians at North Marion High School ("NMHS").

2. On September 27, 2001, there was a power outage at NMHS in the early morning hours, causing school to be cancelled for the entire day.

3. Power was restored at NMHS at approximately 10:00 a.m. on September 27, 2001.

4. The day shift custodians at NMHS who reported to work early in the morning on September 27, 2001, were sent home due to the power outage.

5. When power was restored, Brad Straight, Assistant Director of Maintenance, called the day

shift custodians to return to work. He also contacted the afternoon shift custodians, telling them to report to work that day as usual.

6. Grievants have been compensated for working on September 27, 2001.

7. By memorandum dated September 12, 2001, the superintendent, assistant superintendent, and the administrative assistant, informed custodians that, in the event of a school closing for reasons other than weather, custodians are to report to work for their regular shifts.

8. Prior to issuance of the September 12, 2001, memorandum, if school was closed under similar circumstances, day shift custodians worked one-half day and received "comp" time for the rest of the day, and afternoon shift custodians did not work. All custodians received full pay as if they had worked that day.

9. Respondent's employee handbook states that "[s]chool will be closed for . . . . custodians . . . on days that schools are closed for students because of the prevalenceof contagious disease, conditions of weather, or any calamitous cause over which [the Board] has no control." (See footnote 2)

10. The September 12, 2001, change in Respondent's previous policy regarding which employees work when school is closed was not voted upon nor approved by the Board.

Discussion

As this grievance does not involve a disciplinary matter, Grievants have the burden of proving their claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

Grievants contend that Respondent's past practice, along with the provisions contained in the employee handbook, should govern whether custodians work on days when school is closed for non-weather reasons. They believe that the administration had no authority to issue the memorandum of September 12, 2001, altering past practice and, in effect, enacting a new personnel policy without formal approval of the Board. Accordingly, they should not have been required to work when school was closed due to loss of electricity.

West Virginia Code § 18A-5-2 addresses school closings and provides, in pertinent part:

> Any school or schools may be closed by proper authorities on account of the prevalence of contagious disease, conditions of weather or any other calamitous cause over which the board has no control. Under any or all of the above provisions, the time lost by the closing of schools is counted as days of employment . . . . On such day or days, county boards of education may provide appropriate alternate work schedules for professional and service personnel affected by the closing of any school or schools under any or all of the above provisions. Professional and service personnel shall receive pay the same as if school were in session.

Clearly, the above statute provides county boards of education the discretion to decide when school should be closed due to conditions beyond its control, along with deciding which employees should work. It has previously been noted by this Grievance Board that water problems constitute “calamitous cause” within the meaning of the statute, so, certainly, loss of power would also be reason for school closing. See Moss v. Wirt County Bd. of Educ., Docket No. 98-53-402 (March 3, 1999). Nevertheless, the issue in the instant case is whether Grievants should have been required to work on a day when school was closed under such circumstances.

Respondent does not dispute that the September 12, 2001, memorandum altered its longstanding practice and handbook policy of not requiring custodians to work on days when school was closed for non-weather-related reasons. Grievants contend that this memo is not legally appropriate for enactment of an official personnel policy. West Virginia Board of Education Policy 5300, Section 2.8 provides that "[a]ll official and enforceable personnel policies must be written and made available to every employee of each county board of education." See Powell v. Brown, 160 W.Va. 723, 238 S.E.2d 220 (1977); Conner v. Barbour County Bd. of Educ., Docket No. 93-01-246 (Apr. 28, 1994). Although there has been some dispute regarding whether or not this memorandum was distributed to all employees (Grievants contend they did not receive it until after this grievance was filed),this new policy regarding which employees work when school is closed under certain circumstances appears to have never been presented to or voted upon by the Marion County Board of Education. It is well-established that all personnel policies must be formally adopted and approved by the board of education to be valid and enforceable. Teller and Nelson v. Hancock County Bd. of Educ., Docket No. 98-15-299 (Nov. 28, 1998). Accordingly, absent any evidence to the contrary, the undersigned finds that the September 12, 2001, memorandum, not having been voted upon by the Board members, was not a valid and enforceable alteration of Respondent's previous policy of not requiring custodians to work when school is closed.

Grievants have proven by a preponderance of the evidence that, based upon Respondent's

longstanding policy, they should not have been required to work on September 27, 2001. However, the relief they have requested--compensation for having worked that day--does not seem appropriate, because they did receive pay for working that day. Therefore, the undersigned finds that the appropriate relief should be to give Grievants the relief they would have received if not for Respondent's illegal act, which would have been a day off work with pay. Accordingly, Respondent is to provide Grievants with an additional day off work with pay, beyond what is provided in their current contracts, without requiring use of accrued leave time. Grievants who are morning shift custodians would be eligible for only a partial day off, depending on how long they worked on September 27, 2001.

The following conclusions of law support the decision reached.

Conclusions of Law

___1. In a non-disciplinary matter, Grievants have the burden of proving their claims by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.21 (2000); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. County boards of education have the authority to determine when school should be closed due to circumstances beyond their control and whether employees should be required to work under such circumstances. See W. Va. Code § 18A-5-2.

3. All personnel policies must be in writing, distributed to all employees, and formally adopted and approved by the board of education to be valid and enforceable. State Board of Education Policy 5300; Teller and Nelson v. Hancock County Bd. of Educ., Docket No. 98-15-299 (Nov. 28, 1998).

4. The September 12, 2001, memorandum from the superintendent, assistant superintendent, and administrative assistant, requiring particular employees to work when school is closed for reasons unrelated to weather, was an alteration of personnel policy which was not voted upon or approved by the board of education, so it was not valid and enforceable.

Accordingly, this grievance is **GRANTED**, and Grievants are to be given a day off with pay, without having to use accrued leave, in addition to what is contemplated by their current contracts, as discussed in this Decision.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of

Marion 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: August 21, 2002 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievants include Delene Higgins, Frank E. Beavan, Michael R. Delaney, Tina Delaney, Linda S. Glover, Betty E. Grugin, William A. Harris, Charles L. Hart, Peggy L. Kuhn, and Carole A. Toothman.

Footnote: 2

It is presumed that this policy/practice had been approved by the Board for placement in the employee handbook.