RICHARD STRICKLAND,

Grievant,

v. **DOCKET NO. 04-20-274**

KANAWHA COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

On or about March 25, 2004, Grievant (See footnote 1) filed a grievance at level one against his employer, the Kanawha County Board of Education ("Respondent"), stating: "He [Roy G. Jones] tried to evaluate the full time custodian out of the building and I think that is harassment." Grievant sought as relief to "get the work load even[ed] up and put the other three to work and make the other carry there [sic] own load[.] School kids have been doing there [sic] work for [them.] Mr. Jones said that he did not care who done the work as long as it [is] done." (See footnote 2) Having been denied at levels one and two, level three was bypassed and a level four hearing was held in the Grievance Board's Charleston office on August 31, 2004. Grievant was represented by John Roush, Attorney for the West Virginia School Service Personnel Association. Respondent was represented by counsel, James Withrow. The matter became mature for decision on September 30, 2004, the deadline for submission of the parties' proposed findings of fact and conclusions of law.

Based on a preponderance of the evidence contained in the record and adduced at the level four hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant has been employed by Respondent for about six years as a regular Custodian at Herbert Hoover High School (HHHS) on the 3:00 p.m. to 11:00 p.m. shift.

2. His assigned area of responsibility comprises twelve rooms, two halls, one stairwell, three

bathrooms and a gymnasium.

3. In the classrooms, he is responsible for sweeping and mopping the floor, emptying the trash, dusting, and cleaning the chalkboards or whiteboards. He sweeps and mops the hallways, and in the bathrooms he must clean the commodes, sinks and mirrors, and mop the floors. In the gymnasium, he sweeps and mops and empties the trash. The stairwell gets swept from top to bottom.

4. It should take about twenty minutes to clean a classroom, stairwell or bathroom. A time study of Grievant's assigned area showed it should take approximately nine and one-half hours to complete all the work. Grievant's shift contains seven work hours. 5. Including Grievant, there are six custodians assigned to HHHS. Of the other custodians, all but two had work loads in excess of nine hours. All had work loads that well exceed the seven hours of worktime per day.

6. In order to cope with the overload, Principal Roy Jones met with the custodians to go over the work that must be done and his expectations. On Grievant's and on the other custodians' work schedules, he designated some areas that must be cleaned daily, and some that could be rotated, to be cleaned on alternating days. Grievant's schedule included five hours and fifty minutes of “daily work.”

7. After performing the time study and meeting with the custodians, Principal Jones revised the work schedules of the custodians in order to make them more equitable in terms of what needed to be cleaned each day. Principal Jones offered to give Grievant the schedule of the custodian who had eight hours of work to do, and Grievant refused the offer. (See footnote 3)

8. Grievant agreed that some rooms are harder to clean than others, so a person who has five difficult rooms to clean has more work to do than someone who has five easier rooms to clean, notwithstanding they both have the same number of rooms.

9. Sometimes Grievant will take his normal lunch break, but then take both of his fifteen-minute breaks at the end of his shift, and quit working at 10:00 p.m., one hour earlier than his scheduled quitting time.

10. In March and in April, 2004, Principal Jones evaluated Grievant's work, each time finding it to be unsatisfactory. The evaluations stated Grievant needed more training, to improve his attitude toward suggestions, to follow instructions, to show initiative and to be more efficient with his time.

11. An improvement plan was developed for Grievant and given to him on April 28, 2004. The plan was coordinated by Karen Williams, Human Resources Coordinator. The plan stated Grievant

showed deficiencies in judgment, cleanliness of work areas, quality of work, response to instruction, and improvement following inspections. The plan provided for daily inspections, trainers to work with Grievant and for development of a check sheet for Grievant to use. It required Grievant to keep all work areas clean, exercise better judgment in keeping his areas clean, keep adequate supplies, and tend to areas that require immediate attention.

12. On May 28, 2004, Grievant was reevaluated, and was found to have unsatisfactory performance in seventeen of twenty-two rated areas. It noted Grievant refused to follow suggestions in work habits.

13. Despite the numerous evaluations, suggestions, instructions and the plan of improvement, there was no change in Grievant's work performance.

14. Sharon Paxton is a teacher at Herbert Hoover High School, whose room is within Grievant's work area. She has been teaching at that school since 1972. She described the cleanliness of her room as “poor.” Grievant did not dust or clean the boards and the desks, even after he had been instructed to, and only emptied the trash and used the dust mop. She observed that when Grievant cleaned her room, it took him three to five minutes, until December, 2003 or January, 2004, when he began also mopping the room sometimes.

15. Ms. Paxton has also observed other rooms and the stairwell within Grievant's work area, and described them as poorly cleaned and maintained.

16. Board of Education member William “Pete” Thaw visits HHHS once or twice a month, and often meets with Grievant and other custodians. He found HHHS to be “likeall or our schools, uniquely well taken care of,” and “immaculate . . . like all the others.” He agreed, however, Principal Jones would be in a better position to judge the overall condition of the school, and he did not know whether he was seeing areas Grievant was assigned to maintain.

DISCUSSION

This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. Grievant's contentions are that he was evaluated unfairly and has been given a workload disproportionate to other custodians, both of which constitute harassment. Grievant argues that Principal Jones, upon assuming his position, “decided that in order to clean the school it

was necessary to 'clean house', i.e., move out the present custodial staff and acquire a new one." Respondent counters that the workloads are distributed evenly among the custodians, and Grievant's substandard work performance justifies his low evaluations and the improvement plan that was developed for him.

West Virginia Code § 18-29-2(n) defines harassment as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession." "Harassment has been found in cases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. *See Moreland v. Bd. of Trustees*, Docket No. 96- BOT-462 (Aug. 29, 1997)." *Pauley v. Lincoln County Bd. of Educ.*, Docket No. 98-22-495 (Jan. 29, 1999). It is undisputed that Grievant bore a heavy workload, so much that it could not all be done in one night. It is also clear that overall, HHHS is a school that has not been well- maintained. Naturally, upon Mr. Jones assuming the position of principal there, he wanted to make a change, and addressed his concerns to the custodians. After years of complacency, Grievant apparently resisted the changes that would require him to actually do his job properly.

Although Grievant believes the school and his assigned area were in acceptable condition, that is clearly not the case, and his misperception is part of the problem. Although Mr. Jones agrees there is too much work assigned to Grievant for it all to be done properly in one night, Grievant is not held responsible for doing it all in one night. Even so, the results of the time study do not accurately reflect the effort Grievant puts into the work; while it should take twenty minutes to properly clean a classroom, Grievant routinely ignores most of the work involved in doing so and completes a room in much less time.

Grievant was properly evaluated, and has not shown Principal Jones' demands to be unreasonable. He was instructed and advised on ways to better manage his time, and to keep track of what needed to be done. He was offered plenty of constructive feedback and training, and opportunity to seek help with problems and to discuss issues with management. He nevertheless failed to improve. Mr. Jones' efforts to improve the condition of Grievant's work area were not harassing, and there is no evidence he intended any other result than to get the work done properly. Just because Grievant did not like the information he received, does not mean it was inappropriate or constituted harassment. *Rider v. Bd. of Trustees/Marshall Univ.*, Docket No. 99-BOT-348 (Apr. 7,

2000).

Grievant has also failed to demonstrate that the work load is distributed unevenly. By his own admission, plain square-footage is not a reliable indicator of how much workmust be done. Those custodians who had fewer rooms also had more tasks that must be done daily. Some rooms naturally required more work than others. In addition, all custodians were assigned more work than they could complete on a seven-hour shift, and were instructed how to rotate rooms so more attention could be paid within the time allotted. The total time it took to clean the various areas were roughly equal. In addition, Grievant was offered the chance to take over the area that had the least amount of total time, and he refused the offer.

Grievant has failed to meet his burden of proof. Respondent has shown that Grievant's school in general and Grievant's assigned area in particular was not up to an acceptable level of cleanliness. Grievant's evaluations and his improvement plan were valid responses to his failure to follow reasonable instructions to keep his area up to a fair expectation of cleanliness. Grievant has not shown an inequitable division of labor among the custodians.

The following Conclusions of Law support this decision:

CONCLUSIONS OF LAW

1. This is a non-disciplinary grievance in which Grievant bears the burden of proof. Grievant's allegations must be proven by a preponderance of the evidence. *See*, W. Va. Code § 18-29-6, 156 W. Va. C. S. R. 1 § 4.21. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health and Human Resources*, Docket No. 92-HHR-486 (May 17, 1993).

2. West Vairginia Code § 18-29-2(n) defines harassment as “repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession.” “Harassment has been found incases in which a supervisor has constantly criticized an employee's work and created unreasonable performance expectations, to a degree where the employee cannot perform her duties without considerable difficulty. *See Moreland v. Bd. of Trustees*, Docket No. 96- BOT-462 (Aug. 29, 1997).” *Pauley v. Lincoln County Bd. of Educ.*, Docket No. 98-22-495 (Jan. 29, 1999).

3. Grievant has failed to meet his burden of proof on the issue of harassment, and has failed to

prove his evaluations were in any way unreasonable.

For the foregoing reasons, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Date: November 5, 2004 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

This case was originally styled Jack Bird & Richard Strickland v. Kanawha County Board of Education. Since filing the level four appeal, Mr. Bird has retired, and he made no appearance at the hearing. His grievance is considered abandoned.

Footnote: 2

Grievant's representative restated the grievance upon appeal to level four, asserting in addition to the original complaint that Grievant was the victim of discrimination and favoritism, and had been unfairly placed on an improvement plan. He also restated the relief sought as including the removal of evaluations and plans of improvement for the 2003-2004 school year. This decision has been made based on the original grievance filing. See Hess v. West Virginia Department of Health and Human Resources, 189 W. Va. 357, 432 S.E.2d 27 (1993), which states, "the final levelof the grievance procedure where alteration of the substance of a grievance under W. Va. Code, 29-6A-3(j), can occur is at Level III."

Footnote: 3

That particular schedule included a high proportion of "daily work."