GARY MCCOMAS, .

Grievant, .

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v. . Docket Number: 94-29-1045

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MINGO COUNTY BOARD OF EDUCATION, .

Respondent. .

D E C I S I O N

Gary McComas (hereinafter Grievant) is employed by the Mingo County Board of Education (hereinafter Board) as a Drivers' Education instructor. On November 3, 1994, he was suspended from employment for two days, without pay, for having allowed one of his students to drive recklessly through a service station and for having crossed the center line. Grievant filed this grievance at level four on November 4, 1994, challenging the appropriateness of his discipline, and an evidentiary hearing was held on January 24, 1994. The case became mature on February 28, 1995, pursuant to the established briefing schedule.

The material facts are not in dispute and shall be set forth below as appropriately made findings.

Findings of Fact

1. Grievant is a Drivers' Education instructor at Tug Valley High School. One of the typical routes that he has his students drive is from the school, at Naugatuck, to the East Kermit Shopping

Center and back, on U. S. Route 52, a two-lane road. This route is approximately 12 to 14 miles round-trip.

2. The drivers' education car is equipped with a brake located on the passenger's side that overrides the operation of the brake and/or accelerator pedals on the driver's side so that the instructor is able to maintain control over the student driver's actions.

3. On October 4, 1994, at approximately 11:15 a.m., Grievant permitted one of his students to drive the route referred to in finding number one. This student crossed the center line three times with approximately two feet of the car. Each time an on-coming car approached from the left, the student returned to a proper position in his lane. On one occasion, the student put his hand out the window and shook it at a passing motorist. Grievant orally reprimanded the student both for his driving and for his behavior.

4. Grievant allowed this student driver to stop at the Ashland Service Station in Naugatuck to get some snacks. This service station has a drive-through which runs through the middle of the building. When the student pulled into the parking lot, he slowed down as if to park, then increased his speed and drove through the drive-through without stopping. Once through thedrive-through, Grievant stopped the car and reprimanded the driver for not having parked and also for not having stopped inside the drive-through. The student had also driven through the drive-through in the wrong direction although neither the building nor the parking lot signifies which side should be used as the entrance.

5. After Grievant spoke with the driver concerning his having driven improperly in the service station lot, the student drove back to the school in an uneventful manner.

6. Upon arriving at the school, Grievant spoke with the Board's Dean of Students concerning this student's driving. Grievant signed an incident report verifying the student's actions.

7. At no time did Grievant believe that the student driver endangered life or property by virtue of his driving.

8. Grievant was suspended by Superintendent Conn on October 13, 1994.

9. The Board approved Grievant's suspension on November 3, 1994.

10. Grievant has not been trained as to how or when to discipline the student drivers in his class. Grievant has always been allowed to use his discretion as to when to remove a student driver from behind the wheel for having driven badly.

11. Grievant had not been disciplined prior to October 13, 1994.

Discussion

W. Va. Code §18A-2-8, states, in pertinent part,

> Notwithstanding any other provisions to the contrary, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge. A charge of unsatisfactory performance shall not be made except as a result of an employee performance evaluation pursuant to section twelve of this article.

In order for the Board's decision in this case to be upheld, it must prove the facts supporting the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Bailey v. Logan Co. Bd. of Educ., Docket No. 93-23-383 (Jun. 23, 1994). Further, the appropriateness of an adverse action, while depending upon the resolution of questions of fact, is by no means a mere factual determination. Such a decision involves the application of administrative judgment. Douglas v. Veteran's Administration, 5 M.S.P.B. 280 (1981). Accordingly, a county board of education is authorized to suspend an employee under W. Va. Code §18A-2-8, so long as it exercises its authority in a reasonable, non-arbitrary manner. Hoover v. Logan Co. Bd. of Educ., Docket No. 93-23-383 (Jun. 23, 1994). A county board of education may only suspend or dismiss an employee if said employee's behavior can be found to fit into one of the categories listed in Code §18A-2-8. DeVito v. Board of Educ., 317 S.E.2d 159 (W.Va. 1984); Blake v. Cabell Co. Bd. of Educ., Docket No. 92-06-150 (Dec. 10, 1992). However, the fact that a board of education does not correctly classify the misconduct does not operate to invalidate the adverse action if the misconduct can be found to fit within one of the categories above.

The Board appears to support its decision to suspend Grievant on the basis that he did not exercise appropriate authority over the driver in the drivers' education car on October 4, 1994. It contends that he should have stopped the car before reaching the service station and removed the student then driving from behind the wheel. It contends that Grievant's inaction amounted to either incompetence or willful neglect of duty, justifying the two-day suspension, given its broad discretion in such matters. Grievant contends that he did not act inappropriately on the day in question, as he has discretion to determine when a student driver should be prevented from driving. He opined that the

student's actions did not place any motorists in danger; therefore, his decision to allow the student to continue to drive was reasonable. The Undersigned agrees with Grievant's position.

Under W. Va. Code §18A-2-8 (1969), a county board was authorized to suspend an employee for incompetency but only after the employee was given benefit of the State Board of Education's Policy 5300 which sets forth procedures dealing with, among other things, employee job performance evaluations and subsequent improvement plans and periods. See, Mason Cty. Bd. of Ed. v. State Supt. of Sch., 274 S.E.2d 435 (W. Va. 1980). The Court's focus in Mason, and in other similar cases, was whether the conduct complained of involved professional incompetency or whether it directly and substantially affected the morals, safety and health of the education system in a permanent, non-correctable manner. Id., p. 439.

Code §18A-2-8 has since been amended to include an additional charge for which an employee may be suspended or dismissed: unsatisfactory performance. Currently, a county board of education may only suspend or dismiss an employee for unsatisfactory work performance after that employee has been given the protection afforded him/her by Policy 5300. Therefore, given the amendments to Code §18A-2-8, a Board is not limited to disciplining an employee for incompetency after having followed the policies and procedures of State Board of Education Policy 5300. In other words, it can be inferred that the Legislature intended the term "incompetency" to relate to acts of misconduct unrelated to professional job performance which is deemed correctable. Otherwise, the amendment to this Code section would seem meaningless. A board may find incompetence in one or more scenarios: i.e., the employee's job performance over a period of time is below acceptable standards and his/her performance can be corrected; or an employee's conduct may be of such nature that the employer determines he/she is not suitable for the position held. (See footnote 1) In this case, the Board has not established that Grievant's actions constituted misconduct.

On the date in question, Grievant exercised his judgment as to whether the student should have been removed from behind the wheel or whether he should be allowed to continue driving in order to correct the mistakes he had made. Grievant's actions must beviewed in light of the fact that he is teaching young adults to drive. It is presumed that they will make driving errors, regardless of the fact that they may already possess a state-issued driver's license. It is obviously up to the driving instructor to monitor the driving situation within his control. However, he must not be held accountable for actions which he cannot prevent.

Grievant testified that he believed the student was not posing any threat to oncoming traffic during the times when he had crossed the center line. Further, he testified that he did not apply the brake in order to gain control over the car so that he could remove the student because of the traffic following close behind him. Although Grievant's decision at this time may not have been what some individuals in his place would have done, it does not seem so unreasonable as to constitute misconduct or incompetence. Further, Grievant did not believe that the student was going to drive through the drive-through, therefore, it was a surprise to him when the car entered that area. He saw that they were not going to collide with another car and stopped his car immediately after it came out of the drive-through. Again, Grievant's decision-making at this time does not appear to be unreasonable given the circumstances. These facts, coupled with the facts that Grievant has been a drivers' education instructor for some time and that he has never received any formal training as to how to exercise his obvious discretionary authority prevents a finding that his inaction constituted misconduct, i.e., incompetence.

"Willful neglect of duty" has generally been defined as conduct which constitutes a knowing and intentional act, rather than a negligent one. Hoover v. Lewis Co. Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994), citing Board of Education of County of Gilmer v. Chaddock, 398 S.E.2d 120 (W. Va. 1990). The Court in Gilmer further cited to its case of Fox v. Board of Educ., 236 S.E.2d 243, 246 (W. Va. 1977), wherein the following pronouncement was made regarding willful acts of misconduct:

> we do not attempt to formulate a comprehensive definition of 'willful neglect of duty' that would reasonably support a teacher's permanent dismissal. A continuing course of lesser infractions may well, when viewed in the aggregate, be sufficient. And we may envision a single act of malfeasance, whereby severe consequences are generated, that merits a dismissal.

"Malfeasance" is defined as the "doing of an act which is wholly wrongful and unlawful." "Malfeasance" is to be contrasted with "misfeasance" which is normally defined as "the improper doing of an act which a person might lawfully do." Black's Law Dictionary, Revised Fourth Edition, West Publishing Co., (1968).

Grievant did not knowingly or intentionally neglect his duty as a drivers' education instructor. He assessed the situation and made instantaneous decisions consistent with his understanding that no harm had been or was going to be present. Further, there were no adverse consequences of his actions. Grievant simply exercised his discretion, given his experience and lack of direction, in a

manner which the members of the Board, in hindsight, contend should have been done differently. This is not the type of conduct whichcan be labeled as "willful neglect of duty." See, Rovello v. Lewis County Bd. of Educ., 381 S.E.2d 237 (W. Va. 1989).

The Board proved the facts supporting its charge against Grievant by a preponderance of the evidence; however, as noted, the imposition of discipline must not only be based upon findings of fact but also upon an exercise of administrative discretion. The Board abused its discretion in this case in deciding to suspend Grievant pursuant to the provisions of Code §18A-2-8 as the nature of his conduct cannot be associated with the grounds pronounced therein.

The foregoing discussion of the case is hereby supplemented by the following appropriately made conclusions of law.

Conclusions of Law

1. W. Va. Code §18A-2-8 establishes the grounds upon which a board of education may rely in deciding either to suspend or dismiss one of its employees, and a board may only suspend or dismiss an employee if said employee's behavior can be found to fit into one of the categories listed in Code §18A-2-8. DeVito v. Board of Educ., 317 S.E.2d 159 (W.Va. 1984); Blake v. Cabell Co. Bd. of Educ., Docket No. 92-06-150 (Dec. 10, 1992).

2. A board of education has discretion in matters of employee discipline and its decision to suspend or dismiss an employee will be upheld unless it is based upon an arbitrary or capricious exercise of that discretion. Meckley v. Kanawha County Bd. of Educ., 383 S.E.2d 839 (W. Va. 1989).

3. Grievant's conduct at issue herein can neither be classified as incompetence nor willful neglect of duty; therefore, the Board abused its discretion in suspending him for two days based upon its interpretation of his actions taken on October 4, 1994.

Therefore, this grievance is hereby **GRANTED**. The Mingo County Board of Education is hereby **ORDERED** to pay Grievant his salary for the two days he was suspended, plus any and all other related benefits, including seniority, minus any appropriate deductions. Further, the Board is required to remove all reference of Grievant's suspension from his personnel file.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mingo 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.

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ALBERT C. DUNN, JR.

Administrative Law Judge

March 14, 1995

Footnote: 1Arguably, incompetence may encompass forms of negligence being that that term is not separately included within Code §18A-2-8.