ED TOLER

v. **Docket No. 94-55-306**

WYOMING COUNTY BOARD OF EDUCATION

DECISION

The grievant, Ed Toler, protests the decision of the Respondent Wyoming County Board of Education (Board) to deny him continuing contract status following the completion of his third year as a probationary teacher at the Wyoming County Vocational School (WCVS). That decision was made May 2, 1994, on the recommendation of Superintendent of Schools Frank Blackwell who, after consultation with WCVS Director Paul McNair and Assistant Director Fred Halsey, had concluded that the grievant's overall performance during his probationary period was not satisfactory. (See footnote 1)

The grievant was notified on May 12, 1994, that his name had not been included on a list of probationary employees recommended for reemployment in the 1994-95 school year. In response to a May 19, 1994 request, Superintendent Blackwell cited the following deficiencies as the basis for his recommendation:

Poor supervision of classroom and shop activities;

Lack of professional work habits;

Inappropriate communication with administration, peers, and students;

Disrespectful toward administration;

Disregard for meeting deadlines; and

Failure to follow established purchasing procedures.

Upon the grievant's further request, a hearing before the Board was held June 28, 1994. At this hearing, Mr. McNair testified extensively and numerous documents were submitted in support of the administration's assertions that, while the grievant had performed adequately for various periods during the past three school years, his overall performance did not warrant granting him continuing contract status. Superintendent Blackwell also testified regarding his assessment of that performance. The grievant appeared personally and by counsel and was provided a full opportunity to present evidence and cross-examine witnesses. The grievant declined to testify.

At the end of the hearing, the Board voted to affirm its earlier decision not to rehire the grievant. The grievant received official notification of this vote on July 5, 1994, and filed this grievance at Level IV on July 18, 1994. (See footnote 2) A hearing was held October 13, 1994, (See footnote 3) and the parties completed a responsive briefing schedule by December 5, 1994.

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

> The Superintendent at a meeting of the board on or before the first Monday in May of each year shall provide in writing to the board a list of all probationary teachers that he recommends to be rehired for the next ensuing school year. The board shall act upon the superintendent's recommendations at that meeting in accordance with section one [§ 18A-2-1] of this article. The board at this same meeting shall also act upon the retention of other probationary employees as provided in sections four and five [§§ 18A-2-1] of this article. The probationary employees as provided in sections four and five [§§ 18A-2-4, repealed and 18A-2-5] of this article. Any such probationary teacher or other probationary employee who is not rehired by the board at that meeting shall be notified in writing, by certified mail, return receipt requested, to such person's last known addresses within ten days following said board meeting, of their not having been rehired or not having been recommended for rehiring.
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> Any probationary teacher who receives notice that he has not been recommended for rehiring or other probationary employee who has not been reemployed may within ten days after receiving the written notice request a statement of the reasons for not having been rehired and may request a hearing before the board. Such hearing shall be held at the next regularly scheduled board of education meeting or a special meeting of the board called within thirty days of the request for hearing. At the hearing, the reasons for nonrehiring must be shown.

The import of this language and the rights in general of probationary employees who receive notice of termination were extensively discussed in Cordray v. Wood County Bd. of Educ., Docket

No. 90-54-267 (Jan. 31, 1991). Specifically, the case held that a county board of education may not refuse to rehire a probationary employee for "just any, or no, cause," but that the board need not do more than afford the employee a "full and complete hearing which supports" that the reasons for the action are "substantive." There is no "for cause" standard in casesinvolving a Board's decision to terminate a probationary employee's employment per Code §18A-2-8a. Id. at 14. (See footnote 4)

Cordray also recognized that per the holdings in Powell v. Brown, 238 S.E.2d 220 (W.Va. 1977), the following provisions of West Virginia Board of Education Policy 5300 (Policy 5300) are applicable to such cases:

> Every employee is entitled to know how well he is performing his job and should be offered the opportunity of open and honest evaluation of his performance on a regular basis. Any decision concerning promotion, demotion, transfer or termination of employment should be based upon evaluation, and not upon factors extraneous thereto. Every employee is entitled to the opportunity of improving his job performance, prior to the terminating or transferring of his services, and can only do so with assistance of regular evaluation.
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> Every employee is entitled to "due process" in matters affecting his employment, transfer, demotion or promotion.

Thus, at Level IV, the employee bears the burden of showing that he did not receive a full and complete hearing on the reasons for the non-renewal of his contract; that the evidence did not support that the reasons were substantive; and/or he was denied his rights under Policy 5300.

The grievant herein concedes that the Board is not required to show cause for its decision and does not contend that the hearing held before the Board on June 28, 1994, was not "full and complete." He asserts that the evidence presented at that hearing and at the hearing held at Level IV does not establish that the reasons for the action were substantive. The grievant alsomaintains the Board did not adhere to the above provisions of Policy 5300.

Finally, the grievant asserts that the Board was required but failed to follow the provisions of W.Va. Code §18A-3-2b, which establishes a mentor program for probationary teachers. He specifically asserts that the mentor(s) assigned to him did not provide him sufficient assistance and guidance during his probationary period. (See footnote 5)

The Board maintains the decision not to rehire the grievant was in accordance with all applicable

statutes and policies and that the grievant has failed to show that it acted arbitrarily in the matter. The undersigned concludes that the Board must prevail in the matter.

The evidence (See footnote 6) presented by the Board at the June 28, 1994hearing establishes that during the grievant's three years of employment, he consistently ignored directives concerning the proper accounting procedures for obtaining supplies from local construction material companies; disobeyed other direct orders from his supervisor; used inappropriate language and made offensive gestures during classroom instruction; made remarks of a sexual nature to male and female students; at least occasionally disregarded established safety standards for the operation of woodworking equipment; and generally exercised poor control of his students.

The evidence presented by the grievant at Level IV refutes only minor insignificant portions of that presented by the Board at the June 28 hearing. The record in its entirety will not support that any Board administrator contrived any portion of the charges against the grievant. There is also no evidence of record that any administrator harbored any ill will towards him. Rather, it reflects that all concerned had hopes that the grievant would correct his deficiencies and achieve tenure. (See footnote 7) Accordingly, it is concluded that the Board provided the grievant the reasons for itsdecision not to rehire him; afforded him a "full and complete" hearing; and demonstrated at that hearing that the reasons were substantive.

The grievant's assertions regarding Policy 5300 are also without merit. The record establishes that the grievant was placed on three improvement plans for deficiencies in the areas of classroom climate, shop safety, shop security, student discipline, instructional management, communication and professional work habits. (See footnote 8) It also reflects that he was placed on an August 31, 1993 improvement plan as a result of Mr. Blackwell's determination that he had made sexually inappropriate remarks to students during the summer of 1993. (See footnote 9) Further, the grievant was clearly advised of the nature of his failings; he was assigned an improvement team and two mentors; and was provided on-going written and verbal assessments of his performance.

A preponderance of the evidence also establishes that the grievant did make improvements during the 1992-93 and 1993-94 school years and that Mr. McNair acknowledged as much on his evaluations and other communications. The evidence, however, demonstrates that these improvements were invariably followed by some infraction of policy, complaints of inappropriate language or conduct, or failure to follow Mr. McNair's directives. The grievant received at least one

written reprimand during his formalimprovement plan periods for failure to follow accounting procedures for the purchase of building materials.

The testimony of Mr. McNair and Superintendent Blackwell reflects that both gave full consideration to the grievant's efforts to correct his deficiencies before concluding that his performance overall had been "up and down" and that he was not an acceptable candidate for tenure. The undersigned finds no flaws in their reasoning and concludes that the grievant received any and all rights he was entitled to under Policy 5300.

W.Va. Code §18A-3-2b, in pertinent part, provides,

> Every person to whom a professional teaching certificate is awarded after the first day of January, one thousand nine hundred ninety-two, shall successfully complete a beginning teacher internship program under the provisions of this section, except such persons who were awarded a professional teaching certificate on the basis of at least five years teaching experience in another state.
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> The beginning teacher internship program is a school based program intended to provide appropriate staff development activities and supervision to beginning teachers to assure their competency for licensure to teach in the public schools of this state. The beginning teacher internship program shall consist of the following components:
>
> (1) A professional team comprised of the school principal, who shall be the chair of the professional support team, a member of the county professional staff development council and an experienced classroom teacher at the school who teaches the same or similar subject and grade level as the beginning teacher and who shall serve as a mentor for the beginning teacher.

. . .

Since the record reflects that the grievant obtained his teaching certificate prior to his employment with the Board at the start of the 1991-92 school year, there was no requirement that hecomplete an internship program. Nevertheless, the Board did appoint the referenced "professional team" and the undersigned concludes that its duties, as set forth in the statute, were fulfilled.

In addition to the foregoing discussion, the undersigned makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1) The grievant was employed by the Board from 1991 to 1994 as a probationary teacher assigned to the Wyoming County Vocational Center. He was notified in May 1994 that the Board, upon the recommendation of Superintendent of Schools Frank Blackwell, had decided not to grant him a contract for the 1994-95 school year.

2) The grievant requested a list of reasons for the action and a hearing before the Board. He was provided both.

3) At the June 28, 1994 hearing, Vocational Center Director Paul McNair and Superintendent Blackwell explained, via sworn testimony and documentation, the reasons for the recommendation that the grievant not be rehired. The grievant was afforded the opportunity to cross-examine the witnesses and provide evidence in his defense. He chose not to testify.

CONCLUSIONS OF LAW

1) W.Va. Code §18A-2-8a requires a county board of education to provide "after-the-fact" notice to a probationary teacher that it has decided not to renew his or her contract of employment. If the employee so requests, the board must provide the employee a list of reasons for the decision and a hearing on those reasons. The hearing must be "full and complete." Miller v. Boone County Bd. of Educ., 437 S.E.2d 591 (W.Va. 1993); Hedrick v. Bd. of Educ., 332 S.E.2d 109 (W.Va. 1985).

2) The evidence adduced at the hearing must support that the reasons for the non-renewal are "substantive." Cordray v. Wood County Bd. of Educ., Docket No. 90-54-267 (Jan. 31, 1991).

3) The provisions of West Virginia Board of Education Policy 5300 which require an open and honest evaluation process and the opportunity to correct deficiencies are applicable to probationary teachers. Powell v. Brown, 238 S.E.2d 220 (W.Va. 1977).

4) A preponderance of the evidence in the present case establishes that the Board provided the grievant all rights to which he was entitled under Policy 5300 and fully complied with Code §18A-4-8a when it elected not to grant him a contract for the 1994-95 school year.

5) The grievant has failed to show that W.Va. Code §18A-3-2b was applicable to his probationary period and has, in any event, failed to show a violation thereof.

Accordingly, the grievance is **DENIED.**

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

Wyoming 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 notbe 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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JERRY A. WRIGHT

CHIEF ADMINISTRATIVE LAW JUDGE

Dated: May 4, 1995

Footnote: 1The probationary period covered school years 1991-92, 1992-93 and 1993-94.

Footnote: 2After conferring with counsel, the undersigned deviated from Grievance Board practice and permitted the case to proceed at Level IV. As discussed infra, the non-renewal of a probationary teacher's contract is not the equivalent of a dismissal for cause which, pursuant to W.Va. Code §18A-2-8, may be appealed directly to Level IV.

Footnote: 3At the grievant's request, the case was not scheduled for hearing until discovery of pertinent documents was completed.

Footnote: 4See also, Camiolo v. McDowell County Bd. of Educ., Docket No. 92-33-245 (Jan. 26, 1993).

Footnote: 5The grievant's assertions regarding Policy 5300 are interrelated to those concerning Code §18A-3-2b, and his brief occasionally refers to his rights under both as "due process" ones. Despite that Policy 5300 also uses that term, the undersigned is not convinced that it is an accurate description of the protections afforded the grievant by either. As a probationary employee, he had no expectation of continued employment and, therefore, acquired no property interest to which procedural due process safeguards would attach. See, Powell v. Brown, supra. The holdings made herein are confined to the statutes and policies cited and do not address whether the Board was required, during any phase of the grievant's employment or termination, to provide the "notice and opportunity to be heard" mandated in cases involving the termination of an employee who has achieved continuing contract status under W.Va. Code §18A-2-2.

Footnote: 6The rather extensive record in the case consists of the transcript of the June 28, 1994 hearing; approximately six hours of recorded Level IV testimony; Board exhibits 1 through 48; and Grievant's Exhibit 1. For brevity's sake, the undersigned has not set forth in any detail the testimony and documentation upon which the factual determinations in the case are based. Rather,conclusions regarding the sufficiency of the evidence on a particular issue are made in summary fashion.

It is further noted that in arriving at these conclusions, it was necessary to assess the relative credibility of Mr. McNair

and the grievant. After consideration of such factors as demeanor, consistency, and responsiveness to questions, the undersigned found Mr. McNair to be the more credible and reliable witness.

Footnote: 7Mr. McNair was particularly hopeful since it was he who recommended to Superintendent Blackwell in 1991 that the grievant be hired.

Footnote: 8The first plan was an informal one and covered the entire 1992-93 school year.

Footnote: 9The grievant was providing classroom instruction at that time as part of the Governor's Summer Youth Program.