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**WEST VIRGINIA EDUCATION  
EMPLOYEES GRIEVANCE BOARD**

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STEVE MCBRIDE

v.

Docket No. 50-86-184-01

WAYNE COUNTY BOARD OF EDUCATION

**DECISION**

Grievant, Steve McBride, has been employed by the Wayne County Board of Education for four years as a physical science teacher and assigned to Fort Gay High School.<sup>1</sup> On March 12, 1986 an incident occurred involving a student which resulted in grievant receiving a written reprimand from the principal, Patrick Mills, and the issuance of a 5300 evaluation to be placed in grievant's personnel file. Grievant filed a grievance on March 27, 1986, had a level two hearing on April 16, 1986 and a level four hearing on July 3, 1986.<sup>2</sup>

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<sup>1</sup> Grievant has taught for five years and teaches biology, physics, chemistry and computer programming at Fort Gay Hi. He had taught one year in Cabell County before his employment in Wayne County.

<sup>2</sup> The transcript of evidence was admitted into evidence at the level four hearing but there is no written decision containing findings of fact and conclusions of law in the record as required by Code, 18-29-6. In a grievance of this nature it is particularly important because it is not possible to discern the logic involved in rejecting uncontroverted evidence without the benefit of the decision. Cf. Golden v. Bd. of Educ. of Harrison Co., 285 S.E.2d 665 (W.Va. 1980).

The evidence adduced at the level four hearing is that on March 12, 1986 at approximately 8:15 a.m., as grievant was entering his homeroom, an eighth grade student slammed the door on grievant's knee, barely missing his nose. Grievant turned and placed his hand on top of the student's chest and pushed him against the wall. The student said to grievant "don't push me against the wall" and grievant responded "if you ever hit me again I'll push you through the wall." Grievant then went into the classroom, called the homeroom roll and proceeded to the principal's office to report the incident.

A short time later grievant was summoned to Mr. Mills' office, where he encountered the student and his mother. The student's initial version of the incident was that he had not closed the door on grievant, which was later changed to include a version that the door might have accidentally closed while he was leaning against it.<sup>3</sup> The student requested that two student witnesses be brought to the principal's office to verify his account; grievant also requested that two other student witnesses be interviewed. Grievant left the office and Mr. Mills took the statements of three students who had

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<sup>3</sup> Grievant did not know the student and had never had him in class. He did, however, check the disciplinary file maintained on all students at the school and learned that the student had been given forty nine days detention periods during the previous year and had a record of striking other students with a wooden hall pass. This is the first disciplinary action against grievant in his five year career.

witnessed the incident. The statements, taken in Mr. Mills' handwriting, verified that the slamming of the door on grievant was "deliberate" and "on purpose" and was "shut in McBride's face." Shortly thereafter grievant was again summoned to Mr. Mills' office where he encountered both of the student's parents; he departed when the student's father became belligerent.

The following day, March 13th, Superintendent Ferguson was at Fort Gay Hi, met with grievant and advised him that the parents wanted grievant discharged. Later that day, Superintendent Ferguson telephoned Mr. Mills directing him to inform grievant that if he was charged and convicted of a crime his employment could be terminated; he also informed Mr. Mills of the available options in dealing with the incident and sent Mills some 5300 forms.<sup>4</sup> On the morning of March 20th Superintendent Ferguson again talked with Mr. Mills and inquired as to the action Mills intended to take; Mills informed Ferguson that he was issuing a reprimand. Superintendent Ferguson instructed Mills to put the reprimand in grievant's personnel file and that he (Ferguson) would send someone to pick up a copy by noon the following day. On March 21st Mills delivered the reprimand to grievant and on March 27th grievant filed a

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<sup>4</sup> Superintendent Ferguson testified that the reason he instructed Mills to inform grievant of the possible dismissal was because he did not feel that grievant was sufficiently concerned about the incident. Grievant, however, contends it was intended as a means of intimidation.

response in which he strongly objected to the reprimand on seven grounds. Of major concern to grievant and to approximately two thirds of the faculty at Fort Gay High School is the disparity of treatment received by grievant and the unexplained refusal of Mr. Mills to find that the act of the student was deliberate and to discipline the student instead of the grievant.<sup>5</sup>

Code, 18A-5-1 provides that a teacher shall stand in the place of the parent or guardian in exercising authority over the school and shall have control of all pupils enrolled in the school from the time that the pupil reaches the school until they have returned to their homes. The section authorizes a principal to administer moderate corporal punishment by

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<sup>5</sup> By petition dated April 9, 1986 twenty five teachers at Fort Gay Hi signed a protest of Superintendent Ferguson's actions in "purposefully singling out this teacher with total disregard for his interests..." (Exhibit C, Level Two hearing). This protest was prompted, in part, by evidence that three other teachers had been involved in similar incidents at Fort Gay Hi within the two previous years and had not received written reprimands. Compare, Cook v. Logan Co. Bd. of Ed., No. 23-86-112.

As to the failure to discipline the student, Mr. Mills obviously refused to believe the testimony of grievant and the eye witnesses who testified that the act of the student was intentional. There is also a strong indication that Mr. Mills felt "pressured" by Superintendent Ferguson and that some compromise had been reached with the parents of the student in return for a written reprimand of grievant. See, e.g., the testimony of Superintendent Ferguson at level two that he advised Mr. Mills that it would be in "...the best interests of Mr. McBride that we resolve the issue or attempt to resolve the issue with the parents of the young man..." and the testimony of Mr. Mills that "...this legal situation..." justified giving grievant a written reprimand. Accordingly, it does not appear that discipline for the student was ever a viable option. In retrospect, at the level four hearing, Mr. Mills testified that he probably should have suspended the student.

means of the open hand or a paddle subject to enumerated restrictions. In construing this section our Court has held that this section does not prohibit the spanking by hand, the physical seizure and removal of unruly students from the classroom nor the use of physical force to restrain students from fighting or engaging in destructive or illegal acts. Smith v. W.Va. State Board of Education, 295 S.E.2d 680 (W.Va. 1982).<sup>6</sup>

Obviously, if physical force is permissible in maintaining discipline it is illogical to conclude that a teacher cannot defend him or herself from unwarranted assaults by students without fear of reprisal by the school officials. In evaluating the action of the teacher as against an allegation of excessive force the teacher should be entitled to a "good faith" presumption and the conduct, attitude and past behavior of the student should have been taken into account. Ingraham v. Wright, 430 U.S. 651, 51 L.Ed.2d 711, 97 S.Ct. 1401 (1977). Cf. Guillory v. Ortego, 449 So.2d 182 (La. 1984).

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<sup>6</sup> The Court stated that the doctrine of in loco parentis as contained in this section, in light of the present day standards and legislative enactments in the child abuse area, cannot be interpreted as permitting corporal punishment of public school children by means of a paddle, whip, stick or other mechanical devices. In the vast majority of cases where the question of excessive force has arisen in suits against teachers, they have involved the use of such mechanical contrivances. The Court concluded that if disciplinary measures are to be taken they should follow promptly. Id. at 687. Ostensibly this should apply to disciplinary action against teachers also. See also, Bethel School District No. 403 v. Fraser, decided by the United States Supreme Court on July 7, 1986 (54 L.W.5054).

The evidence in the instant case more appropriately presents a situation wherein the grievant might have been guilty of an error in judgment. However, because of the evidence in this case and the serious and seemingly permanent nature of the 5300 evaluation, it appears that the punishment is disproportionate to the nature of the grievant's conduct and the 5300 evaluation is not a fair and honest evaluation based upon that conduct.<sup>7</sup> See, Totten v. Board of Education of Mingo County, 301 S.E.2d 846 (W.Va. 1983); Beverlin v. Board of Education, 216 S.E.2d 554 (W.Va. 1975); DeVito v. Board of Education, 317 S.E.2d 159 (W.Va. 1984).

In addition to the foregoing discussion the following specific findings of fact and conclusions of law are appropriate.

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<sup>7</sup> Grievant agreed on cross-examination that, under normal circumstances, teachers should not push students and that he could possibly have dealt with the situation better; however, he felt that he had a right to defend himself. Moreover, he felt that he responded to a situation he believed to be self-defense and Mr. Mills deliberated on the matter for over a week, and then disregarded completely grievant's version.

The part of the 5300 evaluation particularly troublesome to grievant and which he feels might become a permanent part of his file is the Final Evaluation, which states: "No specific final evaluation can be provided due to the fact that this deficiency cannot be effectively measured and established as being permanently solved." (Joint Ex. No. 2).

### FINDINGS OF FACT

1. Grievant has been employed by the Wayne County Board of Education for four years and assigned to Fort Gay High School.

2. On March 12, 1986 at approximately 8:15 a.m. as grievant was entering his homeroom class an eighth grade student slammed the door into grievant's knee, barely missing his nose. Grievant turned and placed his open hand on top of the student's chest and pushed him against the wall. The student was not injured but received some red marks at the base of the neck. Grievant denies that he was angry but states that he acted strictly in defense; he continued into his homeroom class, took the roll and then went to the office of the principal, Mr. Mills, and reported the incident.

3. Grievant returned to the office at the request of the principal at which time the student first denied having hit grievant with the door and then stated that the door might have closed accidentally while he was leaning against it. The student requested that the principal interrogate two student witnesses and the grievant also submitted the names of two witnesses to be interviewed.

4. Principal Mills took the statements of three witnesses and the statements confirmed grievant's account of the incident, i.e., that the student had intentionally slammed the door on grievant. Grievant did not know the student and had never had the student in class but grievant did ascertain that the student had a lengthy record of disciplinary action in the files maintained at the school.

5. After several discussions with Superintendent Ferguson Mr. Mills issued a letter of reprimand to grievant and placed a 5300 evaluation in grievant's file; the statement of deficiency was as follows:

"Placing hands on a student in anger in response to a perceived attack by the student."

The final evaluation was that:

"No specific final evaluation can be provided due to the fact that this deficiency cannot be effectively measured and established as being permanently solved."

Grievant had never had a reprimand during the course of his teaching career or an unfavorable 5300 evaluation.

6. Grievant "strongly objected" to the letter of reprimand and the inclusion thereof in his personnel file and the 5300



evaluation on the basis that:

- a. Grievant had been intentionally hit with a door and acted in defense.
- b. Grievant had exercised restraint when dealing with this student, who was not physically harmed.
- c. Grievant denied telling Mr. Mills that he was wrong to put his hands on the student in "anger".
- d. That the attack was not "perceived" as stated by Mr. Mills and was contrary to the statements of the student witnesses.
- e. That Mr. Mills had stated in the reprimand that he (Mills) did not know what he would have done in the same situation.
- f. Several other teachers had placed their hands on students for less reason and did not receive letters of reprimand.
- g. The letter of reprimand was possibly a reprisal for a disagreement grievant had with a member of the county board of education at a "Meet the Candidate" meeting on March 20, 1986.

7. Grievant had requested that the principal take disciplinary action against the student in accordance with Code, 18A-5-1a but the principal declined on the basis that he was unsure if the act of the student in slamming the door on grievant had been deliberate.

8. The evidence was uncontroverted that within the past two years three teachers at Fort Gay High School have been involved in incidents wherein two students had been slapped and two students picked up by their hair and kicked in the buttocks and that the only action taken was an oral reprimand of one teacher. No adequate explanation was given for the disparity of treatment.

9. Mr. Mills is a relatively new principal and had never issued a written reprimand. He testified that Superintendent Ferguson did not instruct him to issue a reprimand to grievant but that he felt pressured by Mr. Ferguson to make a decision; that Mr. Ferguson had sent him the 5300 forms. The evidence is persuasive, if not conclusive, that the letter of reprimand and/or 5300 evaluation was issued to placate the parents and/or to compromise any claim against the school board arising out of the incident.

10. There is an insufficient showing by grievant that the letter of reprimand was a result of his confrontation with a member of the board of education at a "Meet the Candidate"

meeting on March 20, 1986 but there is a sufficient showing that the letter of reprimand and 5300 evaluation was the result of pressure exerted by Superintendent Ferguson upon Mr. Mills and that the reprimand was not based upon the factual accounts of the incident.

11. Administrative notice is taken of the fact that a letter of reprimand and 5300 evaluation accusing a teacher of student abuse would have a dramatic adverse effect upon the career of that teacher and such action should only be taken upon a clear showing thereof. There was no showing that grievant had any abusive or hostile tendencies or a record thereof and under the evidence in this case his conduct was, at most, an error in judgment, not student abuse.

## CONCLUSIONS OF LAW

1. West Virginia Board of Education Policy No. 5300

(6)(a) provides that 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. The purpose of this policy is to give job protection to school employees who are performing competently against demotion, transfer or discharge without cause.

2. A 5300 (6)(a) evaluation which accuses a teacher of laying hands upon a student in anger without provocation is not an honest evaluation of that teacher's performance when the probative evidence available to the evaluator is clearly to the contrary. Such an evaluation violates the letter and spirit of Policy 5300 and is arbitrary and of no force and effect; it is extremely detrimental to the teacher and will be removed in a grievance filed pursuant to Code, 18-29-1, et seq.

3. Code, 18-29-2(m) defines discrimination as any difference in the treatment of employees unless such differences are related to the actual job responsibilities of the employees

or agreed to in writing by the employees. Unaccounted for differences in the disciplinary treatment of teachers under similar circumstances will amount to a grievance cognizable under Code, 18-29-1, et seq. Under the evidence in this case the grievant has proved by a preponderance of the evidence that there was a disparity in the treatment he received as a result of the incident on March 12, 1986 and the treatment received by other teachers at Fort Gay High School under similar circumstances within the past two years.

4. School personnel regulations and laws are to be strictly construed in favor of the employee.

For the foregoing reasons the grievance is allowed and the board of education of Wayne County is directed to remove the letter of reprimand dated March 19, 1986 and the 5300 evaluation from grievant's personnel file and to expunge any other reference thereto in any record kept by said board of education.

Either party may appeal this decision to the Circuit Court of Kanawha County or Wayne County and such appeal must be filed within thirty days of receipt of this decision. (Code, 18-29-7). Please advise this office of your intent to do so in order that the record can be prepared and transmitted to the Court.

A handwritten signature in cursive script, reading "Leo Catsonis", is written over a horizontal line.

LEO CATSONIS

Chief Hearing Examiner

Dated: August 28, 1986