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EMPLOYEES GRIEVANCE BOARD**

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DEBRA SMARR

v.

Docket No. 54-86-062

WOOD COUNTY BOARD OF EDUCATION

DECISION

Debra Smarr, hereinafter referred to as Ms. Smarr or the grievant, was first employed by the Wood County Board of Education as a substitute custodian in September, 1977. Although several principals testified that they considered her performance as a substitute to have been less than satisfactory, in August, 1983, Ms. Smarr, then senior substitute custodian, was assigned a full-time position at Criss Elementary School.

In November, 1985 a custodial vacancy at McKinley Elementary School was posted and bid on by Ms. Smarr. When Principal Richard Weblen recommended another employee for the position, Ms. Smarr filed a grievance as she had earned more seniority than the recommended individual.

Following an informal conference Ms. Smarr was transferred to McKinley School.

Approximately one month later Ms. Smarr was notified by letter of her suspension effective December 15, 1985. This suspension was based on pending charges involving the theft of property at McKinley School; insubordination by entry into the school kitchen in violation of the principal's directive and incompetence demonstrated by the poor quality of performance in general cleaning.

Ms. Smarr was notified January 7, 1986 that Dr. William Staats, Superintendent of Wood County Schools, would recommend her dismissal based on the same charges of theft, insubordination and incompetence. These charges had been amended in that the milk, candy, student folders and toys were deleted from the list of missing items, leaving only an allegation of theft relating to soft drinks. The charge of insubordination was rewritten to include the failure to lock outside doors as directed by the principal. To the charge of incompetence was added "insubordination and incompetence at six (6) other Wood County Schools...over a three year period...".

At the level four hearing the following testimony and evidence was presented:

CHARGE ONE - THEFT OF PROPERTY

Principal Weblen stated that on or about November 22, 1985 he began to regularly receive reports of missing items including milk, candy and toys. He believed these items were being taken by a custodian and secured a detection kit from local authorities in an effort to identify the culprit.

On the afternoon of December 13, 1985 Mr. Weblen marked certain items with the detection dust and instructed the other evening custodian not to report to work that day. At 9:30 p.m. Mr. Weblen, accompanied by his wife and joined by Officer J.A. Nohe of the city police department, returned to the school. Mr. Weblen ascertained that some soda was missing and asked Ms. Smarr if she would submit to the detection process. Ms. Smarr agreed and when she held her hands under an ultraviolet lamp the dust was detected on one hand.

Ms. Smarr testified that out of fright she initially denied taking the soda but then admitted she had taken one bottle. She explained that she either had no money or not enough money but intended to pay for it later. When accused of stealing the other items, Ms. Smarr denied having taken anything other than one soda.

Although no criminal charges were ever filed in this matter Mr. Weblen stated that had the thefts not occurred he would have continued to work with Ms. Smarr in the other areas and would not have recommended dismissal.

CHARGE TWO - INSUBORDINATION BY ENTERING THE SCHOOL KITCHEN
CONTRARY TO THE PRINCIPAL'S DIRECTIVE

Mr. Weblen testified that custodians are not permitted in the kitchen area as they do not have health permits and as they have no assigned duties in that area, they have no reason to be there. According to Mr. Weblen, this policy has been stated on several administrative directives shared with the custodians and he believes that he reviewed it with Ms. Smarr when she reported to work.

The grievant admits she used her master key and entered the kitchen to investigate when she heard noises coming from the area. In fact, another employee was making deliveries. She does not recall ever having been instructed not to enter the kitchen.

Mr. Weblen alleges that on five occasions the grievant failed to lock outside doors and properly secure the school. It appears that in most instances the doors were locked but not completely closed or that the chain and padlock were attached but the mail locks were not secured. At least once a door was not locked at all.

Again, Mr. Weblen's testimony was that he believes he talked to Ms. Smarr about being careful to lock the doors but he had not confronted her regarding the problem as he was concentrating on the missing items.

CHARGE THREE - INCOMPETENCE AS SHOWN BY POOR QUALITY OF PERFORMANCE AT MCKINLEY ELEMENTARY SCHOOL AND SIX OTHER SCHOOLS.

Five principals who had utilized the grievant as a substitute custodian testified on the board's behalf. Three found her work to be unacceptable, one termed her as average and the fifth stated that while she had difficulty completing her duties the first day, her performance after that time was satisfactory.

James Hall, principal at Criss Elementary School described his difficulties with Ms. Smarr as a regular custodian at his school. Mr. Hall indicated that the grievant's performance was below average and that a corrective action plan was written for her in March, 1984. Following this plan Ms. Smarr's evaluations indicate improvement had been made and that she was meeting expectations.

A second corrective action plan was written for the grievant in October, 1985 when she tripped the security system. This corrective plan was limited to the specific skill of disarming the security system and no further

incidents occurred before Ms. Smarr's transfer.

At no time over this eight year period did any of these principals recommend the grievant be dismissed.

Ms. Smarr began working at McKinley Elementary School on or about November 13, 1985. On November 16, 1985 Mr. Weblen drew up a list of items which in his own opinion had not received proper attention. The list was discussed with Ms. Smarr on November 18, 1985. Her job performance was apparently not discussed again after this time until her suspension.

Ms. Smarr alleges her suspension and subsequent dismissal to be an act of reprisal following the filing of a previous grievance and an act of sexual discrimination as Principal Weblen had stated he preferred a man in that position. The grievant requests to be reinstated with back pay, attorney's fees and costs.

W.Va. Code, 18A-2-8 states that a board may suspend or dismiss any person in its employment at any time for immorality, incompetence, cruelty, insubordination, intemperance or willful neglect of duty. This authority is to be exercised reasonably and not arbitrarily or capriciously. Beverlin v. Board of Educ., 216 S.E. 2d 554 (W.Va. 1975); Fox v. Board of Educ., 236 S.E. 2d (W.Va. 1977).

It is important that these sanctions be imposed only upon a showing of just cause. DeVito v. Board of Educ., 317 S.E. 2d 159 (W.Va. 1984).

Charge number one, theft of school property originally included several items with an approximate value of \$182.30. This charge was later amended to include only soft drinks of no specific quantity or value. Although Mr. Wiblen clearly believes the grievant took these items as evidenced by his comment that he would not have recommended dismissal if the thefts had not occurred, no criminal charges were filed and Ms. Smarr has not been found guilty of any theft. Therefore, the board has failed to meet its burden of proof regarding this charge.

The second charge is insubordination by the unauthorized entry into the kitchen area and failure to lock outside doors and properly secure the school. In Holland v. Board of Educ., 327 S.E. 2d 155 (W.Va. 1985) the Court held a charge of insubordination to be a charge of misconduct. A board is prohibited from dismissing an employee for reasons of misconduct or incompetency that have not been called to the attention of the employee through evaluation and which is correctable. Mason Co. Board of Educ., v. State Supt. of Schools, 274 S.E. 2d 435 (W.Va. 1980); Trimboli v. Board of Educ., 163 W.Va. 1, 254 S.E. 2d 561 (1979).

Testimony indicates the grievant may not have been instructed to not enter the kitchen area by the principal

and there is no indication she had been informed of this policy from any other source.

Mr. Weblen did discuss the importance of properly securing the building with the grievant when she reported to work; however, he also testified that he probably did not discuss the documented incidents of improperly securing certain doors with her as he was more concerned with the missing items.

As the grievant was not clearly made aware of or given an opportunity to correct these deficiencies, dismissal on the charge of insubordination is prohibited by State Board of Education policy 5300.

The charge of incompetence and insubordination relating to job performance at six other Wood County Schools over a three year period causes this examiner some concern as it does not specify to which three years of the grievant's eight years of employment it refers and it includes time during which the grievant was employed on a limited basis as a substitute.

The board clearly did not act in good faith in dismissing this employee based on charges of incidents brought several years after the fact. See Claude R. Cook v. Logan Co. Board of Educ., Docket No. 23-86-112, decided April 7, 1986.

Regarding the charge of incompetency at McKinley School, Mr. Weblen did observe Ms. Smarr's work approximately three

days after her arrival and discussed with her his list of concerns regarding her performance. However, this charge as a basis for dismissal is highly questionable as Ms. Smarr was suspended on December 15, 1985 after having been accused of theft on December 13, 1985. This, together with Mr. Weblen's statement that he would not have recommended the grievant be dismissed had not the thefts occurred, indicates that Ms. Smarr would not have been dismissed for incompetency at this time.

Reprisal is statutorily defined as "the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or for any lawful attempt to address it." W.Va. Code, 18-29-3(p). The facts and testimony presented in this matter undeniably indicate the dismissal of this grievant was motivated by reprisal. It is therefore ordered that the decision rendered by the Wood County Board of Education at level three of the grievance process be reversed and the grievant be reinstated to her position as custodian at McKinley Elementary School, awarded back pay and restored to any other benefits to which she may be entitled.

Any costs incurred at levels one through three must be assumed by the party incurring the expenses. W.Va. Code, 18-29-8.

Costs incurred at level four, including attorney's fees may be awarded to any employee who shall substantially prevail in any proceeding in circuit court (W.Va. Code, 18A-2-11) and may not be awarded at this level.

FINDINGS OF FACT

1. Debra Smarr was employed by the Wood County Board of Education as a substitute custodian from September, 1977 through August, 1983.

2. Despite several evaluations which indicated her performance as a substitute to have been less than satisfactory, Ms. Smarr was assigned to Criss Elementary School as a regular, full-time custodian in 1983.

3. Testimony indicates Ms. Smarr's performance at Criss School to initially have been below average to failing but had improved to the point of meeting expectations.

4. In November, 1985 Ms. Smarr bid on a custodial vacancy at McKinley Elementary School.

5. When another board employee with less seniority was recommended for the vacancy, Ms. Smarr filed a grievance.

6. Subsequent to an informal conference, Ms. Smarr received the position at McKinley School.

7. Approximately one month later Ms. Smarr was suspended from her duties after being accused of stealing school property.

8. Ms. Smarr confessed to having taken one bottle of soda earlier in the evening but stated she intended to pay for it later.

9. Ms. Smarr denied taking any other items from the school.

10. No evidence has been presented linking Ms. Smarr with any of the other items and the board has filed no criminal charges against her.

11. Dismissal was approved by the board based on pending criminal charges, relating to the theft of school property, insubordination and incompetence.

CONCLUSIONS OF LAW

1. A board of education may suspend or dismiss an employee at any time for immorality, incompetence, cruelty, insubordination, intemperance or willful neglect of duty.
(W.Va. Code, 18A-2-8)

2. The authority to suspend or dismiss is to be exercised reasonably and not arbitrarily or capriciously.

3. A board is prohibited from dismissing an employee for reasons of misconduct or incompetency for reasons of misconduct or incompetency which have not been called to the attention of the employee and which is correctable.

4. Charges must be made in good faith and in a timely manner to insure compliance with W.Va. Code, 18A-2-7-8 and due process requirements.

5. The evidence presented by the board of education was insufficient as a matter of law to support the dismissal.

6. The dismissal and suspension of the grievant one month after she filed a grievance in order to secure the position indicates the action to be retaliatory in nature.

7. School personnel laws are to be strictly construed in favor of the employee.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wood County and such appeal must be filed within thirty (30) 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.

Sue Keller

SUE KELLER
Hearing Examiner

Dated: June 16, 1986

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