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1987 DEC 15

WEST VIRGINIA EDUCATION
EMPLOYEES GRIEVANCE BOARD
ARCH A. MOORE, JR.
Governor

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Charleston, WV 25301
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BETTY WHITE

v.

Docket No. 11-87-020-3

GILMER COUNTY BOARD OF EDUCATION

D E C I S I O N

Betty White, grievant, was employed by the Gilmer County Board of Education as chief fiscal officer and treasurer before her dismissal by the board on January 26, 1987. Pursuant to W.Va. Code, 18A-2-8 she filed a grievance directly to the hearing examiner level by letter dated January 29, 1987. Several hearings were set but continued by both parties due to scheduling difficulties. Level four proceedings were then conducted on May 11 and 12 and June 9, 1987 in Glenville, West Virginia.¹

¹ A level four hearing was set for February 11, 1987 in Wheeling. The parties jointly moved for a continuance for cause shown, and agreed to a March 17, 1987 hearing date at Wheeling. Grievant's counsel then identified a conflict in his schedule and by agreement, the parties continued to April 29 on-site at Glenville, Gilmer County and subpoenas were issued for that date at the board's request. The hearing was again continued to May 11 and 12 at the joint request of the parties but testimony was not completed at that time. Due to various site complications proceedings did not resume until June 9, 1987 in Glenville.

The parties agreed to a briefing schedule following receipt of the transcript.²

Grievant was first employed by the Gilmer County Board of Education as Financial Bookkeeper on April 24, 1974, appointed chief fiscal officer in 1976 and granted a continuing contract in that position in 1977. On July 1, 1982 she was appointed treasurer of the board of education, presumably a joint appointment with that of chief fiscal officer since that continuing contract of employment was not modified. Grievant worked with a number of superintendents (at least three) over her thirteen year tenure and every evaluation rendered of her professional performance was generally positive containing above average to excellent ratings.

² The transcript was received in three separate bound volumes: one volume contained 650 pages of testimony, another contained 639 pages, 52 exhibits, submitted by the board and the third 57 page volume contained grievant's 27 exhibits.

Both parties requested an extension of time of the earlier agreed date for submission of briefs. On August 19, 1987 the board filed a 19 page unnumbered document, "Proposed Findings of Fact and Conclusions of Law of the Gilmer County Board of Education," a 38 page unnumbered "Memorandum of Law" and two unnumbered and unmarked documents as additional supporting evidence. On August 26, 1987, grievant's proposals were filed.

By document dated November 24, 1986 grievant received a letter of reprimand from the board of education prepared by board president Mrs. Jeane Kennedy.³ The reprimand cited alleged work deficiencies such as untimely payment of invoices and unpaid invoices from the prior fiscal year, disregard of the board's request that she be present for board meetings, failure to notify the board of coding error corrections and unauthorized changes and/or inconsistencies in monthly financial statements.

Grievant was advised that she was expected to improve in those areas and reference was made to State Policy 5300, "wherein an employee is entitled to know what they are doing wrong and be given an opportunity to correct the situation." (Grievant exhibit 3, 5/11/87.)

³Mrs. Kennedy had formerly been on staff with grievant at the board's administrative offices where she served as executive secretary to the superintendent from 1974 until her resignation in January 1985. She was elected a school board member in 1986.

Following the letter of reprimand, on December 6, 1986, grievant filed a grievance with the school superintendent, he being her immediate supervisor, in which she protested the reprimand placed in her file as being unwarranted, improper and unjustified and a violation of business office policies and rules. Mr. Hardman waived to level three but by letter dated December 15, 1986, Mrs. Kennedy advised grievant that the board of education could not acknowledge the grievance as submitted, on the ground that grievant had not specifically cited a statute misapplied, misinterpreted or violated nor stated who her claim was against and relief sought. (Grievant exhibit 7, 5/11/87.)⁴

After ongoing, numerous telephone conversations and consultations with only two of the four other board members over an undisclosed period of time, Mrs. Kennedy prepared a letter

⁴ Mrs. Kennedy issued the response on her own initiative without consultation with other board members or formal board action (T.170.)

Grievant submitted a revised grievance on the letter of reprimand issue with her January level four filings to the West Virginia Education Employees Grievance Board (Grievant exhibit 4, 5/11/87); however, the matter was not pursued as a grievance issue, per se, at level four. It is noted that W.Va. Code, 18-29-2, et seq., does not require that grievants specify a statute on grievance forms and it appears that grievant's objections to the reprimand were straight-forward and understandable.

to grievant dated January 26, 1986 (T.245, 246, 247, 248). The prepared letter was presented during executive session at the regular meeting of the board of education on that date and dismissed grievant from her position "for wilful neglect of duty, insubordination, and inefficiencies in the performance of your duties to the detriment of the efficient operation of the ... school system." (Grievant exhibit 11, 5/12/87.) Mrs. Kennedy testified that grievant was terminated by the board on a 3-2 vote (T.177), but it appears that the board, with one member absent, voted 3 to 1 for grievant's dismissal as reflected in the board minutes. (Board exhibit 29, 5/11/87; Grievant exhibit 26, 5/12/87.)

Counsel for the board contended that over the past two years problems arose in grievant's work performance to the extent that the board, and others, lost confidence in her ability to discharge her duties or to accurately reflect the board's financial status. Counsel charged that grievant's work became increasingly untimely, inaccurate, erroneous and misleading, and, as such, after July 1, 1986, amounted to willful neglect of her duties to properly manage the board's finances. Moreover, counsel alleged certain of grievant's actions after July 1, 1986, rose to the level of insubordination when the board's attempts to have its numerous concerns answered and explained were ignored or challenged.

The board argued that provisions of State Board Policy 5300 mandating employee notification of undesirable job performance and opportunity to remediate therefrom only applies to cases of employee incompetence, not instances of willful neglect of duty and insubordination, and that grievant's behavior in those areas has permanently affected the school system in a permanent and non-correctible manner. Even if Policy 5300 does apply, the board asserted, grievant did not avail herself of the ample opportunity to meet the expressed ongoing concerns of the board and other concerned persons, especially members of the Gilmer County Education Association (GCEA), from July 1986 until her January 1987 dismissal, nor otherwise modify, improve or satisfactorily explain her job performance during that time.⁵

⁵ The board cites Rovello v. Lewis County Board of Education, Docket No. 21-86-081 in support of its notion that informal evaluations satisfy the requirements of Policy 5300. Rovello can be distinguished as that dismissal was upheld on the basis of immorality deemed not to be relevant to "professional competency," and other charges, such as willful neglect of duty and insubordination, were not addressed. In the instant case, the board alleges insubordination and willful neglect of duty and those job performance deficiencies fall clearly within the purview of misconduct which affects professional competency and which must be brought to an employee's attention with a sufficient improvement period. Holland v. Board of Education, 327 S.E.2d 155 (W.Va. 1985). Regardless of the label given employee misconduct, if the conduct does involve professional competency, Policy 5300 must be implemented, including an evaluation by a qualified professional. Mason County Board of Education v. State Superintendent of Schools, 274 S.E.2d 435, 439. (W.Va. 1980).

As to the concerns of teacher members of the GCEA, notice can be taken that any hint of staff reduction and the like will trigger the aggressive scrutiny of teacher advocacy groups.

Accordingly, the board urges, in light of the factors enumerated, it reasonably exercised its statutory authority to discharge grievant from its employ.⁶

Counsel for grievant countered that many of the problems surrounding grievant's work performance and discharge of her duties commencing in the spring, summer and fall of 1986 were due to factors beyond her control and included numerous added duties, unusual new funding accounts and a state mandate to implement an extensive new accounting system by July 1, 1986. According to grievant, these factors were known or made known to the board and/or grievant did attempt to address concerns regarding budgetary and financial matters when she was apprised of them and was able to do so.

Moreover, counsel contended, grievant's dismissal in January 1987, was unlawful and violative of State Board Policy 5300 since grievant was not afforded an adequate opportunity to correct work performance deficiencies cited in the November 24, 1986 letter of reprimand and the dismissal ensued prior to any determinations whether grievant had or had not, in fact, complied with the enumerated board directives.

⁶ W.Va. Code, 18A-2-8 provides that "a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance or willful neglect of duty...."

Counsel further argued that the November letter of reprimand, in the first instance, was improperly issued; that the reprimand was contrary to grievant's ongoing positive evaluations and that the board's action was not supported by any sort of past practices. Counsel alleged that, indeed, grievant's dismissal from her employment amounted to a retaliatory discharge emanating from her previously filed grievance protesting the board's letter of reprimand and the personal biases of board president, Jeane Kennedy.

Counsel urges that the board's dismissal of grievant was flawed in all respects and that she be reinstated to her former position with the board of education with an appropriate award of back pay and benefits. Grievant additionally seeks an award of attorney fees and related costs.⁷

In addition to the foregoing narration, the following specific findings of fact and conclusions of law are appropriate. Proposed findings and conclusions of the parties have been analyzed and considered and are incorporated herein to the extent that they are consistent with the probative evidence and the determinations of the undersigned hearing examiner.

⁷ Absent express statutory authority to award attorney fees and costs at level four, the West Virginia Education Employees Grievance Board will not entertain motions or requests for the award of said fees to any party to a grievance. Wyatt v. Marshall University, Docket No. BOR2-87-004; Davis v. Summers County Board of Education, Docket No. 45-87-119.

FINDINGS OF FACT

1. Betty White, grievant, was employed by the Gilmer County Board of Education as Chief Fiscal Officer and was granted a continuing contract of employment for that position in 1977; she was appointed Treasurer of the board of education in 1982.

2. Grievant's duties as chief fiscal officer/treasurer are defined in the resolution adopted by the board April 20, 1982, and by job descriptions contained in Board Policy 4216.7-5315 and Policy 4216.7b and are extensive and detailed as related to her responsibilities. (See, Board exhibits 5, 44, 5/11/87, and Grievant exhibit 9, 5/12/87, as well as the other numerous work products and financial documents submitted into the evidence.)

3. Jeane Kennedy, the current board president, formerly worked at the board offices as secretary to the school superintendent during the same period of time as grievant; she resigned from that position in January 1985. At that time she wrote a letter to grievant inquiring about the amount of her exit salary. The lengthy letter remarked upon grievant's "mode of operation," and brought to question grievant's conscientiousness. Mrs. Kennedy ended by expressing a hope "that every individual having business with the business office at the board of education has the foresight to request, in detail, items that should be a matter of simple and efficient record keeping." (Emphasis in original.) (Grievant exhibit 1, 5/11/87.)

4. Mrs. Kennedy ran for a seat on the board of education in early 1986. On February 20, 1986 the Glenville Democrat-Pathfinder published an open letter from her. Mrs. Kennedy stated that contrary to the opinions of persons who expressed that she harbored a personal vendetta against some board employees, such was not the case and that her reasons for running had nothing to do with personal grudges, rather she was motivated by personal concern. She went on to state her platform noting, among other things, that she was concerned about questions dealing with the school system's funding and whether those finances were managed wisely and efficiently. (Grievant exhibit 3, 5/11/87.)

5. Mrs. Kennedy was appointed to fill an unexpired term on the school board in May 1986; she was elected to a six-year term on the board commencing July 1, 1986 and was elected president of the board soon thereafter.

6. Concerning grievant's work performance prior to 1986, Mrs. Kennedy testified that grievant would not "cooperate in providing ... information" necessary for her to properly perform her secretarial functions for a newly appointed school superintendent, Dr. Alkire, beginning June 1984 until Mrs. Kennedy resigned in January 1985. She did not illuminate, by any specific example, grievant's alleged wrongdoing, but she stated that "friction" existed between grievant and herself for the duration of that time. (T.145.)

7. Dr. Alkire did not appear to testify as to his working relationship with grievant and there was dubious, conflicting, and inconclusive hearsay testimony regarding the matter.

8. Also in regard to grievant's pre-1986 performance, board member Robert Miller testified that in March 1985 during preliminary preparation of the board's budget for the 1985-1986 school term, the board was advised that 26 or 27 employee reductions in force would be necessary during the coming year due to inadequate funding. (T.20-21.) No cut-backs were approved at that time and later it was found that the 1985-86 March estimated budget had understated revenue. However, grievant had used the Assessor's estimate provided her on March 7, 1985 to file her statement by the March 28, 1985 deadline and did not receive the Assessor's revised and corrected figures until April 30, 1985. In addition, legislation provided \$75,000 more in Step 7 funds for instructional improvement; this amount was not disclosed to grievant until May 3, 1985 subsequent to the filing of the estimated budget. (T.547.)

9. Instead of finishing fiscal year ending June 30, 1986 with a deficit, the board finished the year with a surplus of over \$290,000. This amount, 4.8% of the county's revenue, was close to the 3% average of the collective balances of all West Virginia school counties, as found in the January 22, 1987 report issued to the board by State School Superintendent, Tom McNeel, and was not cited as a budgetary managerial shortcoming. (Board exhibit 31, 5/11/87.)

10. The board published its financial statement for FYE June 1986 in the local newspaper on August 28, 1986; the newspaper, however, omitted an account causing the financial statement to be unbalanced as published. When questioned repeatedly about the matter, grievant insisted her figures were correct but she failed to review the published statement for a period of time, thus, the correction was not published until November 13, 1986. (T.134-38; Board exhibits 39 and 40.)

11. Discovery of the FYE 1986 surplus and frustration over the newspaper incident raised the ire of the GCEA who then began to critically scrutinize grievant's management of the board's finances when recommendations of cut-backs and reduced benefits again surfaced. In response to GCEA requests, the board directed grievant to provide the GCEA with specific data its members required in order to keep its own (the GCEA) set of books regarding the board's finances.

12. During the summer months of 1986, the board changed its method of dealing with accounts payable and requested copies for each board member of billings, invoices, purchase orders and the supporting documentation as opposed to the long standing prior practice of using a vendor list and amounts due. (T.55-60, 184; Grievant exhibit 25, 5/12/87.)

13. As reflected in the August 11, 1987 board minutes, grievant had initially and erroneously informed Mrs. Kennedy earlier that day that the board could only access invoices and billings upon formal board action. (Board exhibit 9, 5/11/87.) Grievant thereafter complied with the board's request.

14. Handbook II Accounting, as required by state education officials, was to be fully implemented in the county's financial office by July 1, 1986. (T.451, 524.)

15. The new accounting system was more complex than previous methods and contained over 1000 line item codes with multiple identifying digits; new codes were being added or others altered by the State well into autumn and far beyond the July 1986 implementation target date. (T.451, 465, 524, 525.)

16. The board denied grievant's request that she be funded to attend a Handbook II training session (T.166) although the superintendent had recommended at a August 11, 1986 board meeting that a proposed spending freeze not affect trips for professionals who needed information to implement a new program. (Board exhibit 9, 5/11/87.)

17. Immediately before and during the implementation of the Handbook II Accounting system, the financial office was involved in adjusting computer hardware and software and in training new employees, (T.472), Lynn Chapman, employed August 1985, and Amy Roberts, employed March 10, 1986 (T.529). Grievant's office was also administering Federal Disaster Relief funds paid for damages caused by the November 1985 flood. Additionally, an auditing team examining FYE 1984-85 was on-site in July 1986 and finished its work July 11. (T.534.)

18. At times after July 1986 financial documents relating to the board's budgetary matters generated by grievant for board approval and submission to the State were inconsistent and contained hand modified entries made by grievant in order that accountings were correct. When asked at board meetings about errors grievant would explain computer error or malfunctioning. (T.73, 74.)

19. Mrs. Kennedy admitted that she had firsthand knowledge of computer problems in the finance office; she, having little hands on experience with computer operation (T.256), was not in the best position to evaluate the veracity of grievant's explanation of errors appearing in the computer printed financial statements during implementation of Handbook II.

Mr. Robert O. Hardman, II, board member, who was a chief accountant/controller for his firm and more qualified to assess the situation, agreed that it could take months to "get all

the bugs out" of a new computer accounting system (hardware and software) and thus was satisfied with grievant's explanations of computer error. (T.419,420.)

20. Prior to submission of the August 1986 financial statement to the State, grievant altered the document already distributed to board members and Mrs. Kennedy; she then provided a copy of the corrected report to Mrs. Kennedy and did not simultaneously give Mrs. Kennedy and the board materially different statements as the board alleges. (T.71-84; Board exhibits 11,12,14, 5/11/87.)

21. Monthly financial reports, generated by state education officials back to the individual counties, contain a cover letter directed to the county superintendent with copy to the financial office. The cover letter states that if there are any overdraft accounts, they will be noted on a separate statement within and a copy should be distributed to the board president. (Board exhibit 15, 5/11/87.) The board received copies of the financial reports and overdraft statements at board meetings and the fact that the covering letter was deleted (T.84,85,86) appears to be of no particular significance in a determination of grievant's job performance. (See Board Proposal No. 50.)

22. Property values were diminished in Gilmer County as a result of the 1985 flood and the school system received disaster relief funds to replace property tax revenue thus lost. Grievant had no experience with this type of revenue, "in lieu of tax monies," and did not initially budget the funds, \$12,753, for the school system's use.

23. The evidence is inconclusive as to when inquiry began, but it appears that after being confronted by GCEA about the unbudgeted revenues, grievant and the superintendent sought advice as to disposition of the funds. The matter was problematical and state officials were not helpful. One state auditor who was questioned by GCEA member Phyllis Starkey said he would have to look into the matter in case he had a flood account in another county in the future and would thus have the needed information. (T.352.) Other state auditors on-site in the county in 1986 who reviewed the finance office's books in the summer and fall did not cite grievant for handling the revenue as an unbudgeted account. Finally, in March 1987 after grievant's dismissal, the State Tax Division responded to the superintendent's January inquiry and said the money could be budgeted but told him to contact state education officials for information. The board failed to establish any adverse impact upon its overall financial resources due to this matter. (T.542; Board exhibit 45, 5/11/87.)

24. Whether budgeted or not, the fund would not have solved the school system's overall financial plight which was brought

to light after a state education financial assistance team conducted an on-site review at the request of the board. The report cited the board for overstaffing and payment of employee optical and dental benefits, not matters relating to grievant's office. (Board exhibit 31, 5/11/87.)

25. The school board also received federal funds to replace items lost, damaged or destroyed in the 1985 flood. Although state regulations submitted by the board after the hearing suggest grievant should have deposited the money in a separate demand depository account, grievant had not been cited by either the state tax division or education financial department for failure to do so.

26. After grievant's dismissal the board decried grievant's commingling of the restricted funds with other of the board's unrestricted revenues. However, it is clear that prior to grievant's dismissal, the board's primary concern in regard to a federal audit was that items purchased with flood funds be items that could be identified as those actually lost, damaged or destroyed in the flood. (T.263.)

27. Individual purchases relating to flood funds are encoded in the computer system and a running total is maintained in the data. The board has presented no evidence that grievant's accounting of federal fund monies will not withstand a federal audit.

28. The board directed grievant to complete three major research projects, all between the months of July and December 1986. Grievant was to prepare invoices and accountings of certain disbursements prior to July and already board approved, prepare a detailed accounting of all items purchased to replace items lost in the 1985 flood which were funded by Federal monies and prepare information for the GCEA as related to monies currently unbudgeted on the board's financial statements.

29. Although the board had not requested that she do so, grievant logged and calculated the man-hours and costs involved in completion of two of these directives. Grievant presented the board with documentation of the costs; her efforts to apprise the board of these matters via her reports could not be construed as an invoice and billing for her services as the board suggests, rather it comports with the accountability the board was demanding of her and does not amount to insubordination. (Board exhibit 21, 28 5/11/87.)

30. There was no expressed requirement that she do so, either in her job descriptions or by board request/action, but grievant usually attended board meetings during the budgetary sessions; grievant's attendance declined after July 1, 1986. As shown below, the board did not establish that grievant's failure to attend board meetings for a time amounted to gross insubordination.

31. As reflected in the board minutes, on October 13, Mrs. Kennedy asked the superintendent if grievant could come to board meetings to answer budgetary questions. The superintendent was "shocked at the misunderstandings" and urged that matters could best be explained to the board via a financial work session for all. (Board exhibit 10, 5/11/87.)

32. Subsequent to the October 27 board meeting, grievant had numerous tasks to perform to prepare for the State Department of Education's on-site visitation dates of October 29 and November 12. She was then asked by the state team to prepare a ten-year county tax history, in report form, and forward it to Charleston. (T.534,535.)

33. Grievant did not attend the November 10 board meeting and at that time Mrs. Kennedy again asked the superintendent to ask grievant to come to board meetings. (Board exhibit 16, 5/11/87.) November 24 and 25 were out-of-school (OS) non-work days for all school employees; the Thanksgiving holiday was later that week and grievant did not attend the board meeting of November 24, 1986. During that period of time, state auditors were again on-site evaluating FYE 1985-86, and remained until December 8, 1986. (T.534, 535.)

34. After July 1, 1986 the board made increasing demands that it be particularly apprised of even the most minute details of the financial office in advance of board meetings. Requests were met, but the board in turn presented complicated financial questions, not in advance of board meetings to the administrative offices, but on the night of board meetings, thus neither the superintendent nor grievant, if she were in attendance, were prepared or able to respond on the spot. (T.471, 476, 490.)

35. At the November 24 board meeting, the board considered a reprimand, drafted and pre-prepared by Mrs. Kennedy, to be issued to grievant (and also another to Superintendent Robert H. Hardman). (Board exhibit 17, 5/11/87; Grievant exhibit 3, 5/11/87.) Mrs. Audra Stalnaker, a board member, testified that prior to November 24, 1986 reprimands had been issued by the board to a former superintendent and a former board employee but had been done upon the unanimous agreement of the persons who then comprised the board. The earlier reprimands were not written by the board members, but were drafted by a Charleston official of the West Virginia School Board Association asked to assist in the matter. Mrs. Stalnaker and another board member who had not been consulted about the reprimands prior to the board meeting, (T.413-414) voted against the action. (T.507-508.) The former board employee so reprimanded was Mrs. Kennedy (T.507), thus she was fully aware of past practices of the board relating to this unusual board action regarding an extraordinary personnel disciplinary matter.

36. The November 24, 1986 reprimand cited grievant for untimely payment of invoices and unpaid invoices from the prior fiscal year, disregard of the board's request that she be present for board meetings, failure to notify the board of coding error corrections and unauthorized changes and/or inconsistencies in monthly financial statements. Grievant was advised that she was expected to improve in those areas "in order to avoid possible disciplinary action." (Grievant exhibit 3, 5/11/87.)

37. At the December 8, 1986 board meeting Superintendent Hardman responded to the reprimand issued to him by the board on November 24. His lengthy statement mainly addressed the problems of the financial office. He detailed the difficulties the grievant had experienced with implementing Handbook II and the computer programming problems. He explained that other counties were experiencing similar adjustment problems and that a state education official had advised the board that the new system was difficult. He advised that grievant's budgetary management withstood the scrutiny of yearly audits and confirmed that the county's records were in order. He explained why bills were not always paid when rendered and he again implored the board members to participate in work sessions for better understanding of the state system and the workings of the financial office. (Board exhibit 19, 5/11/87.) This recommendation was not heeded.

38. Also in early December, grievant filed a grievance protesting her reprimand. The superintendent acknowledged it and waived it to the board level three. On December 15, 1986, Mrs. Kennedy advised grievant that she believed the grievance was improperly filed since it did not cite specifics regarding statutes or relief requested.

39. Prior to the January 26, 1987 board meeting, Mrs. Kennedy consulted by telephone with board members Robert Miller and Leon Ellyson regarding the grievant herein. Board members Audra Stalnaker and Robert O. Hardman II testified that they were not consulted although each were available, Mrs. Stalnaker not being employed and generally at home and Mr. Hardman having a secretary to take messages at work and a telephone recorder at home. (T.414,415.)

40. Since her original employment date in 1974, grievant's professional evaluations had been mainly positive and often commended her for her hard work. (Grievant exhibits (13) 12-24, 5/12/87.) at home.

41. At the January 26, 1987 board meeting Mrs. Kennedy had a prepared letter of dismissal which she presented in executive session to board members Stalnaker, Miller and Ellyson. A discussion ensued but there was no review of grievant's prior evaluations or an assessment of whether grievant had complied with the November 24, 1986 board directives. (T.506,507.) Grievant was dismissed by a 3-1 vote.

42. The evidence adduced supports a finding that when Mrs. Kennedy attained her seat on the board, she harbored some negative opinions of grievant, but does not support a finding that grievant's dismissal was in retaliation of her earlier filed grievance.

43. The evidence adduced supports a finding that although the board's concern with its accountability was commendable, there was an inordinate focus on grievant's job performance from July 1986 forward, and that the controversy involving grievant polarized board members into two separate groups. The evidence establishes that one faction did not fully consider the impact of the burgeoning demands placed upon grievant's office and attempts that were made to clarify financial matters for them. (See, the accumulated Board minutes from July 1986 through January 1987 and related testimony.)

44. Since grievant's dismissal, financial reports from the State Department of Education to the county board have not been error free. (T.629.)

45. The evidence adduced supports a finding that work emanating from grievant's office since July 1986 was not always error free and was at times untimely. The errors and untimeliness, probably caused by both human and mechanical error, were not entirely unreasonable in light of the complexity of the new accounting and computer system and other added tasks of grievant's office commencing at that time.

46. The evidence adduced does not support a finding that grievant willfully neglected her duties or that her conduct rose to the level of insubordination between July 1986 and November 1986 nor that she was guilty of that specific misconduct from November 1986 until her discharge in January 1987.

CONCLUSIONS OF LAW

1. Failure by a board of education to follow the evaluation procedure in West Virginia Board of Education Policy No. 5300 (6)(a) prohibits the board from discharging school personnel for reasons having to do with prior misconduct or incompetency that has not been called to the attention of the employee through the evaluation and which is correctible. Trimboli v. Wayne County Board of Education, 163 W.Va. 1, 254 S.E.2d 561 (1979); Don Williams v. Roane County Board of Education, Docket No. 44-86-160-1.

2. Regardless of the label given alleged employee misconduct, if the conduct involves professional competency, adherence to Policy 5300 is required including an evaluation by a qualified professional. Mason County Board of Education v. State Superintendent of Schools, 274 S.E.2d 435, 439 (W.Va. 1980).

3. Insubordination and willful neglect of duty are job performance deficiencies which fall clearly within the purview of misconduct affecting professional competency and which must be brought to an employee's attention with a sufficient improvement period. Holland v. Board of Education, 327 S.E.2d 155 (W.Va. 1985); Don Williams v. Roane County Board of Education, supra.

4. The provisions of Policy No. 5300 (6) (a) must be strictly construed in favor of the employee to ensure that the employee receives the full guarantee of protection intended to be encompassed by the Policy. Wilt v. Flanigan, 294 S.E.2d 189 (W.Va. 1982); Don Williams v. Roane County Board of Education, supra.

5. The board's dismissal of grievant in January 1987 following its reprimand in November 1986 with no professional reevaluation or assessment as to whether grievant had or had not complied with the reprimand's stated directives is arbitrary and capricious and an abuse of the board's dismissal powers under W.Va. Code, 18A-2-8.

6. The school board failed to follow Policy No. 5300 or any other reasonable and fair evaluation, remediation and reevaluation process or procedures and has otherwise failed to prove the charges against the grievant by a preponderance of the evidence.

Accordingly, this grievance is **GRANTED** and grievant is to be reinstated to her former position with the Gilmer County Board of Education and paid back wages from the time of her dismissal less any appropriate set off. The request for an award of attorney fees is **DENIED**.

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

DATED: November 20, 1987 Nedra Koval

NEDRA KOVAL
Hearing Examiner