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CINDI DRAKE

v.

DOCKET NO. 47-86-326-2

TUCKER COUNTY BOARD OF EDUCATION

DECISION

Cindi Drake, also referred to as the grievant, is employed by the Tucker County Board of Education as a learning disabilities teacher. Ms. Drake has been employed by the board since 1979 and is presently assigned to Tucker County High School. On September 22, 1986, Ms. Drake filed a grievance as a result of several letters being placed in her personnel file. Ms. Drake alleges that the unsubstantiated and discriminatory charges made in the letters constitute a substantial detriment to or interference with her job performance, a violation of W. Va. Code, 18-29-1 et seq.

The five letters in question are:

(1) October 31, 1985, Principal Howard Moore recounts to Ms. Drake an incident of October 23, 1985 when she was not at her workstation. Mr. Moore warned Ms. Drake that "[i]nstances of insubordination and willful neglect of duty cannot be condoned or permitted to exist or continue." The grievant was further informed that the letter was a final formal reprimand.

(2) June 5, 1986, Glenn W. Patsy, Assistant Principal, notified Superintendent Roy Moss of an incident which occurred on May 30, 1986, when Ms. Drake left school for a doctor's appointment without providing adequate coverage for her fourth period class.

(3) June 6, 1986, Assistant Principal Patsy notified Superintendent Moss of an incident occurring May 23, 1986, when Ms. Drake conducted a conference with a student in her room while the remainder of the class sat in the hallway because the door was either locked or stuck.

(4) June 6, 1986, Principal Moore recommended to Superintendent Moss that Ms. Drake be suspended and dismissed for conduct constituting immorality, willful neglect of duty and insubordination. Mr. Moore noted that the charges had developed over a period of time, that Ms. Drake had been informed a number of times that changes were necessary, she had been "written up" on several occasions and given a formal reprimand.

(5) June 9, 1986, Mr. Moore advised Ms. Drake that he had evidence that she had "...put students up to creating disturbances on other teachers' classes." Mr. Moore noted that the behavior had been ongoing throughout the term and that she could respond in writing if she so chose.

Following the hearing held at level two, Superintendent Mary Alice Klein determined that the charge of immorality made by Principal Moore in his letter of June 6, 1986 was unsubstantiated and would be removed from the grievant's record. Superintendent Klein determined that charges of willful neglect of duty and insubordination are correctable through the evaluation process and recommended that Mr. Moore write an improvement plan to assist the grievant in the correction of the behaviors which led to these charges or that he submit a statement verifying

that the behaviors had been corrected. With the exception of the charge of immorality all other information plus any documentation to verify the improved behavior would remain in the grievant's file.

Upon appeal to level three the Tucker County Board of Education determined that the charges of immorality and insubordination were unsubstantiated and were to be "whited out" of Principal Moore's letter of June 6, 1986 and that the charge of willful neglect of duty had been substantiated but that the behavior leading to that charge had been corrected, making an improvement plan unnecessary. The board determined that all documentation would remain in the grievant's file along with a statement regarding the correction of the behavior constituting willful neglect of duty.

At the level four hearing the grievant indicated that she wished to appeal only the issue of willful neglect of duty and the failure to remove the letters. She requested that the scope of the hearing be limited to those areas and not be reopened to all three charges inasmuch as her grievance had been partially granted at levels two and three. The board of education indicated no objection and the request was granted.

The grievant then requested a summary judgment based on a second grievance alleging various procedural irregularities at

level three.¹ The grievant alleges that she suffered irreparable harm when Superintendent Mary Alice Klein, who represented the administration at the level three hearing, remained with the board during deliberation of the matter. The grievant alleges this action to be in violation of W. Va. Code, 18-29-6 which requires that all hearings be held in a fair and impartial manner ensuring all parties an opportunity to present and rebut evidence.²

Two members of the board of education appeared at the level four hearing and testified that the Superintendent did remain with them during the executive session but that her presence did not influence their decision.

William Miller, counsel for the board of education, stated that both he and Superintendent Klein remained with the board for the purpose of providing procedural advice.

¹Perry Bryant, WVEA UniServ Consultant for the grievant, notified this examiner of the second grievance by letter dated December 16, 1986. Mr. Bryant advised that both parties had waived consideration at level two and that Superintendent Klein would recommend that the board of education waive the matter to level four making consolidation of the two grievances possible. No further documentation of the second grievance was submitted at level four.

²Other alleged irregularities include the board's failure to vote on the decision prior to adjournment and a failure to follow statutory time lines. The grievant did not pursue these issues as the first was remedied at a subsequent meeting and neither caused irreparable harm.

The motion for summary judgment was denied and the parties presented their evidence regarding the charge of willful neglect of duty and the removal of the letters from the grievant's personnel file. As the determinative issue is whether the board will be required to remove the letters, it will not be necessary to address the question of whether the grievant has engaged in willful neglect of duty.

The grievant argues that past practice at Tucker County High School had been to remove letters from an employee's personnel file after the behavior had been corrected and that any unsatisfactory behavior had not been brought to her attention through the evaluation process making an improvement plan unjustified.

The board of education argues that at the time the letters were placed in the grievant's file county policy did not provide for the removal of documentation from personnel files and that Principal Moore's actions were his individual decision. Superintendent Klein views the letters as a part of the evaluation process as the behaviors occurred outside the classroom observation for which the evaluation form was designed.

Findings of Fact

1. The grievant is employed by the Tucker County Board of Education as a learning disabilities teacher assigned to

Tucker County High School.

2. In October, 1985 and June, 1986 grievant's principal and assistant principal placed five letters in her personnel file. Two letters were addressed to Ms. Drake and three were directed to Superintendent Roy Moss. Four of the letters concerned incidents in which the grievant was involved while the fifth was a recommendation by Principal Moore that the grievant be suspended and subsequently dismissed.

3. Principal Moore's recommendation for suspension and dismissal was based on charges of immorality, insubordination and willful neglect of duty.

4. At level two of the grievance process Superintendent Klein determined that the charge of immorality should be removed from the grievant's file but that the letters would remain. Superintendent Klein recommended that the grievant's immediate supervisor develop a plan of improvement to correct the behavior or submit a written statement that the behavior had been corrected.

5. At level three, the board of education determined that the charges of immorality and insubordination were to be "whited out" of Principal Moore's letter of June 6, 1986 and no plan of improvement would be necessary as the behavior leading to the charge of willful neglect of duty had been corrected. The letters were to remain in the grievant's file along with a letter documenting the improved behavior.

6. At the level three hearing Superintendent Klein represented the administration and then later remained with the board in executive session while the members were considering their decision regarding the grievance.

7. Principal Moore's testimony at level two indicates that in the past letters similar to those referred to in this matter have been removed and destroyed from other employee files when the behavior in question had been corrected. (T. Level II p. 7).

8. At the time these letters were written the Tucker County Board of Education had no policy regarding the removal of letters from personnel files.

9. Both Principal Moore's testimony and the letters indicate the grievant's behavior had been ongoing throughout the 1985-1986 term and in prior terms. (T. Level II pp. 5-6).

10. The grievant's performance evaluation for the 1985-1986 school term reflects none of the problems addressed in the letters.

11. The grievant was given no plan of improvement to correct the unsatisfactory behavior.

12. Superintendent Klein determined that the letters were to be considered a part of the grievant's evaluation.

13. Both Assistant Principals Lloyd and Patsy testified that the grievant's behavior has been satisfactory during the 1986-1987 term.

Conclusions of Law

1. The presence of the superintendent in an executive session during the deliberation of a grievance by the board of education, when the superintendent represented the administration at the level three hearing, prohibits the grievant from receiving a fair and impartial hearing as required by W.Va. Code, 18-29-6 and therefore is improper.

2. The presence of the superintendent during the deliberation of a grievance by the board of education, when the Superintendent was the level two hearing officer, creates an opportunity for violation of W. Va. Code, 18-29-3 (n) which prohibits a person or board to which an appeal has been made from conferring or corresponding with a grievance evaluator from a previous level regarding the merits of a grievance unless all parties are present.

3. The characterization of the letters in question as part of the evaluation process is inconsistent with the tenor of the letters which indicates them to be disciplinary in nature, e.g., the recommendation for suspension and dismissal.

4. The utilization of letters regarding a teacher's behavior

outside the classroom as part of that teacher's evaluation subjects that teacher to evaluation above and beyond that received by teachers as a group resulting in discriminatory treatment as defined by W. Va. Code, 18-29-2 (n).

5. W. Va. State Board of Education Policy 5300 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 on a regular basis. Decisions concerning promotion, demotion, transfer or termination of employment should be based upon evaluation and not upon factors extraneous thereto.

6. The West Virginia Supreme Court of Appeals has frequently and consistently held that the failure of a board of education to follow the procedures set forth in West Virginia Board of Education Policy 5300 (6)(a) prohibits the discharge, demotion or transfer of an employee for reasons of prior misconduct or incompetency that has not been called to the attention of the employee through evaluation, and which is correctable. See: Trimboli v. Board of Education, 163 W. Va. 1, 254 S.E. 2d 561 (1979); Mason County Board of Education v. State Superintendent of Schools, 247 S.E. 2d 435 (W. Va. 1980); and Holland v. Board of Education of Raleigh County, 327 S.E. 2d 155 (W. Va. 1985); Petry v. Kanawha County Board of Education, Docket No. 20-86-085; Burdette v. Summers County Board of Education, Docket

Docket No. 45-86-280; Smoot v. Kanawha County Board of Education,
Docket No. 20-86-177; Williams v. Roane County Board of Education,
Docket No. 44-86-160-1.

7. A county board of education must provide every employee with due process in matters of employment. This shall include making the employee aware of any misconduct or incompetency through some type of formal evaluation and providing the individual with an opportunity to improve his behavior prior to exercising any form of discipline which permanently affects the individual's employment record. Williams v. Roane County Board of Education, Docket No. 44-86-160-1.

Accordingly, the grievance is GRANTED.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Tucker 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: March 12, 1987

Sue Keller

SUE KELLER
Hearing Examiner