



**Members**  
James Paul Geary  
Orton A. Jones  
David L. White

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

**Offices**  
240 Capitol Street  
Suite 508  
Charleston, WV 25301  
Telephone 348-3361

**DR. RAYMOND DUNLEAVY**

**v.**

**Docket No. 20-86-240-1**

**KANAWHA COUNTY BOARD OF EDUCATION**

**DECISION**

Grievant, Raymond Dunleavy, is employed as a psychologist by the Kanawha County Board of Education. On April 4, 1986, he filed a grievance on the basis of an unfavorable evaluation and improvement plan issued on February 18, 1986. The grievance was denied at levels one through three and appealed to level four on August 5, 1986. By agreement of the parties evidentiary hearings were commenced on November 12, 1986, but prior to the taking of evidence counsel for the board of education moved to dismiss that part of the grievance dealing with the evaluation on the ground that the grievance was not timely filed. The motion to dismiss the evaluation portion of the grievance was granted and the hearing was continued until December 10, 1986, on motion of the grievant's

representative.<sup>1</sup>

On December 10, 1986, the parties announced that an agreement had been reached whereby: (1) the board of education agreed to expunge from grievant's personnel file the improvement plan and all of the attachments thereto, and, (2) the remaining legal issues would be submitted to and decided by the hearing examiner upon the expert testimony of Dr. John Andes and the legal memoranda of the parties. The memoranda were received on January 15, 1987, and the legal issues may be characterized as follows:

1. The necessity of employee input into the improvement plan prepared by the immediate supervisor, and,
2. The effect upon the improvement plan of a request for an improvement team to verify deficiencies set out in the plan, and,
3. The persons contemplated by the term "receivers of service" and the effect of inclusion of non receivers of service complaints upon the validity of the evaluation or improvement plan.

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<sup>1</sup> Counsel for the board contended that W.Va. Code, 18-29-4 required the filing of a grievance within 15 days of the event, i.e., the delivery of the evaluation to grievant, and this was not done. He agreed, however, that the plan of improvement portion of the grievance was timely because it had been an on-going matter.

Grievant's representative contended that the evaluation was the triggering mechanism and the grievance was therefore on-going; that the inaccurate evaluation caused the improvement plan to be initiated and it was all part of the same grievance. She agreed, however, that grievant was not alleging discrimination or favoritism but a misapplication of Kanawha County evaluation policy and State Board of Education Policy 5310 regarding evaluation.

Dr. John Andes is professor of higher education and education administration and associate dean of the College of Human Resources and Education at West Virginia University. Among his other duties he works with the faculty evaluation plan for the College and the Board of Regents and advises faculty and administrators on their rights and responsibilities under Policy Bulletin 36 of the Board of Regents. He currently teaches two doctoral courses at Marshall University and has taught various public school courses in the field of education administration, education leadership for principals and public school law; his students number in the thousands over the years.<sup>2</sup> Counsel for the board of education did not challenge Dr. Andes' qualifications or his testimony as an expert witness.

The first legal issue presented for decision relates to the necessity of employee input into the improvement plan and Policy 5310 provides that:

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<sup>2</sup> He has been professor of higher education since 1970 and associate dean since 1982; has a BS from the University of Florida, a theological degree from Wake Forest and three masters and one doctoral degree from the University of Florida in public and higher education administration.

Dr. Andes is also president-elect of the West Virginia Advisory Council on Professional Personnel for the Department of Education, which council recommends to the Department of Education all policies relating to personnel, staff development, teacher certification, etc. This past year he chaired a staff development subcommittee which was involved with evaluations and testified before the State Board of Education on Policy 5310-5315; he has conducted in-service workshops on staff development with local boards of education and regional education service agencies (RESA) dealing with evaluations.

An improvement plan shall be written by the evaluator, using input from the employee, for areas in which the employee needs improvement.

Dr. Andes opines that because the sole purpose of Policy 5310 is to improve the employee's performance and thereby improve the quality of education, employee input into an improvement plan is essential. Failure to do so creates an employee attitude which invalidates the purpose of Policy 5310 because if the employee is not involved he/she "gets their back up" and this is counter-productive to improving the employee's performance. Grievant's representative contends that an improvement plan developed solely by the supervisor without input from the affected employee is invalid for any purpose. Counsel for the board of education does not contest the necessity of employee input into the improvement plan and offers no argument on the issue.

The second legal issue is found in Policy 5310 as follows:

e. Improvement Team

- 1) The composition, duties and uses of the improvement team will be determined by the county board of education.
- 2) The improvement team will serve only as a resource to the immediate supervisor who retains decision making authority.
- 3) The improvement team may: a) conduct interviews, b) conduct at least two observations, c) develop a written improvement plan with the employee, d) provide assistance to the employee in meeting the performance requirements of the plan, and e) report the results of the plan's implementation to the immediate supervisor.

- 4) Upon referral, if the employee cannot or chooses not to remediate the deficiency, dismissal proceedings may be initiated if the deficiency substantially impairs the employee's ability to fulfill his/her job responsibilities.

According to Dr. Andes it was the intent of the developers of Policy 5310 that when the employee requested an improvement team the improvement plan developed by the supervisor would "sit" until the verification of the deficiencies was complete.<sup>3</sup>

Grievant's representative contends that Policy 5310 and Kanawha County School's Evaluation makes clear that an improvement team has responsibility to make a determination whether deficiencies exist and to develop an improvement plan; that the responsibilities placed upon the improvement team by Policy 5310 does not duplicate the function of the supervisor but supersedes that responsibility as it pertains to the responsibility for improvement planning.

Counsel for the board of education contends that Policy 5310 preserves to the immediate supervisor decision making authority and no authority relied upon by grievant compels an abrogation of that authority; that the continued viability of an improvement plan developed by a supervisor and an employee does not violate

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<sup>3</sup> Although there was no written memorial of this intent Dr. Andes had talked with the others who had worked on 5310 over the past three years and viewed that as an appropriate interpretation designed for employee benefit and protection. He stated that if the team was going to draw up a plan then the administration should not implement a plan in the interim or there would be no point in having a team.

any law, policy or regulation.<sup>4</sup> Finally, counsel contends that if such a modification is mandated it should be done by the State Board of Education and not the Education Employees Grievance Board.

The final issue to be resolved is the definition of "receivers of service" contemplated by Policy 5310, (7), section D, 2 (f), which states:

Receivers of Service: the population most immediately served by the employee, e.g., students as receivers of service from teachers, teachers as receivers of service from principals. (Grievant's Exhibit No. 1).

In the evaluation process of Policy 5310 it is provided that:

As part of the evaluation process, information on the established performance standards may be obtained from receivers of the employee's service.

Kanawha County Schools utilizes a definition more broad in scope than 5310 which is as follows:

The immediate supervisor may request relevant information from any receivers of the professional support personnel service (i.e., principals, students, teachers, service employees). Any information used by the immediate supervisor in the evaluation process must be shared with the professional support personnel. (Kanawha County Handbook, page 8).

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<sup>4</sup> Kanawha County Schools Evaluation Handbook for Professional Support Personnel provides that the purpose of the improvement team is to (1) verify the identified deficiencies as determined by the supervisor, (2) provide technical assistance to the employee, and (3) to report the results of the plan's implementation to the employee and the immediate supervisor. (Grievant's Exhibit No. 2, page 30).

Dr. Andes testified that the more comprehensive provisions of the Kanawha County Handbook would permit a supervisor to consider information from secondary sources which had not been personally observed by the supervisor so long as this information is shared with the employee.<sup>5</sup> He emphasized that personal observation is the key to Policy 5310 and that for secondary data to be acceptable it must be verified and shared with the employee.

Grievant contends that receivers of service for an employee is that population most immediately served by an employee and an evaluation or improvement plan based on information received from receivers of service must be substantiated by properly recorded observation; that an evaluation or improvement plan based on data received from non receivers of service is invalid. Counsel for the board of education responds that limiting the supervisor to an information base consisting of the supervisor's own observations and consultation with students as the receivers of service is unreasonable and not required by law or policy; that consultation with other professionals who work with the employee and rely upon that employee's professional contribution is not unreasonable even according to Dr. Andes.

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<sup>5</sup> Dr. Andes acknowledged that county school policy could go further than State Policy as long as the due process rights of the employee were safeguarded; that if the safeguards limited administrators it was preferable to have administrators limited than employees hurt through capricious and arbitrary administrative action.

## FINDINGS OF FACT

1. Grievant is employed as a psychologist by the Kanawha County Board of Education and filed a grievance alleging irregularities in an unfavorable evaluation and improvement plan issued by grievant's immediate supervisor.

2. At a level four hearing on November 12, 1986, a motion to dismiss that part of the grievance dealing with the evaluation was granted as untimely and the hearing was continued on motion of grievant until December 10, 1986.

3. On December 10, 1986, the grievance was compromised upon the agreement of counsel for the board of education to remove the February 18, 1986, improvement plan and the attachments thereto from the personnel files of the grievant and to submit certain legal issues to the hearing examiner after receipt of briefs from the parties and hearing the expert testimony of Dr. John Andes of West Virginia University.

## CONCLUSIONS OF LAW

1. West Virginia Board of Education Policy 5310, section D, 7(c)(6) requires that an improvement plan be written by the evaluator using input from the employee and the failure to follow the requirements thereof invalidates the improvement plan.

2. Pursuant to West Virginia Board of Education Policy 5310, section D, (7)(e), when an employee requests an improvement team to verify deficiencies in an improvement plan of the supervisor the improvement plan is not implemented until the improvement team has completed its duties unless the abatement thereof would present a danger to students and/or faculty or for other good cause shown.

3. Pursuant to West Virginia Board of Education Policy 5310, section D, (2)(f) and (7)(b)(3), the immediate supervisor may consider information from secondary sources not personally observed by the supervisor only when the information is verified and shared with the employee; failure to do so invalidates the improvement plan or evaluation.

Accordingly, the grievance is denied in part and granted in part.

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



LEO CATSONIS

Chief Hearing Examiner

Dated: February 24, 1987