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EMPLOYEES GRIEVANCE BOARD**
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KAREN P. GRAY

v.

Docket No. 20-87-111

KANAWHA COUNTY BOARD OF EDUCATION

DECISION

Grievant, Karen Gray, is employed as a Chapter I math teacher at Sharon Dawes Elementary School. On October 22 she received a written reprimand from her principal, Jana Tolliver, for a prank she had engaged in on October 10, 1986. She filed a grievance seeking an apology from the principal and removal of the reprimand from her personnel file; a level two evidentiary hearing was held in April 1987. A level four evidentiary hearing was conducted on September 24 and proposed findings of fact and conclusions of law were submitted on October 15, 1987.¹

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The hearing had been continued on motion of counsel for the school board due to the unavailability of the principal on the original hearing date. Except for the level two decision (Employee Exhibit 1) the level four hearing was a de novo hearing.

At level four grievant's representative abandoned the request for an apology and sought removal of the written reprimand from grievant's files and/or evaluations.
(footnote continued)

On Friday afternoon, October 10, 1986 during the final few minutes of the last class period for the day, grievant entered Mike Eakle's sixth grade classroom in a costume to engage in a "goodbye" gesture to Mr. Eakle, who had accepted a transfer. Mr. Eakle was in the rear of the room and as grievant approached him she opened the raincoat and then put her arm on his shoulder. About that time Mrs. Harper, another teacher at the school, brought her fourth grade class to Mr. Eakle's room to observe the prank.² The costume worn by grievant consisted of a trench coat, tights, a sleeveless leotard, an oversized T-shirt extending to above the knees and high heeled shoes; it had been worn by grievant on several previous occasions at the school and was a blend of two costumes -- one she had used to promote a math scavenger hunt sponsored by the Chapter I math group and another she had worn at an Easter program she and three other teachers had done for the student body.

(footnote continued)

The Education Employees Grievance Board has not generally awarded relief in the form of an apology but has encouraged the parties to pursue that type of relief on their own initiative. See, e.g., Zban v. Cabell County Board of Education, Docket No. 06-87-010.

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Grievant had released her students at 2:20 p.m. and they had departed her classroom. There were students in Mr. Eakle's classroom but grievant testified that she did not disturb them because they had their backs to her working on their math. Grievant stated that, at most, the entire incident was over in five minutes.

Grievant was off work with illness on Monday, October 13 and when she returned to work on Tuesday Mrs. Tolliver requested she come to her office, where grievant was informed that she (Mrs. Tolliver) was conducting an investigation into the incident the previous Friday. Grievant related to Mrs. Tolliver her version of the incident, including a description of the costume. Mrs. Tolliver informed grievant that she was surprised and shocked at such improper behavior and had received complaints from parents. When grievant realized the gravity of the situation she attempted to explain to Mrs. Tolliver the background of the use of the costume at the school in the math scavenger hunt and Easter program and expressed her remorse and sorrow that it had occurred; that she had not intended to harm anyone and would not do it again. Mrs. Tolliver opined and grievant agreed that the prank had been in poor taste and had disrupted instructional time and should not be repeated. According to grievant, Mrs. Tolliver did not indicate that she intended to take any further action and appeared satisfied with the private reprimand.

However, the following week, on Thursday, October 22 grievant was given a memorandum dated October 16 by Mrs. Tolliver which referred to the conference on October 13 and noted:

You are responsible for your conduct and the disruption of instructional time. As a result of this incident I feel obliged to formally reprimand you for the unprofessional behavior and to direct that a copy of the letter be filed with your permanent records.³

3

The memo concluded that Mrs. Tolliver was encouraged by grievant's statement that she would not repeat the (footnote continued)

Mrs. Tolliver testified that the math scavenger hunt and Easter program were fun and everyone was aware what was happening but to dress in such an outfit and appear in a male teacher's room was sexually suggestive and disruptive of instructional time; that if the same incident had occurred in the lounge after school she would have been the first person who would have laughed at it. Mrs. Tolliver had recommended to deputy superintendent Acord that grievant be suspended for two days and that Mrs. Harper receive a letter of reprimand for poor judgment in allowing her class to observe the incident. The report⁴ to Mr. Acord was, in pertinent part, as follows:

On Friday, October 10, 1986 - at 2:15 p.m. - Karen Gray - dressed in silver hose, long sweatshirt, high heels, covered by a raincoat, went into Mike Eakle's classroom to give him what she labeled as a going away gift. Karen walked into the classroom where Sandra Harper had assembled her class to witness the "gift". In front of Mike Eakle, and his class of twenty students, Sandra Harper and her class of twenty-four students - Karen Gray - flashed her coat open and tried to kiss Mr. Eakle.

This took place on instruction time, the behavior was completely out of line, very unprofessional, definitely not in the best interest of the children, or the image of our school. We are a learning institution not a three ring circus.

I was in a conference with another teacher

(footnote continued)

incident and would use better judgment in the future.

At level four grievant testified that at the time she delivered the memo Mrs. Tolliver advised her that the school board had been concerned that the incident would be discovered by the newspaper and become blown out of proportion; that otherwise the matter would have been resolved via the private reprimand. Mrs. Tolliver denied making the statement.

⁴ This report was based partly upon a discussion Mrs. Tolliver had with Mr. Eakle after his departure
(footnote continued)

and was not aware of this unprofessional behavior. Until I received complaints from parents. One parent stated it was very upsetting to her family - when at the dinner table her 4th level student wants to know what a "Flasher" is. (Employee Exhibit 2; emphasis in original).

Grievant contends that Kanawha County Schools advertises a policy of progressive discipline⁵ with the idea that disciplinary action should be measured -- sufficient to prevent future occurrence but not to the extent that there is undue damage to the employee's career; that an employee, once disciplined for an infraction, should be safe in the knowledge that no further action will be taken for the same event and it will not be resurrected unless there is a future similar incident. Grievant concludes that the principal, Mrs. Tolliver, in the first weeks of her first administrative position, overreacted and overly disciplined grievant for an incident over which grievant has shown much remorse and sorrow.⁶

(footnote continued)

from the school. However, grievant denied she attempted to kiss Mr. Eakle and since Mr. Eakle's testimony was not adduced this hearsay report cannot be used to contradict direct testimony. In addition, Mrs. Harper apparently did not confirm the assertion that grievant attempted to kiss Mr. Eakle; Mrs. Tolliver had also heard that grievant was attired in a bathing suit, which was untrue.

Mrs. Tolliver was advised by Mr. Acord and other school officials that her recommendation was too severe.

⁵ Grievant was permitted to adduce the testimony of her husband, Michael Gray, on the theory of progressive discipline. Counsel for the board moved to strike this evidence on the basis that the witness lacked the qualifications to testify as an expert and his unfamiliarity with the disciplinary policies of Kanawha County Schools. Upon review of this testimony the motion is granted and the testimony is stricken. Ventura v. Winegardner, 357 S.E.2d 764 (W.Va. 1987); Allison v. Kanawha County Board of Education, Docket No. 20-86-273.

⁶ Grievant was visibly emotional in recounting the (footnote continued)

Counsel for the school board does not contend that the costume was immodest or sexually suggestive but that the gesture of appearing as a "flasher" in the classroom in an outrageous costume thereby disrupting a classroom was unprofessional conduct warranting the official letter of reprimand.

In addition to the foregoing factual narrative the following specific findings of fact are appropriate.

FINDINGS OF FACT

1. Grievant is employed as a Chapter I math teacher at Sharon Dawes Elementary School; during her professional career she has generally received very good evaluations.

2. On Friday afternoon, October 10, 1986 during the final minutes of the last class period for the day, grievant entered the sixth grade classroom of Mr. Mike Eakle to engage in a "goodbye" gesture because Mr. Eakle was being transferred from Sharon Dawes Elementary School. Grievant wanted to do something humorous since she considered farewells as sad events.

(footnote continued)

incident at the level four hearing and acknowledged that it was an error in judgment. Reverend Sprague, her pastor at the East Bank Methodist Church, confirmed the emotional trauma grievant has suffered as a result of this incident. He has known grievant for ten years as an honest, decent person of high moral character who works actively with children in the church.

3. At the time grievant was clad in a costume described in another part of this decision, which costume had been worn by grievant on several occasions during school sponsored activities. Grievant approached Mr. Eakle, opened the raincoat and then put her arm on his shoulder; there is no contention that the costume was revealing or sexually suggestive and none is apparent from the evidence.

4. Mrs. Jana Tolliver, the new principal at the school, was in conference at the time and received a telephone call at home on Saturday from a parent who related that her daughter had inquired what was a "flasher" and had related the incident. Mrs. Tolliver telephone Mr. Eakle and commenced an investigation into the incident.

5. On Tuesday, October 13, 1986 Mrs. Tolliver summoned grievant to her office and requested grievant give her account of the incident, which she did. Mrs. Tolliver reprimanded grievant at that time for her conduct, grievant acknowledging that it had been in poor taste and disruptive of instructional time. Mrs. Tolliver requested and was given assurances by grievant that there would be no repetition of that or similar conduct and grievant was of the opinion that Mrs. Tolliver was satisfied the matter had been resolved. Grievant was and is sincere in her expressions of remorse and regret that she had committed the prank.

6. However, unknown to grievant, on October 14, 1986 Mrs.

Tolliver made a written report of the incident to deputy superintendent Acord and recommended that grievant be suspended for two days. This report was inaccurate or incomplete in several significant aspects, i.e., Mrs. Harper had not assembled her class to witness the prank but had entered Mr. Eakle's class without invitation by grievant; grievant did not attempt to kiss Mr. Eakle and there was only one complaint from a parent -- the one referred to in the report. The parent had also advised Mrs. Tolliver that the child had stated that grievant wore a bathing suit, which was inaccurate. Mrs. Tolliver testified that she had received one other telephone call at school but did not characterize it as a complaint as such.

7. Deputy superintendent Acord and other school officials met with Mrs. Tolliver and informed her that her recommendation was overly harsh but, based upon her account of the incident, apparently approved of the issuance of a written, official reprimand for grievant. At the time Mrs. Tolliver was not familiar with grievant's personnel file and did not consider her previous unblemished record as relevant to the decision to issue the official reprimand.

8. Accordingly, on October 16, 1986 Mrs. Tolliver delivered a written reprimand to grievant, with a copy thereof to her personnel file. Thereafter, in November, the incident was referred to in the observation form completed by Mrs. Tolliver but at grievant's request the reference was deleted by Mrs. Tolliver.

9. The probative evidence in this grievance preponderates in favor of a finding that the initial decision to discipline grievant was predicated upon erroneous and incomplete information and the issuance of the official reprimand was therefore arbitrary.

CONCLUSIONS OF LAW

1. It is not the function of the Education Employees Grievance Board to modify the discipline meted out to school employees but, instead, to examine and assess the evidence presented upon which the discipline was predicated. Totten v. Mingo County Board of Education, 301 S.E.2d 846 (W.Va. 1983); Curtiss Pinson v. Cabell County Board of Education, Docket No. 06-87-100-1.

2. The issuance of an official letter of reprimand which is based upon erroneous information is arbitrary as a matter of law.

The grievance is granted and it is Ordered that the official letter of reprimand be deleted from grievant's personnel file.

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.

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

LEO CATSONIS
Chief Hearing Examiner

Dated: November 25, 1987