



REPLY TO:
111 - 19th Street
Wheeling, WV 26003
Telephone: 233-4484

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

ANTHONY MCFARLANE

v.

Docket No. DOE-87-132-1

WEST VIRGINIA DEPARTMENT OF EDUCATION

D E C I S I O N

Anthony McFarlane, grievant, is employed by the West Virginia Board of Education as an Aide IV at the Colin-Anderson Center. On May 26, 1987 he filed a level four appeal protesting his three day administrative suspension for setting off a fire alarm at the Colin-Anderson Center.¹ In his level four filings, grievant's representative indicated that a hearing would not be necessary. However, on June 12, 1987, the Department of Education notified this Board that it would not waive the level four hearing and requested that a hearing date be scheduled. Accordingly, a level four hearing was conducted July 21 1987, at the Colin-Anderson Center in St. Marys, West Virginia and briefs were submitted by the parties on September 1 and September 11, 1987, respectively.

¹ Grievant had previously appealed the matter in accordance with State Board personnel policies, and the Department of Education conducted a level two hearing April 28, 1987. Tom McNeel, State Superintendent, affirmed the suspension by decision dated May 12, 1987.

On March 17, 1987 grievant was working in the North-South Living Area under the direction of Linda Springston, a teacher. In an attempt to determine whether the smoke detector was operable, grievant lit and held a burning paper under the detector which thereby set off a fire alarm throughout the living area. Donald Rice, principal of the facility, became aware of the incident the next day. He interviewed some employees who were in the North-South Living Area at the time of the incident, including the grievant, and subsequently sent a memorandum, dated March 19, 1987 to Robert Sturey, Assistant Director in the Office of Special Education, recommending that grievant be suspended for five days.

Rice listed as rationale for his recommendation that the alarm caused a disruption of services for the 140 severely handicapped residents of the Living Area, endangered the lives of some fragile residents requiring 24-hour care and caused undue alarm among staff and residents. He stated that grievant's conduct regarding his concerns about the fire alarm system was inappropriate, irresponsible and unacceptable, and as such, warranted punishment.

By letter dated March 25, 1987, John Pisapia, Assistant State Superintendent, notified grievant that the fire alarm incident necessitated disciplinary action and he was recommending

to the Superintendent that he (grievant) be suspended three days without pay. By letter dated March 30, 1987, the State Superintendent acted upon Pisapia's recommendation and so notified grievant of his suspension effective March 31, 1987.

The department contends that it not only properly exercised its authority and discretionary powers to discipline grievant, but also met its burden of proving the charges to suspend grievant.

Grievant does not dispute that he set off a fire alarm while attempting to test a smoke detector, but argues that the Department of Education failed to follow the disciplinary action procedure of the Health Facilities Employee Handbook and has otherwise failed to prove the suspension charges by a preponderance of the evidence.

Grievant states that the suspension recommendation written by grievant's principal was not sent to the Bureau Assistant Superintendent, Mr. Pisapia, but instead to Mr. Sturey, and that the stated reasons were not documented, both Handbook step one procedural requirements. Step two requires that the Bureau Assistant Superintendent shall investigate the matter and, grievant

contends, Mr. Pisapia delegated the job to Mr. Sturey, who in fact, conducted no investigation other than an interview with Principal Rice.²

In addition to the foregoing, the following specific findings of fact and conclusions of law are appropriate.

FINDINGS OF FACT

1. Grievant has been employed at the Colin-Anderson Center since 1982; he has been employed by the Department of Education as an aide at the Colin-Anderson Center since 1984.

2. On March 17, 1987 grievant was working in the North-South Living Area under the direction of teacher Linda Springston. Grievant admits that he placed a piece of burning paper under a smoke detector to see if it was operable and caused a fire alarm to sound throughout the living area.

²It would seem that both of grievant's arguments are flawed and must fail. Grievant overlooks his admission that, without authorization to test the smoke detector, he did, in fact, place burning paper beneath the detector and cause the fire alarm to sound. Therefore no investigation was required as the offense was admitted. Under those circumstances, grievant's arguments regarding procedural infractions are weak at best, as persons authorized to mete discipline were utilized.

Since the Department acted upon grievant's admitted offense, among other things, grievant's further arguments as to whether disruption and endangerment actually occurred will not be reached.

3. There is no authority vested in grievant to test smoke detectors nor did he seek permission from the proper authorities to test said equipment in the living area on March 17, 1987.

4. Grievant claims he did not intend to set off the fire alarm but he knew or should have known that if the smoke detector was operable, a false fire alarm would be made by his testing of the detector with a burning piece of paper.

5. Administrative notice can be taken that a great potential for disruption and endangerment exists among residents and staff when an unexpected and unauthorized false fire alarm occurs in a facility charged with the medical and educational care and treatment of resident mentally and physically disadvantaged persons.

6. Grievant was notified by Assistant State Superintendent John Pisapia that a disciplinary action was warranted as a result of the fire alarm incident. Pisapia stated in the March 25, 1987 communication that he would recommend to the State Superintendent that grievant be suspended for three days without pay. The State Superintendent acted on the recommendation March 30, 1987.

CONCLUSIONS OF LAW

1. The Department of Education's, Health Facilities Employee's Handbook, provides that when an offense is of such magnitude to warrant it, an employee may be suspended for "misuse of state property ... and violations of law...."

2. State law prohibits the making of a false fire alarm known to be false at the time of making, W.Va. Code, 29-3-21, and grievant's admission that he caused a false fire alarm to be made precludes the need for an investigation to determine whether he did, indeed, perform the prohibited act or documentation of proof thereof.

3. Whether or not the false fire alarm was disruptive or caused endangerment to any persons is immaterial as the potential for disruption and endangment existed under the circumstances.

4. In this instance, the Department's substantial compliance with technical requirements of disciplinary procedures have not prejudiced the interests of grievant herein. Pearl B. Cohen v. West Virginia University, Docket No. BOR1-86-247-2.

5. 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.

6. The Department's exercise of its powers to discipline and suspend was not shown to be arbitrary, capricious or an abuse of discretion.

Accordingly, the suspension decision is affirmed and grievant's request for three days' lost wages is DENIED.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Pleasants 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 30, 1987

Nedra Koval

NEDRA KOVAL
Hearing Examiner