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VIRGIL KELLY

v.

Docket No. 18-87-179-3

JACKSON COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant, Virgil Kelly, signed a probationary contract of employment with the Jackson County Board of Education on July 26, 1986 and was assigned to Gilmore Elementary School at the beginning of the 1986-87 school term to teach seventh and eighth grade math and science classes. By letter dated May 1, 1987 Mr. Kelly was informed he had not been recommended for rehiring and he would, therefore, not be employed for the 1987-88 school term. Grievant requested and received an explanation for not being rehired and a hearing before the Board. After an adverse decision by the Board, grievant appealed directly to Level IV. In July 1987 the parties agreed to submit the case for decision on the record and briefs.¹

¹Apparently counsel for the grievant and the Board had some difficulty upon a briefing schedule and briefs were not received until March 3, 1988.

There is little if any factual dispute between the parties and the events leading to the grievance are as follows:

1. On October 30, 1986 grievant's principal at Gilmore, Mr. Charles Shaver, completed a personnel evaluation of his performance and gave him an overall rating of "meets standards" and noting "highly effective" or "effective" in all categories. (Grievant's Exhibit No. 1)

2. There was a change in principals and the new principal, Mr. Hackworth, made observations of grievant's classroom performance on January 27 and 29, 1987 and completed a personnel evaluation on January 30, 1987 which overall indicated a "meets standard" rating and specifically noted four areas which "needed improvement". (Board's Exhibit T).

3. After another change in principals, the new principal, Ms. Casto, made observations of grievant's classroom performance on March 17 and March 26, 1987 and completed an evaluation on March 30, 1987 which indicated grievant did "not meet standards", specifically noting eleven areas where grievant's performance was unsatisfactory. An improvement plan containing eleven specific actions to be taken by grievant was attached. By its terms grievant's progress on this plan would be reviewed April 10, 1987. (Board's Exhibit S)

4. On April 2, 1987 Superintendent of Schools, Carroll Staats, directed Delores Ranson, Director of Elementary Education, and Rob Walters, Middle/Adolescent Director, both central office staff, to make observations of grievant's classroom performance and to complete independent evaluations of that performance. (Board's Exhibit P).

5. Ms. Ranson also made two observations of grievant's classroom and completed an evaluation on April 20, 1987 which found that grievant did "not meet standards". (Board's Exhibit O).

6. Mr. Walters made observations on April 7 and April 21, 1987 and completed an evaluation on April 21, 1987 which also found grievant did "not meet standards". (Board's Exhibit N).

7. On April 2 and April 7, 1987 grievant's principal, Ms. Casto, again made classroom observations and completed another evaluation on April 27, 1987 which also found grievant did "not meet standards". This was the last evaluation grievant received. (Board's Exhibit M).

8. Ms. Casto, Mr. Walters and Ms. Ranson all made written recommendations to the Superintendent that grievant not be rehired for the 1987-88 school term. (Board's Exhibit J, K, L).

9. In response to grievant's request for reasons for not being rehired, Superintendent Staats informed grievant the action was taken because of his unsatisfactory performance evaluation. (Board's Exhibit H).

Grievant takes issue with these actions of the Jackson County Board of Education and basically offers three legal arguments.

1. Personnel policies of the Jackson County Board of Education require that any improvement plans developed as a result of poor evaluations include input from the employee and grievant did not provide such input when his principal, Ms. Casto, wrote the improvement plan of March 30, 1987.

2. Notwithstanding the legality of the development of the improvement plan grievant was only given eleven teaching days between the date of the plan and the date of his last evaluation in which to achieve overall improvement in at least eleven cited areas of deficiency.

3. The excessive number of classroom observations of grievant's performance (seven observations in eleven days) and the resulting evaluations are indicative of a development of a "paper trail" by the Board in preparation for the termination of grievant's employment and thus not in keeping with the open and honest intent of the Board's own personnel policies.

The Board contends grievant was given opportunity to provide input in the development of the improvement plan and chose not to do so and grievant also had ample time to show improvement but actually

demonstrated even poorer performance. The Board further takes the position all observations and evaluations were in strictest compliance with county and state personnel policy.

Testimony at grievant's hearing before the Board was conflicting on the question of his input on the development of the improvement plan but the record is sufficiently supportive of the Board's contentions that he did not choose to assist in its formulation.

(T.53) The record is also not supportive of grievant's claim that the whole evaluation process was in some way manipulated to facilitate a preconceived decision to terminate his employment. There was no evidence presented that Superintendent Staats had planned to recommend grievant not be rehired before all the evaluations were completed.

The validity of grievant's remaining argument concerning his denial of a reasonable period of time to comply with the requirements of the improvement plan rests upon an interpretation of the applicable portion of the Jackson County Board of Education Policy GBI-GCI which reads:

All employees of the Jackson County Board of Education are covered with this evaluation policy. Each employee can expect an open and honest evaluation by his/her immediate supervisor which will show how well the employee is performing his/her assigned job. Any employee who has an unsatisfactory performance rating on an evaluation will be given the opportunity to improve his/her job performance prior to any action to terminate his/her services. It is recognized that every employee is entitled to due process in matters

affecting his/her employment. (State Board Policy 5310 Jackson County Board of Education, adopted June 20, 1985, Board's Exhibit Q)

(Emphasis added)

It appears from the record that because of a spring break and illness, grievant only taught eleven regular school days between March 30, 1987, the date he received the improvement plan and April 21, 1987, the date of the final classroom observation. (T.78,93) A review of the improvement plan (Board's Exhibit S) reveals at least eleven (11) changes to be completed by grievant and while some appear minor in terms of what might be required to implement them, the majority seem complex in nature and would require a considerable period of time to initiate and maintain. In Wren v. McDowell County Board of Education, 327 S.E.2d 464 (W.Va. 1985) the West Virginia Supreme Court of Appeals, upon a finding that the probationary employee in that case had one month to improve, noted:

Only one month elapsed between the time of the appellant's March 1982 evaluation and the recommendation of the Board that he be dismissed from his position as a school psychologist. There was clearly not time for the appellant to improve his performance even if he wanted to.

Even if it was conceded that the grievant, Virgil Kelly, had weekends and the regular scheduled spring break in which to work on the improvement plan, he would at best have had thirty days to complete it before the superintendent made his recommendation not to rehire him and it is therefore consistent with the Court's holding in Wren,

supra, to find grievant was not given the "opportunity to improve" as contemplated by State Board of Education Policy 5300 as adopted by the Jackson County Board of Education in Policy GBI-GCI. A failure of a county board of education to follow the evaluation provisions prohibits such board from discharging, demoting or transferring an employee for reasons having to do with incompetency. See generally, Trimboli v. Board of Education of the County of Wayne, 254 S.E.2d 561 (W.Va. 1979); Lipan v. Board of Education of the County of Hancock, 295 S.E.2d 44 (W.Va. 1982).

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

FINDINGS OF FACT

1. Grievant, Virgil Kelly, was first employed by the Jackson County Board of Education under a probationary contract of employment in July 1986 and assigned to Gilmore Elementary School to teach seventh and eighth grade math and science classes at the beginning of the 1986-87 school term.

2. Grievant was given evaluations in October 1986 and January 1987 which indicated his performance "met standards".

3. Grievant was given an evaluation by his principal, Lois Casto, on March 30, 1987 which indicated his performance did not

meet standards and an accompanying improvement plan which required grievant to correct deficiencies in at least eleven (11) different areas of performance.

4. Grievant's principal, Lois Casto, Rob Walters, Middle/Adolescent Director, and Delores Ranson, Director of Elementary Education, subsequently made at least six (6) classroom observations of grievant during the month of April 1987 and developed three additional evaluations all of which noted he did not meet performance standards.

5. Superintendent Staats did not recommend that grievant be rehired for the 1987-88 school term on April 30, 1987 and the Jackson County Board of Education voted on that date not to rehire grievant because of his poor personnel evaluations.

6. Grievant had only eleven (11) regularly scheduled working days from the time he received the improvement plan and the date of his final evaluation to implement the required changes in said plan.

CONCLUSIONS OF LAW

1. State Board of Education Policy 5300, et seq. and the personnel policies of the Jackson County Board of Education prohibit the termination of an employee for unsatisfactory performance unless

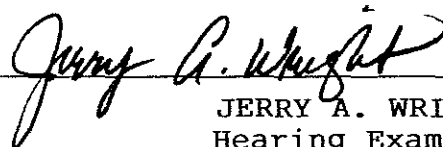
said employee is given an opportunity to improve his or her job performance.

2. The Jackson County Board of Education's decision not to rehire grievant for the ensuing school term on April 30, 1987 after he was given a written improvement plan on March 30, 1987 effectively denied grievant the opportunity to improve his performance. Wren, supra.

3. The Board's failure to follow the provisions of State Board of Education Policy 5300, et seq. nullifies its decision not to rehire grievant for the 1987-88 school term. Trimboli, supra; Lipan, supra.

Accordingly, the grievance is **GRANTED** and the Jackson County Board of Education is hereby **ORDERED** to reinstate grievant, Virgil Kelly, to his former position at Gilmore Elementary School and to further compensate him for any loss of wages due to his improper termination, less any appropriate set-off.

Either party may appeal this decision to the Circuit Court of Jackson County or the Circuit Court of Kanawha County and such appeal must be filed within thirty (30) days of receipt of said decision. (W.Va. Code, 18-29-7). Please inform this office of your intent to do so in order that the record can be prepared and transmitted to the Court.


JERRY A. WRIGHT
Hearing Examiner

DATED: March 23, 1984