

**REPLY TO:**

101 Harper Park Drive  
Suite D  
Beckley, WV 25801  
Telephone: 255-6155

**Offices**

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

**Members**

James Paul Geary  
Orton A. Jones  
David L. White

**WEST VIRGINIA EDUCATION  
EMPLOYEES GRIEVANCE BOARD**

ARCH A. MOORE, JR.  
Governor

EUGENE KINDER

v.

Docket No. 02-87-199

BERKELEY COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant, Eugene Kinder, is employed by the Berkeley County Board of Education and has been assigned to the position of guidance counselor at Hedgesville Senior High School for the past seven (7) years. Mr. Kinder filed a grievance in April 1987 alleging two personnel evaluations completed by his principal, Paul Stroup, were not open and honest assessments of his performance and thus violations of West Virginia Board of Education Policy 5300, et seq. A Level II hearing was held May 19, 1987. A decision rendered at that level instructed Mr. Stroup and grievant to review the last evaluation and if deficiencies were still found an improvement plan was to be developed in accordance with county policy. No such review took place and grievant appealed

to Level IV. The Board apparently waived proceedings at Level III.

Grievant received an evaluation on June 6, 1986 which indicated he did not meet standards in all areas of performance. Mr. Stroup's attached comments were based entirely on others perception of grievant's performance and included a personal opinion that substantial changes should be made or a different assignment considered. (Grievant's Exhibit No.1) No improvement plan was attached as required by the Board's personnel policy GBI (West Virginia Board of Education Policy 5300) and grievant indicated in writing his disagreement with Mr. Stroup's findings. No grievance was filed however upon the issuance of this evaluation and it is Mr. Kinder's contention that he is not barred by the timeline requirements of W.Va. Code, 18-29-4 from including it in the present grievance because it was part of a recurring aggrieved violation of policy. Such an interpretation cannot logically be placed on the clear and unambiguous language of that section of the West Virginia Code. A performance evaluation may be a component of an on-going process but it is a distinct and separable part of that process and a poor performance rating is clearly an "event" upon which a grievance may be based. Accordingly, Mr. Kinder's failure to file a grievance over the June 1986 evaluation precludes him from raising that issue in the present grievance.

The evaluation of March 30, 1987 indicates scores of "meets

standards" in five performance categories and five "does not meet standards".<sup>1</sup> Again there was no improvement plan and Mr. Stroup's attached comments merely related the fact that he and grievant had totally different opinions on his job performance. Mr. Kinder contends this evaluation was not based on any formal or informal observations but was merely the result of Mr. Stroup's reliance on rumors and innuendos circulated by students and citizens. In support of this allegation he points to the testimony of Mr. Stroup at Level II proceedings wherein it was admitted that no observations were made and the names of persons allegedly critical of the guidance counselor's office were not revealed. The record developed at those proceedings is more than sufficient to support grievant's basic claim that his evaluation was not conducted openly and honestly in accordance with the requirements of Berkeley County Board of Education Policy GBI.

Mr. Stroup related that his evaluation was based on his meetings with grievant and discussions with teachers, parents and students but he either could not or would not indicate specific incidents or conversations on which he formulated his conclusions contained on the evaluation form. When asked for any details or rationale for finding deficiencies in five (5) areas of performance Mr. Stroup consistently responded that he could not cite specific incidents of conduct. (T.37-53)

---

<sup>1</sup> Grievant and Mr. Stroup had a discussion about this evaluation and a minor change was made and the final form was dated March 30, 1987/April 7, 1987. It was signed by Mr. Stroup on April 8, 1987.

Understandably the process of evaluation for a high school guidance counselor poses some difficulties not associated with regular classroom teachers, particularly in the area of observation but Policy GBI contains a provision wherein an observation can be an informal sampling of the employee's performance. It also provides that information on the employee's performance may be obtained from receivers of the employee's services. Mr. Stroup therefore had some latitude to assess grievant on the basis of his observation of performance outside of the private student counseling sessions and information derived from students and parents but he had a duty to inform him of what criteria he was using and what weight it was to be afforded. See, Dunleavy v. Kanawha County Board of Education, Docket No. 20-86-240-1.

Generally the West Virginia Education Employees Grievance Board will not intrude upon evaluations under State Board Policy 5300 unless there is evidence of such an arbitrary abuse of discretion on the part of a school official to show the primary purpose of the policy has been confounded. Brown v. Wood County Board of Education, Docket No. 54-86-262-1; Thomas v. Greenbrier County Board of Education, Docket No. 13-87-313-4. It is clear, however, that grievants assessment was based on generalities and undisclosed sources of criticism and the basic premise of Policy 5300 that all employees are entitled to an open and honest evaluation of their performance was thereby thwarted. The lack of documented proof in an evaluation which accuses an employee of performing below acceptable standards renders it arbitrary and capricious.

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

#### FINDINGS OF FACT

1. Grievant, Eugene Kinder, is employed by the Berkeley County Board of Education as a guidance counselor assigned to Hedgesville Senior High School.

2. On June 6, 1986 grievant received an evaluation from his principal, Mr. Paul Stroup, which indicated he did not meet standards in all listed areas of performance but no grievance concerning this evaluation was filed at that time.

3. On or about April 8, 1987 grievance received an evaluation completed by Mr. Stroup which noted he did not meet standards in five listed areas of performance and no improvement plan or documentation of criteria used in the evaluation was provided to the grievant.

#### CONCLUSIONS OF LAW

1. A personnel evaluation is a separable and distinct part of an on-going performance assessment and poor ratings on said evaluation constitute a grievous event within the meaning of W.Va. Code, 18-29-4 and the grievance must be filed within the timelines prescribed in that section of the West Virginia Code.

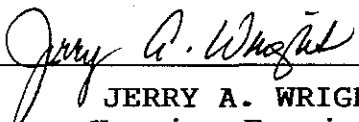
2. Grievant failed to file a grievance when he received the evaluation of June 6, 1986 and is precluded from including it in the present grievance filed in April 1987.

3. An evaluation which is not based on personal observation but utilizes information derived from undisclosed sources and other criteria not available to the employee is not an open and honest assessment of said employee's performance and a violation of West Virginia Board of Education Policy 5300, et seq. and Berkeley County Board of Education Policy GBI.

4. A failure to follow the requirements of West Virginia Board of Education Policy 5300 in the performance assessment of an employee invalidates the evaluation or improvement plan. Dunleavy v. Kanawha County Board of Education, supra.

Accordingly, the grievance is **GRANTED** and the Berkeley County Board of Education is hereby **ORDERED** to remove from grievant's personnel file the evaluation dated March 30, 1987/April 7, 1987.

Either party may appeal this decision to the Circuit Court of Berkeley 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:

June 16, 1988