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**WEST VIRGINIA EDUCATION AND  
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CHARLES K. SUTTON

v.

DOCKET NO. 28-88-110

MINERAL COUNTY BOARD OF EDUCATION

DECISION

Grievant, Charles K. Sutton, is employed by the Mineral County Board of Education (Board) as a teacher and varsity basketball coach assigned to Frankfort High School. Mr. Sutton filed a level one grievance on May 9, 1988 in which he alleged violations of State Board of Education Policies 5300 and 5310 and the county personnel policy relating to evaluation. The grievance was denied at level one and was dismissed at level two for having been untimely filed. A level four appeal was received on June 14 and an evidentiary hearing was conducted on November 10, 1988.<sup>1</sup>

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<sup>1</sup>Numerous continuances were requested by the Board as a result of two changes of counsel and their conflicts of schedule.

The testimony presented at the level four hearing establishes that the grievant received an observation form on or about January 12, 1988 which rated him "effective" in his capacity as basketball coach.<sup>2</sup> Sometime later in January or early February parental complaints were made known to Principal Don Knotts regarding the grievant's use of unacceptable language to the team members. The grievant testified that he discussed the matter with Principal Knotts, who informed him that he had suggested the parents contact the grievant individually. The grievant admitted that he had referred to team members individually and collectively as "prime time pussies", which he intended to mean they were meek and that he had told the team they had "sucked", a term which he hears numerous times during the day. Nevertheless, the grievant asserts that, following his discussion with Principal Knotts, he ceased using these terms.

According to Dr. Shirley Ball, Superintendent, she received a telephone call from a parent in late January concerning the grievant, at which time she advised the individual to contact the school principal. When Dr. Ball returned to work in late

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<sup>2</sup>The observation form included seven categories of criteria which were to be rated as not observed, effective, attention needed or unsatisfactory.

February after a lengthy leave of absence a second parent presented her with five written statements of concern regarding the grievant.<sup>3</sup> Dr. Ball stated that she held a conference with the grievant and Principal Knotts, who determined that the matter was correctable, and that a plan of improvement should be implemented.

The grievant received a second observation form dated March 18, 1988. This observation rated the grievant in the area of self-control as "attention needed" and in the use of appropriate language as "unsatisfactory". Attached to the observation form was a plan of improvement which stated the deficiency to be appropriate language. The plan provided that the grievant was to refrain from the use of profane or derogatory terms and was to be monitored by neutral observers who would attend all practices and half-time locker room meetings of home games and through the questioning of team members. A final evaluation was scheduled for March 31, 1989.<sup>4</sup>

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<sup>3</sup>These letters contained repetitive complaints regarding the grievant's language but also made allegations of mental and physical abuse by the grievant. These issues were not addressed through evaluation and are not a part of the plan of improvement.

<sup>4</sup>The plan of improvement was given to the grievant after the 1987-88 basketball season and was therefore to be effective the 1988-89 season.

Prior to the grievant's receiving the plan of improvement Dr. Ball presented the parental letters of complaint to the Board. She testified that while the Board's reaction was to fire the grievant she thought that the situation might be more easily remedied by asking the grievant to resign, which she did by letter dated March 16, 1988. The grievant refused to submit his resignation and Dr. Ball subsequently notified him by letter of April 4 that she would recommend to the Board that he be placed on the administrative transfer list for the 1988-89 school year from his assignment as teacher/coach to the position of teacher.

In compliance with the grievant's request for a statement of the reason(s) for the proposed transfer Dr. Ball advised that he had allegedly engaged in the consistent use of immoral language which went beyond profanity to verbal, mental and emotional abuse; to have been cruel, abusive and negative in his treatment of the team; and that he was neglectful of duty by ignoring and acting in disregard of the players' injuries.

The grievant requested a hearing before the Board on the above-stated charges; however, by letter of April 20 Dr. Ball advised him that she was not prepared to recommend his transfer until her investigation was completed and the constraints of

time would not permit that prior to the deadline for Board action regarding transfers on May 2, 1988. Dr. Ball advised the grievant that he would remain in his present position for the 1988-89 term but that she would take steps to ensure that the concerns of the students and parents were addressed.

The grievant argues that the plan of improvement is defective as it did not follow an evaluation nor was he permitted any input into the plan as required by state and county policies. The Board asserts that it is working within the framework of the policies and guidelines to address the problem.

Prior to addressing the merits of this matter, consideration must be given to a Motion to Dismiss made by the Board. The Board argues that the plan of improvement was given to the grievant on March 18 yet the informal conference prior to filing a level one grievance was not held until May 3, long past the 15 day statutory deadline. The grievant concedes that the delay occurred but argues that the intervening effort to transfer him stayed the time lines for filing a grievance regarding the plan of improvement. Had the transfer been implemented the plan of improvement would have been moot; therefore, the grievant argues that the 15 days should be effective April 20, when

the proposed transfer was withdrawn, or, in the alternative, 15 days from the beginning date of the 1988-89 basketball season.

As the request for the grievant's resignation occurred after the conference in which Principal Knotts advised Dr. Ball that a plan of improvement would be developed and the proposed transfer occurred after the plan of improvement had been issued it would reasonably appear that the administration had chosen to remove the grievant from the position rather than proceeding with the plan of improvement. When the revised course of action did not transpire the Board reverted to the plan of improvement for the 1988-89 school year. In effect the Board issued a plan of improvement, negated the plan when it opted for transferring the grievant and then readopted the plan when the transfer processings were abandoned. The informal hearing was held on May 6, within 15 days of the revised action shifting back to the plan of improvement. The grievant has pursued the matter with due diligence after ascertaining the intent of the Board and has acted in substantial, if not actual, compliance with the statute, which requires that matters be raised in a timely manner. Accordingly, the Motion to Dismiss is denied. See Murphy v. Mingo County Board of Education, Docket No. 29-86-341-1 (May 28, 1987).

State Board of Education Policy 5310(D) provides that when an improvement plan is written the evaluator shall use input from the employee. The grievant's uncontroverted testimony was that he had no input into the plan. According to Dr. Ball the plan may have been discussed with the grievant but Principal Knotts was not called as a witness to controvert the grievant's testimony. The failure to follow the procedural requirements of Policy 5310 renders a plan of improvement void and unenforceable.

In addition to the foregoing narration it is appropriate to make the following specific findings of fact and conclusions of law.

#### Findings of Fact

1. The grievant has been employed by the Mineral County Board of Education as a teacher for 20 years and as a coach for 18 years. He is presently assigned as a teacher and varsity basketball coach at Frankfort High School.

2. The grievant was rated as "effective" in his capacity as coach as an observation form dated January 12, 1988.

3. In late January or early February parental complaints were made regarding the grievant's use of unacceptable language to members of the basketball team.

4. The grievant concedes that he referred to the team as "pussies" and told them they "sucked" but asserts that when the matter was brought to his attention by his principal that he no longer used that terminology.

5. In late February additional complaints were filed by parents concerning the grievant's use of the unacceptable language and other charges.

6. At a meeting with the grievant and Dr. Shirley Ball, Superintendent, Principal Don Knotts opined that the situation was correctable and that a plan of assistance would be developed.

7. Dr. Ball made the Board of Education aware of the complaints and by letter dated March 16, 1988 requested the grievant's resignation. The grievant did not comply with that request.

8. The grievant received a second observation form dated March 18 which indicated that attention was needed in the area of self-control and that his use of appropriate language was unsatisfactory.

9. A plan of improvement was attached to the March 18 observation form. The grievant was given no opportunity to participate in the development of this plan.

10. The grievant was notified by Dr. Ball on April 4 of her intent to recommend that he be transferred from his assignment of teacher/coach to that of teacher for the 1988-89 school term.

11. Dr. Ball notified the grievant by letter of April 20 that she would not recommend the proposed transfer.

12. The grievant began grievance proceedings on May 6, 1988, when an informal conference was held with his immediate supervisor.

#### Conclusions of Law

1. Grievance proceedings must be initiated within 15 days following the occurrence of the event upon which the grievance is based or within 15 days of the date on which the event became known to the grievant or within 15 days of the most recent occurrence of a continuing grievable practice. W.Va. Code §18-29-4.

2. The grievance was timely filed within 15 days of the transfer proceedings being dropped and the reversion to the plan of improvement.

3. W.Va. 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 plan. Dunleavy v. Kanawha County Board of Education, Docket No. 20-86-240-1 (February 24, 1987); Brown v. Wood County Board of Education, Docket No. 54-86-262-1 (March 1, 1988).

Accordingly, the grievance is GRANTED and the plan of improvement is to be withdrawn.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mineral County and such appeal must be filed within thirty (30) days of receipt of this decision. (W.Va. Code §18-29-7) Neither the West Virginia Education and State Employees Grievance Board nor any of its Hearing Examiners is a party to such appeal, and should not be so named. Please advise this office of any intent to appeal so that the record can be prepared and transmitted to the appropriate Court.

DATED: December 9, 1988

Sue Keller

SUE KELLER

HEARING EXAMINER