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**WEST VIRGINIA EDUCATION
EMPLOYEES GRIEVANCE BOARD**

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LARRY BROWN

v.

Docket No. 54-87-221-3

WOOD COUNTY BOARD OF EDUCATION

D E C I S I O N

The grievant, Larry Brown, is employed by the Wood County Board of Education and is assigned to Blennerhassett Junior High School as a science teacher. By letter dated April 19, 1987 he filed a level four appeal of two grievances in which he had not prevailed at the lower administrative levels. One grievance alleged wrongdoing regarding his 1986-87 evaluation and the other protested his principal's issuance of a plan of improvement calling for the formation of an "assistance" team. The grievances were acknowledged and assigned one docket number; however, upon the request of grievant's WVEA representative matters were held in abeyance pending review of the level two transcripts. Subsequently, by letter dated September 4, 1987, grievant's representative advised that the parties agreed to submit the grievances for decision based upon the record developed at level two and submission

of written briefs on or before October 31, 1987 (the briefs were received November 3, 1987).¹

The basic facts giving rise to grievant's complaints are not contested. During the 1985-86 school term grievant's principal rendered an evaluation noting that grievant Does Not Meet Performance Standards (DNMPS) in the standard, "Monitors Student Progress Toward Learning Outcomes" and attached an improvement plan thereto. A grievance was filed and in due time the issues were adjudicated at level four. A decision was rendered by the undersigned hearing examiner on May 5, 1987. A copy of that grievance decision, Larry Brown v. Wood County Board of Education, Docket No. 54-86-262-1 is appended to this decision and the historical data will not be reiterated herein. Grievant appealed the decision to the Kanawha County Circuit Court where it is currently pending.

The issues giving rise to the instant grievance are identical, or nearly so. For school year 1986-87 grievant was again evaluated by Principal Summers; he was again dissatisfied with the evaluation and remedial action and filed a grievance on the matter.

¹Two separate level two hearings were conducted July 20, 1987 and separate transcripts were prepared. In order to facilitate an adjudicator's review of the record at higher levels, school officials are advised that a level two transcript prepared in-house should contain, at the minimum, a covering sheet entry identifying documents submitted by each party by number and title and bound to the transcript and an affidavit signed by the transcriber attesting to the accuracy of the transcription.

The 1986-87 Evaluation

Grievant's 1986-87 evaluation rendered May 21, 1987 by his principal was again predicated on "aberrant grade distribution," i.e., grievant's students again received a disproportionate amount of Ds and Fs in comparison with other teachers' grade distributions. Grievant was accorded a DNMPs in "Monitors Student Progress Toward Learning Outcomes."

Grievant argues that the open and honest provisions of State Policy 5300 were violated as no showing was made with respect to how grievant's grade distribution indicated a failure to meet the cited performance standard since grievant met all the (printed) indicators for the standard. He urges that school regulations are to be strictly construed in favor of the employee and requests that his 1986-87 evaluation be purged from all records.

The board contends and argues that:

1) grievant's grade distribution was a subject of concern for several years and he had been so notified,

2) the inclusion of grade distribution as an indicator for the performance standard is provided via policy language indicating areas "such as" teacher grading and teacher grading is a legitimate evaluative concern offending neither state or county policy and

3) that the May 5, 1987 adjudication now pending in circuit court has not been overturned thus far and the doctrine of res judicata should apply with respect to this grievance issue.

On the basis that the matter is pending before the Kanawha County Circuit Court, this grievance issue, the 1986-87 evaluation, shall not be addressed herein, however, grievant's rights are preserved should the Court determine the 1985-86 evaluation was improper.

The "Team of Assistance"--1986-87

By letter dated May 14, 1987, grievant's principal notified grievant that they must develop an Improvement Plan and he (the principal) would recommend that the plan include an assistance team. By letter dated May 21, 1987 grievant furnished his principal "input" and suggestions to implement an improvement plan. Suggestion 2 stated, "That you provide assistance based upon a continuous period of time in a class to experience assignments, presentation, illustration, quizzes, review and final evaluation and follow-up that takes place therein."²

²Clearly, grievant indicated a desire for a closer scrutiny of his teaching performance in order that an in-depth analysis be made thereof. From the testimony adduced at level two, it appears that he expected the principal himself to devote an extended period to the task (T.10, Improvement Team Grievance).

The Improvement Plan appended to the May 26, 1987 evaluation noted that grievant was to "[c]ooperate with an assistance team which will take a closer look at the cause for your grade distributions." The four team members were to observe grievant's classes, confer with him and recommend remedial measures to the principal on or before October 2, 1987. After the principal's endorsement of the measures, grievant was to implement the remediation.

Grievant contends and argues that the use of a team of assistance violates county board policy 4117 (E) (5) which forbids use of an improvement team unless an employee rates an overall DNMPs and the board is bound by the policies it properly establishes. He asks that the team of assistance be dissolved and all compiled reports be destroyed.

The board defends its actions on this grievance issue by asserting that the measures taken were an implementation of the previous Brown decision rendered May 5, 1987. It argues that its authority stems from county policy 4117(C) (2) which permits a supervisor to appoint a person with expertise to observe an employee and make recommendations to the supervisor who shall then inform the employee of the results and recommendations.

Whether the team be labeled improvement team, assistance team or team of assistance, it is true, as grievant suggests, that the terms are interchangeable and the function is identical. The crux of the matter is, thus, County Policy 4117(E) (5). While school board regulations can provide greater rights, remedies and grievance procedures for its employees than required by statute or policy and be held to them, a school board cannot adopt and implement regulations that diminish the explicit language and intent of State school policy.

Insofar as Wood County Board of Education Policy 4117(E) (5) providing for the initiation of an improvement/assistance team limits the procedures available for an employee not meeting performance standards as set forth in State Board Policy 5310(D) (7) (d) (1), it is void and of no effect and the board has properly provided grievant the assistance that his principal was unable to provide and to which he is entitled. Trimboli v. Bd. of Ed. of Cty. of Wayne, 254 S.E.2d 561, 566 (W.Va. 1979).

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

FINDINGS OF FACT

1. The grievant is a science teacher currently assigned to Blennerhassett Junior High School. On May 21, 1987 he received an evaluation from his principal citing that he did not meet performance standards for the standard, "Monitors Student Progress Toward Learning Outcomes" with comment, "Aberrant grade distribution." Grievant filed the instant grievance protesting the evaluation and requesting that it be purged from all relevant files.

2. Grievant received a nearly identical evaluation for the 1985-86 school year and his protest thereto culminated in a prior level four grievance adjudication, Larry Brown v. Wood County Board of Education, Docket No. 54-86-262-1, decided May 5, 1987. Grievant appealed the previous Brown decision to the Kanawha County Circuit Court and the propriety of the 1985-86 evaluation is pending before that court.

3. A Plan of Improvement calling for the formation of a team of assistance was attached to the 1986-87 evaluation. The team was directed to confer with grievant, make observations and compile recommendations to be submitted to grievant's principal. Upon the principal's endorsement, grievant would then implement recommended measures for improvement.

4. Input from grievant regarding an improvement plan indicated his desire that the principal provide assistance via in-depth monitoring and scrutinizing of his teaching performance. The record in this and the previous Brown decision indicate grievant's principal is unable to provide improvement.

5. County Policy 4117(IV)(E)(5) restricts the use of an improvement team to only those employees with an overall DNMPs. However, in this instance, school officials' use and implementation of the assistance team comports with that of an improvement team authorized by State Policy 5310(D)(7)(d)(1) to assist an employee not meeting performance standards when the immediate supervisor is unable to provide improvement for the employee.

CONCLUSIONS OF LAW

1. State Board Policy 5300 providing evaluation and opportunity to improve is a mandatory function of every board of education, and right of every board employee. Trimboli v. Bd. of Ed. of Cty. of Wayne, 254 S.E.2d 561, 566 (W.Va. 1979).

2. State Board Policy 5310(C)(2) provides that a county develop and implement evaluation policies and procedures adding components and processes as determined by local needs. This provision does not authorize a board to limit or delete those remediation provisions explicitly provided in the Policy.

3. State Board Policy 5310(D)(7)(d)(1) provides for referral to an improvement team for employees not meeting performance standards when the immediate supervisor cannot provide improvement for the employee and a county policy which limits or omits this entitlement is void.

4. The board of education properly provided grievant with a team of assistance or improvement team which comports to the provisions of State Policy.

Accordingly, this grievance is **DENIED**.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wood 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: March 1, 1988

A handwritten signature in cursive script, reading "Nedra Koval", written over a horizontal line.

NEDRA KOVAL
Hearing Examiner