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MOSS BURGESS

v.

Docket No. 23-88-046

LOGAN COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant, Moss Burgess, is employed by the Logan County Board of Education as a teacher assigned to Logan Senior High School. He filed a grievance on January 1, 1988 protesting the placement of a written warning in his personnel file. A Level II hearing was held on March 1, 1988 and the decision at that level directed the grievant to meet with his principal for the purpose of resolving the dispute. A resolution could not be reached and an appeal was made to Level IV on March 25, 1988. A Level IV hearing was held on June 3, 1988.

There is essentially no dispute between the parties as to the facts giving rise to the grievance. On or about January 20, 1988 the teachers were informed they would be responsible for the completion of their homeroom students' permanent record

cards. Apparently the former principal, Ms. Cosma Crites, had indicated earlier that the school's secretaries would be performing this task and the new instructions displeased grievant and several other teachers. On January 22, 1988 Mr. Burgess entered the school office and made an inquiry of Mr. Cletis Napier, assistant principal, as to who would be completing the cards and was informed it would be the duty of any teacher with a homeroom. Grievant then made a statement to the effect that this task had been so assigned because the secretary was too lazy to do it. This statement was directed toward two other teachers in the office at the time. There were no other persons present in the area and Mr. Napier overheard the statement and subsequently reported the matter to the principal, Mr. Robert Lonker, indicating he felt grievant's actions could have "possible repercussions". (Joint Exhibit No.1) Mr. Lonker subsequently held a discussion with Mr. Burgess in which he refused to make an apology to a particular secretary as suggested by Mr. Lonker. Grievant was then informed the incident would be reduced to writing and placed in his personnel file. A memorandum to Mr. George Klipa from Mr. Bob Lonker dated January 22, 1988 was subsequently placed in grievant's file. The subject matter of this memorandum is noted as "Written Warning" but is merely a recount of the events of January 22, 1988 containing a conclusory statement that the "negative comment has created distrust between our secretary and Mr. Burgess." (Joint Exhibit No.1)

Grievant contends Mr. Lonker's actions were in contravention of his First Amendment rights to freedom of speech and discriminatory as other teachers at the school who have openly criticized the performance of certain employees have not been similarly reprimanded. He further asserts the placement of the memorandum in his file is a violation of Section VI.5 of the Rules of Regulations of the Logan County Board of Education, which reads:

An employee, regardless of his position or work performed, may be warned, or recommended for suspension or dismissal by his immediate supervisor whenever the supervisor considers the good of the school division to be served by such action. The cases for suspension or dismissal fall into two categories: (1) Causes relating to performance of duties, and (2) causes relating to personal conduct.

...

The following causes relating to personal conduct are representative of those considered for suspension or dismissal.

...

6. Participation in any action which would tend in any way to seriously disrupt operation of a school or school services.¹

¹The parties stipulated these provisions were the relevant Board personnel policy and that there is also an implicit provision contained therein that they be applied in a manner which is not arbitrary and/or capricious.

The Board takes the position that grievant's statement had the effect of creating hard feelings between himself and the secretary which were disruptive to the operations of the school and therefore the situation required some corrective actions. The Board further asserts that if there was an infringement on grievant's freedom of speech, it was minimal and reasonable under the circumstances.

In support of his allegation that Mr. Lonker's actions constituted discrimination, grievant specifically noted one occasion at a faculty meeting on January 11, 1988 in which Ms. Barbara Vance, another teacher at Logan Senior High, criticized the practice of certain other unidentified teachers for not following policy on the completion of forms relating to student absences and remarked that those teachers were just lazy. (T.__) The Board does not dispute grievant's account of this incident but notes that Ms. Vance's comments were not directed toward a specific person whereas grievant's remarks concerned a particular employee. (T.__) Similarly, the Board also makes a distinction between grievant's statement and certain criticisms that Mr. Napier voiced about a particular employee because those criticisms, although made to teachers, were stated in private conversations. (T.__)

Grievant provided no legal authority in support of his contentions regarding an infringement upon his First Amendment rights but merely asserted criticisms of fellow employees was within the purview of those rights. Allegations raised but not developed

or pursued are considered abandoned, Church v. McDowell County Board of Education, Docket No. 33-87-214; Farmer v. Logan County Board of Education, Docket No. 23-87-052-4, and accordingly this particular part of the grievance is not further addressed herein. Grievant's charge concerning the discriminatory application of the Board's disciplinary policy, however, has merit. The distinctions made between grievant's statement in the school's office on January 22, 1988 and Ms. Vance's remark at a faculty meeting are at best illusory. Persons present in the office could have assumed which employee grievant was making reference to but no name was used and the circumstances surrounding the criticisms made during the faculty meeting were quite similar in that no names were used and the same inferences could be made. Moreover, the Board's reliance on the disruptive nature of Mr. Burgess' comment as cause for corrective action loses a great deal of credibility when it is noted no such action was taken against a teacher making a like statement before a much larger audience. Additionally it appears any disruption of the operations of the school as a result of grievant's remark could have been minimized by a disregard for the whole matter. Instead, Mr. Napier, the assistant principal, informed the secretary of what was said and such an action is not indicative of an attempt on the part of the administration at Logan Senior High School to maintain harmony among its employees.

The disparity in the application of Board's disciplinary policy to two employees at the school, in similar circumstances, may not in itself be a violation of the provisions of W.Va. Code, 18-29-2(m) but it is an indication that the policy as applied in grievant's case was not based on an unbiased assessment of his actions.² The Board's failure to make such an assessment before the written warning was placed in grievant's file was a violation of the implied provision of its own personnel policy that disciplinary actions be made in a manner which is not arbitrary or capricious.

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

FINDINGS OF FACT

1. Grievant, Moss Burgess, is employed by the Logan County Board of Education as a teacher assigned to Logan Senior High School.

²W.Va. Code, 18-29-2(m) defines discrimination as:

any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.

2. On January 22, 1988 grievant made a statement in the presence of two other teachers and the assistant principal, Mr. Cletis Napier, to the effect that the assignment of the completion of student permanent record cards to homeroom teachers was made because the secretary was too lazy to do it.

3. Grievant subsequently received a written warning concerning his statement on January 27, 1988 and said warning was placed in his personnel file.

4. Ms. Barbara Vance, a teacher at Logan Senior High School, made a similar remark on January 11, 1988 at a faculty meeting concerning the failure of certain teachers at the school to follow procedures for the completion of student absence reports and received no warning, oral or written.

CONCLUSIONS OF LAW

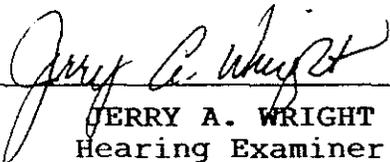
1. Pursuant to Logan County Board of Education personnel policy, employees' direct supervisors may take disciplinary action against said employees in the form of oral and/or written warnings but such action must be applied uniformly and in a manner which is not arbitrary or capricious.

2. The failure of Mr. Robert Lonker, principal at Logan Senior High School, to apply the Logan County Board of Education

personnel policy uniformly among employees at the school was an arbitrary and capricious action and a violation of said policy.

Accordingly, the grievance is **GRANTED** and the Logan County Board of Education is hereby **ORDERED** to remove from the personnel file of the grievant, Moss Burgess, the written warning dated January 22, 1988.

Either party may appeal this decision to the Circuit Court of Logan 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: August 22, 1988