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**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**

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HASKELL HOLLEY

v.

Docket No. 89-22-79

LINCOLN COUNTY BOARD OF EDUCATION

DECISION

Grievant Haskell Holley, employed by Respondent Lincoln County Board of Education as a sixth-grade teacher at Hamlin Elementary School, on December 5, 1988, grieved his formal evaluation of that date, alleging,

Violation of W.Va. State Board of Education Policy 5300 and 5310 in regard to grievant's evaluation. Relief sought is to have the "needs improvement" marking removed from his evaluation.¹

The grievance was denied at Level I and also at Levels II and III after hearings, respectively, on January 13, 1989,

¹ At the Level IV hearing Grievant also contended that an alleged failure of Respondent to promptly put him on an improvement plan after the December evaluation violated West Virginia Board of Education Policy 5310. However, the parties stipulated that Grievant was subsequently re-evaluated and found to have met the standard at issue in this matter. The undersigned accordingly ruled that Grievant was not prejudiced by any such failure and that therefore the contention would not be further addressed. In accordance with that ruling, any issue on the improvement plan is not herein addressed.

and February 6, 1989. The grievance was advanced to Level IV on February 27, 1989. A hearing was held April 20, 1989,² wherein it was agreed that the decision should be made on the evidentiary records of Levels II, III, and IV. Respondent waived its right to submit proposed findings of fact and conclusions of law; such proposals were received from Grievant May 18, 1989.

While Grievant was evaluated by his Principal Forrest Cummings as meeting performance standards overall, Grievant was found not to meet the standard of "Interacts with Students in a Positive Manner." Mr. Cummings' comment to that rating was "Needs to reinforce students in a manner other than physical contact." The grievance accordingly relates only to that one negative portion of the review.

There is little disagreement as to the facts of this case. On or about September 27, 1988, a teacher, acting as representative of four or five instructors at Hamlin who had concerns that Grievant was being inappropriately physical with students on the playground, related these to Mr. Cummings. On September 28th Mr. Cummings met with Grievant and told him of the concerns. He did not identify the teachers to Grievant other than the one who had come to

² A hearing scheduled for April 4, 1989, was continued at the request of Respondent.

him.³ Mr. Cummings cautioned Grievant about being too physical with students.⁴

The day before the conference Mr. Cummings did observe Grievant on the playground and saw him hugging children and allowing them to sit on his lap. The children were of approximately sixth-grade level and girls. Mr. Cummings did not tell Grievant of this observation at the conference.

The next week, on October 4th, Mr. Cummings received a call from the upset parents of a student of Grievant, who complained of Grievant's kissing their daughter, which caused her to be very upset. They demanded the child be removed from Grievant's classroom immediately. The parents met with Mr. Cummings and also, upon being called on the matter, Mr. Tom Miller, Assistant Superintendent for

³ The record does not establish exactly what was the behavior complained of to Mr. Cummings, although teachers testified at Level III of behavior by Grievant they found troublesome, e.g., playing rough with children, pulling on their arms and legs, picking up a girl from the monkey bars, picking a student up and letting her slide down his front, and letting students sit on his lap. All incidents reported were with female students (the great majority of Grievant's sixth-grade class were girls). It is clearly indicated that the teachers reported incidents of such behavior to Mr. Cummings.

⁴At the hearings Grievant made much of the fact that Mr. Cummings told him at the conference that he did not have personal problems with Grievant's behavior. Mr. Cummings testified that he had known Grievant for years and he was hoping that Grievant would clear the matter up (Tr. IV, 37). There is no indication that Mr. Cummings made any statement that Grievant could reasonably accept as approval of his actions, especially since, if Mr. Cummings approved, he would not have called the conference.

Respondent. While Mr. Cummings requested that the parents have a conference with Grievant, they were too angry to meet Grievant. The daughter was placed in another classroom the next morning.

Mr. Cummings did have another conference with Grievant, however, during which Grievant admitted he had given the girl what he termed a "peck" on the cheek.⁵ Grievant told Mr. Cummings at that time that he had given the girl the "peck" as a reward. Grievant thought Mr. Cummings was referring to a time that the girl had made the best grade on a test and he had asked her to stand up in front of the class, where he had congratulated her and had kissed her on the cheek (Tr. III-85). Thereafter, on October 13, 1988, Mr. Cummings issued a letter of reprimand, which provided, in its entirety, as follows:

After investigating the allegations against you by Mr. & Mrs. [name omitted],⁶ parents of [name omitted], a sixth grade student of Hamlin Elementary.[sic]

The Allegations are that you hugged and kissed [name omitted]. I feel that you have used poor judgment in kissing her. You indicated that this

⁵ Throughout these proceedings Grievant has attempted to distinguish between a kiss and a peck, saying that there's a "big difference." (Tr. IV-17). He defined a "peck" as a "little touch with the lips on the cheekbone" (Tr. IV-17). Clearly the essence of a kiss is "a touch or caress with the lips," see Webster's New World Dictionary (1982), so there can be no argument that Grievant did not kiss the girl.

⁶ No known purpose is served by identifying herein the identity of the child, so neither her name nor her parents' name is provided.

was a reward for a good grade on an assignment. I feel that you should find other means of rewarding students.

Due to the circumstances and nature of this situation, I am instructing you that students should not be hugged or kissed.

Thanking you in advance for your cooperation in this matter.

Only later did Grievant realize that a different incident had been the cause of the parents' outrage, an incident that had occurred the day before they called Mr. Cummings, which Grievant described as follows:

[T]he space shuttle Discovery was landing and, since I have a TV hookup with cable in my classroom I was going to try to show that to the students when it landed during their lunch period. And about, oh, 5 or 6 minutes before the actual touchdown I went to the cafeteria and told the students in my classroom if they wanted to watch it and if they were finished with lunch they could come up to the classroom and watch that. Most of them came up...to the classroom. We watched the touchdown and then it was past time for us to go outside since it was a nice day for their recess period and I had my tray ready to take down. A little girl came up to me and said something to me and with the noise in the classroom I didn't know what she said. I asked her to repeat it and in doing so I bent over, put my hand on her shoulder and said, "What did you say, honey?" She said, "Can I take your tray down?" and I said, "Well, I've got to go down anyway, so I'll just take it myself, but I appreciate your asking. It was sweet of you," and I reached over and gave a little peck on the cheek.

(Tr. IV-7).⁷ Grievant stated that in both incidents he had hugged the girl and given her a "peck" (Tr. III-88). When

⁷ Grievant's testimony on the incident at the other levels was consistent with his Level IV testimony.

Mr. Miller discussed the matter with Grievant the day after the parents complained, Mr. Miller told Grievant that he had used bad judgment and that such behavior was inappropriate.

At the Level IV hearing Mr. Cummings testified that he considered the reprimand justified because of the seriousness of the incident. He noted that Grievant had always admitted kissing the girl. He thought it improper to kiss children, and while hugging may be appropriate at some times, at least with small children, the behavior should be different for 12 or 13-year-old children (Tr. IV-30--34; see also Tr. III-73).

When Mr. Cummings evaluated Grievant two months later, he based his negative rating on his personal observations on the playground, what the teachers had told him, and the hugging and kissing incidents to which Grievant had admitted.

Grievant proposes the following conclusions of law:

1. The use of information derived from sources other than work product or personal observations in personal evaluations have been held permissible only when the source is revealed and the employee is informed of what weight it is to be afforded. Dunleavy v. Kanawha County Board of Education, Docket No. 20-86-240-1 [February 24, 1987]; Kinder v. Berkeley County Board of Education, Docket No. 02-87-199 [June 16, 1988]

2. West Virginia State Board of Education Policy 5310 and 5300 state that each formal written evaluation should be based on observations.

3. Policy 5300 provides that every employee is entitled to an open and honest evaluation. Linda Burdette v. Summers County Board of Education, Docket No. 45-86-280-4 [December 16, 1986]

4. The provisions of Policy 5300 must be strictly construed in favor of the employee to ensure that the employee receives the full guarantee of protection intended to be encompassed by the policy. Wilt v. Flannigan, 294 S.E.2d 189 [W.Va. 1982]; Don Williams v. Roane County Board of Education, Docket No. 44-86-160-1 [March 12, 1987]

5. Evaluations should be based on conclusive information and the alleged deficiencies noted should be adequately brought to the Grievant's attention. Elaine Koontz v. Marshall County Board of Education, Docket No. 25-86-028 [December 17, 1986]....

7. An evaluation should not be conducted as a reprisal for actions by the employee of which the supervisor disapproved. An "honest" evaluation is one based on actual observations. Each formal evaluation must be based upon at least two observations. State Board Policy 5310.

Since Grievant does not connect his proposals to the facts of this case, it is not clear therefrom what Grievant is actually arguing. The record at the other levels reveals that Grievant is contending that the evaluation is improper because Mr. Cummings did not twice observe inappropriate behavior by Grievant, the parents of the girl did not meet with him, and he was not fully informed of the identity and complaints of the teachers.

While Grievant's proposals do state proper legal concepts and rules of law, no contravention of those requirements are established on this record. Some general principles should be stated. Policy 5310 does not mandate

⁸ Grievant also includes a proposed conclusion of law on the requirements of an improvement plan. Any issue on an improvement plan is moot. See n.1.

two observations of any behavior found less than adequate; it simply requires two observations of the teacher's performance. Grievant's classroom teaching was twice observed. Furthermore, while Dunleavy and Kinder do not allow an evaluation to be based solely on unverified information from secondary sources, no such situation existed. Most notably, Grievant conceded kissing the little girl, admitting to behavior that was considered by Mr. Cummings and Mr. Miller as inappropriate. Furthermore, Mr. Cummings did observe other conduct that he thought inappropriate.

In this matter there has been no showing of any abuse of discretion on Respondent's part in issuing the letter of reprimand⁹ and in finding Grievant's behavior inappropriate and the proper subject of a determination that he needed improvement in how he interacted with students.

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

Findings of Fact

1. Grievant, a sixth grade teacher at Hamlin Elementary School, was notified by his principal, Mr. Cummings, on

⁹ Neither the statement of grievance nor Grievant's proposed conclusions of law raise or address any issue regarding the propriety of the letter of reprimand. However, since Grievant at each level in his testimony requested removal of the letter from his file and the evidence submitted related to it, along with the issue of whether his evaluation was proper, Respondent's issuance of the letter is here addressed. See W.Va. Code §18-29-3(j).

September 28, 1988, that other teachers had raised concerns whether his physical contact with students was appropriate.

2. On October 3, 1988, Grievant kissed a student on the cheek in thanks for her offer to take his lunch tray.

3. The child told her parents, who reported to Mr. Cummings and Assistant Superintendent Tom Miller that the daughter was very upset, and the parents demanded her removal from Grievant's classroom. The student was removed the next morning.

4. When asked about the incident the next day, Grievant thought Mr. Cummings was referring to a prior incident when he had kissed the same girl on the cheek in appreciation for making the highest grade on a test. Later Grievant realized the incident that had upset the girl was the one of October 3rd. Grievant admitted he has in total twice kissed the girl on the cheek and hugged her.

5. On October 13, 1988, Mr. Cummings issued a letter of reprimand to Grievant for kissing and hugging the girl, wherein he advised Grievant that he showed poor judgment in doing so and instructed Grievant to no longer kiss and hug students.

6. Mr. Cummings observed Grievant on the playground hugging 12 and 13-year-old students and such students sitting on Grievant's lap.

7. Mr. Cummings and Mr. Miller thought it inappropriate for Grievant to hug and kiss students twelve or thirteen years old.

8. When Mr. Cummings evaluated Grievant on December 5, 1988, he found Grievant did not meet the standard on positive interaction with students and commented on the written evaluation that Grievant needed "to reinforce students in a manner other than physical contact."

Conclusions of Law

1. It is incumbent upon a grievant to prove the allegations of his complaint by a preponderance of the evidence. Hanshaw v. McDowell Co. Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988); Andrews v. Putnam Co. Bd. of Educ., Docket No. 40-87-330-1 (June 7, 1988); Bulford v. Preston Co. Bd. of Educ., Docket No. 39-87-204 (Feb. 26, 1988).

2. It was reasonable and not an abuse of discretion for Mr. Cummings to decide that Grievant exercised poor judgment and acted inappropriately in kissing and hugging a sixth-grade female student and otherwise exhibiting physical behavior with students of such an age.

3. The evidence established that Grievant engaged in misconduct by kissing and hugging a sixth-grade student and that said conduct warranted a letter of reprimand. See Smith v. Marshall Univ., Docket No. BOR2-87-229-1 (June 29, 1988).

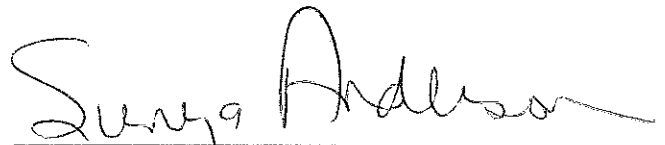
4. Grievant failed to establish that his evaluation was not open and honest, as required by West Virginia Board

of Education Policy 5300, or in any other way violated that policy or that board's Policy 5310.

5. Grievant submitted no evidence in support of his contention that the evaluation constituted reprisal, as defined by W.Va. Code §18-29-3.

Accordingly, the Grievance is **DENIED**.

Either party may appeal this decision to the Circuit Court of Kanawha County or the Circuit Court of Lincoln County and such appeal must be filed within thirty (30) days of receipt of this decision. See 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.



SUNYA ANDERSON
HEARING EXAMINER

DATED: June 16, 1989