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**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**
GASTON CAPERTON
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RAJ MALHOTRA

v.

Docket No. 89-26-189

MASON COUNTY BOARD OF EDUCATION

DECISION

Raj Malhotra was an English teacher with Respondent Mason County Board of Education at Point Pleasant Junior High School (PPJHS) until his dismissal, for reasons of incompetence and insubordination, on April 18, 1989.¹ Pursuant to the expedited procedure of W.Va. Code §18A-2-8, he initiated an employee grievance at Level IV on April 26, seeking relief, including reinstatement. Hearing was conducted June 22, and the record was left open until July 7

¹ Shortly before his dismissal, Grievant was suspended for a period in excess of thirty days based on these same charges, which are enumerated in Resp. Ex. 8. Since the outcome of this Decision and the reasoning upon which it is based apply to Grievant's suspension as well as his dismissal, the suspension will not separately be dealt with.

for the submission of proposed findings of fact and conclusions of law.²

There is very little discrepancy between the parties' versions of pertinent facts.³ Grievant first worked for Respondent as a dramatics instructor at Wahama High School in 1972, and remained in the employ of the Mason County Schools until April of this year.⁴ Starting in about 1977, he commenced exhibiting symptoms of a significant emotional disorder and his professional performance began to decline. Over the years, some of his specific recurring deficiencies were poor classroom control and supervision, inappropriate outbursts and other bizarre behavior, and inadequate preparation. Resp. Ex. 9.⁵ Grievant's overall rating was "above average" in 1977 and "effective" in some of these years, but

² Respondent presented its proposals July 5; Grievant has chosen not to submit post-hearing materials.

³ Grievant's continuing objection to the hearsay aspects of Respondent's evidence is noted.

⁴ Grievant was classed as a "permanent gen. substitute - itinerant" for two school years, Resp. Ex. 8, and he was on an extended medical leave of absence during the second half of the 1985-86 term, Resp. Ex. 17.

⁵ This exhibit is a packet of formal evaluations of Grievant's performance as a teacher, beginning with the 1977-78 school year. No evaluations covering 1985-86 or 1987-88 appear, and it is not certain that Grievant's work was reviewed during this time; however, Grievant has raised no objection in this regard.

It is noted that 1985-86 and 1986-87 were the two years Grievant was categorized as "permanent gen. substitute - itinerant" and that Resp. Ex. 8, at p. 6, makes reference to one evaluation conducted then.

"substandard" or "needs improvement" in several others. Resp. Ex. 8, 9.

In August 1984, Grievant, then assigned to Hannan High School, was given a written plan of improvement by his principal, John S. Oshel. Resp. Ex. 12. Twenty areas were targeted for positive change, with suggestions on how such could be effected.⁶ A November 1984 review revealed continuing problems in most areas and extended the time allowed for improvement to early January 1985. Resp. Ex. 13. In January, Grievant was suspended with pay for two days to provide "the opportunity for all of us to review your teaching assignment at Hannan High School and determine the appropriate action to be taken in this matter." Resp. Ex. 14. In response to this, Grievant requested a medical leave of absence for the remainder of the 1984-85 school term, Resp. Ex. 15, and entered into a "Memorandum of Understanding," Resp. Ex. 16, with Respondent.⁷ This Memorandum consisted of eight paragraphs and obligated both Grievant and Respondent to a certain course of conduct designed to maximize Grievant's chances at successful teaching. One of the requirements was Grievant's "procurement of regular and

⁶ Apparently this plan was prompted by Grievant's unsuccessful candidacy for another position within Hannan for which he was the most senior applicant. Resp. Ex. 11. See W.Va. Code §18A-4-8b(a).

⁷ Grievant was represented by a Uni-Serv Consultant from the West Virginia Education Association at the time he executed this agreement.

continuous medical care." Grievant was granted the leave, Resp. Ex. 17, and sought intensive psychiatric intervention into his condition.

He returned to active employment with the start of the 1985-86 school year. According to Grievant, "things went well for about a year" before the same problems arose once again. Effective 1987-88, Grievant was assigned to Point Pleasant High School (PPHS), and for that year earned a rating of "meets performance standards," but his principal noted that improvement was needed in a number of categories. In May 1988, Grievant, after a meeting with his West Virginia Education Association representative and Respondent's Superintendent and Assistant Superintendent, was suspended for ten days, five without pay, for failure to comply with "certain rules and regulations" of PPHS. Grievant and his representative stated they would not appeal or request a hearing on the suspension, in essence agreeing thereto. Then-Superintendent Barker promised Grievant that he would recommend that Respondent take action that might be helpful to Grievant in his performance. Resp. Ex. 18.

Grievant was transferred to PPJHS at the beginning of 1988-89.⁸ In December 1988, Principal Burris formally

⁸ Grievant had been under consideration for a transfer back to Hannan High School for 1988-89. This possibility became known publicly and created enough concern that Respondent received letters of protest from Hannan administrators. Resp. Ex. 1, 2. One administrator opined
(Footnote Continued)

reprimanded Grievant for failure to prepare lesson plans and recommended suspension with no pay for two days Grievant was absent without permission. During January and February 1989, Grievant received four more letters, each constituting a reprimand or a finding of insubordination, from Mr. Burris. It was also around this time that several parents lodged a "Citizens' Appeal" with Respondent, seeking Grievant's "resignation from education." Resp. Ex. 4.

On February 17, 1989, Grievant was suspended without pay for insubordination in failing to comply with Mr. Burris' directives, as evidenced by the six letters previously referenced. Resp. Ex. 6. Grievant was also advised of his right to a hearing before Respondent; he did not request such a meeting. On March 8, 1989, Grievant was reminded of his right to a hearing and informed that Respondent was considering the termination of his employment. Resp. Ex. 7. Grievant still did not request a hearing and, on April 18, 1989, he was dismissed based on charges of insubordination and incompetence. Resp. Ex. 10. ⁹

(Footnote Continued)

that Grievant "needs to be counseled out of teaching." Resp. Ex. 2.

⁹ Grievant was represented by counsel prior to his dismissal. At some point during the early months of 1989, Grievant was hospitalized for a time; due to this, he indicated that Respondent could take action on his recommended suspension and/or dismissal without his presence. No hearing was ever requested of or conducted by Respondent on the imposition of either sanction. At no time has Grievant charged any procedural impropriety on

(Footnote Continued)

At the Level IV hearing, Grievant requested that the undersigned order Respondent to grant him another medical leave of absence, for one or two years, so that he can pursue the treatment plan of his newly-found psychiatrist, Dr. Allen Kayser, Gr. Ex. 1,¹⁰ and investigate employment in a college setting. Grievant first sought this leave of Respondent after he had been terminated from employment. Gr. Ex. 2. Respondent expressed the concern that there was no guarantee that the 1985 medical leave situation would not be

(Footnote Continued)

Respondent's part, and none is apparent to the undersigned. See W.Va. Code §§18A-2-7, 18A-2-8.

¹⁰ In pertinent part:

[I]t is my opinion that Mr. Malhotra may be able to remain a competent and stable teacher, but he certainly must become more compliant with treatment recommendations than he has in the past. As a condition for return to teaching, I would recommend that he be required to see a psychiatrist or therapist every two to four weeks, obtain serum Lithium levels to insure medication compliance at least monthly, and to allow for an open line of communication between his principal and his physician whenever his behavior becomes erratic. He should be required to make and keep an appointment with his psychiatrist anytime his principal observes erratic behavior. Probably, he should be required to take antipsychotic medication for four to six months to see if it has any therapeutic effects on his behavior and moods, and this could also be monitored with serum blood tests. It is my opinion that this treatment plan will not absolutely insure his competence and stability; however, I think this plan will help him to maximize his chances of remaining competent and stable.

repeated; Grievant contended that matters will definitely work out favorably this time, since he now has "the right doctor."

The remainder of this Decision will be presented as formal findings of fact and conclusions of law.

FINDINGS OF FACT

1. Grievant was reprimanded and/or counseled for insubordination by his Principal six times during December 1988 and January 1989. Charges against him, which were meritorious, included failures to prepare lesson plans, to report work absences, and to provide continuous class supervision.

2. Grievant's overall performance did not improve as a result of these contacts, and he was first suspended without pay and later dismissed, based upon charges of insubordination and incompetence. His termination was effective April 18, 1989.

3. Grievant has a history of poor performance with Respondent, at least some of which is related to emotional illness. Over the years since approximately 1977, Respondent has worked with Grievant on several occasions and in a number of different ways, attempting to assist him in improving his work performance. For example, in 1985, Grievant was granted a medical leave of absence and sought psychiatric assistance for his problems; at the same time,

Respondent promised to take steps to make Grievant aware of and eligible for positions more compatible with his identity as a person and a teacher.

5. On April 20, 1989, Grievant requested that Respondent grant him an extended medical leave of absence, in part so he could pursue the treatment regimen of a newly-acquired psychiatrist.

6. Requiring Respondent to grant Grievant a one- or two-year medical leave of absence to allow Grievant to pursue other employment and a mental health treatment plan, or to participate with Grievant's psychiatrist in exacting supervision of his on-the-job behavior, would be an unreasonable burden upon the Mason County Schools.

CONCLUSIONS OF LAW

1. "Insubordination may be defined as 'willful failure or refusal to obey reasonable orders of a superior entitled to give such order.'" Webb v. Mason Co. Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). Grievant was insubordinate in his failure to respond to the directives of his Principal in December 1988 and January 1989.

2. Grievant was incompetent in the performance of his duties as a teacher at PPJHS during school term 1988-89.

3. Respondent complied with West Virginia Board of Education Policy 5300(6) by giving Grievant adequate notice

of deficiencies and granting him ample, structured opportunity for improvement.

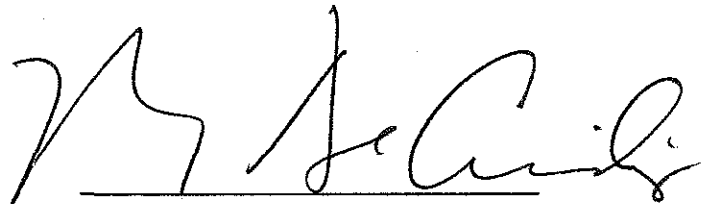
4. Grievant's suspension and dismissal were appropriate as a matter of law and will be upheld. See W.Va. Code §§18A-2-7, 18A-2-8. Grievant is not entitled to a medical leave of absence or any other relief in this case.¹¹

Accordingly, this grievance is **DENIED**, and Grievant's suspension and dismissal is upheld.

¹¹ It is unfortunate that Grievant suffers from an emotional malady, but there comes a point where he must bear the consequences of his behavior. Respondent has gone well beyond what is required of it in working with Grievant and his problems and for him, that point has long since passed.

Even if Grievant were entitled to reinstatement herein, questions regarding any subsequent leave of absence would be outside the scope of the within case.

Either party may appeal this decision to the Circuit Court of Mason County or the Circuit Court of Kanawha 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.

A handwritten signature in dark ink, appearing to read 'M. Drew Crislip', written over a horizontal line.

**M. DREW CRISLIP
HEARING EXAMINER**

Dated: JULY 28, 1989