WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

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DANNY WALKER

v. Docket No. 89-20-384

KANAWHA COUNTY
BOARD OF EDUCATION

D E C I S I O N

Danny Walker, employed by Respondent Kanawha County Board of Education as a Roofing/Sheet Metal Mechanic, filed a grievance at Level IV July 24, 1989, pursuant to W.Va. Code §18A-2-8, protesting Respondent's suspending him for thirty days without pay. A hearing was held September 7, 1989, and briefs were received from both parties on October 5.

By letter of June 8, 1989, Superintendent of Kanawha County Schools Richard Trumble notified Grievant that an investigation had raised allegations that he, along with three other employees,

> on June 5, 1989, proceeded to Charleston High School in a county vehicle during your work day and removed a number of auditorium seats with intent to convert such property to private use.

A disciplinary hearing was held June 26, 1989, and the evaluator who heard the case recommended to Superintendent

Trumble that Grievant be suspended for one month without pay, upon making the following conclusion:

> The evidence has clearly established that Mr. Walker and [name omitted][1] made an unauthorized trip during their workday in Board of Education Vehicles to Charleston High School and participated in an unsuccessful attempt to remove, without authorization or permission, six auditorium chairs with intent to convert them to private use.

On July 14, 1989, Respondent approved the suspension, adopting the findings and conclusions of the evaluator.

At the Level IV hearing Grievant's counsel moved for dismissal on the grounds that, since Code §18A-2-8 provides that a board of education may dismiss or suspend an employee for "[i]mmorality, incompetency, cruelty, insubordination, intemperance or willful neglect of duty," the charges must state such grounds and without that statement the grievant cannot know how to defend. Grievant cited, inter alia, Meckley v. Kanawha Co. Bd. of Educ., Slip Op. No. 18008 (W.Va. July 14, 1989), where the West Virginia Court of Appeals ruled in its Syllabus,

> "The authority of a county board of education to dismiss a teacher under W.Va. Code 1931, 18A-2-8, as amended, must be based upon the just causes listed therein and must be exercised reasonably, not arbitrarily or capriciously." Syllabus point 3 in Beverlin v. Board of Education of Lewis County, [158] W.Va. [1067], 216 S.E.2d 554 (1975)." Fox v. Board of Education, 160 W.Va. 668, 236 S.E.2d 243 (1977).

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[1]While three other employees were charged, the disciplinary hearing only involved Grievant and the other employee whose name is deleted.

The motion was denied without prejudice for proper consideration herein, and in his brief Grievant clarifies that he is contending that both Code §18A-2-8 and due process notice requirements have been violated.

While Meckley and the cases it cites assuredly require that the action of the employee for which he is disciplined must comprise one of the stated types of misconduct, the statute does not require that the notices so label the action. Furthermore, due process is not denied if the notices apprise the grievant of the nature of the charges. See Higginbotham v. Kanawha Co. Bd. of Educ., Docket No. 20-87-087-1 (Aug. 12, 1987). The notices firstly apprised Grievant of the behavior for which he was being disciplined,[2] and secondly, because Grievant was charged with removing property "without authorization or permission" "with intent to convert such property to private use," it is

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[2]The Court has stated,

> Where an act of misconduct is asserted, in a notice of dismissal, it should be identified by date, specific or approximate, unless the characteristics are so singular that there is no reasonable doubt when it occurred. If an act of misconduct involves persons or property, these must be identified to the extent that the accused employee will have no reasonable doubt as to their identity.

Snyder v. Civil Service Commission, 238 S.E.2d 842 (W.Va. 1977). Undoubtedly the notices fulfilled even this stringent standard.

clear that he was being charged with larceny,[3] which undoubtedly would fall within the grounds of "immorality."[4] Finally, there is no indication on this record that Grievant was surprised by any evidence presented and could not defend himself against the charges. See Higginbotham. No denial of due process can be found on this record.[5]

Grievant did not dispute the occurrence of the incident as alleged. He testified that on June 5, 1989, he and another employee in one truck and two other employees in another truck left the Crede facility where they worked to get materials in South Charleston. After loading the materials they did not return to Crede but went to Charleston High School, having discussed the possibility of getting mementoes from the school, which was scheduled for demolition. They went to the auditorium, where they saw a

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[3]The elements of a charge of larceny are that "the defendant took and carried away the personal property of another against his will and with the intent to permanently deprive him of the ownership thereof." State v. Louk, 285 S.E.2d 432 (W.Va. 1982).

[4]While Respondent's counsel asserted at hearing that the actions of Grievant could also constitute "willful neglect of duty," that ground was clearly not the import of the notices.

[5]Even if due process notice requirements had not been met, the remedy would not have been dismissal of the charges but a remand to the board of education for correction. Bledsoe v. Wyoming Co. Bd. of Educ., Docket No. 55-88-215 (Jan. 24, 1989), citing Clarke v. West Virginia Board of Regents, 279 S.E.2d 169 (W.Va. 1981).

custodian removing auditorium chairs to put in a woman's vehicle. They helped him remove the chairs. They then removed six more chairs and took them to a classroom, intending to lower them to the ground through a window. However, upon finding out that the chairs could not be so removed, they returned one to the auditorium. In the auditorium they were confronted by the principal of the school, Mr. Al Brown, who told them they were not authorized to remove the chairs. Grievant further testified that he told Mr. Brown they would put the chairs wherever Mr. Brown wished and accordingly returned them to the auditorium. Finally, Grievant stated that Mr. Brown told him to return a few days later to get some chairs.

The crux of the case is whether Grievant had the alleged intent. Grievant admitted that the janitor told him and the others that the chairs were being sold to the woman for $25 per chair and, since his testimony supports that the employees talked to the janitor only before they attempted to remove the chairs, Grievant clearly was aware that the chairs were not being given away before he attempted to remove them. This evidence strongly supports that at the time of the attempt to remove the chairs Grievant knew such attempt was improper. That Mr. Brown may have later indicated the chairs could be available apparently for free does not negate that Grievant had tried to remove them even

though he had been told they were being sold.[6] Accordingly, the evidence supports larcenous intent, as alleged.[7]

Grievant finally alleges that the sanction is far too severe for the facts. However, in so arguing Grievant mischaracterizes the misconduct merely as an "attempt to obtain some memory of Charleston High School before it was destroyed," which fails to recognize the larcenous intent reflected by this record. While Grievant properly argues that the Court in Fox v. Bd. of Educ. of Doddridge Co., 160 W.Va. 668, 672, 236 S.E.2d 243 (1977), modified a penalty which it found to be "unreasonable and arbitrary," no such conclusion can be made in this case.

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

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[6]At the disciplinary hearing the teacher from whose room the employees were attempting to remove the chairs testified that one of them told her they were planning to sell the chairs for $45 each. While Grievant asserted in his appeal that there was no intention of such sale, he did not so testify. In fact, Grievant never asserted that he thought the chairs could be removed with impunity or otherwise indicated that his actions were innocent.

[7]That Grievant was prevented from removing the chairs and that the chairs have apparently been destroyed in the demolition are irrelevant to this inquiry.

Findings of Fact

1. Grievant, employed by Respondent as a Roofing/Sheet Metal Mechanic, with three other employees, during their workday on June 5, 1989, tried to remove as mementoes auditorium chairs from Charleston High School, which was slated for demolition.

2. Prior to Grievant's attempt to remove the chairs, Grievant was told that such chairs were being sold for $25 each.

3. Grievant was stopped from removing the chairs by the Principal of the School, Al Brown.

4. Grievant was charged with "remov[ing] a number of auditorium seats with intent to convert such property to private use."

Conclusions of Law

1. A board of education may suspend an employee for immorality. W.Va. Code §18A-2-8. "Immorality" may be defined as "conduct 'not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially, not in conformity with the acceptable standards of proper sexual behavior.'" Golden v. Bd. of Educ. of the Co. of Harrison, 285 S.E.2d 665, 668 (W.Va. 1981), quoting from Webster's New 20th Century Dictionary, Unabridged (2d Ed. 1979), at 910.

2. The notices advised Grievant of the nature of the charges and therefore did not violate due process notice

requirements. See Higginbotham v. Kanawha Co. Bd. of Educ., Docket No. 20-87-087-1 (Aug. 12, 1987).

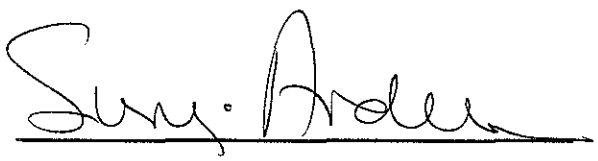
3. It is not required by Code §18A-2-8 that the notice specify which type of misconduct is alleged, for example "immorality."

4. Since the evidence established that Grievant knew the chairs were not being given away, larcenous intent was established. It was further established that he attempted to remove the chairs. Respondent therefore established that Grievant was guilty of immorality under Code §18A-2-8.

5. The penalty of suspension for thirty days without pay was not unreasonable or arbitrary. Compare Fox v. Bd. of Educ. of Doddridge Co., 160 W.Va. 668, 236 S.E.2d 243 (1977).

Accordingly, the grievance is **DENIED**.

Either party may appeal this decision to the Circuit Court of Kanawha County and such appeal must be filed withing 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.



SUNYA ANDERSON
HEARING EXAMINER

Dated: October 26, 1989