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WILLIAM WEBB

v. Docket No. 26-89-004

MASON COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant, William Webb, was employed by the Mason County Board of Education (Board) as a mathematics teacher at Point Pleasant High School until his dismissal on December 21, 1988. Pursuant to the provisions of W.Va. Code §18A-2-8, grievant appealed his dismissal to the West Virginia Education and State Employees Grievance Board and a Level IV hearing was held January 27, 1989. The parties submitted extensive legal briefs in support of their positions by February 28, 1989.

The sequence of events leading to grievant's dismissal is undisputed. He was employed by the Board for twenty (20) years at Point Pleasant High (PPH) and for the first several years of his employment wore a jacket and tie. It is not entirely clear from the record but at some point he abandoned the practice

Decision Reversed CCT WD SCT

of wearing a tie and also began wearing blue jeans. Grievant always received evaluations indicating he "met or exceeded established standards of performance" during his tenure at PPH (Grievant's Exhibit No.1).

Mr. Charles Chambers assumed the duties of Superintendent of Schools for Mason County, July 1, 1988 and, upon his determination that a dress code for professionals was necessary, unilaterally issued one August 19, 1988 which prohibited the wearing of jeans and required males to wear ties (Board's Exhibit No.2). On August 29, 1988, after the beginning of the 1987-88 school term for school employees, teachers, including grievant, were officially advised of the dress code. Grievant refused to comply and after a conference with his principal, Mr. Michael Whalen, and Mr. Chambers, he received a letter dated September 14, 1988 in which Mr. Chambers informed him that disciplinary action would be recommended for failure to comply by September 16, 1988 (Board's Exhibit No.3). Grievant did not comply and was suspended for four (4) days without pay.[1] Grievant continued his manner of dress after this suspension and, after another meeting in which he was verbally admonished for his behavior and advised the grievance procedure contained in W.Va. Code §§18-29-1, et seq. was the proper course for protest, he received a letter dated October

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[1]Mr. Chambers, by letter dated September 16, 1988, suspended grievant pursuant to his authority to do so under W.Va. Code §18A-2-7 and the Board upheld the suspension on September 27, 1988.

4, 1988 from Mr. Chambers directing him to comply by October 7, 1988. Grievant communicated his intent not to comply to his principal and subsequently was suspended by Mr. Chambers for up to thirty (30) days. At a Board meeting held October 24, 1988 in which Mr. Chambers requested approval of that suspension, grievant was afforded a hearing, and the Board upheld a suspension of eleven (11) days.[2] Grievant was instructed by the Board to "return to his teaching duties at Point Pleasant High School on October 25, 1988, and that he return to work wearing a shirt and tie and not wearing jeans or denim" (Board's Exhibit No.7).

Grievant reported to work October 25, 1988 with no tie and wearing jeans. He subsequently received a letter dated October 28, 1988 in which Mr. Chambers informed him he was once again suspended for a period of time not to exceed thirty (30) days (Board's Exhibit No.8). In this letter Mr. Chambers stated he would be seeking approval of the suspension at a hearing before the Board and at that hearing "evidence will be presented to the Board regarding this action of suspension which will include the intent to recommend your dismissal from employment".

During the months of October and November, Mr. Chambers and other teachers had engaged in discussions concerning a revised

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[2]The West Virginia Education and State Employees Grievance Board upheld this suspension in a decision dated January 5, 1989 by Hearing Examiner M. Drew Crislip. Webb v. Mason County Board of Education, Docket No. 26-88-206.

dress code and at a Board meeting held November 7, 1988, he received approval to submit that policy to all employees for a two (2) week comment period and preliminary approval for grievant's latest suspension. The Board scheduled a meeting for December 1, 1988 to consider the merits of that suspension (Board's Exhibit No.9).

By letter dated November 14, 1988 (Board's Exhibit No.10), the grievant was formally advised that charges to be presented at the December 1 meeting might result in dismissal. The letter recited chronologically the sequence of events up to that date. At a meeting held November 21, 1988, the Board adopted a revised dress code which encouraged but did not require male employees to wear ties and retained the ban on jeans and other articles of clothing made from denim. In addition to these provisions, a progressive disciplinary policy was incorporated into the dress code which provided:

> After a verbal direction followed by a written confirmation of the verbal direction, a written reprimand will be issued for noncompliance and the written reprimand shall be placed in the employee's personnel file. An additional violation of the policy shall require a hand-delivered letter of insubordination to the offending employee requiring a conference with the superintendent and appropriate supervisor/director. At this conference further disciplinary action may be taken or the matter may be referred to the board of education for their review.
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> An accumulation of five or more letters of reprimand or two or more letters of insubordination shall result in litigation being instituted against the offending person for the purpose of seeking his/her dismissal.
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> (Board's Exhibit No.11).

On December 1, 1988 counsel for the grievant presented extensive testimony, including that of the grievant, primarily on the subject of what is considered proper attire for a classroom teacher.[3] Grievant and counsel were then informed by Mr. Chambers that he would not recommend dismissal if he (grievant) would return to his job in compliance with the newly enacted dress code but the offer was refused. The Board then decided to approve the latest suspension and defer further consideration of the matter until December 19, 1988.

At the December 19, 1988 meeting Mr. Chambers again asked Mr. Webb and counsel if he was willing to return to his duties in compliance with the revised dress code and grievant responded that he would only return if awarded backpay and the right to dress as he saw fit (Board's Exhibit No.14, Board Minutes of December 19, 1988). Mr. Chambers then recommended that grievant's latest suspension be upheld and that he be dismissed on the grounds of gross insubordination. The recommendation was accepted unanimously.

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[3]A transcript of this proceeding which was subsequently offered as evidence at Level IV, revealed a great deal of the testimony concerned the opinions of various authors on the subject of what dress is appropriate in certain circumstances. The transcript, however, was defective in that extensive portions of testimony were labeled "inaudible" or "indiscernible" and, upon the representation of counsel for the Board that mechanical recording equipment malfunctions had been the cause, admission was refused.

The evidence presented at Level IV merely confirmed this sequence of events and grievant admitted he had steadfastly refused to obey Mr. Chambers' orders and the directive of the Board issued October 24, 1988. In his brief grievant advances seven (7) legal arguments for reversal of the Board's decision, none of which has merit.

First, grievant contends the Board's action was a violation of applicable law which requires the establishment of a rational nexus between the infraction for which an employee is disciplined and a legitimate school objective. Grievant cites Golden v. Board of Education of the County of Harrison, 285 S.E.2d 665 (W.Va. 1981); Waugh v. Board of Education of Cabell County, 350 S.E.2d 17 (W.Va. 1986); and Rogliano v. Fayette County Board of Education, 347 S.E.2d 220 (W.Va. 1986), as support for this contention. Little discussion is needed to reject this argument except to note that all three cases have held, as a prerequisite for the requirement of a rational nexus, that the actions complained of occurred separate and apart from employment. Grievant does not and could not seriously contend the actions for which he was dismissed were not related to his employment.

Grievant also asserts, as his second argument for reversal, that the dress code impedes the achievement of a thorough and efficient system of free schools and infringes upon the guarantee of academic freedom embodied in W.Va. Const., Art. III, §7. There

was no evidence whatsoever presented to show the dress code had any adverse impact on grievant's ability to conduct a thorough and efficient program of instruction in his own classroom, much less the Mason County School system as a whole. Similarly, there is no evidence of record that grievant's academic freedom was stifled by the directive that he change his manner of dress. The bald assertion that a necktie and trousers made of material other than denim can in some way impede a teacher's ability to inquire, evaluate or study in violation of the West Virginia Constitution must therefore be rejected.

Grievant's next contention in frivolous and merits no discussion. This is the assertion that the imposition of the dress code created two classes of employees, namely, those who comply and those who do not. Under this theory grievant maintains the Board failed to show a compelling state interest for the desparity of treatment in the two classes and the code is therefore constitutionally impermissible.

Along a line of reasoning which is less offensive to the Constitution but nonetheless untenable, grievant maintains the dress code infringed upon his freedom of expression. The right to express oneself in manners of dress has been held to be a protected liberty interest but not without limits. In Miller v. School District No. 167, Cook County, Ill., 495 F.2d 658 (7th Cir. 1974), the Court considered those limits at length

in a case with similar circumstances and concluded at page 667:

> If a school board should correctly conclude that a teacher's style of dress or plumage has an adverse impact on the educational process, and if that conclusion conflicts with the teacher's interest in selecting his own life style, we have no doubt that the interest of the teacher is subordinate to the public interest. We must assume, however, that sometimes such a school board determination will be correct. Even on that assumption, we are persuaded that the importance of allowing school boards sufficient latitude to discharge their responsibilities effectively--and inevitably, therefore to make mistakes from time to time--outweighs the individual interest at stake.

Mr. Chambers testified that his observation of teachers in the county, which revealed a wide variety of dress including jeans, sweatshirts, shorts and even see-through clothing, led him to the conclusion that corrective steps should be taken. Apparently he also wisely concluded that as a solution, dress restrictions on certain individuals were less preferable than a county-wide dress code. The Mason County Board of Education, by its unanimous approval of grievant's September 27, 1988 four (4) day suspension, implicitly gave its approval to the policy and Mr. Chambers' conclusions. Webb v. Mason County Board of Education, Docket No. 26-88-206 (January 5, 1989), Webb I, Conclusion of Law 5. Grievant offered no evidence to show Mr. Chambers' evaluation and determinations were either unreasonable or unfounded.

Grievant's fifth argument is an assertion that the dress code breached his continuing contract of employment. According to the grievant, the requirement that he change his style of dress was a material change in that contract which could not be initiated. No authority is cited in support of this contention and the contract itself, in pertinent part, provides:

> [T]he Teacher agrees faithfully to perform all the duties of said position and employment, and agrees faithfully to observe and enforce the rules and regulations lawfully prescribed by legally constituted school authorities insofar as such rules and regulations may be applicable to said county.[4]

For reasons hereinafter discussed, the dress code was a lawfully prescribed regulation which grievant, by virtue of this clause, agreed to observe. There is no requirement in the provisions of W.Va. Code §§18A-1-1, et seq. that a county board of education adopt personnel policies within any prescribed time periods.

Grievant next asserts the promulgation and adoption of the new dress code on November 21, 1988 and its incorporation of relative progressive disciplinary procedures bestowed upon him rights which he was not afforded before his dismissal. Unquestionably administrative bodies must abide by the regulations they establish, Powell v. Brown, 238 S.E.2d 220 (W.Va. 1977), but

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[4]Only grievant's continuing contract of employment for school year 1971-72 was offered into evidence. It is undisputed that teachers in Mason County sign a yearly "status form" which is in effect an acknowledgement that they wish to be employed for the ensuing school year under the terms and conditions of their continuing contracts.

when adherence to those regulations would constitute an exercise in futility, they may be abandoned. Parsons v. Monongalia County Board of Education, Docket No. 30-86-339-2 (March 1, 1987). Grievant was given the opportunity on December 1, 1988 and December 19, 1988 to conform to the new dress code and refused both times. On the latter date the made it quite clear that he would only return to work if awarded backpay and the freedom to dress as he always had. Under those circumstances, it would not only have been useless but even illogical to follow the newly-enacted disciplinary procedures.

Finally, the grievant advances perhaps the only argument pertinent to the circumstances surrounding his dismissal. He contends neither Superintendent Chambers nor the Board had the authority to impose a dress code on teachers and, if any such code were constitutionally permissible, the authority to promulgate it rests solely with the West Virginia State Board of Education.[5]

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[5]It should be noted that this particular argument was raised and addressed in Webb I as was grievant's argument concerning a breach of his contract. At the Level IV hearing in that case, grievant also explicitly abandoned claims regarding denial of constitutional rights and had the opportunity, if not the obligation, to raise the issue of the applicability of the rule pronounced in Golden, supra, but did not. In the present case the Board did not make objections at the Level IV hearing or in its post-hearing brief to consideration of these matters on the grounds that such consideration should be barred under the theories of res judicata and/or collateral estoppel. The West Virginia Education and State Employees Grievance Board will not address issues not fairly
(footnote cont.)

Although not stated, grievant presumably asserts his actions would not then constitute insubordination as he did not refuse a lawful order from a person or persons entitled to give it. In support of this position grievant points to the explicit authority of a county board of education to provide appropriate uniforms for school service personnel in W.Va. Code §18-5-13(13) and the absence of any such authority to regulate the dress of teachers elsewhere in Chapter 18 as evidence of a legislative intent to deprive boards of the latter. Within this same vein, grievant asserts that even if such dress codes were permissible, their implementation would be under the control of the West Virginia State Board of Education.

Those contentions are not supported by either the statutory language of W.Va. Code §§18-5-13 or 18-2-5, which delineates the powers and duties of the State Board of Education. W.Va. Code §18-5-13 is entitled "authority of boards generally" and the powers bestowed therein and elsewhere in Chapter 18 do not reveal an intent to so narrowly define those powers that a specific personnel policy regarding classroom teachers cannot be exercised unless it is statutorily authorized. The statutory language defining the duties and responsibilities of the State Board of Education, likewise, do not disclose an intent to place within

(footnote cont.)

raised, Johnson v. Cabell County Board of Education, Docket No. 06-87-248-1 (July 20, 1988), and the relevancy of those principles have, therefore, not been considered. The holdings herein should not, however, be construed as a determination that the principles will not be applied when validly raised by one of the parties to a grievance.

the purview of that body the control of all county board of education personnel policies. W.Va. Code §18-2-5, in pertinent part, provides:

> Subject to and in conformity with the constitution and laws of this State, the state board of education shall determine the educational policies of the State and shall make rules for carrying into effect the laws and policies of the State relating to education, including rules relating to the physical welfare of pupils, the education of feeble-minded and physically disabled or crippled children of school age, school attendance, evening and continuation or part-time day schools, school extension work, the classification of schools, the issuing of certificates upon credentials, the distribution and care of free textbooks by the county boards of education, the general powers and duties of county boards of education, and of teachers, principals, supervisors and superintendents, and such other matters pertaining to the public schools of the State as may seem to the state board to be necessary and expedient.
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> (Emphasis added)

These provisions obviously give the state board a great deal of discretion regarding the promulgation of certain personnel policies which is binding on county boards of education[6] but do not prohibit the latter from implementing their own, absent an exercise of that discretion.

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[6]Perhaps one of the most significant examples of this authority was the promulgation of Policy 5300 which provides comprehensive methods for school employee personnel evaluations and procedures for the correction of deficiencies in performance. It should be noted that, according to Mr. Chambers' testimony, this policy's emphasis on the communication of expectations and performance criteria to the employee to be evaluated was an important consideration when he formulated the dress code.

Moreover, focus should not necessarily be centered upon the question of whether or not a superior's directive is legal in a technical sense in a consideration of whether the subordinate's refusal to obey constitutes insubordination. It might be determined, upon subsequent legal analysis, that one did not have authority to issue a particular order but in the context of the existing employer-employee relationship, that order was quite reasonable when given. A standard which emphasizes the reasonableness of the order at the time it was issued and takes into account any obvious illegalities or improprieties in the order is the proper one. Ware v. Morgan County School District, 719 F.2d 351, 352 (Colo. 1985); Webb v. Mason County Board of Education, supra; Gill v. West Virginia Department of Commerce, Docket No. COMM-88-031 (December 23, 1988). Grievant may have been, as he testified, under the impression in September 1988 that Mr. Chambers could not unilaterally issue a dress code policy or compel his adherence thereto and even if it were conceded that his assumption was legally well-founded, there can be no doubt that after the Board upheld his first suspension subsequent orders to conform were reasonable and issued by a person or persons entitled to give them. The repeated and willful failures on the part of the grievant to abide by the dress regulations therefore constituted gross insubordination as a matter of law.

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

FINDINGS OF FACT

1. Grievant, William Webb, was employed by the Mason County Board of Education as a mathematics instructor at Point Pleasant High School until his dismissal for gross insubordination on December 21, 1988.

2. Prior to his dismissal, grievant was given numerous directives by the Superintendent of Schools, Charles Chambers, and one directive of the Mason County Board of Education to conform to a dress code which required him to wear a tie and discontinue his practice of wearing jeans. Grievant did not choose to comply with said code and contested its validity or legality through the grievance procedure contained in W.Va. Code §§18-29-1, et seq. but simply steadfastly refused to change his manner of dress.

3. On December 1 and December 19, 1988 grievant was given the opportunity, following suspensions imposed by Mr. Chambers and approved by the Board, to return to work in compliance with a revised dress code but declined to do so.

CONCLUSIONS OF LAW

1. The original dress code implemented by Mr. Chambers and later adopted by the Board was not violative of grievant's continuing contract of employment or his constitutional guarantees of academic freedom or freedom of expression.

2. The implementation and/or enforcement of the dress code was not beyond the authority of either Superintendent Chambers or the Board and did not interfere with or impede the achievement of the thorough and efficient operation of the Mason County School system.

3. The promulgation of the dress code did not create a disparity of treatment in any identifiable classes which required the application of constitutional equal protection principles.

4. The holding in Golden, supra that a county board of education must establish a rational nexus between an employee's action which result in discipline and job performance is inapplicable in grievant's case.

5. The Mason County Board of Education had no obligation to adhere to the progressive disciplinary policy incorporated in its revised dress code after being informed by the grievant that he would not abide by its provisions.

6. A county board of education may dismiss any person in its employment at any time for insubordination and upon an appeal of that action to the West Virginia Education and State Employees Grievance Board, must prove the charge by a preponderance of the evidence. Gill v. West Virginia Department of Commerce, supra; Putnam v. Braxton County Board of Education, Docket No. 04-88-022-4 (May 13, 1988).

7. Insubordination may be defined as "willful failure or refusal to obey reasonable orders of a superior entitled to give such order". Ware v. Morgan County School District, supra; Webb v. Mason County Board of Education, supra.

8. The Board has proven by a preponderance of the evidence the charge of gross insubordination against the grievant.

Accordingly, the grievance is **DENIED** and the decision of the Mason County Board of Education to dismiss the grievant is hereby **AFFIRMED.**

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.

JERRY A. WRIGHT
Chief Hearing Examiner

Dated: May 1, 1989