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

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LYNN SLAVIN

v.

Docket No. 06-88-121

CABELL COUNTY BOARD OF EDUCATION

DECISION

Grievant Lynn Slavin was hired as an English teacher at Barboursville High School by Respondent Cabell County Board of Education in Fall 1987 under a probationary contract of employment. By letter of April 27, 1988, from Robert J. Brewster, then Associate Superintendent of Schools, she was notified that Respondent had decided not to renew her contract for the following school year. On May 5th Grievant requested a hearing on the matter, which was held June 2, 1988. On June 9th Respondent reaffirmed its decision not to renew her contract and so notified Grievant on June 20th. On June 23, 1988, Grievant filed a grievance at Level IV with this Grievance Board. Upon a determination that the grievance had not been filed or considered at any lower level, on August 31, 1988, the grievance was remanded to Level III for a hearing on the grievance and issuance

of findings of fact and conclusions of law. On September 22, 1988, the hearing was held¹ and Respondent issued findings of fact on December 8, 1988.² Grievant appealed December 15, 1988 and the case was submitted for a decision on the record. Respondent's proposed findings of fact and conclusions of law and Grievant's brief were received by January 18, 1989.

Grievant contends that she was denied open and honest evaluation and opportunity to improve required by West Virginia Board of Education Policy 5300, as implemented by the Cabell County Public School Employee Evaluation Handbook (the Handbook). Respondent maintains that the allegation that it violated Policy 5300 was untimely raised and therefore should not be addressed, and, alternatively, that there was no violation thereof.

Respondent's argument that Policy 5300 was not timely raised is frivolous,³ for Grievant complained even at the

¹ Neither party presented evidence at the September hearing but relied thereat on the evidence presented at the June nonrenewal hearing. Consequently, all cites to exhibits and transcript refer to the evidence submitted at the nonrenewal hearing.

² Respondent's issuance of its findings of fact contravened the order's requirement that they be issued within 30 days of the hearing.

³ In its findings of fact Respondent made the following statement, which is also proposed as a finding of fact to this Grievance Board:

[I]t must be pointed out that the allegation of failure
(Footnote Continued)

nonrenewal hearing that she was not properly evaluated and provided reasonable opportunity to improve. As Respondent recognizes, Grievant explicitly relied on Policy 5300 at the

(Footnote Continued)

to follow Policy 5300 was never presented to this Board [of Education], in writing, as the basis of the grievance, nor was it ever addressed at Levels I or II or IV. The Level IV hearing did not address it and the Level IV appeal form, it is our understanding, did not raise this issue. The appeal to Level IV was simply that the nonrenewal decision was substantially incorrect and there was no addressing of the issue of failure to follow State Board Policy 5300. Therefore, the grievance is untimely as it seeks to raise the issue of failure to follow the State Board Policy 5300. It is clear that this issue was first raised orally at the September 22, 1988, hearing. In fact, the Level IV remand order specifically limits the grievance hearing to "address the contentions raised thereat by the grievant" which contentions were those set forth in the record of the nonrenewal hearing. That was the reason that there was no direction to hold additional hearings.

This argument makes no sense whatsoever. There have been no hearings at Levels I, II, or IV. The appeal forms sent this Grievance Board in Summer 1988 did not limit Grievant's arguments on the propriety of Respondent's nonrenewal of her contract. Finally, the remand order stated,

The Cabell County Board of Education is further ORDERED to render findings of fact and conclusions of law on this matter within 30 days after said [grievance] hearing. The parties are advised that, in that the nonrenewal hearing was detailed and the record extensive, the grievance hearing may, by agreement of the parties, be abbreviated, but the board must address the contentions raised thereat by the grievant.

The order clearly made no limitation on the Level III grievance hearing at all; the order to "address the contentions raised thereat by the grievant" did not relate to the conduct of the grievance hearing but mandated that the Board of Education, in its findings of fact and conclusions of law, address all contentions raised by grievant at the grievance hearing, not the nonrenewal hearing.

September 22, 1988, hearing. Since that hearing was the first and only hearing on the grievance, Grievant would have been entitled to raise the issue there even if she had not raised it, as she had, at the nonrenewal hearing.

It is not necessary to address Grievant's contention that she was not fairly evaluated⁴ because, in any case, she was not provided a reasonable opportunity to improve, as required by Policy 5300, implemented by the Handbook.⁵ Section 6(a) of Policy 5300 provides in pertinent part,

Every employee is entitled to the opportunity of improving his job performance, prior to the terminating or transferring of his services, and can only do so with assistance of regular evaluation.

The Handbook essentially restates Policy 5300 in providing, as a "Principle of Operation,"

If an employee's performance is declared deficient, the employee shall be given the opportunity to correct the deficiency, and the administration shall give reasonable support necessary to help the employee succeed.

In the section "Evaluation Procedure," the Handbook is more specific, providing in pertinent part,

An improvement plan shall be written by the evaluator, using input from the employee, for areas in which the employee needs improvement. An employee may have more

⁴ While Grievant contends that she was unfairly evaluated and the record does indicate some animosity toward Grievant by the principal at Barboursville High School, Grievant admits and the record establishes that her teaching needs improvement.

⁵ The requirements of both Policy 5300 and the Handbook apply just as much to probationary employees as to tenured teachers. See Powell v. Brown, 238 S.E.2d 220 (W.Va. 1977).

than one improvement plan in progress at the same time....

The functions of the improvement team shall be to set a timeline to follow in completing the functions of the team; to observe and record in writing findings about the employee; to provide assistance to the employee in meeting the performance standard(s) as noted on the improvement plan for the employee; and to report all results to the employee's evaluator. The improvement team's report shall serve as a resource document, be attached to the improvement plan for the employee and made available to the employee.

Finally, in a special section on improvement plans, the Handbook states,

The improvement plan shall include:

I. Statement of Deficiency....

II. Plan of Assistance

The purpose of the "Plan of Assistance" is to mutually outline a program that brings together, or makes available, resources to assist the employee in correcting the stated deficiency.

The Plan of Assistance shall include:

- | | | |
|--------------|----|---|
| Expectations | 1. | Provide specific statement as to what is expected of the employee in the area(s) judged to be deficient. |
| Assistance | 2. | Identify the assistance to be provided by the evaluator and other resources and/or contributors. It should be noted, however, that the responsibility of utilizing this assistance is that of the employee. |
| Time Line | 3. | Provide the time line to accomplish the assistance plan. Sufficient time for improvement shall be allowed. |
| Monitoring | 4. | Providing for monitoring progress of the employee by the evaluator.... |

Grievant began working for Respondent on September 1, 1987, the first day of classes.⁶ She was assigned five English classes. It was not long before Grievant was criticized by Lawrence Childers, Principal of Barboursville High School, for on November 3, 1987, he charged her for insubordination and neglect of duty for allegedly walking out of a class (Ex. D). A week later she was formally evaluated by John Flowers, an Assistant Principal at the high school. On the evaluation form (Ex. E) he marked that Grievant's performance did not meet standards in five out of the eight areas covered by the form. While the form provides "Attach Improvement Plan" in the space for marking deficiencies in performance, no improvement plan was attached or provided Grievant. Mr. Flowers testified he did discuss his findings with Grievant (Tr. 102). Grievant signed the form, marking that she was not in agreement with it.⁷

No further action was taken until February 1, 1988, when Mr. Childers wrote Assistant Superintendent of Schools

⁶ Grievant was notified of her appointment the day before classes began and therefore missed the five-day period during which teachers were provided orientation, if new, and otherwise were able to prepare for classes.

⁷ On November 12, 1987, Grievant was also observed by Lonnie Ward, also an Assistant Principal, and on the observation form he marked several areas in which Grievant needed improvement. This report of observation was not provided Grievant, and, although the form itself states, "An Improvement Plan must be developed for any item rated as 'Needs Improvement,'" no improvement plan resulted.

Ed McNeel, primarily complaining of discipline problems in Grievant's classes and requesting that Grievant be terminated immediately. Mr. McNeel testified that at that time he did not think the information sufficed to support Mr. Childers's recommendation. Instead, he met with Grievant and her attorney on February 11th,⁸ when Grievant's attorney suggested Grievant be put on an improvement plan. The suggestion was accepted and at the end of February the members of the improvement team met to formulate a plan.⁹ Grievant was observed during the first week of March. The team members wrote individual reports (Ex. R, S, T), which were not provided Grievant, but team-leader Dr. David Koontz wrote a summary report (Ex. Q), which discussed problems the team members had observed and made recommendations for improving Grievant's teaching and discipline in her classroom, and provided it to Grievant on March 22, 1988.¹⁰ No

⁸ Exhibit H is Mr. McNeel's February 12th memo on what was discussed at the meeting.

⁹ On February 24, 1988, Mr. Childers wrote Mr. McNeel complaining of Grievant's sending disruptive students into the hall and for using profanity. He asked for disciplinary action. On March 9 Grievant was reprimanded by Dr. Robert Frum, then Superintendent of Schools. On March 21st Grievant, in a detailed fourteen-page letter, responded to the charges (Ex. V).

¹⁰ Dr. Koontz and Grievant did not discuss the report. Dr. Koontz gave Grievant the report during a break between classes. While Mr. Childers had advised Dr. Koontz that a discussion could continue into the next period because he had told another teacher to cover Grievant's class, no one told Grievant of that arrangement, so she hurried off to class.

further efforts were made to improve Grievant's performance (Tr. 52) and indeed no one further observed Grievant or evaluated her teaching after receipt of the team's suggestions. The Board of Education voted on April 19, 1988, not to renew Grievant's contract and she was so notified April 27, 1988 (Ex. X).¹¹

Respondent contends as follows:

The record is filled with instances of intervention with Ms. Slavin's teaching and teaching techniques. The goal of State Board Policy 5300 is to have open and honest evaluations.

There were written evaluations of Ms. Slavin on November 10, 1987, February 1, 1988, February 12, 1988, February 15, 1988 and March 1988. There were conferences with Ms. Slavin concerning her teaching deficiencies in November 1987, February 1988 and March 1988.

In addition, it is clear from the record that numerous other informal methods of evaluation and help were consistently being offered to Ms. Slavin by the professional staff at Barboursville High School. Both the procedure and the substance of State Board Policy 5300 were clearly met.

While the written communications and conferences referred to in this argument may have fulfilled the requirement of Policy 5300, as implemented by the Handbook, that an employee be evaluated and therefore notified of deficiencies,¹² Respondent does not answer Grievant's

¹¹ The record does not establish when the administration recommended termination of Grievant's employment.

¹² The only time Grievant was formally evaluated was November 10th. It also must be noted that the February 15, (Footnote Continued)

contention that she was not given a reasonable opportunity to improve, as required by Policy 5300 and the Handbook, especially since the Handbook mandates¹³ that an improvement plan be written for the areas of deficiency found upon evaluation and that each plan provide a plan of assistance, for which there are in turn specific requirements. Respondent's argument refers to no written plan of assistance at all; indeed, it only refers to "intervention with Ms. Slavin's teaching and teaching techniques" and "informal" help offered Grievant, which of course would not fulfill the requirements for a proper improvement plan.

Respondent's witnesses Mr. McNeel and Mr. Childers did recognize that the November evaluation should have had an improvement plan attached (Tr. 41-42, 73-74). Further, the written plan implemented March 22nd did not provide Grievant any opportunity to improve. Mr. McNeel's statement that it gave her the opportunity "to prove herself as a teacher" (Tr. 52) is a succinct statement of exactly all the plan offered her. The deficiencies found by the improvement team were only used as a basis for nonrenewal of her

(Footnote Continued)

1988, communication referred to by Respondent cannot be considered an evaluation. It was simply a letter to Mr. Childers from the father of one of Grievant's pupils, who was not employed by Respondent and of course had no authority to evaluate Grievant.

¹³ It is well-settled that "shall" is interpreted as requiring, or mandating, action. See Weimar-Godwin v. Bd. of Ed. of Upshur County, 369 S.E.2d 726, 730 (W.Va. 1988).

contract, not as a plan for improvement at all. With no further evaluation after the plan was implemented, it was impossible for her to be credited with any improvement she may have made in the month between when she was provided the plan and Respondent's decision not to renew her contract on April 19th. Finally, the Supreme Court of Appeals has held that when there is only a month between implementation of an improvement plan and evaluation, there is not adequate time for the employee to improve his performance even if he wants to. Wren v. McDowell County Bd. of Ed., 327 S.E.2d 464, 466 (W.Va. 1985).

Mr. McNeel and Mr. Childers (Tr. 36-38, 73-74) apparently believed that, because Grievant had been informed of deficiencies, she was provided an opportunity to improve. Such an approach would not fulfill the requirements of the Handbook, at the very least.

Furthermore, from the April 27th letter (Ex. X) it is clear that Grievant was not allowed any opportunity to erase past mistakes. The letter not only referred to incidents that predated the March improvement plan but also restated mistakes made by Grievant as early as the first few weeks of school which the record indicates she did not continue to make after being informed of them. Two examples suffice. The first two of the thirteen reasons for nonrenewal stated by the April letter are as follows:

1. Your inability to maintain self-control. You became upset with students, told them to get it on their own, and walked out of classroom leaving students unattended on at least two occasions.

2. You defied school rule and principal's directive by placing students in hallway for discipline.

The first charge refers to the October incident which was the subject of Mr. Childers's letter of November 3rd (Ex. D). There is no evidence Grievant left her classroom unattended thereafter. The second charge also refers to a practice Grievant discontinued after she was informed that it was contrary to procedures. Grievant explained in her testimony that at the beginning of the year she did not know that sending students into the hall was improper and she had done so in accordance with disciplinary methods accepted in the schools at which she had previously substituted. It was improper for Respondent to base its decision not to renew Grievant's contract on mistakes which Grievant had rectified.¹⁴

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

Findings of Fact

¹⁴ Mr. McNeel opined that behavior such as walking out of a classroom, which was labelled insubordination and neglect of duty, did not require an improvement plan. The West Virginia Supreme Court of Appeals, in Holland v. Board of Educ. of Raleigh County, 327 S.E.2d 155 (W.Va. 1985), ruled that since insubordination is correctable it must be the subject of the evaluation procedures of Policy 5300.

1. Grievant was employed by Respondent Board of Education as an English teacher on a probationary contract in Fall, 1987.

2. Grievant was formally evaluated on November 10, 1987, and deficiencies in performance were found, but no improvement plan was formulated.

3. On February 1, 1988, Grievant's supervisory principal, Mr. Childers, requested that Grievant's employment be terminated immediately. His request was denied.

4. At the end of February an improvement plan was formulated, Grievant was observed by the improvement team members the first week of March, and a summary of the team's findings and recommendations for improvement was given March 22, 1988. She was not thereafter observed or evaluated.

5. On April 19, 1988, Respondent Board of Education voted not to renew Grievant's employment for the following year and she was so notified by letter of April 27th.

6. The April 27th letter included as reasons for not renewing Grievant's contract mistakes Grievant had made prior to the improvement plan and which she had rectified.

Conclusions of Law

1. West Virginia Board of Education Policy 5300 and the Cabell County Public School Employee Evaluation Handbook require that every employee be provided an opportunity to improve prior to termination of his or her employment.

2. The Handbook provides in its evaluation procedures that, when an employee is found deficient in an area, an improvement plan "shall be written by the evaluator, using input from the employee." The Handbook also mandates that the plan of improvement provide a plan of assistance with specific requirements.

3. Grievant was not provided a reasonable opportunity to improve under the plan of March 1988 because she was not observed or evaluated after its implementation and the month's time between its implementation and Respondent's decision not to renew her contract did not provide her time to improve. Wren v. McDowell County Bd. of Ed., 327 S.E.2d 464, 466 (1985).

4. It was contrary to Policy 5300 and the Handbook for Respondent to rely on actions predating the March improvement plan as grounds for not renewing Grievant's contract, especially since she had discontinued action upon being asked to do so.

5. A board of education must comply with the mandates of its policies. See Powell v. Brown, 238 S.E.2d 220 (W.Va. 1977).

Accordingly, the Grievance is **GRANTED**. Respondent is ordered to reinstate Grievant to her position and to provide her backpay, less any appropriate set-off.

Either party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell 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: February 17, 1989