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GENE FARMER

v.

Docket No. 89-23-673/a, b

LOGAN COUNTY BOARD OF EDUCATION

D E C I S I O N

Grievant, Gene Farmer, is a long-time employee of Respondent Logan County Board of Education and is presently employed as a classroom teacher at Chapmanville High School. He filed two separate grievances alleging that Respondent had engaged in harassment and reprisal against him as the result of his prior grievance over the principalship of Chapmanville High School. He further contended that Respondent's actions were part of a long-range plan to remove him from the school system.

Following denial at Level One, both grievances were advanced to Level Two where, after separate hearings, they were denied by written decision dated September 29, 1989.¹ Following W.Va. Code §18-29-4(c) waiver at Level Three, the

¹ The testimony and exhibits from Level Two are a part of the record herein.

grievances were pursued to Level Four on November 20, 1989, where they were consolidated for hearing and decision. Following a Level Four hearing on January 12, 1990, the parties were given until February 9, 1990, to submit any proposed findings of fact and conclusions of law.² That date having passed, this matter is mature for disposition.

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Initially, Grievant protested the placement of a letter of reprimand in his personnel file for his failure to comply with the request of E. J. Amburgey, Jr., Chapmanville High School Principal, that he turn in a grade-distribution sheet. Mr. Amburgey, who became principal at Chapmanville at the start of the 1988/89 school year, continued the practice of prior administrations in requesting that teachers turn in a grade-distribution sheet at the conclusion of each grading period. The grade-distribution sheet is simply a list of courses taught by each teacher with a breakdown of the number of letter grades per class. This information is compiled from the teacher's grade book and takes approximately one hour to prepare. The sheet has numerous uses by the school administration including determining if learning

² Grievant submitted his proposals in a timely fashion. Respondent's proposals were not submitted until February 26, 1990.

³ Respondent numbered this grievance "5-7-89/90."

outcomes are being met; establishing reasons for exceedingly high numbers of any grade range; evaluating textbooks, supplemental materials and interruption in class periods; assisting teachers in self evaluation; and evaluating subject matter and teaching styles.

The evidence showed that on Monday, February 20, 1989, Mr. Amburgey circulated a memorandum to all teachers advising, among other things, that the grade distribution sheets for the first semester should be turned in as soon as possible. This memo was placed in the school mailbox of each teacher. School was cancelled on Thursday, February 24, 1989, due to snow and on Friday, February 25, Grievant, Mr. Amburgey and various administrators of Respondent were in the Charleston, West Virginia, offices of this Board for the Level Four hearing over Grievant's non-selection as principal at Chapmanville High School.

According to Mr. Amburgey, a conference was held on Monday, February 27, 1989, with grievant and Mr. Ted Ellis. At that time, Mr. Amburgey contended that he asked Grievant if he had the blank distribution forms, to which Grievant replied that he had the forms but had not had time to complete them. Mr. Amburgey asserted that he then told the Grievant to fill out the forms and deliver them to him as soon as possible. The following day, February 28, Mr. Amburgey presented Grievant with a letter of reprimand for his insubordination in failing to prepare the distribution sheets. While the letter stated that it was a formal

reprimand, it also stated that the matter would not be reported to Respondent's Central Office if the documents were received by March 2, 1989. Grievant denied that a conference was ever held on February 27, as claimed by Mr. Amburgey, and stated that he had simply forgotten about the forms until he was presented with the letter of reprimand. However, there is no dispute that Grievant, once given the letter of reprimand, refused to complete the forms claiming they could be used in an unethical manner to harass teachers for whom Respondent wished to cause trouble. Grievant contended that one could not look at the grade distributions in isolation but must also consider how the grades were derived. His attempt to resolve this dispute by furnishing Mr. Amburgey a photocopy of his actual grade book was rejected.

The second request for grade distribution sheets came on April 18, 1989, at the end of the third grading period. This request was contained in a memorandum circulated to all faculty members asking that they try to finish up the grade distribution sheets as soon as possible. This was followed by an undated memo asking that the sheets be turned in by May 4, 1989. It was undisputed that Grievant did not turn in grade distribution sheets again, claiming they were unethical. However, he did give Mr. Amburgey a copy of his grade book. On May 11, 1989, Mr. Amburgey gave Grievant a second letter of reprimand.

Grievant has claimed throughout these proceedings that the grade distribution sheets cannot be viewed independently of the grade book. He asserts that the number of grades alone is meaningless without taking into consideration how the grades were derived, which is why he continued to furnish a copy of his grade book to Mr. Amburgey. Despite his admitted failure to turn in the requested information to his principal, Grievant maintains that the letters of reprimand constitute harassment and are acts of reprisal for his continued efforts, through the grievance procedure, to obtain the Chapmanville principalship for which Mr. Amburgey was selected.

This argument is simply without merit. W.Va. Code §18A-2-9 mandates that a principal "shall assume administrative and instructional supervisory responsibility for the planning, management, operation and evaluation of the total educational program of the school or schools to which he is assigned." Furthermore, W.Va. Code §18A-5-5 provides that "teachers shall also keep such other records and make such other reports as may be required by the Board of Education employing them." Clearly, this would apply to requests for records and reports of the Board's agents, such as Principal Amburgey. Finally, the possibility that the grade distribution sheets may be used in the future in an unethical manner is not justification for refusal to comply with a lawful request of one's superior.

Grievant also alleged that the reprimand letters were given to him by Mr. Amburgey on direction of certain Board of Education members as retaliation for grievances filed in the past. As evidence, Grievant submitted two pages of the Level Four hearing transcript from his grievance over the Chapmanville principal position. Grievant attaches great significance to the fact that Mr. Ken Zigmond, Respondent's president, had heard that Grievant had refused to turn in his grade distribution sheets. Grievant notes that this testimony was given on February 24, 1989, and Mr. Amburgey did not bring this matter to Grievant's attention until February 27, 1989, the Monday following the Level Four grievance hearing. However, Mr. Zigmond testified in the instant grievance at Level Four that he had learned this information from fellow Board of Education member Dan Ellis, whose wife is a secretary at Chapmanville High School. Of course, the mere fact that individuals other than Grievant knew that he had failed to turn in a grade distribution sheet is not evidence of a conspiracy or a long-range plan to remove him from the school system. Based upon all of the testimony surrounding this matter, it cannot be determined that any impropriety occurred in Board of Education members' being informed that Grievant had failed to comply with a request from his principal.

Grievant also presented the testimony of Mr. Moss Burgess, a teacher at Logan High School, who was present at a special meeting of Respondent in the summer of 1989 when

he was approached by Mr. Zigmond and asked if he knew Grievant. According to Mr. Burgess, Mr. Zigmond said that Grievant was going to keep on until Respondent fired him. Although Mr. Burgess is of the opinion that Respondent is upset with Grievant, he knows of no cases where someone has been told to reprimand someone else. Mr. Zigmond testified that the conversation with Mr. Burgess did, in fact, occur, but denied that it referred to Grievant's activity in the grievance process. Instead, Mr. Zigmond stated that Grievant was digging his own grave because of the duties he was not performing. While it is clear that there is animosity between Grievant and Respondent, it cannot be found that a conspiracy exists to remove Grievant from the school system or that Respondent has engaged in harassment or reprisal over prior grievances.

However, Grievant's argument that, in giving the reprimand letters in the manner in which they were given, Respondent violated its own policies regarding discipline has merit. Grievant contends that this action on the part of Respondent violates Section VI.5. Disciplinary Action of the Logan County Policy Manual. In summary, this policy provides that, prior to dismissal of permanent employees for unsatisfactory performance of duties, the employee should be given at least two warnings. Initially, the employee should receive an oral warning, followed by an oral warning with a letter setting forth the points covered in the discussion. This policy goes on to set out six specific topics that are

to be covered during the administration of the oral warning and concludes by noting that the supervisor should record the date of the interview and relevant information for future reference. The evidence is not persuasive that a formal disciplinary conference was ever held with Grievant on February 27, 1989. It is significant that the letter of reprimand dated February 28 makes no mention of a conference of any sort with regard to Grievant's failure to turn in grade distribution sheets. At the same time, the letter does make reference to a request for the sheets on February 20, 1989.

It is clear that Respondent did not follow its own policy pertaining to discipline in giving the letters of reprimand to grievant. A county board of education in West Virginia is bound by the procedures that it properly establishes to conduct its affairs. Dillon v. Wyoming County Board of Education, 351 S.E.2d 58 64, 65 (W.Va. 1986). While the reprimand letter of February 28, 1989, was not proper, it certainly served to put Grievant on notice with regard to future instances of his refusal to obey directives of his principal. Therefore, the letter of reprimand dated February 28, 1989, and the discussion which Mr. Amburgey had with Grievant at the time of its delivery will be treated as Grievant's first oral warning pursuant to the aforementioned provisions of the Logan County Policy Manual. Accordingly, the letter of February 28 must be removed from Grievant's personnel file. However, the May 11, 1989, reprimand letter

to Grievant may remain in his personnel file as its issuance was in compliance with Logan County policy.

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Grievant's second allegation is that Respondent improperly and illegally evaluated him, as part of a continuing pattern of harassment, at the conclusion of the 1988/89 school year. Specifically, Grievant contends that the evaluation is invalid because it was done by Mr. Amburgey, who was biased against Grievant because of the aforementioned grievance over the Chapmanville principalship, was not performed in accordance with Logan County policy with regard to evaluations and was based upon impermissible factors. Respondent contends that the allegations regarding the evaluation are not a grievable matter as the overall evaluation rated grievant "meets standards." As this grievance involved a non-disciplinary matter, Grievant has the burden of proving his allegations by a preponderance of the evidence.

The evaluation document in question provides for teacher evaluation in seven areas: implementation program of study, classroom management, professional work habits, instructional skills, student progress, pupil-teacher-parent relationships and professional growth. The document also

⁴ Respondent numbered this grievance "5-8-89/90."

contains blanks for evaluating the teacher on two separate observation occasions. The evaluation form submitted into evidence in this matter shows that the first observation of Grievant was by Mr. Amburgey on December 15, 1988. To aid in the completion of the evaluation form, a separate observation report form was completed by Mr. Amburgey on that same day. According to this observation report form, Mr. Amburgey observed Grievant's Contemporary America class.

There has been no documentary evidence as to a second classroom observation of Grievant by Mr. Amburgey, despite Mr. Amburgey's claims that an observation was done. However, if an observation was, in fact, done, it did not consist of one class period. At Level Four, Mr. Amburgey testified that the second evaluation of Grievant was based upon several informal observations over a period of time. Mr. Amburgey testified that these informal evaluations occurred when he would walk through Grievant's classroom and when he would look in the door while walking down the hall. At most, he spent between five and ten minutes at any one time observing Grievant. Moreover, there is no indication on the evaluation form itself as to the date, or dates, or class periods during which Mr. Amburgey observed Grievant.

Again, Grievant submitted a portion of the Logan County Policy Manual dealing with evaluation procedure. Section VI.3.3 provides that evaluation reports shall be based upon a minimum of two direct observations of job performance. The evaluation report is also to include written

documentation of observations of teacher performance during the evaluation period. This policy concludes by noting that documentation is essential to the evaluation. It instructs supervisors to keep an accurate record of dates, times, places, events and other specifics supporting the evaluation report. It also provides that a copy of the evaluation report shall be submitted to the superintendent's office and maintained in the employee's personnel file.

It is significant that Mr. Amburgey completed a rather detailed classroom observation form and evaluation form in December, 1988, but apparently failed to do so in the spring of 1989. While Mr. Amburgey testified that he felt sure that he had, in fact, done an observation of grievant, there is essentially no documentation that would establish that fact. At the Level Four hearing, Mr. Amburgey testified that he had been unable to find grievant's second observation in the school files; however, he stated it would be on file in Respondent's central office. Upon agreement of all parties, Mr. Amburgey was directed to obtain a copy of that second observation form and submit it to the undersigned post hearing. However, that observation form was never provided. Accordingly, it must be concluded that Respondent has again violated its own policies with regard to the performance of teacher evaluations. As stated earlier, boards of education in West Virginia are bound by the procedures that they properly establish to conduct their

affairs. E.g., Dillon v. Bd. of Educ. of the Co. of Wyoming, 351 S.E.2d 58 (W.Va. 1986).

Grievant's contention that the evaluation done by Mr. Amburgey was based upon impermissible factors also has merit. Grievant was rated as "does not meet standards" under item 5, Professional Work Habits, dealing primarily with grievant's ability to work cooperatively with school personnel. The comments in support of that rating indicate that it was based upon Grievant's failure to turn in his grade distribution forms and grievances which he has filed. In fact, Mr. Amburgey testified at Level Four that he was unaware that he could not use grievances filed by Grievant to lower his evaluation. W.Va. Code §18-29-3(s) clearly provides that the number of grievances filed by an employee shall not, per se, be an indication of that employee's job performance. Significantly, there was no evidence presented at any level that anything other than the number of grievances filed by Grievant were taken into consideration in this evaluation. Moreover, W.Va. Code §18-29-3(h) states that no reprisals shall be taken against any participant in the grievance procedure by reason of such participation. It is undisputed that the Grievant has filed a number of grievances against Respondent during his tenure. While Grievant has not shown that Respondent engaged in reprisal against him as the result of these grievances, it is clear that the 1988/89 evaluation was based upon impermissible considerations. Based upon these impermissible factors and

Respondents failure to follow its own policies regarding evaluation, the 1988/89 evaluation must be removed from Grievant's personnel file. While the adverse evaluation was without doubt arbitrarily and improperly rendered by the evaluator, the evaluation in and of itself cannot sustain a finding of harassment or reprisal.

Findings of Fact

1. Grievant is a long-term employee of Respondent and is currently employed as a classroom teacher at Chapmanville High School. He has filed several grievances against Respondent including one over the selection of E.J. Amburgey, Jr. as principal at Chapmanville.

2. On February 20, 1989, Mr. Amburgey circulated a memorandum to all faculty members at Chapmanville requesting grade distribution sheets be turned in as soon as possible. Grievant did not comply with this request.

3. On February 28, 1989, Mr. Amburgey presented Grievant with a letter of reprimand for his failure to turn in the distribution sheets. It made no mention of a conference or oral warning prior to its issuance but did mention the February 20 request.

4. On April 18, 1989, Mr. Amburgey again requested grade distribution sheets for the third grading period. Despite an undated reminder memo, asking for the sheets by May 4, 1989, Grievant failed to turn them in.

5. On May 11, 1989, Mr. Amburgey again presented Grievant with a letter of reprimand for failing to turn in the distribution sheets.

6. Mr. Amburgey violated Logan County Policy VI.5 by issuing the February 28 reprimand without first giving Grievant a formal oral warning. However, because that letter served to put Grievant on notice that continued failure to turn in the requested forms would result in further disciplinary action.

7. There is no evidence that Respondent or its members have taken part in a conspiracy to drive Grievant from the school system.

8. On December 15, 1988, Mr. Amburgey performed and documented a formal classroom observation of Grievant. No evidence was provided to establish that Mr. Amburgey performed a second formal evaluation.

9. The second evaluation of Grievant was not in compliance with Respondent's formal policies and was based upon impermissible factors, such as the number of grievances filed by Grievant.

Conclusions of Law

1. W.Va. Code §18-29-2(n) defines harassment as "repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession."

2. W.Va. Code §18-29-2(p) defines reprisal as "retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it."

3. Respondent has met its burden of proof in showing that Grievant was insubordinate in failing to turn in the requested grade distribution sheets on two occasions. "Insubordination" is willful failure or refusal to obey reasonable orders of a superior who is entitled to give such orders. Gill v. W.Va. Dept. of Commerce, Docket No. COMM-88-031 (Dec. 23, 1988).

4. Respondent's failure to follow its own procedures in issuing the February 28 letter of reprimand was an arbitrary and capricious act.

5. Grievant has met his burden of proof in showing that Respondent failed to follow its own policy regarding evaluations and that Respondent considered impermissible factors in its evaluation of him.

6. Grievant has not met his burden of proof in establishing that Respondent has engaged in harassment or reprisal against him.


7. A county board of education in West Virginia is bound by procedures it properly establishes to conduct its affairs. Dillon v. Bd. of Educ. of the Co. of Wyoming, 351 S.E.2d 58 (W.Va. 1986).

8. W.Va. Code §18-29-3(s) provides that the number of grievances filed against an employer or agent or by an

employee shall not, per se, be an indication of such employer's or agent's or such employee's job performance.

Accordingly, grievance 89-23-673/a is **GRANTED** to the extent that Respondent is ordered to expunge the February 28, 1989 letter of reprimand from Grievant's personnel file and to treat that incident as a formal oral warning. Grievance 89-23-672/b is **GRANTED** and Respondent is ordered to expunge the 1988/89 evaluation from Grievant's personnel file.

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



ROBERT M. NUNLEY
HEARING EXAMINER

DATE: April 25, 1990