



REPLY TO:
401 Davis Avenue
Suite 315
Elkins, WV 26241
Telephone: 636-1123

Members
James Paul Geary
Chairman
Orton A. Jones
David L. White

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

GASTON CAPERTON
Governor

Offices
240 Capitol Street
Suite 515
Charleston, WV 25301
Telephone 348-3361

ARDEN WILKINS

v.

DOCKET NO. 89-51-696

WEBSTER COUNTY BOARD OF EDUCATION

DECISION

Grievant, Arden Wilkins, is employed as a bus operator by the Webster County Board of Education (Board). Mr. Wilkins filed a level four grievance on December 4, 1989 in which he alleged violations of W.Va. Code §§18A-2-7 and 18A-2-8 when he was suspended first by Superintendent Martha Dean and later by the Board.¹ A level four hearing was conducted on January 26, 1990 and documents not available on that date were submitted on February 5, 1990.

The facts in this matter are not in dispute. On Saturday, September 23, 1989 the grievant was involved in an automobile accident after which he was taken to the Webster County Memorial Hospital where he was treated for a head

¹W.Va. Code §18A-2-8 provides an expedited process for employees who have been suspended or dismissed by which they may file a grievance directly to level four.

injury and submitted to a blood alcohol test. By letter dated September 28, 1989 Superintendent Dean advised the grievant that she was suspending him from employment under authority of W.Va. Code §18A-2-7 for a period not to exceed thirty days. The reason for this action was that evidence existed indicating the grievant had been driving under the influence of alcohol at the time of the accident and conviction upon such a charge would result in the revocation of his school bus driver certification, as provided by the "W.Va. School Transportation Regulations." She continued that in light of this possible conviction and in fulfilling her duties regarding the safety and well-being of the students the suspension was imposed without pay and would be effective until such time that charges could be presented to the Board. The grievant was further advised that he would be notified of the date and time of the Board meeting and that he could appear to present any information he considered pertinent to the disposition of the matter. The grievant was notified by letter dated October 25, 1989 that on October 23 the Board had voted to uphold and extend the suspension imposed by Superintendent Dean until a resolution of the pending criminal charge is reached by the proper law enforcement authorities. The grievant had not received earlier notification of the meeting.

The grievant alleges numerous procedural violations including the Superintendent was without authority to summarily suspend him without approval by the Board, the

charges presented to the Board were not those set forth in the initial letter of suspension, the reasons stated by Superintendent Dean in the letter of September 28 were not within the confines of those specific statutory reasons for suspension, he was not given proper notice or afforded a hearing on the charges, and no rational nexus exists between the charges and his duties as a bus operator. The Board responds that the suspensions were properly implemented within the statutory authority granted to the Superintendent and the Board. It asserts there is no legal requirement that the grievant be allowed to present his case to the Board and that the grievant's due process is protected by the level four grievance hearing. Rational nexus exists, the Board argues, because the grievant's action applies to his competence to perform the primary duties for which he is employed by the Board.

In support of his allegation that the superintendent has no authority to suspend an employee without approval of the Board, the grievant cites the first sentence of W.Va. Code §18A-2-7: "The superintendent, subject only to the approval of the board, shall have authority to ... suspend school personnel and recommend their dismissal pursuant to provisions of this chapter." However, the following paragraph provides that the "superintendent's authority to suspend school personnel shall be temporary only pending a hearing upon charges filed by the superintendent with the board of education and such period of suspension shall not

exceed thirty days unless extended by order of the board." This provision is generally interpreted to grant the superintendent additional authority to temporarily suspend an employee under circumstances which require his immediate withdrawal from service until such time that the Board can review the matter. See Allison v. Kanawha County Board of Education, Docket No. 20-86-273-1 (December 30, 1986). Because the grievant did not allege any misapplication or misinterpretation of this statutory provision, it is determined that the superintendent acted within her authority to suspend the grievant effective September 28, 1989.

It is also determined that the charges were properly set forth in the superintendent's letter of September 28. The grievant bases his argument that none of the seven grounds for suspension set forth in W.Va. Code §18A-2-8 were stated as the cause for the superintendent's action. A strict reading of this statutory section would require that the suspension be only for: immorality, incompetency, cruelty, insubordination, intemperance or willful neglect of duty. Such a rigid wording of the charges is not required as evidenced in the decision of Green v. Board of Education, 133 W.Va. 356, 56 S.E.2d 100 (1949) in which the Court held that the word "inefficiency," used in a resolution by the board of education to terminate a teacher's continuing contract of employment, was synonymous with "incompetency" and was thus a valid reason for the action. In the present matter the superintendent clearly expressed that the

suspension was based on evidence that the grievant was driving under the influence. Whether this charge could be categorized as intemperance, incompetence or willful neglect of duty is not controlling.²

It is uncontroverted that the grievant was not provided a notice of the hearing before the Board and therefore was denied an opportunity to respond to the charges prior to its voting on the recommended suspension. The Board defends its action by erroneously relying upon the level four grievance hearing to provide the grievant a full measure of due process. The very statute cited by the Board in its response to whether the superintendent could temporarily suspend the grievant on her own authority specifically states that "the superintendent's authority to suspend school personnel shall be temporary only pending a hearing upon the charges..." (emphasis added). W.Va. Code §18A-2-8.

In Cleveland Board of Education v. Loudermill, 105 S. Ct. 1487, 470 U.S. 532, 84 L.Ed.2d 494 (1985) the U.S. Supreme Court determined that once a property interest in employment is established, deprivation of that interest cannot occur without appropriate procedural safeguards. The need for some sort of hearing was found to be evident from a

²The phrasing of the charges is important only to the extent that the employee is given a true and complete statement of the complained of action. Of course said action must reasonably fall within any of the seven statutory grounds for suspension or dismissal.

balancing of the competing interest at stake: the private interest in retaining employment, the governmental interest in the expeditious removal of an unsatisfactory employee and the avoidance of administrative burdens, and the risk of an erroneous termination. Although a pre-deprivation "hearing" was considered to be necessary, the Court determined that it need not be elaborate. Because provisions existed for a full post-deprivation hearing the Court held that the essential elements required prior to the pre-deprivation action was notice and an opportunity to respond, either in person or in writing.

The West Virginia Supreme Court of Appeals has applied the same balancing of interest test and standards to determine the extent of due process required in numerous employment deprivation cases. See Buskirk v. Civil Service Commission of West Virginia, 332 S.E.2d 579 (W.Va. 1985); Clarke v. West Virginia Board of Regents, 279 S.E.2d 169 (W.Va. 1981); Waite v. Civil Service Commission, 241 S.E.2d 164 (W.Va. 1978); North v. West Virginia Board of Regents, 233 S.E.2d 411 (W.Va. 1977); Beverlin V. Board of Education of Lewis County, 216 S.E.2d 554 (W.Va. 1975); State ex rel. Rogers v. Board of Education of Lewis County, 25 S.E.2d 537 (W.Va. 1943). In addition the Grievance Board has previously held that an employee must be provided an opportunity to respond orally or in writing to the charges constituting the basis for the suspension, unless compelling

circumstances dictate otherwise. Knauff v. Kanawha County Board of Education, Docket No. 20-88-095 (Jan. 10, 1989).³

In the present matter the grievant should have been granted an opportunity to respond to the charges and the failure to provide that opportunity renders the Board's action to suspend in violation of W.Va. Code §18A-2-7. Due to the finding that the grievant has been deprived of his due process safeguards it is not necessary to address the remaining issues.

In addition to the foregoing recitation it is appropriate to make the following specific findings of fact and conclusions of law.

Findings of Fact

1. The grievant is employed as a bus operator by the Webster County Board of Education.

2. On Saturday, September 23, 1989 the grievant was involved in an automobile accident after which he submitted to a blood alcohol test.

³Although due process is generally required prior to the deprivation, it may not be in the presence of a compelling public policy which dictates otherwise. North, supra. Therefore, Superintendent Dean's emergency, temporary suspension based on her perceived threat to the safety of the children may not have required a granting of due process; however, no such compelling concerns existed at the time the Board voted to suspend the grievant.

3. Based on information which she had received regarding the accident and the surrounding circumstances, Superintendent Martha Dean suspended the grievant, without pay, effective September 28, for not more than thirty days.

4. The reason for the temporary suspension was clearly stated to be the existence of evidence that the grievant was driving while under the influence of alcohol.

5. At a meeting held on October 23 the Board voted to uphold and continue the suspension pending a resolution by the proper law enforcement authorities.

6. The grievant was not notified of the hearing depriving him of an opportunity to respond to the charges.

Conclusions of Law

1. A superintendent's authority to suspend employees is temporary only pending a hearing upon charges filed by the superintendent with the board of education. W.Va. Code §18A-2-7.

2. Pre-deprivation due process need not be elaborate but must provide the essential elements of notice and an opportunity to respond either orally or in writing to the charges constituting the basis for the suspension, unless compelling circumstances dictate otherwise. See Cleveland Board of Education v. Loudermill, supra; Clarke v. West Virginia Board of Regents, supra; Knauff v. Kanawha County Board of Education, supra.

3. The failure of the Board to provide the grievant with an opportunity to respond to the charges prior to acting on the recommended suspension was a violation of his due process rights.

Accordingly, the grievance is **GRANTED** and the Webster County Board of Education is hereby Ordered to reinstate the grievant and to reimburse him for all lost wages incurred as a result of the improper suspension until such time the grievant is allowed to respond to the charge and, after considering the presentations of both the Superintendent and the grievant, the Board votes to suspend.

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

DATED: February 28, 1990

Sue Keller
SUE KELLER
SENIOR HEARING EXAMINER