JONATHAN T. MCVAY

v. Docket No. 95-54-041

WOOD COUNTY BOARD OF EDUCATION

D E C I S I O N

Respondent Wood County Board of Education (WCBE) terminated Grievant Jonathan T. McVay for misappropriation of school property and also approved a prior suspension which had been imposed after the offense was discovered. Grievant appealed. WCBE maintains that Grievant's appeal was untimely filed, and that, in any event, the termination was justified under the circumstances. Grievant, who admits to the charges and does not protest the suspension, claims the punishment is too severe and alleges that WCBE has not terminated other employees for similar wrongdoing. Following a level four hearing, the parties completed post-hearing responsive briefing on March 29, 1995.1

1At the February 17, 1995, level four hearing, a proffer was made of the transcript of Grievant's pre-termination hearing before WCBE on January 10, 1995. The parties agreed to merely augment the evidence adduced during that proceeding. Although Grievant was not represented by counsel at MCBE's hearing, he had retained an attorney by the time of the level four hearing.

The Timeliness Issue

WCBE's timeliness defense arises upon the following facts. Grievant, who had been suspended on December 21, 1994, for his admitted wrongdoing, was apprised that MCBE would meet on Tuesday, January 10, 1995 for a personnel hearing to consider a recommendation that he be terminated. Grievant attended the hearing. Eventually, WCBE, by vote, approved the recommendation

to terminate Grievant and additionally approved the prior action of the superintendent in suspending Grievant.

By letter dated January 11, 1995, WCBE formally notified Grievant of the termination and also advised that, pursuant to W.Va. Code 18A-2-8, he could file a level four grievance within five days of receipt of the notice. The letter was given to Grievant in person on Wednesday, January 11, 1995, and Grievant signed an acknowledgement that he received it that day. WCBE also sent Grievant a copy of the letter on January 11, 1995, via certified mail, return receipt requested. Grievant received that copy on Thursday, January 12, 1995.

Grievant appealed to level four. According to the date-stamp on Grievant's pleadings, the West Virginia Education and State Employees Grievance Board's (Grievance Board or Board) principal office in Charleston received the grievance on Monday, January 23, 1995. However, the envelope containing the appeal was postmarked Thursday, January 19, 1995, exactly five business days after Grievant first saw the written termination notice.2

After WCBE received a level four notice of hearing, it filed a motion requesting the grievance be dismissed. WCBE argued that the grievance was untimely filed because it was not received by the Grievance Board within the allowable five-day period mentioned in 18A-2-8, i.e., on or before January 19, 1995, and that, therefore, the Board lacked jurisdiction. By letter dated February 7, 1995, the undersigned responded that jurisdiction would lie to take evidence on a timeliness defense. It was also noted that the January 19, 1995, postmark on the envelope containing Grievant's appeal indicated compliance with the five-day filing deadline. The parties were informed that the hearing would commence as scheduled.

At the level four hearing, WCBE renewed its motion to dismiss and more fully argued the timeliness issue then and in its post-hearing fact/law proposals. WCBE's argument that the grievance is untimely filed since the appeal was not actually received by the Board by the cut-off day, January 19, 1995, focuses upon the Board's Procedural Rules, Sections 4.1, 4.2 and 2.2(a). WCBE asserts that the rules "contemplate that griev ances will be properly 'filed'" and that the rules "expressly define to 'file' to mean 'to ensure that documents or articles are received by the Board.'" WCBE asserts that the Board's

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2Monday, January 16, 1995, is not counted because it was a legal holiday. See, definition of "days" in Code 18-29-2(b). Rules, once properly established, take on the force of law. See, WCBE's initial Brief at 5.
It is true that the Board's rules cited by WCBE suggest that a grievance is filed when received by the Board. However, the rules do not expressly declare just what it is that a Grievant must do to "ensure" receipt of his appeal by the Board. The undersigned believes that the Grievance Board has not addressed that specific issue to date, although a "substantial compliance" standard has been applied by the Grievance Board under certain circumstances, and this standard has been upheld by the West Virginia Supreme Court of Appeals. See Syl. pt. 2, Duruttya v. Bd. of Educ. of the County of Mingo, 382 S.E.2d 40 (W.Va. 1990). Substantial compliance with filing requirements has been found when a grievant has attempted to file an appeal, but, through no fault of his own, the grievance was not properly filed by the due date. See Brown v. Bluefield State College,

Docket No. 92-BOD-128 (Mar. 30, 1994); See also, Jack v. W.Va. Div. of Human Services, Docket No. 90-DHS-524 (May 14, 1991). Here, Grievant simply mailed his appeal on the day that WCBE has identified as the last day the appeal could have been timely filed and actually received by the Grievance Board. Hence, WCBE contends that Grievant failed to ensure that his grievance was received by the Grievance Board by the due date. Certainly, one means by which a grievant in West Virginia could ensure that his grievance complaint absolutely reached the Board's administrative office in Charleston would be to hand deliver the materials, a burdensome task for someone residing as far away as Morgan, Hancock or Preston Counties, for example. Therefore, it is recognized that a grievant residing anywhere but Charleston must ordinarily rely on the United States postal service to deliver grievance-related correspondence, including copies of filing materials.

However, no one can predict how long it will take for a posted letter to arrive at its destination. It is entirely possible that it might take more than five days to deliver a letter. Indeed, at times the undersigned has received mail postmarked within West Virginia in one day, but at other times, it has taken up to five days from the date of the postmark. In Brown, supra, the grievant's initial level four appeal form was evidently lost in the mail!

Moreover, the Grievance Board has already adopted the "mail-box rule" with respect to the filing of grievance-related documents. In Wadbrook v. Shepherd College, Docket No. 93-BOD-214 (Aug. 31, 1993), a worker filed a grievance about a personnel matter. He later claimed the respondent had not transmitted its level one decision to him within the prescribed

time and sought a default judgment. The respondent appealed and claimed a written response was timely placed in the United States mail. The postmark on the envelope the grievant pre sented confirmed that the letter had been mailed on the due date.

The administrative law judge ruled in Wadbrook that a party is deemed to be in compliance with applicable time lines so long as the grievance document is placed in the mail and is post-marked by the due date.3 Obviously, it would be unreasonable for a grievant to be held to a standard that the date for perfecting a level four appeal is the date of actual receipt by the Grievance Board when a respondent is held to a lesser stan dard that a decision can be issued on the day the response is placed in the United States mail.

Therefore, it is expressly held that, under existing Grievance Board rules, a grievant ensures that his grievance is timely filed at level four if, for filing purposes, he places the grievance appeal in the United States mail and the postmark on the envelope reflects the due date.4 Accordingly, it is determined that, because Grievant posted his level four appeal in the United States mail on or before the due-date for filing, his grievance was timely filed.

3It is noted that the United States Internal Revenue Service recognizes that a tax return is timely filed when the envelope containing the return is post-marked on or before the filing cut-off date.

4This is not to say that the Grievance Board cannot keep records indicating the date of receipt for administrative

purposes.

The Termination Issue

There is no dispute over the essential facts in this case regarding the incident which prompted Grievant's termination, and no serious controversy as to other events which were brought to light and developed at the pre- and post-termination hear ings. Therefore, based on the record as a whole, the following findings are made.

Findings of Fact

1. Grievant was hired as a maintenance employee on a full-time basis in 1981. Over the years Grievant had been assigned various jobs, and his evaluations were generally satisfactory. However, there was concern about Grievant's fre quent absences from work.

2. In 1990, Grievant won the bid for a position as warehouse foreman at WCBE's huge maintenance complex.

3. As warehouse foreman, Grievant was in charge of numerous items in the 4,000 square foot warehouse, including materials and equipment which were valued at thousands of dollars. He had to release these items to employees and main tain disbursement records. He often personally purchased merchandise and placed it into the inventory. According to WCBE's assistant superintendent, the warehouse foreman position was one in which a "tremendous" amount of trust had to be placed.

4. In 1992, school officials discovered that Grievant had taken a recently-purchased lawn mower from the warehouse to his home for his own use; had used the school system's gasoline in his own personal vehicle when he picked up materials and had not discussed the matter with his superiors or sought reimbursement

for the work-related use of his vehicle in an appropriate manner; and had filled out inaccurate work records about his time on the job.

5. Grievant was given an oral and written warning rela tive to the 1992 incident, and he agreed that he would not commit the infractions again. The matter was also reflected in his performance evaluation during that school year.

6. Grievant's performance evaluations since 1992 were above average, and school officials admitted that he had been doing an excellent job in the warehouse.

7. A "Placement and Salary Notice" issued to Grievant in August 1994 for the 1994-95 school year reflected a 261-day work term at an annual salary of $23,698.80.

8. Sometime in Fall 1994, Grievant removed a relatively new lawn mower from the warehouse for his own use at home. On December 9, 1994, school officials learned from Grievant's wife, with whom he was having a disagreement, that Grievant had stolen the mower and other items and was attempting to return the mower.

9. When confronted about the mower on December 9, Grievant admitted to his supervisor that he had taken the mower, but had just returned it to an abandoned, old storage shed near the warehouse. When asked why he took a mower again, Grievant apologized and promised not to do it again.

10. By letter dated December 21, 1994, WCBE's superinten dent advised Grievant that he was suspended pending a January 10, 1995 meeting in which a recommendation would be made that he be terminated from employment.

11. School officials testified on January 10, 1995, that they could no longer trust Grievant relative to his position of

trust in WCBE's warehouse.

12. At the January 10, 1995 hearing, Grievant asked his supervisor if he had knowledge that another employee had taken equipment home for use; that still another employee had lived in the maintenance facility for two months the past summer; and that yet another employee kept a motorcycle parked in the shop and worked on it during the afternoon and in the evening after work. The supervisor replied that he recently learned about the equipment incident; that he was aware of some hearsay, but did not know for a fact that an employee had lived in the mainte nance facility; and that he knew a motorcycle had been parked in the shop, but did not know that the employee had worked on it there. When asked by WCBE's counsel, the supervisor testified that Grievant had never reported those incidents to him.

13. Following the January 10, 1995, hearing, WCBE voted to terminate Grievant. Grievant was thereafter apprised by letter dated January 11, 1995, that WCBE had terminated his employment and that he could file a level four grievance within five days from receipt of the notice.

14. Grievant thereafter appealed to level four of the education employees' grievance procedure. He mailed the grievance form on January 19, 1995, exactly five business days from the time he first saw the termination notice.

15. Grievant did not testify at the March 17, 1995, level four hearing, although his counsel produced evidence that other employees had used school maintenance property for personal reasons in the past. In addition, two high-ranking maintenance supervisors admitted that they had drafted some personal busi ness letters and other related documents on a school computer in the past.

16. School officials testified that employees who had used school property inappropriately received a warning to not repeat their wrongdoing, just as Grievant had received a prior warning about taking a lawn mower in the past.

17. Grievant presented no evidence that any of WCBE's employees had repeated infractions for which they had been disciplined previously.

Discussion

Grievant essentially argues that because other employees have used WCBE's property for personal gain, perhaps on multiple occasions, and were not dismissed, the fact that he "borrowed" school property on two occasions, misconduct which never result ed in criminal charges, does not warrant termination. He requests reinstatement, although not necessarily as a warehouse foreman. He averred in his reply brief that he would willingly accept a transfer into another position for which he is quali fied. He also suggests that, given his long employment and good evaluations, the lesser penalty of a suspension without pay of no more than ninety days would be appropriate.

Grievant's legal argument is as follows:

[WCBE's] discharge of Grievant for relatively minor misconduct is arbitrary, capricious and not in the best interest of the school system. The [Grievance] Board may grant fair and equitable relief. See W.Va. Code 18-29-5(b) and Hoover [v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994)], in which an indefinite suspension for fighting on duty was reduced to sixty (60) days.

Grievant was not able to locate a case where any employee was discharged for borrowing school property.

In Kuthy [v. W.Va. Division of Highways, Docket No. 92-DOH-48 (Aug. 10, 1993)], a ten-day suspension was given for unauthorized use of property. Likewise, in Williston [v. W.Va. Dept. of Human Services, Docket No. 90-DHS-44 (July 16, 1990)], a brief suspension was upheld for the improper charging of 41 personal phone calls to the State. Even a physical altercation with a student did not lead to discharge. See Grooms [v. Raleigh County Bd. of Educ., Docket No. 91-41-224 (July 10, 1993)]. All these cases discuss progressive discipline or disproportionate penalties.
Finally, the West Virginia Supreme Court has refused to sanction dismissal for relatively minor misconduct involving misuse or theft of public proper ty. See Waugh v. Cabell County, 357 S.E.2d 17 [1986], (Janitor's removal of personal and public property from school grounds) and Rovello v. Lewis County Board, 381 S.E.2d 237 [1989], (Principal's billing for female companion's expenses on school trip.)

WCBE has met its burden of establishing the charges upon which Grievant's termination was based. However, Grievant insists that, under the circumstances, the penalty of termina tion is disproportionate to the offense. Inasmuch as Grievant admits to his misdeed but seeks mitigation of the punishment, he bears the burden of persuasion that the termination was exces sive. Grievant's arguments in that regard are not persuasive. For example, Grievant's misconduct is entirely different from that of the principal in Rovello, supra. Mr. Rovello's misdeed involved a single incident which occurred after a meritorious and unblemished twenty-five year work record. Of

equal importance was the fact that the board of education had not developed a clear policy about expenses. Grievant repeated an infraction he clearly knew was wrong.

Grievant had been placed in a position of trust, and he violated that trust not once, but twice in two years. He stated in his grievance pleadings that he was entitled to "progressive" discipline. He has already had the benefit of one warning for exactly the same wrongdoing. Grievant confiscated a fairly new lawn mower in 1992, an item in WCBE's inventory for which he bore primary responsibility of safekeeping for his employer, and committed other improprieties. When caught, Grievant promised not to misbehave again. Two years later, he again took a lawn mower for use at his home.

Moreover, Grievant's reliance on Waugh, supra, is mis placed. In Waugh, a schoolhouse custodian was terminated by a board of education because he had stolen some items from another employer while intoxicated and was believed to have taken some goods from a school. The Court reinstated the custodian prima rily because the board failed to establish a rational nexus between the custodian's off-the-job misconduct and his employ ment and because the goods the custodian had received from the school had been given to him.

Additionally, Grievant's posture that he merely "borrowed" a mower for use at his own home simply does not ring true. Notably, Grievant had not "returned" the confiscated items until officials learned he had taken them. With respect to the December 1994 incident, Grievant never explained why he had not returned the lawn mower after the grass mowing season was over and never explained why, when he did return the mower, he placed it in an abandoned storage shed rather than the warehouse. An

inference can be drawn that Grievant intended to keep the mower. As for misconduct on the part of other WCBE employees, an employee's one-time use of the school system's plumbing snake to open a drain at home or yet another's one-time use of a snow blade to plow his own driveway was not on a par with Grievant's prolonged use of the school system's mower in 1994. Further, school officials testified that when those or other misdeeds on the part of employees were brought to light, the employees received a first-offense warning, the same as Grievant had received in 1992. There was no evidence that any employee, once warned of an infraction, had repeated the conduct, let alone that any employee had been retained following a second offense. In summary, Grievant has not demonstrated that WCBE's termination decision was excessive, under the circumstances. Neither has Grievant shown how the termination could be contrary to the "best interests of the school system," as he put it. Rather, WCBE has shown that the interests of the school system would be seriously compromised by Grievant's retention. Based on the foregoing findings and determinations, the following formal conclusions of law are made.

Conclusions of Law

1. A party to a grievance is deemed to be in compliance with applicable time lines so long as the grievance-related document is placed in the mail and is postmarked by the due date. Wadbrook v. Shepherd College, Docket No. 93-BOD-214 (Aug. 31, 1993). Stated another way, under existing Grievance Board rules, grievants can ensure that a grievance is timely filed and will be received by the Board by placing the grievance form in the United States mail on or before the due date.

2. As evidenced by the postmark on the envelope received

by the Grievance Board, Grievant mailed his level four appeal form on or before the applicable due date; therefore, his grievance was timely filed.

3. Because this is a disciplinary-related grievance, WCBE must establish the validity of its charges against the employee by a preponderance of the evidence. Webb v. Mason County Bd. of Educ., Docket No. 26-88-206 (Jan. 5. 1989).

4. WCBE demonstrated that Grievant irreparably breached his trust as an employee responsible for the inventory of valuable goods when he removed a lawn mower from school property for prolonged use at home, despite his pledge on an earlier occasion when discovery was made of the identical offense, that the infraction would not be repeated.

5. Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis. Rovello v. Lewis County Bd. of Educ., 381 S.E.2d 237 (W.Va. 1989); Grooms v. Raleigh County Bd. of Educ., Docket No. 91-41-224 (July 13, 1993); Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1991); Stewart v. W.Va. Alcohol Beverage Control Comm., Docket No. 91-ABCC-137 (Sept. 19, 1991).

6. The penalty of termination is not excessive or dispro portionate to the offense, given that Grievant committed acts of misappropriation of school property twice within two years of his four-year tenure as warehouse foreman.

7. WCBE established good cause for Grievant's termina tion, see, W.Va. Code 18A-2-8, and its actions were not arbi

trary, capricious, an abuse of discretion or otherwise contrary to the best interests of the school system.

Accordingly, WCBE's termination of Grievant is upheld, and the grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wood 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 Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

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NEDRA KOVAL

Administrative Law Judge

Date: May 18, 1995