

DAWN L. WEST

v. Docket No. 95-52-411

WETZEL COUNTY BOARD OF EDUCATION

DECISION

Grievant Dawn L. West, employed by Respondent Wetzel County Board of Education (WCBE) as a Learning Disabilities (LD) teacher, was suspended without pay for thirty days based on a charge of insubordination. She filed a level four grievance pursuant to W.Va. Code §18A-2-8, seeking reimbursement of all lost wages and restoration of benefits, as well as the removal of all references to the suspension from her employment record. A level four hearing was held on March 4, 1996. The case became mature for decision on March 27, 1996, the agreed-upon final day for the submission of all written level four fact/law proposals and rebuttal.

School Superintendent Martha Dean, Short Line School (SLS) Principal Jane Beckett and SLS Assistant Principal Samuel Snyder testified for WCBE at the level four hearing, while Grievant testified on her own behalf. In addition, numerous documents were placed in evidence. Altogether, the record reflects little dispute about the underlying facts which gave rise to this grievance.

During the 1994-95 school year, Grievant was assigned as a LD teacher at SLS, under the supervision of Ms. Beckett and Mr. Snyder. At the onset of the 1994-95 school year, SLS initiated "inclusion" for seventh and eighth grade classes, a teaching method and practice for instructing special education students in the same classroom as regular students. Unlike "mainstreaming," in which special education students are placed in some regular classes with only a content-area trained teacher, in inclusion the special education students are placed in regular classes for nearly all of their instruction, and the special education teacher works together with the content-area teacher in the same classroom.

Grievant believed, at least in its early stages, that inclusion was not working that

well with her LD students. Therefore, she volunteered her time to work on a one-on-one basis with some of those students on Saturdays and weekday evenings at a local fire hall. One LD student of Grievant's, hereinafter referred to as "D," lived with his father and his father's girlfriend. D, who was having particular difficulty with reading, participated in Grievant's after school tutoring with his father's approval, at least initially. There was some testimony that D's father's girlfriend may have resented Grievant's work with the boy, and that the father eventually became convinced that Grievant's influence over his son had undermined his own authority.

For whatever reason, during the late winter of 1995, D's father conveyed to school officials his desire for an end to Grievant's tutoring sessions with his son outside of the school, and also an end to any non-teaching contact with D in the school. It is quite clear from the record that Grievant was directed by school officials to cease all one-on-one contact with D in and out of school, including that she limit contact with D to classroom instruction, even if he approached her at times other than during instruction. Grievant was also warned that non-compliance with the directive could result in suspension or dismissal for insubordination. See WCBE EX 4.

It is also apparent from the record that Grievant strongly believed D needed her help and support. In fact, Grievant felt the directive to limit her contact with D to classroom instruction was unworkable. Grievant also believed she had a duty as a teacher to talk with D and help him if he approached her at school. In short, Grievant disagreed generally that avoiding contact with D was the answer to the problem.

At one point, Grievant, convinced that D needed additional attention and instruction from her, attempted to contact D's father at his home to ask for permission to continue tutoring the boy, basically because D's reading had improved so much with the extra help. In turn, D's father posted signs on his property for Grievant to stay out. Additionally, from the perspective of school officials, Grievant continued to have unwarranted contact with D in school after she had been asked and warned to end such contact.

Of record is a March 20, 1995 letter from Mr. Snyder to Grievant citing her for meeting alone with D in her classroom at lunch time. That letter was followed by an

April 28, 1995 letter from Mr. Snyder to Grievant after he again observed her alone with D in her classroom. Mr. Snyder mentioned in the second letter that he had been shocked to hear her make statements against D's father in D's presence, and that he deemed such actions on the part of an educator unprofessional and not responsible. WCBE EX 6.

Dr. Dean followed up on the April 28, 1995 incident. She met with Grievant at SLS to discuss the matter, and subsequently notified Grievant, by letter dated May 1, 1995, that she was suspended for three days, beginning the next day, May 2, 1995. Grievant was again warned that further acts of insubordination, relative to contact with D, could result in further discipline, including discharge. WCBE upheld the suspension, and Grievant chose not to file a grievance over the matter.

Later in the month, on May 30, 1995, Grievant was in her classroom during a change of classes and she saw D in the hallway. Grievant called out to D, asking whether he had a necessary form that was to have been signed by his father. D entered Grievant's classroom and began explaining why he did not have the signed form. While Grievant and D were discussing the matter of the form, Mr. Snyder observed Grievant alone with D and entered the classroom. Grievant then told D to hurry along so he would not be late for class.

After D left the room, Mr. Snyder and Grievant conferred briefly, although Mr. Snyder never brought up the subject of D's presence in the classroom when he arrived. When Mr. Snyder departed from Grievant's classroom, he immediately authored a letter citing Grievant for having a non-teaching school contact with D, in direct contravention of directives previously issued. Mr. Snyder explained at the level four hearing that he had not informed Grievant in person that he was going to cite her for being alone with D because students had begun to arrive in the classroom for instruction. At some point following the May 30, 1995 incident, Dr. Dean conferred with Grievant by telephone. During the discussion, Grievant related to Dr. Dean her belief that SLS' administrators and some of her co- teachers had treated her unfairly, and that certain staff in the school should be contacted as they would support her contentions. Grievant did not return to her classes at SLS after May 31, 1995,

apparently taking leave for illness for the remainder of the school year.

During the next few months, Dr. Dean investigated matters at SLS. At some point, Grievant was directed to attend a conference with Dr. Dean on August 1, 1995, to discuss Dr. Dean's findings. When Grievant arrived at the conference, both Dr. Dean and another administrator, Chief Instructional Leader Edward Glover, were present.

Dr. Dean apparently began the August 1, 1995 meeting by reporting to Grievant that the perceptions she held about the situation at SLS had not been supported by SLS staff, and that she should voluntarily apply for jobs outside of SLS. Grievant, who may have believed she had been summoned to the meeting to be vindicated, as she claims in her level four brief, became very upset, raised her voice, called Dr. Dean a liar, and departed the conference abruptly without bidding leave to either Dr. Dean or Mr. Glover. Following the aborted August 1, 1995, meeting, Dr. Dean sent Grievant a certified letter, dated August 1, 1995:

We met in my office on Tuesday morning, August 1, 1995. The purpose of the meeting was to discuss the status of your continued employment with [WCBE].

I informed you that there were two (2) conditions to your continued employment:

1)

That you seek, by applying for vacancies, a position in a school within the county other than [SLS]; and

2)

That you undergo a psychological evaluation, at [WCBE's] expense, in order to obtain a "fitness to work" statement prior to reentering the classroom.

You left my office without agreeing to the conditions which I outlined. Anticipating your agreement, we will proceed to obtain an appointment for your psychological evaluation.

It is important that you let me know immediately if you will be keeping the appointment and if you will agree to the stipulations stated. Please either call my office or let me know in writing no later than Friday, August 4, 1995.

Grievant, who received Dr. Dean's letter on August 3, did not contact Dr. Dean's

office by August 4, 1995, or during the next several days. By letter dated August 11, 1995, one week following the designated cut-off day for Grievant's response, Dr. Dean advised Grievant that she was being suspended for thirty days on charges of insubordination, relative to Grievant's conduct "throughout the 1994-95 school year" and, particularly, due to Grievant's "behavior" on August 1, 1995. The suspension was to begin the first day of school, August 24, 1995. Dr. Dean ended the August 11, 1995 letter to Grievant as follows: "At such time as you are willing to comply with the conditions as stated in my August 1, 1995, letter, I am willing to re-examine this situation."

Of record is an August 23, 1995, letter from Dr. Dean to Grievant. Dr. Dean stated in the letter that Grievant's union representative contacted her to make arrangements for a psychological examination. Dr. Dean explained that, while an appointment could have been made for August 24, 1995, she had been unable to reach Grievant by telephone for confirmation, thus, the evaluation could not be scheduled until the following week. Grievant was further advised that the suspension would remain in effect until such time as the results of the psychological evaluation were in her office. She concluded by stating that Grievant needed "to continue to apply for all vacancies . . . outside of [SLS]."

Grievant eventually received a psychological evaluation, and a report was transmitted to Dr. Dean, although the record is silent as to when these events occurred. Additionally, while the psychologist's report was not proffered at the level four hearing, there was discussion that the psychologist essentially approved Grievant's return to her teaching duties. Notwithstanding these developments, Dr. Dean proceeded with preparations in conjunction with Grievant's thirty-day suspension.

To this end, Dr. Dean prepared a formal letter of charges, dated September 12, 1995, relative to the suspension, to present to WCBE at its regularly scheduled meeting that night. Two distinct charges were set forth in that charging letter. "CHARGE NUMBER 1: INSUBORDINATION" consisted of two paragraphs, the first briefly outlining the rationale for Grievant's earlier three-day suspension. The second paragraph cited

the May 30, 1995, incident in which Mr. Snyder reported that D and Grievant were "alone" in her classroom. "CHARGE NUMBER 2: INSUBORDINATION" is reproduced as follows:

Over the course of June and July the Superintendent conducted a thorough investigation concerning [Grievant's] behavior and performance throughout the school year. The Superintendent, at the request of [Grievant], interviewed many individuals who were claimed by [Grievant] to have direct knowledge of a lack of professionalism of her immediate supervisors which she claimed influenced their directives and actions throughout the year.

Having concluded the investigation, the Superintendent scheduled a meeting with [Grievant] on August 1, 1995, to discuss the findings of the investigation and the conclusions drawn by the Superintendent about recommendations to the [WCBE] regarding [Grievant's] continued employment with [WCBE]. During that meeting [Grievant] exhibited insubordinate behavior in that she would not accept the findings of the superintendent, attempted to discredit her statements as untruths, and abruptly left the meeting after yelling at the Superintendent and slammed two doors upon exiting.

Subsequent to [Grievant's] departure, the Superintendent sent her a letter directing her to respond by August 4, 1995. No response was received by the deadline set in the letter, further, no response was received by August 11, 1995, at which time the Superintendent notified [Grievant] of the intent to suspend and of the hearing of tonight. [Grievant] never responded to the Superintendent, although that contact was made through . . . [her union representative]. Insubordination is defined as: "the act of not submitting to authority; disobedient." [Grievant] violated direct orders of her superiors on several occasions throughout the school year. The two occasions of insubordination included in these charges are documented in the attached letters from Mr. Snyder and Dr. Dean to [Grievant]. This attached documentation is made a part of this presentation of charges to [WCBE].

Following Dr. Dean's presentation, WCBE upheld the suspension. Grievant resumed teaching at Paden City School on October 5, 1995.

Discussion

Under W.Va. Code §18-29-6, a county board of education must establish the charges in a disciplinary matter by a preponderance of the evidence. Froats v. Hancock County Bd. of Educ., Docket No. 91-15-159 (August 15, 1991). Insubordination is one of the causes listed in W.Va. Code §18A-2-8 for which an employee may be disciplined. Beverlin v. Bd. of Educ., 216 S.E.2d 554 (W.Va. 1975). Insubordination includes instances of an employee's "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Riddle v. So. W.Va. Comm. College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989).

WCBE maintains that it has proven the charge of insubordination, and that a thirty day suspension was appropriate, under the circumstances. It argues that Grievant willfully and intentionally disobeyed her superiors' directives not to have one-on-one contact with D on May 30, 1995, and that it is immaterial whether Grievant understood or agreed with the reasons for the directives. WCBE further argues that Grievant's treatment of those in authority during the meeting with Dr. Dean on August 1, 1995, as well as her refusal to obey, until mid-August 1995, the reasonable request in Dr. Dean's letter of August 1, 1995, to respond by August 4, 1995, and to comply with the two stipulations for continued employment, constituted insubordination.

Grievant offers a number of theories why the thirty-day suspension should not be upheld. She argues that the evidence regarding the May 30, 1995 incident did not establish a willful and intentional failure or refusal to obey a supervisor's order, and accordingly, is insufficient to support a charge of insubordination as contemplated by W.Va. Code §18A-2-8. In her view, the directive to limit her contact with D in school was simply unworkable since D was her student. She further argues that, in any event, the incident with D on May 30, 1995, should not be construed as insubordination since D entered her classroom on his own initiative and remained only briefly to explain why he did not have a required paper signed by his parent.

Grievant also argues that the evidence pertaining to the August 1, 1995, meeting

with Dr. Dean did not establish she uttered derogatory statements to the superintendent, or that the conduct she displayed, while unprofessional, rose to the level of insubordination as contemplated by W.Va. Code §18A-2-8. While Grievant admits to being "emotional" during the August 1, 1995 conference with Dr. Dean, and to leaving the meeting abruptly without being formally excused by her superiors, she maintains those actions were not insubordinate, under the circumstances. In Grievant's view, she was not under contract during the summer months, and she had no duty at that time to remain at the meeting. She additionally states she expected vindication when she attended the meeting without representation, and had no clear understanding that the subject of Dr. Dean's discussion would be adverse information about her continued employment, to which she could not immediately respond.

Finally, Grievant maintains that it was unreasonable of Dr. Dean to expect from her an immediate, one-day response to written directives affecting her employment. Because of the seriousness of the situation, Grievant urges, she needed advice and counsel from a union representative and an attorney. She states that, after receiving counsel, she complied with the two requirements set forth by Dr. Dean. Grievant cites Dr. Dean's concluding statement in the August 11, 1995, letter that she (Dr. Dean) would "re-examine" the suspension decision "[a]t such time as you are willing to comply with the conditions as stated in my August 1, 1995, letter[.]" In that she obtained the required psychological evaluation and transfer out of SLS, Grievant insists, no reason existed for WCBE to carry out the thirty-day suspension.

Grievant's final argument has some merit. Pursuant to W.Va. Code §18-29-5, the West Virginia Education and State Employees Grievance Board's Administrative Law Judges have fashioned fair remedies in cases where employers have not treated their employees equitably. See Stroud v. Mingo County Bd. of Educ., Docket No. 94-29-621 (June 30, 1995); Hickman v. Public Service Comm'n, Docket No. 94-PSC-610 (Mar. 2, 1995); Cole v. Harrison County Bd. of Educ., Docket No. 90-17-540 (Feb. 26, 1991); Clevenger v. Harrison County Bd. of Educ., Docket No. 17-86- 261-3 (Apr. 10, 1987). As will be more fully explained below, WCBE abused its discretion when it imposed a thirty-day suspension on Grievant, and Grievant is entitled to some relief on equitable

grounds.

It is clear from the record that Dr. Dean initially had no intention of imposing any formal punishment upon Grievant for the May 30, 1995 incident with D. Rather, at the August 1, 1995 meeting, Dr. Dean, perhaps wisely, sought to impress upon Grievant the need to leave SLS, for the sake of everyone concerned. Grievant became too emotional to even consider the matter, and, by her own admission, acted unprofessionally toward Dr. Dean. Seemingly, even Grievant's untoward behavior at the meeting did not prompt Dr. Dean to consider suspension. Instead, Dr. Dean's concerns were focused upon Grievant's placement and fitness to work the upcoming school year.

As outlined in Dr. Dean's August 1, 1995 letter to Grievant, Dr. Dean sought only that Grievant leave SLS, presumably since the situation with D could not be corrected, and have a psychological evaluation, so that some assurance could be obtained of Grievant's fitness to teach following a year- end absence from her teaching duties while under medical care. There was no mention or threat in the August 1, 1995 letter that charges of insubordination were being considered for Grievant's actions on May 30, 1995 (or anytime before), or August 1, 1995.

Even as late as August 11, 1995, when Dr. Dean first mentioned insubordination and related her decision to impose the thirty-day suspension, her concerns still remained upon the issue of Grievant meeting the two conditions for continued employment outlined in the August 1, 1995 letter. In fact, the May 30, 1995 incident with D was not even specifically cited. Moreover, it cannot be overlooked that Dr. Dean also informed Grievant in the suspension notice that she would "re-examine" the suspension decision "[a]t such time as" Grievant willingly complied with the two conditions stated in the August 1, 1995 letter. Notably, there was no stated deadline for such compliance. Grievant eventually met the conditions imposed.

Again, the real reason for Dr. Dean's threat to suspend was because Grievant had not agreed to some far-reaching stipulations for continued employment. Under the circumstances, it was totally unreasonable and inequitable for WCBE to consider and impose a suspension relative to alleged behaviors and infractions for which Grievant

had not been cited at the time they purportedly occurred.

As to the two directives outlined in Dr. Dean's August 1, 1995 letter, it cannot be found that Grievant was insubordinate for not immediately agreeing to them, because Grievant simply had not been given enough time to consider the requests and her options. However, Grievant's failure to respond in some manner to Dr. Dean was insubordinate. Grievant could have promptly communicated to Dr. Dean her desire for more time to consider the two directives. Moreover, Grievant could have immediately responded to the August 11, 1995 suspension notice, one way or another. As it was, Dr. Dean heard nothing on the matter until August 23, 1995. It was only then that Grievant, through her representative, agreed to see the psychologist. Her delay in communicating this to Dr. Dean until the day before the 1995-96 school year was to begin (and the day before the suspension was to commence) resulted in a delay in scheduling the psychological evaluation and receiving the psychologist's report.

The bottom line in this situation is that Dr. Dean promised a reconsideration of the suspension decision at the time Grievant willingly agreed to the two conditions outlined in the August 1, 1995 letter. Therefore, the question now is what relief would be proper in this matter. The answer is that, consistent with Dr. Dean's letter of August 11, 1995, the suspension period must be modified to comport with the time Grievant "willingly [complied] with the conditions as stated in [Dr. Dean's] August 1, 1995, letter[.]"

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

Findings of Fact

1. By letter dated August 1, 1995, WCBE Superintendent Martha Dean requested that Grievant transfer to another school for the 1995-96 school year due to insurmountable problems experienced at her assigned school during the 1994-95 school year, and to undergo a psychological examination due to highly-emotional behavior displayed at a meeting and because she had not finished the school year while under medical care. A response was requested by August 4,

1995. 2. Grievant received the letter on August 3, 1995, but did not respond in any manner to the letter.

3. By letter dated August 11, 1995, Dr. Dean informed Grievant she would impose a thirty-day suspension without pay for non-compliance to the two directives for continued employment, to commence when the 1995-96 school year began. Dr. Dean also promised a reconsideration of the suspension decision at the time Grievant willingly complied with the directives.

4. On August 23, 1995, one day before the 1995-96 school year was to begin, Grievant informed Dr. Dean that she would fully comply with the directives, although her delay resulted in a delay in scheduling the psychological evaluation and the submission of a follow-up report.

5. By letter dated August 23, 1995, Dr. Dean informed Grievant that she would schedule the psychological evaluation one week hence. She concluded, "[u]ntil such time as the examination is completed and the results are received by my office, you remain suspended as indicated in my earlier letter."

6. The record is silent as to when Grievant's psychological evaluation was completed and the report forwarded to Dr. Dean.

7. Despite Grievant's agreement on August 23, 1995, to comply with the two directives for continued employment, Dr. Dean decided to go forward and present grounds to WCBE on September 12, 1995, for Grievant's thirty-day suspension without pay, which had begun on August 24, 1995.

8. By document dated September 12, 1995, Dr. Dean set forth grounds for insubordination which were not directly related to the two directives for continued employment contained in the August 1, 1995 letter. Rather the grounds related to alleged incidents for which Grievant formerly had not been threatened with sanctions. Relative to those charges, a letter citing Grievant for an alleged infraction on May 30, 1995, and Dr. Dean's letter of August 1, 1995, were appended to the charging document.

9. Based on the charging letter and documentation, but apparently without having considered Dr. Dean's promise to reconsider the suspension at the time

Grievant agreed to comply with the directives for her continued employment, WCBE upheld the thirty-day suspension of Grievant.

Conclusions of Law

1. Under W.Va. Code §18A-2-8, an employee of a board of education may be suspended for insubordination.
2. Grievant was insubordinate when she failed to respond in some manner to WCBE Superintendent Martha Dean's letter of August 1, 1995, which contained dual conditions for her continued employment.
3. Grievant's non-compliance with the directives outlined in the letter of August 1, 1995, was the true purpose for the suspension; her compliance, albeit belated, obviated the need to impose a suspension for the entire thirty days.
4. WCBE's failure to reconsider the suspension, or at least alter the length of the suspension, after Grievant willingly agreed to comply with the directives for continued employment, was unreasonable and patently inequitable.
5. Under the circumstances in this case, Grievant is entitled to relief on equitable grounds. See Stroud v. Mingo County Bd. of Educ., Docket No. 94-29-621 (June 30, 1995); Hickman v. Public Service Comm'n, Docket No. 94-PSC-610 (Mar. 2, 1995); Cole v. Harrison County Bd. of Educ., Docket No. 90-17-540 (Feb. 26, 1991); Clevenger v. Marshall County Bd. of Educ., Docket No. 17-86-261-3 (Apr. 10, 1987).

Accordingly, the grievance is **GRANTED** in part and **DENIED** in part. The Wetzel County Board of Education is directed to modify the length of the suspension in accordance with when the psychologist's report was received by the superintendent, and to pay Grievant all wages and benefits withheld for those days beyond when the report was received. All documents relating to the suspension shall remain in Grievant's file with the exception of the September 12, 1995 charging letter. Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wetzel 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.

NEDRA KOVAL

Administrative Law Judge

Date: May 17, 1996