PAMELA SURBER

v. **Docket No. 96-29-015**

MINGO COUNTY BOARD OF EDUCATION

DECISION

The grievant, Pamela Surber, was employed by the Mingo County Board of Education (Board) as a Special Education Aide assigned to Gilbert Elementary School (GES) until her termination for cause on January 4, 1996. She filed an appeal of that action to Level IV January 12, 1996; a hearing was held May 9, 1996. The parties submitted proposed findings of fact and conclusions of law by June 13, 1996.

Background

There is no dispute over the facts of the case. At the time of her dismissal, the grievant had been employed by the Board as a Special Education Aide at GES for approximately fifteen years. Her duties entailed tending to the physical needs of physically and/or mentally impaired students and assisting a special education teacher in their instruction. It was one of her responsibilities, at least at times, to accompany particular students on their bus trips to and from the school. It appears that the grievant's performance had always been ranked as satisfactory or above; there is no evidence of any prior disciplinary actions against her.

In September 1989, then-Special Education Director Charles Patterson advised the grievant that she was transferred, effective immediately, from GES to Cline Elementary School (CES). The move was necessitated by the unexpected transfer of a special education student from GES to CES. Having received no previous notice of her reassignment, the grievant believed it to be in contravention of state law on the transfer of school service personnel. She complied with Mr. Patterson's order but filed a grievance shortly thereafter challenging its legality.The case reached Level IV November 14, 1989. In Surber v. Mingo County Bd. of Educ., Docket No. 89-29-662 (Jan. 31, 1990), Administrative Law Judge Robert Nunley found that the Board had failed to provide the grievant any of the procedural protections of W.Va. Code § l8A-2-7 (See footnote 1) prior to the transfer. The Board

complied with ALJ Nunley's order to reinstate the grievant to her GES position.

she be "transferred, within the county, for the ensuing school year (1995-1996)." The reason given for the action was "a drop in student enrollment during the 1994-95 school year, low projected enrollment for the 1995-1996 school year and possible reorganization of the Federal, State, and County Programs." As of the beginning of the 1995-96 school year, the grievant's assigned school had not been changed. She began the year at GES; as was the case in the two previous school years,she was primarily, if not exclusively, assigned to R. H., a student with multiple sclerosis. The assignment included accompanying the student on his morning and afternoon bus trips.

GES is a multi-floored facility with no elevators. By October 1995, R. H.'s health had deteriorated to the point that even with assistance, he was having difficulty moving to and from classrooms and other locations within the building. GES teachers, Assistant Director of Special Education Janice Miller and Director of Transportation William Kirk (See footnote 2) met and developed a new "Individual Education Plan" for the student which called for his transfer to CES, a single-level facility approximately six miles from GES. The plan at least contemplated that, because of her past experience with the student and, in order to maintain some continuity in his care and instruction, the grievant would also be reassigned to CES.

It appears that Ms. Kirk and/or Mr. Miller inquired of the principal at GES whether the grievant would be interested in making the move. At some time prior to November 3, 1995, the grievant advised the principal that she would not voluntarily change schools. On November 3, Mr. Miller and Ms. Kirk met with the grievant at GES and furnished her a memorandum from Assistant Superintendent John Fullen. The memo, which was designated an "official notice of transfer," advised the grievant that, effective immediately, her "homebase school" had been changed to CES. The reason provided for the change was "the decrease in enrollment of Special Education students at Gilbert Grade School and the increased need for an additional aide to assist with an increase in Special Education enrollment at Cline Grade School."

The grievant became very upset and perhaps even belligerent over the memorandum. She was at least forceful in advising Ms. Miller and Mr. Kirk that she believed the order to be unlawfuland that she would resign before complying. R. H. transferred to CES and was assigned a substitute aide. The grievant continued to work at GES for the next several days.

By letter dated November 9, 1995, Superintendent Conn suspended the grievant for insubordination

and willful neglect of duty and advised that he would recommend her dismissal at a December 7, 1995 Board meeting. The grievant appeared at the meeting with counsel. Following the presentation of evidence on the charges, the Board accepted the superintendent's recommendation. (See footnote 3)

Argument

The grievant concedes that she disobeyed Mr. Fullen's directive and that some measure of discipline was due. She maintains that the order contravened state law on the transfer of school employees and that dismissal was too harsh a punishment for her failure to comply; the grievant suggests that a twenty-day suspension without pay would be an appropriate penalty.

The Board primarily asserts that, regardless of how the reassignment is characterized, the grievant had a duty to comply with Mr. Fullen's directive. (See footnote 4) The Board notes that the grievant complied with the 1989 order to move to CES prior to filing a protest over that action; it argues that she had no justification for failing to follow that same course of action with respect to the order in issue.

Findings and Conclusions

The legal questions in the case are close; both parties advance compelling arguments on the central issues. For the reasons discussed below, the undersigned concludes that the Board has demonstrated that the grievant was guilty of misconduct but has not shown that her actions warranted dismissal.

It is well-settled that a county board of education must exercise its statutory authority (See footnote 5) to dismiss tenured employees reasonably and in a manner which is not arbitrary or capricious. See, e.g., Rovello v. Lewis County Bd. of Educ., 381 S.E.2d 237 (W.Va. 1989). If the action is challenged, the county board must prove, by a preponderance of the evidence, that the employee engaged in the conduct complained of, and that the punishment imposed was commensurate with the offense. Perkins v. Greenbrier County Bd. of Educ., Docket No. 94-13-019 (Aug. 12, 1994); W.Va. Code §18-29-6. The employee bears the burden on any defense raised to the charges. Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1995).

Relying primarily on Ware v. Morgan Co. School District, 799 P.2d 351 (Colo. 1985), prior Level IV

decisions have generally defined insubordination as the refusal or failure to carry out the order of a superior with the authority to give such orders. See, Grooms v. Raleigh County Bd, of Educ., Docket No. 90-41-482 (April 30, 1991). Those decisions also hold that an employee who acts with a disregard for authority may be found insubordinate despite that he did not disobey a direct order. Sexton v. Marshall University, Docket No. BOR2-88-029-4 (May 25, 1988). As a rule, fewdefenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. Maxey v. W.Va. Dept. of Human Resources, Docket No. 93-HHR-424 (Feb. 28, 1995). Essentially, the employer can meet its burden by showing that the person giving the order had the authority to do so, and that the order did not require the employee to act illegally or place himself or co-workers at unnecessary risk. Stover v. Mason Countv Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995), (bus operator who substantiated her concerns over winter road conditions was found blameless in refusing to transport students). (See footnote 6)

The West Virginia Supreme Court of Appeals has generally declined to assign specific definitions to the "causes" for which county board of education employees may be dismissed. In most cases, it has taken the broader approach of assessing and weighing the various facets of the disciplinary action including the seriousness of the employee's conduct, the actual or potential harm to the school system and the employee's work history to determine if, overall, the county board exercised its discretion to discharge reasonably. The Court has focused on the nature of the employee's conduct rather than the label attached to it and, when warranted, modified the punishment imposed. See, Bd. of Educ. of the County of Gilmer v. Chaddock, 398 S.E.2d 120 (W.Va. 1990), and Monteith v. Bd. of Educ. of the County of Webster, 375 S.E.2d 209 (W.Va. 1988).

In Dancy v. Raleigh County Bd. of Educ., Docket No. 95-41-168 (Sept. 7, 1995), a custodiancharged with failure to adhere to a new work schedule implemented by his school principal claimed that only the county board could establish such schedules. The case holds that an employee charged with insubordination may not rely, at least not entirely, on a technical legal analysis of whether the superior had actual authority to give a particular order. The decision instructs that if compliance does not entail unnecessary risk and the order is otherwise reasonable under the circumstances in which it was given, the employee must defer to the "apparent" authority of the superior and then litigate questions of law.

The grievant's concession that her actions merited some measure of discipline is accepted as a

concession that, notwithstanding real or perceived illegalities in the Board's transfer processes, Mr. Fullen's directive carried sufficient weight of authority to impose a legal obligation on her part to comply. The undersigned summarily finds that Mr. Fullen had such authority and that the Board has, therefore, demonstrated that the grievant was insubordinate.

There are, however, several well-founded reasons for mitigating the punishment imposed. First, and perhaps most importantly, the grievant had, for the second time, good cause to question the process by which the Board was attempting to move her to another work location. The process by which the grievant was placed on the transfer fist for school year 1995-96, was seriously flawed.

Although county board of education employees have no vested right to assignment at a particular school, see, Hawkins v. Tyler County Bd. of Educ., 275 S.E.2d 908 (W.Va. 1980), W.Va. Code §18A-2-7 does restrict the board's authority to change those assignments. The employee must receive notice in the spring of a given year if the superintendent of schools intends to recommend substantial changes in his assignment for the ensuing school year and, if requested, the employee must be afforded a fair hearing on any challenge he makes to the stated reasons for the proposed transfer. Lavender v. McDowell County Bd. of Educ., 327 S.E.2d 691 (W.Va. 1984) and cases citedtherein, make it clear that the statute demands strict compliance.

The Level IV testimony of Transportation Director Kirk and, to a lesser extent, the testimony of Mr. Fullen, establishes that the Board routinely issues notices of proposed transfers to all Special Education Aides in the school system each spring despite that no or only particular employees have been actually identified for a move to another work site. Mr. Kirk explained that the practice allows the Board flexibility in the event that unforeseen circumstances require that an employee be moved to another location. The rather general terms used in Superintendent Conn's March 28, 1995 letter to the grievant advising her of placement on the transfer fist is consistent with this approach and supports the director's testimony. The Board does not appear to dispute that beyond a desire for versatility in making necessary but unexpected changes in the schedules and/or work locations of its Special Education Aides, administrators had no reason to issue the grievant a transfer notice in Spring 1995. The record rather conclusively establishes that there was no real need to move her until R. H.'s condition deteriorated. Further, there is no evidence of record that the duties of Special Education Aides are such that, as a class, they are transferred more frequently than other employees.

Little analysis is needed to see that the Board's practice is directly contrary to the purpose of Code §18A-2-7. A notice of transfer which is not based on at least a reasonable belief that circumstances in the coming school year will warrant the move of the identified employee is, in essence, no notice. Obviously, an employee who has not received substantive reasons why he is subject to transfer is in no position to contest the superintendent's proposal before the county board. Moreover, an employee who receives the same nonspecific notice each spring and is then assigned to the same location throughout the following school year would, at some point, be justified in ignoring such notices; the grievant's testimony suggests that this was the case with her Spring 1995 notice.Further, it is apparent that any notice of transfer must necessarily expire at some point during the identified school year. Arguably, since employees must be assigned to some work location at the beginning of the school year, the notice must be fulfilled, if at all, at that time. It is at least reasonable for employees who have been reassigned to their previous schools at the beginning of the school year to assume that the reasons given in their notices of transfer did not materialize and that they are no longer targeted for a move to another location. In any event, it is clear that the grievant's concerns over the legality of Mr. Fullen's order were not at all speculative, and that the Board's failure to adhere to W.Va. Code §18A-2-7 contributed to her insubordination.

The grievant's long, previously unblemished work history with the Board also favors mitigation. That the grievant had no prior record of defying authority and did resort to the grievance process to challenge a previous unlawful transfer order demonstrates that she is not typically inclined to defy her superiors' authority. The record supports that the grievant is otherwise a good candidate for "rehabilitation," and would be an asset to the school system if reemployed.

Finally, there is little if any evidence on the extent to which the grievant's actions caused problems for R. H. It can be assumed that the new Aide assigned to the student's care was not as knowledgeable about his needs; it is likely that the grievant's refusal to move resulted in a temporary disruption in his care and/or instruction, and created additional, unnecessary work for Board administrators. It would be speculative, however, to conclude that the harm to the student or the school system was more severe. It also appears that the grievant's disobedience was not broadcast to other employees; in short, the evidence, or the lack thereof, supports that her actions did not cause significant harm to the student or school system.

In establishing the appropriate penalty, the undersigned follows the approach taken in Rovello, supra

and Chaddock, supra. In both cases, the Court found that reinstatement of theaffected employee was warranted but withheld backpay for the entire period of unemployment. The grievant's assertion that a twenty-day suspension without pay would be commensurate with her offense is rejected. Her Level IV testimony establishes that her refusal to obey was premeditated and willful and that R. H.'s care was not a factor, or at least not an important one, in her deliberations. The testimony of Ms. Miller and @. Kirk establishes that the manner in which she reacted to the delivery of Mr. Fullen's order was, in and of itself, insubordinate conduct.

Accordingly, the Mingo County Board of Education is hereby **ORDERED** to reinstate the grievant to her former position at Gilbert Elementary School and remove any and all records of the dismissal from her personnel file. The Board may, at its discretion, impose a suspension with or without pay for a period not to exceed one year; the Board is **ORDERED** to compensate the grievant for the difference in loss of pay in the event a shorter period is imposed.

Any party may appeal this decision to the Circuit Court of Kanawha County or the Circuit Court of Mingo 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 intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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JERRY A. WRIGHT

ADMINISTRATIVE LAW JUDGE

Dated: December 30, 1996

Footnote: 1 *The statute, in pertinent part, provides,*

> *The superintendent, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter. However, an employee shall be notified in writing by the superintendent on or before the first Monday in April if he is being considered for transfer or to be transferred. . . Any teacher or employee who desires to protest such proposed transfer may request in writing a statement of the reasons for the proposed transfer. Such statement of reasons shall be delivered to the teacher or employee within ten days of the receipt of the request. Within ten days of the receipt of the statement of the reasons, the teacher or employee may make written demand upon the superintendent for a hearing on the proposed transfer before the county board of education.*

Footnote: 2 *Mr. Kirk participates in all such discussions when the transportation of a student is involved.*

Footnote: 3 *The transcript of the hearing before the Board is part of the record herein.*

Footnote: 4 *The Board's Level IV proposals contain an assertion that the proposed change in "homebase" schools would have been a minor adjustment in the grievant's daily work schedule and not a transfer. This contention is difficult to understand in that it is entirely inconsistent with the administration's stand at the December 7 hearing before the Board and the evidence, including Mr. Fullen's memorandum. In any event, the argument warrants little discussion; logic dictates that unless two work sites share common facilities or campuses or are otherwise closely situated, a move from one to the other is a transfer within the meaning of W.Va. Code §18A-2-7. See, Allen v. Harrison County Bd. of Educ., Docket No. 96-17-176 (July 31, 1996).*

Footnote: 5 *W.Va. Code §18A-2-8, provides that a county board of education may dismiss at any time for "[i]mmorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge."*

Footnote: 6 *Stover relied heavily on Peery v. Rutledge, 355 S.E.2d 41 (W.Va. 1987), a case involving a claimant for employment security benefits who had been dismissed for insubordination. While the decision contains several conclusions which may be generally applicable to the present case, it appears that the scope of the Court's review was focused rather narrowly on the term "simple misconduct" as it is defined in W.Va. Code §21 A-7-27, and whether the employee's conduct fit that definition. The case provides little guidance in the present dispute in that it primarily involved a "safety hazard" defense to the charge of insubordination in employment compensation matters.*