IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2003 Term

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No. 30848

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FILED
April 22, 2003
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

PATRICIA WINES,
Petitioner Below, Appellant

v.

JEFFERSON COUNTY BOARD OF EDUCATION,
Respondent Below, Appellee

Appeal from the Circuit Court of Kanawha County
Honorable Tod J. Kaufman, Judge
Civil Action No. 01-AA-101

AFFIRMED, IN PART, REVERSED, IN PART ,
AND REMANDED WITH DIRECTIONS

Submitted: February 26, 2003
Filed: April 22, 2003

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The opinion of the Court was delivered PER CURIAM.
JUSTICES DAVIS and MAYNARD concur, in part, and dissent, in part, and reserve the right to file a separate opinion.

SYLLABUS BY THE COURT

1. "A final order of the hearing examiner for the West Virginia Education and State Employees Grievance Board, made pursuant to *W.Va. Code* 29-6A-1, *et seq*. [1988], and based upon findings of fact, should not be reversed unless clearly wrong." Syllabus, *Quinn v. W.Va. Northern Community College*, 197 W.Va. 313, 475 S.E.2d 405 (1996).

2. "Although we accord great deference to the findings of fact of the West Virginia Educational Employees Grievance Board, we review, *de novo*, questions of law." Syl. pt. 2, *Maikotter v. Univ. of W.Va. Bd. of Trustees*, 206 W.Va. 691, 527 S.E.2d 802 (1999)

3. "'School personnel regulations and laws are to be strictly construed in favor of the employee.' Syllabus Point 1, *Morgan v. Pizzino*, 163 W.Va. 454, 256 S.E.2d 592 (1979)." Syl. pt. 1, *Smith v. W.Va. Div. of Rehab. Services*, 208 W.Va. 284, 540 S.E.2d 152 (2000).

Per Curiam:

This case is before this Court on an appeal by Patricia Wines ("Appellant") from a December 17, 2001 Order of the Circuit Court of Kanawha County. The circuit court's order affirmed that portion of a July 9, 2001 decision by the West Virginia Education and State Employee's Grievance Board ("Grievance Board"), which denied the Appellant's grievance challenging her termination by the Board of Education of Jefferson County ("School Board") as a substitute service employee. The circuit court concluded the Appellant was given adequate notice of her unsatisfactory work performance but that her due process rights were violated by the School Board's failure to afford her a pre-termination hearing. The circuit court awarded the Appellant nominal damages in the amount of one dollar. It is from this Order that Appellant now appeals.

This Court has reviewed the petition for appeal, all matters of record and the briefs and arguments of counsel. For the reasons discussed herein, the order of the circuit court is affirmed, in part, reversed, in part, and remanded for proceedings consistent with this opinion.

I.
FACTS

The Appellant became employed by the School Board as a substitute custodian in August 1999. Beginning November 3, 1999, the School Board appointed her to a long-term substitute position at Jefferson High School. On January 19, 2000, the Appellant was placed on an improvement plan based upon an unsatisfactory evaluation of her work performance.[1] The Appellant's improvement plan was to run through June 30, 2000.

On or about February 2, 2000, the Appellant met with the Jefferson High School principal to discuss the improvement plan. During the meeting, the Appellant reacted negatively, telling the principal, "You're not worth my time." Based upon this insubordinate comment, the School Board superintendent recommended to the School Board that the Appellant be terminated from her employment as a substitute custodian at Jefferson High School.

By letter dated February 17, 2000, the superintendent advised Appellant of his recommendation and that "[u]ntil that time, you will remain suspended with pay. The recommendation to terminate your contract will be made at a meeting of the [School Board] on Tuesday, March 7, 2000 at 7:30 PM. . . . You may request a hearing before the [School

[1]The Appellant's unsatisfactory work performance at Jefferson High School included her failure to complete work assignments and to follow the assigned work schedule.

Board] and may have representation at your expense. If you plan to request a hearing, please do so by contacting my office on or before noon on Tuesday, February 29, 2000." According to the record in the instant case, the School Board took no action on the superintendent's recommendation of termination on March 7, 2000. An evidentiary hearing was conducted on April 7, 2000. After reviewing all the evidence, the School Board declined to follow the superintendent's recommendation of termination but instead, suspended the Appellant, without pay, for ten days.

In the meantime, the School Board appointed the Appellant to a long-term substitute custodian position at Shepherdstown Elementary School, beginning May 2, 2000. The Appellant was aware that the improvement plan previously imposed upon her by the School Board during her assignment at Jefferson High School was still in effect when she began employment at Shepherdstown Elementary School.

The principal at Shepherdstown Elementary School, Suzanne Offutt, gave the Appellant a detailed written work schedule. Between May 25, 2000 and July 5, 2000, Principal Offutt received several complaints from other Shepherdstown Elementary School employees about particular instances in which the Appellant's work performance was less than satisfactory.[2] In addition to these reported deficiencies, Principal Offutt personally observed

[2]For example, Appellant failed to clean a bathroom mess left by a student; left large (continued...)

specific problems with the Appellant's custodial work, which she discussed with the Appellant on or about May 30, 2000. At the same time, Principal Offutt offered Appellant help and support. Although Appellant appeared receptive to Principal Offutt's advice, in Principal Offutt's opinion, Appellant's work performance did not improve.

In early June 2000, another custodian, Mr. Lemon, gave Appellant written instructions concerning the cleaning and waxing of classroom floors. Appellant, who had never been trained to wax the floors, apparently misunderstood Mr. Lemon's instructions and, as a result, did not properly clean and wax the classrooms. Principal Offutt discussed this matter with Appellant. Thereafter, on June 21, 2000, Appellant left the school building unsecured and the following day, she left cleanser on two large areas on the building floor and left scrub buckets full of water with mops in them overnight. Principal Offutt discussed these incidents with Appellant at or near the time each occurred. Again, Principal Offutt's advice to Appellant regarding how to satisfactorily perform her job appeared to be well-received. However, Principal Offutt did not observe any improvement in Appellant's job performance.

On July 3, 2000, Appellant was injured while mowing grass at Shepherdstown Elementary School. As a result of her injury, Appellant received workers' compensation

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[2](...continued)
spots of dirt in the hallway; and obviously failed to sweep classrooms and vacuum offices. Appellant also left open a bathroom window and left on several air conditioning units. Principal Offutt notified Appellant of these complaints.

benefits and, due to her injury, was not scheduled to return to work until sometime in October.

Principal Offutt had completed an evaluation of Appellant's work performance on June 30, 2000, before Appellant sustained her injury. The evaluation indicated Appellant failed to meet the responsibilities and performance standards for her job in eleven evaluation areas, while satisfying the responsibilities and performance standards in two evaluation areas. Principal Offutt also indicated on the evaluation that Appellant had not met the job requirements and had not successfully completed her improvement plan. On July 27, 2000, Principal Offutt discussed the evaluation with Appellant, who signed the evaluation but indicated she disagreed with it.

In the meantime, in a letter dated July 14, 2000, from Principal Offutt to School Board superintendent David Markoe, Principal Offutt recounted, in detail, the various problems she had been having with Appellant, including poor working skills and work habits and a poor attitude towards co-workers. In the letter, Principal Offutt indicated her belief that Appellant would not be able to succeed as a substitute custodian at Shepherdstown Elementary School. On or about July 24, 2000, Principal Offutt forwarded to Appellant a copy of her July 14, 2000 correspondence to Superintendent Markoe.

By letter dated October 27, 2000, Gerry R. Sokol, Assistant Superintendent of Jefferson County Schools, advised Appellant that, based upon her unsatisfactory work performance since her initial employment assignment with Jefferson County schools, he was recommending to Superintendent Markoe that her employment be terminated. Although the School Board had afforded Appellant the opportunity to be heard before it acted on the recommendation of termination in the previous disciplinary matter at Jefferson High School, it is undisputed that Appellant was not advised of her right to such a hearing before the School Board in the instant case.

A regular meeting of the School Board was scheduled for November 8, 2000. Prior to that meeting, Appellant's counsel advised Superintendent Markoe that, due to a scheduling conflict, he would be unable to attend that meeting and offered several alternate dates when he would be available to represent Appellant's interests in the instant disciplinary matter. Despite Appellant's counsel's clear request to be present, and despite the absence of both Appellant and her counsel at the November 8, 2000 meeting, the School Board acted on the superintendent's recommendation of termination and voted to remove Appellant from the substitute custodian list effective immediately.[3] By letter dated November 9, 2000, the School Board notified Appellant of its action.

[3]According to the School Board, its vote to terminate Appellant's employment was made in a summary fashion, as the vote also operated to terminate the employment of another school service employee who was retiring.

A post-termination evidentiary hearing was conducted on December 7, 2000, during a Special Session of the School Board. At the conclusion of the hearing, the School Board voted to uphold the superintendent's recommendation and the motion made at the November 8, 2000 meeting, to terminate Appellant's employment as a substitute custodian.

Thereafter, on May 15, 2001, a Level IV hearing was conducted before the Grievance Board. In a Decision entered July 9, 2001, the Administrative Law Judge found that the School Board's failure to provide Appellant with proper notice and a hearing prior to her termination, as required by *W.Va. Code* §18A-2-8, violated Appellant's procedural due process rights. However, the Grievance Board concluded that the evidence presented proved the procedural violation was "harmless error" because Appellant received a hearing and opportunity to respond to the charges against her one month after she was dismissed.

Appellant appealed the Grievance Board Decision to the Circuit Court of Kanawha County. *See W.Va. Code* §18-29-7. In that appeal, Appellant argued that the Grievance Board erred in determining that the School Board's failure to provide Appellant with notice and a hearing prior to her termination was harmless error. Appellant argued further that the Grievance Board erred in holding the School Board complied with the requirements of 126 C.S.R. §141-2.6, otherwise known as West Virginia Board of Education Policy No. 5300 which, *inter alia*, entitles an employee to the right to know how well she is performing her job

and affords her the opportunity to improve her job performance before her employment is terminated.

In an Opinion Order entered December 14, 2001, the circuit court concluded that Appellant was given proper notice as to the reasons for her termination, but that her procedural due process rights were violated when the School Board failed to afford her a pre-termination hearing, pursuant to *W.Va. Code* §18A-2-8. The circuit court awarded Appellant the nominal sum of one dollar in damages for this due process violation.

II.
STANDARD OF REVIEW

It is well settled that "[a] final order of the hearing examiner for the West Virginia Education and State Employees Grievance Board, made pursuant to *W.Va. Code* 29-6A-1, *et seq*. [1988], and based upon findings of fact, should not be reversed unless clearly wrong." Syllabus, *Quinn v. W.Va. Northern Community College*, 197 W.Va. 313, 475 S.E.2d 405 (1996). Furthermore, "[a]lthough we accord great deference to the findings of fact of the West Virginia Educational Employees Grievance Board,[4] we review, *de novo*, questions of law." Syl. pt. 2, *Maikotter v. Univ. of W.Va. Bd. of Trustees*, 206 W.Va. 691, 527 S.E.2d 802

[4]The West Virginia Education Employees Grievance Board has been renamed the Education and State Employees Grievance Board. *See W.Va. Code* §29-6A-5(a) (1998).

(1999) (footnote added). It is with these legal principles in mind that we consider the instant appeal.

III.
DISCUSSION

A.

The first issue for our review is whether the School Board afforded Appellant proper notice of her unsatisfactory performance, in compliance with 126 C.S.R. §141-2.6, commonly referred to as West Virginia Board of Education Policy No. 5300 (Policy No. 5300), which provides:

> Every employee is entitled to know how well he/she is performing his/her job, and should be offered the opportunity of open and honest evaluation of his/her performance on a regular basis. Any decision concerning promotion, demotion, transfer or termination of employment should be based upon such evaluation, and not upon factors extraneous thereto. Every employee is entitled to the opportunity of improving his/her job performance, prior to the terminating or transferring of his/her services, and can only do so with the assistance of regular evaluation.

Additionally, pursuant to *Board of Educ. of Mercer County v. Wirt*, 192 W.Va. 568, 453 S.E.2d 402 (1994), the due process requirements of *W.Va. Code* §18A-2-8 require that Appellant be afforded written notice of the charges, an explanation of the evidence and an opportunity to respond before the School Board decides to terminate her employment. *Id.*, at syl. pt. 3, in pertinent part.

In essence, Appellant maintains Principal Offutt's manner of constructively criticizing her work performance led Appellant to believe her work was progressing satisfactorily. Thus, according to Appellant, she was not apprised of Principal Offutt's dissatisfaction with her work performance, as required by Policy No. 5300 and *W.Va. Code* §18A-2-8. *See Wirt, supra*.

We cannot agree with Appellant's position. A review of the record reveals that Appellant was repeatedly advised that her work performance was viewed by other employees and Principal Offutt as unsatisfactory. Appellant was placed on an improvement plan while she was employed at Jefferson High School. That improvement plan remained in effect when she began her assignment at Shepherdstown Elementary School, a fact of which Appellant was obviously aware. While Appellant was on the improvement plan, Principal Offutt personally observed deficiencies in Appellant's work performance and also received various complaints about it, including Appellant's failure to clean a bathroom mess left by a student and failure to properly clean and wax floors. Appellant also left a building window open and air conditioning units on and the school building itself unlocked. Principal Offutt discussed these incidents with Appellant at or near the time each occurred. Principal Offutt also offered Appellant help and support, including advice on how to better perform her work. Principal Offutt's kind concern for her employee aside, it is beyond cavil that Appellant was aware that her work performance was not being viewed favorably. Thus, we hold Appellant was afforded proper notice of her unsatisfactory work performance and that, accordingly, the School Board

complied with the requirements of Policy No. 5300 and *W.Va. Code* §18A-2-8. *See Wirt, supra*.

B.

The second issue before this Court concerns the School Board's failure to afford Appellant a hearing before it acted on the superintendent's recommendation that her employment be terminated. As indicated above, in a prior disciplinary matter involving Appellant, the superintendent recommended to the School Board that Appellant's employment be terminated for insubordinate conduct while she was working as a substitute custodian at Jefferson High School. In that case, the School Board notified Appellant that she could request a hearing and, in fact, afforded her the opportunity to be heard before it took any action on the superintendent's recommendation. An evidentiary hearing was conducted, after which the School Board voted not to terminate Appellant's employment as a substitute custodian. In lieu of termination, the School Board suspended Appellant for ten days, without pay.

In sharp contrast, in the instant case, when Appellant was advised that a recommendation of termination was being made to the School Board, her counsel notified the School Board that he represented Appellant's interests but would be unable to attend the November 8, 2000 meeting. Appellant's counsel offered specific alternate dates near in time to November 8th when he could be present. Inexplicably, the School Board declined to accommodate Appellant's counsel's schedule and to afford Appellant the opportunity to be

heard before taking action on the superintendent's recommendation that her employment at Shepherdstown Elementary School be terminated. Consequently, the remaining issue in this appeal involves the School Board's violation of Appellant's procedural due process rights, as provided for in *W.Va. Code* §18A-4-15 and 18A-2-8.

It is well established that "'[s]chool personnel regulations and laws are to be strictly construed in favor of the employee.' Syllabus Point 1, *Morgan v. Pizzino*, 163 W.Va. 454, 256 S.E.2d 592 (1979)." Syl. pt. 1, *Smith v. W.Va. Div. of Rehab. Services,* 208 W.Va. 284, 540 S.E.2d 152 (2000). *W.Va. Code*, §18-4-15(g) provides:

> Substitute service employees who have worked thirty days for a school system shall have all rights pertaining to suspension, dismissal and contract renewal as is granted to regular service personnel in . . . [§§ 18A-2-6, 18A-2-7, 18A-2-8 and 18A-2-8a][.]

It is undisputed that Appellant worked more than thirty days for the School Board, having begun her employment as a substitute custodian sometime in August 1999. Pursuant to *W.Va. Code* §18A-2-15(g), therefore, Appellant is entitled to those rights pertaining to dismissal as are granted regular service personnel under the statutory provisions enumerated therein.

Applicable to the instant case is *W.Va. Code* §18A-2-8, which provides, in pertinent part:

> Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, 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. A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article. The charges shall be stated in writing [and] served upon the employee within two days of presentation of said charges to the board. The employee so affected shall be given an opportunity, within five days of receiving such written notice, to request, in writing, a level four hearing and appeals pursuant to . . . [§§18-29-1 et seq.] [.]

As indicated above, under *Wirt*, *supra*, the due process requirements of *W.Va. Code* §18A-2-8 require that, in addition to the notice of charges, Appellant must be afforded an opportunity to respond before the School Board decides to terminate her employment. *Id*., at syl. pt. 3, in pertinent part. The School Board honored these requirements when it disciplined Appellant while she was employed at Jefferson High School, advising her of her right to a hearing and, appropriately so, taking no action on the superintendent's recommendation of termination until a hearing was conducted. Indeed, following the hearing, the School Board voted not to terminate Appellant's employment as a substitute custodian at Jefferson High School.

The School Board should have acted in precisely this manner in the instant case. It should have taken no action on the superintendent's recommendation that Appellant's

employment at Shepherdstown Elementary School be terminated until such time as Appellant or her counsel could be present, as they clearly requested before the November 8, 2000 School Board meeting. As this Court observed in *Wirt*, "'affording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays." *Id*, 192 W.Va. at 575, 453 S.E.2d at 409 (*quoting Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532, 544, 105 S.Ct. 1487, 1494-95, 84 L.Ed.2d 494, 505 (1985)). Given that a post-termination hearing was conducted one month later, it is apparent that allowing Appellant to be heard prior to the School Board's vote of termination on November 8, 2000, would have imposed neither an administrative burden nor an intolerable delay. It is not at all clear why the School Board honored Appellant's due process rights in one disciplinary action, but treated these rights as an afterthought in the instant proceeding.

This Court does not view this violation as "harmless error," as did the Grievance Board, nor is the nominal sum of one dollar in damages sufficient, as the circuit court concluded. While the Court recognizes Appellant's work performance left much to be desired and her termination for unsatisfactory performance was ultimately justified, we cannot condone the School Board's impertinent disregard of Appellant's right to be heard before it discharged her from its employ. As suggested above, it is not insignificant that Appellant requested a hearing before the School Board acted on the recommendation of termination, and that her request was effectively rebuffed when the School Board declined to accommodate her lawyer's schedule and held the vote in their absence. It is also meaningful that, only months

earlier, the School Board conducted a pre-termination hearing in another disciplinary matter involving Appellant.[5]

Accordingly, we reverse the circuit court's nominal damage award of one dollar and direct, instead, that Appellant be awarded back pay for the period between the effective date of her dismissal, November 8, 2000, and the date of her December 7, 2000 hearing before the School Board, when her employment was terminated.

Finally, we find that the School Board's violation of Appellant's due process rights entitles her to an award of attorneys fees in the amount of $2,000.00, as authorized by *W.Va. Code*, §18A-2-11.

IV.
CONCLUSION

For the reasons stated herein, to the extent the December 17, 2000 Order of the Circuit Court of Kanawha County concluded that Appellant received proper notice as to the reasons for her termination, that portion of the circuit court's order is affirmed. Likewise, the circuit court's conclusion that Appellant's procedural due process rights were violated when the School Board failed to afford her a pre-termination hearing is also affirmed. However, the

[5]Relying on *Barazi v. W.Va. State College*, 201 W.Va. 527, 498 S.E.2d 720 (1997), the School Board argues the nominal damages award should be sustained because Appellant was justifiably terminated. We believe the facts of the instant case mandate a different result.

circuit court's conclusion that Appellant is entitled to a nominal damage award of one dollar is reversed, and this case is remanded to the circuit court for a determination of back pay as set forth in this opinion. Finally, the circuit court is directed to enter an award of attorneys fees in favor of Appellant, in the amount of $2,000.00. *See W.Va. Code*, §18A-2-11.

Affirmed, in part, reversed, in part, and remanded with directions.