STATE BOARD OF EDUCATION

STATE OF GEORGIA

SHERRY HEARN,	:	
	:	
Appellant,	:	
	:	**CASE NO. 1996-45**
vs.	:	
	:	**DECISION**
CHATHAM COUNTY	:	
BOARD OF EDUCATION,	:	
	:	
Appellee.	:	

This is an appeal by Sherry Hearn (Appellant) from a decision by the Chatham County Board of Education (Local Board) to dismiss her for insubordination after she refused to take a drug test within two hours after a marijuana cigarette was found in her car. Appellant claims that the Local Board's decision violated her Fourth Amendment rights and should be reversed. The Local Board claims that the request that Appellant take a drug test was authorized and constitutional. The Local Board's decision is sustained.

On April 4, 1996, the campus police, in coordination with the county police, began making a random drug sweep through the parking lot at Windsor Forest High School in Savannah, Georgia. The police thought that only student cars were located in the parking lot and were unaware that Appellant had parked her car there approximately five minutes before the search began. As the police went through the parking lot with a trained drug-detecting dog, the dog alerted on Appellant's car, which was unlocked and had the windows open. A Chatham County Deputy Sheriff began searching the car without Appellant's consent. A member of the campus police joined the search and they found a partially smoked marijuana cigarette in the ashtray.

Appellant's principal asked her to submit to a drug test. Appellant refused. The Local Board had adopted a policy to provide for a drug-free environment. As part of the policy, teachers and other employees are required to submit to a drug screening if reasonable suspicion exists to ask for the test. The policy also requires a teacher's consent before a teacher's car or other belongings are searched.

Appellant taught for 27 years and was the social studies teacher at Windsor Forest High School. She denied any knowledge about the marijuana cigarette. Appellant was read

her *Miranda* rights and told she had the right to remain silent and consult with an attorney. The police also told her she probably would be charged with criminal possession of marijuana.

When she was directed by her principal to take a drug test, Appellant stated that she thought it was wrong to require her to take a drug test because she questioned the constitutionality of the search of her car. Appellant attempted to contact her attorney for advice, but was told the attorney was unavailable until late in the afternoon. Appellant did not take the school drug test on April 4, 1996, but had her own drug test taken on April 5, 1996. Her test, which was conducted by a commercial facility, found no evidence of marijuana in her system.

Before April 4, 1996, Appellant's principal never observed any indication that Appellant might be engaging in any drug usage. The Local Board's drug policy provides some samples of indicators that can give rise to reasonable suspicion of drug use. Appellant's principal never observed any of the indicators, e.g., performance decline, unexplained behavior or personality changes.

Following a 16-hour hearing on April 30, 1996, the Local Board voted to terminate Appellant's teaching contract on grounds of insubordination because she refused to take the drug test within two hours as directed by her principal. Appellant then appealed to the State Board of Education.

Appellant contends that the Local Board violated its own policy and the policy, therefore, cannot be used as the basis for terminating her teaching contract. Appellant's argument is that the policy provides that a teacher's car cannot be searched without the teacher's consent; since the Local Board violated the policy by conducting a search without her permission, the Local Board cannot thereafter use the remainder of the policy as a basis for disciplinary action. The Local Board counters this argument by maintaining that reasonable suspicion existed for asking for a drug test when the trained dog alerted on Appellant's car before the search was conducted. The Local Board also argues that after the dog alerted on Appellant's car, in the presence of the police, the subsequent search was a police matter that did not require consent by Appellant.

As noted by the Local Board, Appellant was not terminated because she had marijuana in her car. Instead, she was terminated because she refused to submit to a drug test.

The Local Board's policy regarding testing provides that tests can be ordered on reasonable suspicion. Specifically, the policy provides:

Reasonable Suspicion (For Cause)

1. Circumstances Giving Rise to Suspicion. The School System requires all current employees to submit to alcohol and/or drug tests whenever supervisor observations or other objective circumstances reasonably support a suspicion that an employee may have alcohol and/or drugs present in his or her system or has otherwise violated the Board drug and alcohol policy. Reasonable suspicion may arise from, among other factors:

a. evidence of an employee having tampered with a urine specimen;

b. drug-related arrests or convictions;

c. objective supervisor observation or co-worker complaint(s), significant performance decline, or otherwise unexplained significant attendance, work habit, behavior or personality changes indicating possible violation of the Drug-Free Workplace Policy;

d. involvement in a workplace, on-the-job or vehicular accident or incident, or any other actions which indicate a possible error in judgment or negligence which may be due to the presence of drugs or alcohol. (Any accident which results in injury to any person or substantial property damage shall be deemed to warrant testing.)

The supervisor or supervisors requesting testing should prepare and sign written documents explaining the circumstances and evidence upon which they relied shortly after requesting testing, or before the results of the tests are released, whichever is earlier. Although one supervisor may request a test based upon his or her own suspicion, supervisors are encouraged to obtain the assistance of a second supervisor as a witness where feasible. Supervisors should seek to corroborate co-workers or third party accusations before determining to conduct reasonable suspicion testing solely on the basis of such information. ....

Policy 0766, Drug-Free Workplace, p. 4 (Eff. 4/7/93).

A governmental employee may not be discharged for refusing to submit to a drug test where there is no articulable, individualized basis for suspecting that the employee was using narcotics. *See, Jackson v. Gates,* 975 F.2d 648, 653 (9th Cir. 1992). If, however, a dog alerts on a car, then probable cause exists for a search and seizure. *See, United States v. Ludwig*, 10 F.3d 1523, 1527 (10th Cir. 1993). *See also, Donner v. State*, 191 Ga. App. 58, 60, 380 S.E.2d 732, 734 (1989). Although Appellant argues that the principal testified that there never were any previous indications of drug use by Appellant or any other teachers, nor was there any diminution of Appellant's abilities or changes in her behavior or personality that would give rise to reasonable suspicion under the Local Board's policy, the alert by the trained dog was sufficient to give the principal reasonable suspicion to request Appellant to take a drug test. "In dealing with probable cause we deal with probabilities; they are not technical, but are the factual and practical considerations of everyday life on which reasonable and prudent men act. [cits. omitted]. The [principal] had 'a substantial basis' for concluding that probable cause existed, in the totality of all the circumstances." *Baez v. State*, 217 Ga. App. 511, 311 S.E.2d 823 (1995). Even if the subsequent search of Appellant's car may have violated the Local Board's policy, as contended by Appellant, such subsequent action after reasonable cause arose does not establish that the request for a drug test was unconstitutional. Thus, if the evidence of the marijuana in the car is disregarded, there is still sufficient basis for requesting Appellant to take a drug test. The State Board of Education concludes that when the dog alerted on Appellant's automobile, there was reasonable cause under the Local Board's policy for the principal to order Appellant to take a drug test and that ordering such a drug test did not violate Appellant's Fourth Amendment rights.

Appellant next argues that she was not insubordinate because she did not willfully disobey the principal's directive to take a drug test. Instead, she contends, she refused only because she thought that the search of her car was unconstitutional. Regardless of her reasons, Appellant knew what the principal was asking and consciously, with knowledge of the consequences, refused to obey a lawful request. The refusal to obey a lawful and reasonable request constitutes insubordination.

Appellant also contends that the Local Board improperly limited the scope of the hearing by only allowing evidence about the drug test and not permitting her to present witnesses concerning her competence. Appellant, however, was able to present evidence of her competence. The Local Board was aware that she had been voted Teacher of the Year, that she turned students away from drugs, and that Appellant was an outstanding teacher. The issue in this case, however, was not about Appellant's competency, but rather whether she willfully disobeyed a reasonable directive from her principal. The State Board, therefore, concludes that the Local Board did not improperly limit the scope of the hearing.

Based upon the foregoing, it is the opinion of the State Board of Education that the Local Board did not exceed its authority or violate Appellant's constitutional rights in dismissing her because she refused to take a drug test. The Local Board's decision, therefore, is
SUSTAINED.

This 14th day of November, 1996.

Robert M. Brinson
Vice Chairman for Appeals