ALICE SIMONS,

Grievant,

v. Docket No. 95-23-399

LOGAN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Alice Simons, states her three-day suspension for neglect of duty and insubordination was arbitrary and capricious. She requests as relief that the record of her suspension be removed from her file, and that she receive all lost wages and benefits. She believes her actions required a reprimand only and would willingly accept this disciplinary action for her inadvertent mistake.

Grievant filed this grievance directly at Level IV pursuant to W. Va. Code §18A-2-8. After several continuances for good cause, a Level IV hearing was held on February 16, 1996. This case became mature for decision on March 4, 1996, the deadline for the submission of the parties' proposed findings of fact and conclusions of law.

Background

Prior to the beginning of the 1995-96 school year, the principal of Christian Grade School ("CGS"), Mike Johnson, met with the faculty to discuss multiple issues relating to the school; including accreditation, duty rosters, smoking policy, and the "sign-in, sign-out" sheet. CGS had been visited by the State Department of Education ("SDOE") the prior spring for accreditation purposes. SDOE's report stated CGS had multiple problems that must be corrected before accreditation would be forthcoming. Problems included faculty smoking in the school building and on the school grounds, student disrespect for teachers, teachers lacking disciplinary control of their students and the classroom, and a poor learning environment. The administration and teaching staff were found to be responsible for these problems, including the poor learning atmosphere in the school. CGS was the only school in

the Logan County Board of Education ("LCBOE") accreditation process that received these types of citations.

On the first day of school, August 28, 1995, Principal Johnson posted the duty roster in the office and placed a copy of this roster in each teacher's mailbox. The required changes in the roster from last year's schedule had been explained at the pre- school faculty meeting discussed above and held on August 22, 1995.

The incident in question occurred on August 30, 1995, two days after school started. On that day, payday, Grievant asked Principal Johnson if she could go to the bank at lunch time. Hestated she could if she did not have any duty, and if she signed in and out on the proper sheet.

Shortly after 12:00 noon, Principal Johnson found Grievant was not covering her lunch room duty, and he covered this assignment himself. He did not see Grievant in the building and noted she had not signed out on the required sheet. Given the prior discussion, he assumed Grievant had gone to the bank.

He testified he called Grievant to his office at approximately 3:00 p.m. to discuss the situation. Grievant stated she had gotten the schedule "mixed up" and had missed her lunch duty. Principal Johnson told her that this was no excuse, and she would receive a written reprimand he had previously prepared. He asked Grievant to sign at the bottom of the document and told her her signature did not mean she accepted the reprimand, only that she had received it. Grievant refused to sign. Principal Johnson then got Grievant's building representative, and again asked Grievant to sign the reprimand letter indicating she had received it. Grievant again refused to sign stating she wanted to talk to her union representative before she signed the letter. Principal Johnson told Grievant if she did not sign the reprimand, indicating receipt, he would call Assistant Superintendent Skip Hackworth to inform him of the situation, and to ask for further instructions. Grievant still refused to sign the reprimand.

This handwritten reprimand is reprinted below:

To: Mrs. Simons

From: Michael Johnson

Subject: Neglect of duty (lunch duty)

Date: Aug. 30, 1995

This letter concerns neglect of duty. You failed to sign out and sign back in during lunch time.

This is a written reprimand and if this happens again, this is an act of insubordination. There was no excuse for not doing your lunch duty.

_____

Employee's signature

_____

Principal's signature

Your signature only indicates that you have received this letter.

Principal Johnson volunteered that the last sentence on the above-document, about Grievant's signature, was added after Grievant had refused to sign the reprimand. Principal Johnson explained his action by saying: 1) he had given her this explanation verbally; 2) he had forgotten to put this statement on the document when he first wrote it; and 3) he thought this statement should be on the reprimand. (See footnote 1) **Principal Johnson stated Grievant never told him where she had been during her missed duty. Principal Johnson stated Grievant would never have been suspended if she had acknowledged the reprimand and signed it.**

In terms of past disciplinary problems with Grievant, Respondent noted the following incidences:

1) Principal Johnson spoke to Grievant last spring, because she missed bus duty. Principal Johnson stated he gave Grievant“the benefit of the doubt” in this incident and thought Grievant may have been confused about the schedule.

2) In August 1995, prior to the students' arrival, LCBOE's attorney John Sims and Assistant Superintendent Hackworth spoke to Grievant about her smoking on school grounds.

3) Grievant had been placed on an Improvement Period, during the 1993-94 school year, for multiple problems; including being excessively out of her room, poor work habits, poor classroom management, poor attendance, and failure to follow policies.

4) Grievant's 1994-95 evaluation listed as deficiencies that Grievant smoked in her room during her planning period, had difficulty staying on task, and was frequently tardy.

Mr. John Myers, Superintendent of Logan County Schools, stated it was his decision to suspend Grievant for negligence in the performance of her duties and insubordination. The suspension letter is represented below:

I have been contacted by your direct supervisor, Mr. Michael Johnson, concerning an incident whereby you refused to accept a reasonable and proper assignment from your authorized supervisor, were negligent in the performance of your assigned duties, and you were directly insubordinate.

On August 30, 1995, Mr. Johnson gave you a lunch duty assignment from 12:00 to 12:30. This assignment was posted on the school duty roster and provided to you. Instead of performing the assigned duty you left the school. When you left the building you failed to sign out, as required by building policy. Upon your return your principal requested that you meet with him. At that meeting you were advised that you would receive a written reprimand, you refused to acknowledge your receipt of that reprimand initially and in front of your building representative.

I consider these acts to be directly insubordinate. You have also violated county policy, you have refused a directive from your supervisor, you have committed acts of negligence in the performance of your duties, and you have refused to accept a reasonable and proper directive and assignment from your supervisor.

Therefore, I am suspending you without pay for three (3) days beginning on September 5, 1995. You are may [sic] return to work on Friday, September 8, 1995.

Should such acts continue I will be forced to take additional action as outlined in West Virginia Code §[§] 18A-2-2 and 18A-2-8 which could lead to your termination.

You have violated Logan County Schools Policies VI.5.1 and VI.5.2 You have also violated policies established by your supervisor.

In the future it would be in your best interests to follow your supervisor's directive, school policy, and county policy. Future violations could result in the termination of your

employment in the Logan County School system.

Superintendent Myers stated Grievant was negligent when she failed to carry out her lunch duty assignment, and insubordinate when she refused to acknowledge her receipt of a written reprimand. He stated Grievant violated Logan County School Policies VI.5.1 "Performance of duties", and VI.5.2 "Personal conduct." He noted that an employee normally receives two oral warnings (See footnote 2) prior to dismissal for unsatisfactory performance of duties, but that several causes, including "[n]egligence in performance;" are considered just cause for suspension or dismissal without the prior warnings.

Superintendent Myers testified that he did not consider CGS "a normal school" because of the multiple problems and the pooraccreditation report. He stated teachers were too "lax", did not give proper supervision, and were not in control of the school. The SDOE accreditation committee stated these problems must be corrected, and that students could not learn in such an atmosphere. Principal Johnson had been directed to review the accreditation report with the faculty and to devise a plan for correcting the problem. (See footnote 3)

Grievant's view of the facts differs from Principal Johnson's. Grievant stated she did not perform her required lunch duty, she did not look at the posted duty roster, and did not check her box for her copy of the roster. She thought her duty was to start half hour later and went off school property to eat her lunch and smoke. (See footnote 4) She returned a half hour later and found out she had missed her lunch duty, but did not go to discuss it with Principal Johnson as she decided she would talk to him about it later. She did not remember asking Principal Johnson to go to the bank, and she did not go there.

Grievant stated before she could talk to Principal Johnson, he called her to his office prior to his testified 3:00 p.m. time, and gave her the written reprimand. She refused to sign the letter because it sounded so "severe" and did not specify that she had missed lunch duty. She asked Principal Johnson to amend thereprimand to state she had missed lunch duty and stated she would have signed it if he had done so.

Grievant confirmed she still refused to sign the document in the presence of her building representative and requested to call Mr. Steve Angel, her union representative, before she signed it. She testified Principal Johnson refused to let her explain where she was, and that he was very upset and "irrational." Confusingly, Grievant repeatedly testified she had been in

the building when she had previously testified she had gone a short distance off school property to eat and smoke.

Grievant testified that no mention was made of "lunch duty" on the reprimand Principal Johnson asked her to sign. When questioned about the two references to "lunch duty" on the memo, she stated they were not on the original document. **(See footnote 5)** **Grievant stated she had never missed a duty and had always done her job without any problems.**

When cross-examined Grievant did admit she had been tardy, but stated her copy of the 1994-95 evaluation had no negative comments on it about smoking during her planning period, tardiness, or "staying on task." Indeed, Grievant stated her copy had no negative comments at all and only listed commendations. Grievant stated any negative comments were added after she signed it. Also under cross-examination, Grievant admitted she had been on an Improvement Plan for the 1993-94 school year for numerous problemswith her attendance, work habits, and failure to follow school policy.

In rebuttal, Respondent recalled Principal Johnson who testified that the reprimand submitted at hearing was the same he asked Grievant to sign, with the previously noted addition of the last sentence. Principal Johnson also stated both commendations and deficiencies were on Grievant's 1994-95 evaluation when she signed it.

Issues

At hearing Grievant agreed she had neglected her duty, and she deserved a written reprimand. She contended the suspension was invalid because she had not received two prior warnings (one oral, one written) as required by VI.5.1, and because Principal Johnson did not follow proper procedure in issuing the written reprimand. Grievant also argued that since Principal Johnson had not followed proper procedure and first issued an oral reprimand, followed by a written letter, it was not reasonable to expect her to sign anything. It must be noted that Grievant also testified at hearing that if the reprimand had said neglect of "lunch duty" she would have signed it, thus Grievant's argument was somewhat incongruous.

LCBOE contends it followed its policies and utilized the guidelines of its "disciplinary policy" when suspending Grievant. LCBOE noted that although an employee may receive two prior warnings, this is not required by the policy. Respondent also stated this action was

instituted to stop what was perceived as a"sliding pattern of behavior" as demonstrated by Grievant's repeated failure to follow LCBOE and school policies.

Discussion

The first issue to resolve is one of credibility. Grievant testified the reprimand contained no reference to lunch duty, and if it had, she would have signed it. Principal Johnson testified the letter of reprimand was as it is represented at pages 3 and 4 of this Decision, with the exception of the last sentence. An administrative Law Judge is charged with assessing the credibility of the witnesses that appear before her. Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dept. of Health and Human Res./Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993). Grievant's credibility was damaged when her statement about always doing her work without problems was proven to be false by unrebutted testimony and her own admissions. Additionally, it is hard to believe that Principal Johnson added words and phrases to both Grievant's evaluation and her letter of reprimand. It is unclear what he would hope to gain by these additions. Further, Principal Johnson willingly admitted he added the last sentence at the bottom of the reprimand. Thus, an assessment of the testimony and a careful examination of the reprimand (See footnote 6) , the undersigned finds the original reprimand contained the references to "lunch duty". (See footnote 7) The next issues are interrelated: 1) whether LCBOE and Principal Johnson properly followed procedures in issuing the reprimand and the suspension; and 2) whether an alleged failure by LCBOE to follow its procedures excused Grievant from accepting a reprimand, which she agrees she should receive.

LCBOE's "Disciplinary Action Policy" states in its overview that an employee may be suspended or dismissed by his immediate supervisor whenever this action will serve the good of the school. Policy VI.5.1, "Performance of duties," states employees "who are dismissed for unsatisfactory performance of duties should normally receive at least two warnings: (1) an oral warning, and (2) an oral warning followed by a letter which sets forth the points covered in the [oral] discussion." Pursuant to the above statement a supervisor should normally give two warnings prior to a dismissal, but is not required to do so. The section is silent as to the relationship between warnings and suspensions. The only discussion of

suspension comes later in VI.5.1, when "causes [for suspension and dismissal] relating to the performance of duties" are listed. "Negligence in performance" and "[h]abitual failure to report for duty" are listed as "causes."

If as noted above, the policy allows an employee to be dismissed without two prior warnings, depending on the circumstances, then a supervisor may give a written reprimand to an employee without an oral warning. Additionally, although a supervisor may give two or more warnings prior to a suspension he or she is not required to do so. Obviously, Grievant received a warning about missing her bus duty during the 1994-95 school year, and was placed on an Improvement Plan during the 1993-94 school year for many problems, including failure to follow policy and poor work habits. It is also clear that Grievant had been cited in her 1994-95 evaluation for tardiness, smoking during her planning period, and failure to stay on task. Additionally, CGS was a school "in trouble" and Principal Johnson told faculty prior to the start of school that changes must be made and accreditation problems must be corrected. In that regard, Grievant had a discussion with Attorney Sims and Assistant Superintendent Hackworth about her improper smoking behavior. Given the above set of facts, it was within Policy VI.5.1 for Principal Johnson to issue Grievant a written reprimand for her failure to perform her lunch duty, especially since the roster was explained at orientation, posted in the office, and placed in her mailbox.

As for Grievant's suspension, it resulted from Grievant's refusal to acknowledge her failure to perform her responsibilities by signing the reprimand indicating receipt. Grievant refused to sign, even in the presence of her building representative **(See footnote 8)** **, andattempted to dictate to Principal Johnson the terms of the reprimand. Policy VI.5.2, "Personal conduct" states "[a]n employee may be suspended without warning for cause relating to personal conduct which is detrimental to service." A "cause" for suspension is "[r]efusal to accept a reasonable and proper assignment from an authorized supervisor."**

It is LCBOE's policy "to have individual staff members signify they have received documents from their superior, regardless of whether they contain negative commentary or not." Thompson v. Logan County Bd. of Educ., Docket No. 95-23-127 (July 17, 1995) at 4. Grievant was told to sign the document, indicating receipt. She refused. "Generally, an employee must obey a supervisor's order [then] take appropriate action to challenge the

validity of the supervisor's order." McKinney v. Wyoming County Bd. of Educ., Docket No. 92-55-112 (Aug. 3, 1992), citing Reynolds v. Kanawha- Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990). "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds, supra, citing Meads v. Veteran Admin., 36 M.S.P.R. 574 (1988). See also Daniel v. U. S. Postal Serv., 16 M.S.P.R. 486 (1983); Davis v. Smithsonian Institute, 13 M.S.P.R. (1983). In most circumstances, an employee may not disregard a superior's direct order because she or he believes it is unreasonable or procedurally incorrect. See McKinney, supra.

"[A] deliberate, willful or intentional refusal or failure to comply with a reasonable order of a supervisor" is defined asinsubordination. Reynolds, supra. An employee has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority . . .". McKinney, supra, citing In re Burton Manufacturing Co., 82 L.A. 1228 (Feb. 2, 1984). In essence, Grievant was insubordinate two times during the August 30, 1995 incident. Grievant was insubordinate when she failed to perform her reasonably assigned lunch duty, especially in light of the fact that she heard the schedule discussed at orientation, had failed to examine the posted duty roster to confirm her duty time, and failed to pick up and check the roster in her personal school mailbox. Grievant was also insubordinate when she refused to sign the reprimand, indicating receipt. Thompson, supra.

The above discussion will be supplemented by the following findings of fact and conclusions of law.

Findings of Fact

1. Grievant was placed on an Improvement Plan for the 1993- 94 school year, for multiple reasons including failure to follow policies and poor work habits.

2. Grievant received an oral warning about missing bus duty during the 1994-95 school year.

3. Grievant's 1994-95 evaluation noted the problem areas of tardiness, smoking on school properties, and failure to stay on task. 4. Grievant had been counseled about her smoking on school property by Attorney Sims and Assistant Superintendent Hackworth prior

to the beginning of the 1995-96 school year.

5. Grievant failed to perform her "lunch duty" on August 30, 1996, and Principal Johnson performed this assignment.

6. Principal Johnson prepared a written reprimand for Grievant because of her failure to perform her "lunch duty".

7. Grievant, in the presence of her building representative, refused to sign the reprimand, acknowledging receipt.

8. This reprimand stated Grievant had missed her "lunch duty".

9. Principal Johnson informed Grievant if she did not sign the reprimand he would be required to call Assistant Superintendent Hackworth.

10. Principal Johnson called Superintendent Myers about the incident, and Superintendent Myers issued Grievant a three-day suspension for neglect of duty and insubordination.

11. LCBOE disciplinary policies do not require two oral warnings prior to an employee's suspension.

Conclusions of Law

1. An employer must establish the charges in a disciplinary matter by a preponderance of the evidence. W. Va. Code §18-29-6; Nicholson v. Logan County Bd. of Educ., Docket No. 95-23-129 (Oct. 18, 1995); Froats v. Hancock County Bd. of Educ., Docket No. 91-15-159 (Aug. 15, 1991). 2. "Insubordination encompasses more than an explicit order and refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." Nicholson, supra; Sexton v. Marshall Univ., Docket No. BOR2-88-029- 4 (May 20, 1988); aff'd 387 S.E.2d 529 (W. Va. 1989).

3. "Generally, an employee must obey a supervisor's order and [then] take appropriate action to challenge the validity of the supervisor's order." Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990).

4. "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds, supra, citing Meads v. Veteran Admin., 36 M.S.P.R. 374 (1988).

5. A county board of education possesses the authority to suspend an employee, but this authority cannot be exercised in an arbitrary and capricious manner. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995).

6. LCBOE proved by a preponderance of the evidence that Grievant violated Disciplinary Policies VI.5.1 and VI.5.2 when Grievant failed to perform her required duties and when she refused to sign her reprimand.

7. LCBOE established by a preponderance of the evidence that Grievant neglected her duty and acted insubordinately.

8. LCBOE's imposition of a three-day suspension for insubordination and neglect of duty was not such an excessive penalty as to be arbitrary and capricious. See Lanehart, supra;Nicholson, supra; Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994); Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991).

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Logan 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.

_____

JANIS I. REYNOLDS

Administrative Law Judge

Dated: June 27, 1996

Footnote: 1

It must be noted Principal Johnson volunteered this information without prompting, and stated that this last sentence would now appear on any future reprimands prior to his giving it to an employee.

Footnote: 2

The second oral warning is followed by a letter commemorating the events and subsequent discussion.

Footnote: 3

The duties of the LCBOE have been assumed by the SDOE, and Superintendent Myers noted control could not be returned to the LCBOE while schools received poor accreditation reports like CGS's.

Footnote: 4

Grievant testified she did not have to sign out to go to the designated smoking area, even though it was off school property.

Footnote: 5

It is noted there was one other mention of "lunch" in the reprimand. Grievant agreed that reference, in the first sentence, was in the document.

Footnote: 6

The original was not submitted at hearing, but a copy was.

Footnote: 7

The undersigned does not find it necessary to discuss as a separate issue, whether an employee can dictate language utilized in a written warning or reprimand.

Footnote: 8

In Thompson v. Logan County Bd. of Educ., Docket No. 95-23- 127 (July 17, 1995) this Grievance Board held that W. Va. Code §18- 29-3(f) required that an employee had "the right to have a representative present with them at any meeting which may involve a discussion of the possibility of disciplinary action being taken against them . . .". Id. at 7. Since Grievant's building representative was present at the time, the failure to allow Grievant to talk to a different representative is not problematic, especially since Grievant admitted her actions and her signature only indicated receipt, not agreement.