PAUL MILLER,

Grievant,

v.

DOCKET NO. 96-20-360

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Paul Miller, filed a grievance on August 23, 1996, protesting a suspension, with pay, as follows:

> I have been suspended w/pay for filing a grievance on June 4/96. Out of the wood work crawled a pile of allegations - lies - from my administrator, which I consider to be strictly retaliatory, to have me terminated as she stated she would do. Have been denied my rights to due process - even denied my request for an administrative hearing.

As relief, Grievant sought that:

> All harassment to be ordered stopped, and returned to my regular classroom duties, a cash settlement - last 4 yrs have been pure hell!

Subsequently, on September 25, 1996, Grievant filed another grievance protesting his dismissal from the Kanawha County School Board ("Board") as follows:

> Retaliatory Release! The Superintendents recommendation of the dismissal of Paul E. Miller, based upon allegations was arbitrary, where no written policy on handling such situations exists.

Grievant's relief:

My career has been arbitrarily destroyed. I feel at this point I have to request a cash settlement! To be made whole!

These two grievances were consolidated by Order dated September 26, 1996, and a level four hearing was conducted on November 15, 1996. The case became mature for decision on December 9, 1996, the deadline for the submission of proposed findings of fact and conclusions of law.

Background

Grievant, at all times relevant herein, was employed as a vocational teacher at Carver Career and Technical Education Center ("Carver"), and had been employed in that capacity for approximately 13 years. In or about April 1996, Roy Kemp, an instructor and Program Director of the Pharmacy Technician Training Program at Carver, and a co-worker of Grievant, met with his Principal, Mrs. Norma Miller and Mr. Hunt (See footnote 1), to express some concerns he had about Grievant. Mr. Kemp testified that Grievant had come to the school one evening and was bragging about some armour-piercing or explosive bullets he had in his possession. Coupled with other things Grievant had said over the years, Mr. Kemp became very concerned about the safety of the school. Following his conversation, Mrs. Miller asked him to reduce his concerns to writing, which he did. R. Ex. 2.

Mrs. Miller subsequently spoke with other co-workers of Grievant's, and was eventually provided with six written statements in the Spring of 1996. Mrs. Miller forwarded these statements to counsel for the Board, who shared them with Superintendent Jorea Marple. Superintendent Marple determined the allegations contained in the statements were very serious, and acknowledged she did not have the expertise to deal with this matter. Through her staff, she contacted Dr. Jeffrey Harlow, a psychologist at Process Strategies in Charleston, West Virginia. Dr. Harlow reviewed the statements and suggested a psychological evaluation be conducted of Grievant to better determine his emotional state. Superintendent Marple testified she would normally provide a list of the charges in a letter to an affected employee, but on the advice of Dr. Harlow, and given the nature of the allegations, she decided it would be best to discuss the matter with Grievant in person. Thereafter, Superintendent Marple wrote Grievant on July 23, 1996, asking him to attend a conference with her to discuss "certain information of a confidential and personal nature that must be conveyed to you." She advised Grievant in that letter that, because the conference could have "personal ramifications, you may wish to be accompanied by counsel or other representative." R. Ex. 3.

The Superintendent, Dr. Harlow, counsel for the Board, Grievant, and his representative, Richard Stonestreet, met on July 26, 1996, to discuss this matter. The Superintendent wrote Grievant a letter dated the same day summarizing the outcome of that meeting, wherein it stated Grievant had agreed to submit to a psychological evaluation to be performed by Dr. Harlow. The letter states that, as part of the evaluation, Dr. Harlow would review the allegations made against Grievant, and that the Superintendent would be provided a copy of the report. The letter also advised Grievant that if the report resulted in any adverse personnel action against him, he would be afforded all procedural rights, including the right to confront any accusers. R. Ex. 4. On August 5, 1996, Grievant wrote to Superintendent Marple informing her he was “unable to comply with [her] request to submit to any evaluation by Dr. Harlow.” Grievant informed the Superintendent he had legal counsel, was concerned about the nature of the allegations, requested copies of the statements, requested additional information about the examination itself, and requested an administrative hearing to determine whether he should be required to submit to an examination. R. Ex. 5.

Superintendent Marple responded to Grievant on August 9, 1996, informing him she was in possession of statements made by some of his co-workers, which “suggest that you may be mentally unfit to perform your duties as a classroom teacher.” She summarized the statements as follows:

* You served on the front line in the Vietnam War and were expert in weapons, sneaking and stalking.

* You know where all Carver staff live and their schedules.

* You have had lunch with the President of the United States.

* You have purchased an island in the tropics and a large boat to reach the island.

* You have the ability to call people in power and get information on others at any time.

* You have made the following comments regarding Norma Miller: “Her ass is mine;” “I fucked her up the ass this time;” “I've got the bitch by the ass this time;” “I'm going to make her life hell;” and, “I'll have her job.”

* You have a large collection of weapons.

* You have claimed to carry a small pistol in your boot.

* You claim to have shot a mirror at Carver.

* You stated that you inherited billions of dollars worth of Texas oil rights.

* You stated that government representatives have visited your house with concerns that you would bankrupt the Federal Reserve.

* You have stated that you have automatic weapons and an arsenal at your home.

* You have stated that you own a mansion in Florida next to the home of Donald Trump.

* You have stated that you own a 747 and have a pilot on stand by.

* You stated that you were bidding against the Japanese for the purchase of Snowshoe Resort.

* You stated that you have met with Newt Gingrich, Bob Dole and President Clinton over concerns that you would bankrupt the federal government.

* You own a Russian AK-47 and have purchased a 50 round drum for it.

* You own metal-piercing bullets for the AK-47.

* You always carry a pistol in your vehicle.

* You stated if Carver administration ever did anything to you that you have a weapon that would pierce the walls of the school.

* You stated that if anyone ever did anything to you that you would get even.

R. Ex. 6. The letter concluded by informing Grievant she was directing him to submit to a psychological evaluation by Dr. Harlow, setting the date and time of the evaluation for August 26, 1996. The letter also served to suspend Grievant with pay pending the results of the evaluation, and directed him to avoid entering Kanawha County Schools property or having any contact with Kanawha County Schools personnel. Regarding Grievant's concerns about the evaluation and the statements, the letter advised Grievant to have his counsel contact counsel for the Board the next working school day. R. Ex. 6. On August 19, 1996, counsel for the Board received a letter from Grievant's counsel indicating Grievant would follow the Superintendent's directive to submit to the psychological evaluation. The letter indicated that, pursuant to an earlier conversation, Grievant would also obtain an independent evaluation, and that Board's counsel agreed it would consider the results of that evaluation in rendering any decision regarding Grievant. R. Ex. 7.

On September 5, 1996, Superintendent Marple wrote to Grievant informing him that she had been advised he had not kept the scheduled appointment with Dr. Harlow, nor had he called to cancel it. The Superintendent summarized the chronology of events and concluded:

> In light of your insubordination, I have determined that a hearing will be held on Thursday, September 12, 1996 at 8:30 a.m. in room 205 at the Board's central office on the question of whether disciplinary action should be recommended to the Board of Education. You may be present with counsel or other representative. Testimony will be taken under oath and recorded by mechanical means. You may cross examine witnesses, present evidence or call witnesses on the issue of insubordination.

R. Ex. 8.

Subsequently, a hearing was held on September 12, 1996. Grievant was present at the hearing with counsel and a representative. A decision was rendered by Bill Milam on September 18, 1996, recommending Grievant's employment be terminated for insubordination in failing to follow a directive from the Superintendent. R. Ex. 10. The Board voted to accept the Superintendent's recommendation for termination and Grievant was so advised on September 20, 1996. R. Ex. 11.

Discussion

The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). See Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

W. Va. Code § 18A-2-8 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 contendre to a felony charge. A charge of unsatisfactory performance shall not be made except as the result of an employee evaluation pursuant to section twelve of this article.

Grievant has been charged with insubordination. Insubordination involves the “willful failure or refusal to obey reasonable orders of a superior entitled to give such order.” Riddle v. Bd. of Directors/So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995). “Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions.” Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990). As a rule, few defenses are available to the employee who disobeys a lawful directive; theprudent employee complies first

and expresses his disagreement later. Maxey v. W. Va. Dept. of Human Resources, Docket No. 93-HHR-424 (Feb. 28, 1995). “A charge of failing to report for a fitness-for-duty examination is, in essence, a charge of refusal to obey a proper order.” See Fuentes v. U.S. Postal Service, 54 M.S.P.R. 4, 8 (1992).

Grievant concedes that he disobeyed Superintendent Marple's directive to submit to a psychological evaluation. He maintains that the order was not reasonable, was arbitrary and capricious, and impermissibly infringed on his constitutional rights of privacy. Grievant further alleges the action was taken in retaliation for several grievances he had filed in the past.

The Board asserts that under the facts and circumstances of this case, the Superintendent's directive was reasonable and that Grievant was obligated to obey the directive. The Board denies any retaliatory motive for the personnel action taken against Grievant.

It is well-settled that a county board of education must exercise its statutory authority to dismiss tenured employees reasonably and in a manner which is not arbitrary or capricious. Surber v. Mingo County Bd. of Educ., Docket No. 96-29-015 (Dec. 30, 1996); see, e.g., Rovello v. Lewis County Bd. of Educ., 381 S.E.2d 237 (W. Va. 1989). If the action is challenged, the 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. 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 atunnecessary risk. Stover v. Mason County 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). 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).

“The implied authority of a county school superintendent to direct a teacher to submit to a psychiatric examination must be exercised reasonably and only upon a showing of just cause; each case will be resolved on its own merits and must reveal that the action was not arbitrary or capricious.” Higginbotham v. Kanawha County Bd. of Educ., Docket No. 20-87-087-1 (Aug. 12, 1987). See also, Davis v. Smithsonian Inst., DC07528110749 (1983), which held that “[f]ailure to obey an agency order to report for a mental fitness for duty examination, even on the advice of a

union representative or counsel, is improper and basis for discipline unless it would clearly place the employee in a dangerous situation; the employee may take whatever steps he thinks appropriate to challenge the ultimate validity of the order." While there is no specific provision in West Virginia law requiring a school employee to undergo a psychological examination upon the direction of a superintendent, our law clearly considers mental and emotional fitness as an indispensable element of the general qualifications and competency of one to be a teacher; that a certification to teach cannot be granted to a person who is not mentally and emotionally qualified to perform the duties of a teacher. See W. Va. Code § 18A-3-1; Higginbotham, supra.

However, the private interest of Grievant to continue teaching free of any stigma flowing from submitting to a psychological examination or suffer disciplinary measures forrefusal to submit is a substantial interest, Lombard v. Board of Education, 502 F.2d 631 (2d Cir. 1974), cert. denied, 420 U.S. 976 (1978), and must be balanced against the public interest of school officials to preserve the safety and welfare of students. In such a situation courts generally find a paramount interest in the safety and welfare of school children and therefore an overriding interest. Child Protection Group v. Cline, 350 S.E.2d 541 (W. Va. 1986). Applying the law to the instant facts and circumstances, Superintendent Marple had the implied authority pursuant to W. Va. Code § 18-4-10, to direct Grievant to undergo a psychological examination and his refusal to do so constituted sufficient cause for dismissal in accordance with W. Va. Code § 18A-2-8. (See footnote 2)

A review of the summary of the statements provided to Superintendent Marple (R. Ex. 6) supports her determination that Grievant undergo a psychological examination. Even conceding that, taken separately, some of the remarks would not necessarily cause concern to any reasonable person, taken together they understandably were cause of concern. Also, some of the remarks, taken by themselves, would and should cause concern to any reasonable person. Again, taken individually, remarks an individual might make regarding weapons they possess would not necessarily raise an alarm; however, when taken in context with other remarks about getting even with school officials, and shooting bullets through the school building, it cannot be considered unreasonable for Superintendent Marple to feel an examination of Grievant was warranted. Grievant makes much of the fact that he was not given copies of the statements and was unable to face his accusers prior to being ordered to submit to the examination. There is nothing in West Virginia law which provides an employee with a right to an administrative hearing prior to the directive being issued. Furthermore,

the summary of statements provided to Grievant certainly put him on notice of the types of allegations that had been made against him. Given the seriousness of the allegations, and the Superintendent's concern for the safety of school employees and students, it was not unreasonable for her to not provide Grievant with the names of his accusers at that time.

Subsequently, Grievant was afforded all due process rights to which he is entitled under W. Va. Code § 18A-2-8, and the grievance statute, W. Va. Code § 18-29-1, et seq., including a hearing and the right to cross-examine witnesses, as well as to present his own witnesses. Procedural irregularities, if any, were corrected by the complete and full de novo hearing conducted at the level four hearing before this Board. See, Higginbotham, supra; Golden v. Bd. of Educ. of Harrison County, 285 S.E.2d 665 (W. Va. 1981).

Finally, Grievant alleges his dismissal was in retaliation for filing several grievances in the past against his Principal, Norma Miller. W. Va. Code § 18-29-2(p) defines “reprisal” as “the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it.” A grievant claiming retaliation may establish a prima facie case of reprisal by establishing:

> (1) that he engaged in protected activity, e.g., filing a grievance;
>
> (2) that he was subsequently treated in an adverse manner by the employer or an agent;
>
> (3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and
>
> (4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Fareydoon-Nezhad v. W. Va. Bd. of Trustees/Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989). If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering

legitimate, nonretaliatory reasons for its actions. See Mace v. Pizza Hut, Inc., 377 S.E.2d 461 (W. Va. 1988); Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 309 S.E.2d 342 (W. Va. 1983); Webb, supra.

Grievant established a prima facie case of retaliation. Although it does not appear that any of the grievances filed by Grievant reached level four of the grievance process, the Board did not dispute that grievances had been filed by Grievant against his Principal, some of which had been resolved in his favor. The basis of some of those grievances involved Mrs. Miller's attempts to require Grievant to obtain ASE-NATEF certification, which is not required by West Virginia law. Apparently, Mrs. Miller was instructed by the Board that the certification was not required, and she could not require Grievant to obtain such certification. Subsequently, in April 1996, Mrs. Miller gave Grievant a negative evaluation for failing to obtain ASE-NATEF certification. Grievant filed a grievance on June 3, 1996, over this alleged “harassment” on the part of Mrs. Miller. Shortly thereafter, Mrs. Miller obtained the six statements from Grievant's co-workers and submitted them to the Board's counsel, resulting in Grievant's dismissal. Establishment of a prima facie case of retaliation shifts the burden of proof to the employer to show that Grievant's dismissal was the result of legitimate, nonretaliatory reasons. See Tex. Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Mace, supra; Shepherdstown, supra. In this regard, the Superintendent specifically cited Grievant's refusal to submit to a psychological examination as the reason for his dismissal. While the Superintendent was undoubtedly aware of the grievances filed by Grievant, there was no evidence presented to establish that Mrs. Miller coerced Grievant's co-workers into submitting the written statements containing the numerous allegations summarized above. Indeed, it appears that Mr. Kemp voluntarily approached Mrs. Miller and Mr. Hunt to express his concerns over Grievant's behavior. It was only then that Mrs. Miller contacted Grievant's other co-workers and obtained additional written statements. It is clear from the evidence presented that Grievant was dismissed for insubordination for refusing a direct order of the Superintendent, not for filing grievances.

Based upon the foregoing discussion, it is appropriate to make the following findings of fact and conclusions of law.

Findings of Fact

1. Grievant was directed by Superintendent Jorea Marple to submit to a psychological

examination based upon certain written statements she had received from Grievant's co-workers.

2. Grievant at first agreed, but subsequently refused to submit to the psychological examination ordered by the Superintendent.

Conclusions of Law

1. The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8, as amended, including insubordination, and must be exercised reasonably, not arbitrarily or capriciously. Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). See Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

2. Insubordination involves the “willful failure or refusal to obey reasonable orders of a superior entitled to give such order.” Riddle v. Bd. of Directors/So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989).

3. In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995).

4. “Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions.” Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990).

5. “The implied authority of a county school superintendent to direct a teacher to submit to a psychiatric examination must be exercised reasonably and only upon a showing of just cause; each case will be resolved on its own merits and must reveal that the action was not arbitrary or capricious.” Higginbotham v. Kanawha County Bd. of Educ., Docket No. 20-87-087-1 (Aug. 12, 1987). 6. Based upon the facts and circumstances in this matter, Superintendent Marple had just cause to order Grievant to submit to a psychological examination. Grievant's refusal to do so amounted to insubordination, as defined by statute.

7. W. Va. Code § 18-29-2(p) defines “reprisal” as “the retaliation of an employer or agent

toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it." A grievant claiming retaliation may establish a prima facie case of reprisal by establishing:

(1) that he engaged in protected activity, e.g., filing a grievance;

(2) that he was subsequently treated in an adverse manner by the employer or an agent;

(3) that the employer's official or agent had actual or constructive knowledge that the employee engaged in the protected activity; and

(4) that there was a causal connection (consisting of an inference of a retaliatory motive) between the protected activity and the adverse treatment.

Conner v. Barbour County Bd. of Educ., Docket Nos. 93-01-543/544 (Jan. 31, 1995). See Frank's Shoe Store v. W. Va. Human Rights Comm'n, 365 S.E.2d 251 (W. Va. 1986); Fareydoon-Nezhad v. W. Va. Bd. of Trustees/Marshall Univ., Docket No. 94-BOT-088 (Sept. 19, 1994); Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989).

8. If a grievant establishes a prima facie case of reprisal, the employer may rebut the presumption of retaliation raised thereby by offering legitimate, nonretaliatory reasons for its actions. See Mace v. Pizza Hut, Inc., 377 S.E.2d 461 (W. Va. 1988); Shepherdstown Vol. Fire Dept. v. W. Va. Human Rights Comm'n, 309 S.E.2d 342 (W. Va. 1983); Webb, supra. 9. Grievant established a prima facie cae of reprisal under W. Va. Code § 18- 29-2(p), but the Board has presented a legitimate, nonretaliatory reason for its actions, i.e., Grievant's insubordination.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha 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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MARY JO SWARTZ

Administrative Law Judge

Dated: March 7, 1997

Footnote: 1

Mr. Hunt was not identified.

Footnote: 2

For the same considerations set out in this discussion, it is unnecessary to address the Policy 5300 issues since those provisions apply to conduct that is correctable. Higginbotham, supra.