SHELLY DAVIS,

Grievant,

v. DOCKET NO. 96-19-326

JEFFERSON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Shelly Davis, Grievant, submitted this grievance directly to Level IV, in accordance with W. Va. Code §18A-2-8, challenging her termination by Respondent, the Jefferson County Board of Education. She alleges:

> Grievant, a regularly employed secretary, has been dismissed from her employment. Grievant alleges a violation of West Virginia Code §18A-2-8 and requests reinstatement, and wages, benefits and seniority retroactive to July 23, 1996.

On October 21, 1996, an evidentiary hearing was held in this matter at the Grievance Board's office in Elkins, West Virginia. On December 6, 1996, this case became mature for decision upon receipt of Respondent's reply brief.

The following Findings of Fact were derived from the record. (See footnote 1)

FINDINGS OF FACT

1. When this grievance arose, Grievant was employed by Respondent as a secretary at North Jefferson Elementary School (NJES).

2. On June 8, 1995, Perry and Associates, Certified Public Accountants, conducted an audit for Respondent. The audit noted that at NJES “not all receipts were deposited in a timely manner,” and “purchase orders were being approved by the principal but subsequently signed by the school secretary." Level IV, Respondent's Exh. #2. To correct these problems, they recommended daily deposits of all receipts, and that all purchase orders be personally signed by the school's principal, Mr. Patrick Blanc. Mr. Robert Smith, Respondent's Treasurer and Chief School Business Official

since 1994, discussed the recommendations of this exhibit with Principal Blanc. Mr. Smith recommended changes in the accounting procedures at NJES, and informed Principal Blanc, immediately before the beginning of the 1995-1996 school year, that daily deposits were required.

3. The principal is responsible for the financial management of the school. Level IV, testimony of Mr. Smith.

4. On February 12, 1996, Respondent charged Grievant with “lack of compliance, with established accounting procedures, aswell as material and unexplained discrepancies in sums receipted and deposited” for two fund-raisers (the jewelry fund-raiser, and the Secret Santa fund-raiser) and three school accounts (the soda (See footnote 2) account, the ice cream account, and the T-shirt account). She was suspended immediately.

5. The first of the fund-raisers in question is the jewelry fund-raiser. Students solicited orders and collected money. Teachers collected the order envelopes, with money inside, from the students. The order envelopes were then given to Grievant. Grievant placed the money in her desk, or in a locking file cabinet, until she could deposit the money in the bank with the rest of the funds received during the week. The amount of money enclosed was written on the outside of each order envelope. Grievant kept a photocopy of each of the order envelopes given to her.

6. The locking file cabinet, in which Grievant placed the funds, was often unlocked. Several employees had access to it because student records were also kept in that cabinet. Principal Blanc was aware Grievant was storing fund raiser and school account funds in this cabinet.

7. Grievant's locking desk drawer was not secure at all times. Grievant counted money at her desk, and people saw her place the money in her desk drawer or the filing cabinet, after it was counted. Principal Blanc would make change from Grievant'sdesk drawer.

8. The office was often left unlocked, and many different groups had access to the school, after school hours.

9. Mr. Smith determined that there was a significant discrepancy between the total on the photocopied order envelopes and the money deposited in the jewelry fund-raiser account.

10. The second fund-raiser in question was the Secret Santa Shop. Two aides and volunteers ran a “gift shop” for students in a room at the school. This room was not secured at all times. Aides and volunteers who ran the shop did not generate sales receipts documenting items purchased by, and money received from, the students. Aides and volunteers were supposed to give the proceeds to

Grievant. They did not keep records of the amounts given to Grievant, nor did Grievant give them receipts for the money.

11. Mr. Smith determined that there was a discrepancy in the Secret Santa account between the amount of money that should have been generated and the amount of money deposited for this fund-raiser. He compared the number of items delivered to the school, the price of each item, and the number of items returned after the sale.

12. The three school accounts which showed discrepancies were the soda, T-shirt, and ice cream accounts. As with the Secret Santa fund-raiser, Mr. Smith determined that there was a discrepancy between the amount deposited by Grievant and the amount that should have been generated from the sale of these items. 13. Students were able to remove ice cream from the freezer without paying for it. On several occasions, children were chased away from the ice cream freezer after school hours by a custodian. The money can was also often left in the ice cream freezer.

14. Soda was taken from beside the machine, and from a closet without payment to Grievant. Juice and water sales were combined with soda sales in the “soda account.” The juice and water sales were operated on an honor system.

15. Principal Blanc, Grievant's supervisor, was aware of the bookkeeping procedures used by Grievant, including weekly deposits, and where funds were stored before deposit. Prior to February 1996, he never suggested any bookkeeping procedure changes to Grievant, nor did he indicate to Grievant that her bookkeeping performance was deficient.

16. Grievant used the same bookkeeping procedures for four years before Mr. Blanc became principal at NJES, and had excellent evaluations of past service.

17. Mr. Blanc was aware that Grievant would record the amount of money received when she completed a bank deposit form for each account and fund-raiser.

18. Grievant was not instructed to keep a general ledger. She kept a journal of cash receipts and a journal of cash disbursements.

19. Grievant was not directed to make daily deposits, but timely deposits. She usually made weekly deposits, unless she felt she needed to make a deposit during the week. 20. On May 30, 1996, Superintendent Judson Romine advised Grievant that he would recommend the termination of her employment. He made this recommendation after an evidentiary hearing before Respondent on June 11, 1996. Respondent voted to terminate Grievant's employment.

DISCUSSION

The employer must establish the charges in a disciplinary matter by a preponderance of the evidence. W. Va. Code §18-29-6; Bierer v. Jefferson County Bd. of Educ., Docket No. 95-29-558 (Apr. 8, 1996). "The charges shall be stated in writing served upon the employee within two days of presentation of said charges to the board." W. Va. Code §18A-2-8. The decision in this case is limited to the charges as specified in a letter, dated February 12, 1996, by Respondent to Grievant. (See footnote 3) It provides, in pertinent part:

> The intent of this letter is to notify you that, effective immediately, you are suspended from your employment duties, for an indefinite period, pending further investigation into compliance, or lack of compliance, with established accounting procedures, as well as material and unexplained discrepancies in sums receipted and deposited, respectively, by North Jefferson
>
> Elementary School. Your suspension will be with pay and, during your suspension, you are not permitted on school property except to attend the board meeting referenced in this letter.
>
> The basis for your suspension is as follows:
>
> Based upon reports by Mr. Blanc that two fund-raisers and three other school accounts were significantly short of funds, an immediate and preliminary investigation was undertaken by our School Business Official. Upon confirmation of the account discrepancies, and discovery of mandatory accounting procedures which were not followed; i.e., providing a receipt to the individual transmitting money, I made the decision to suspend you, as above, pending further investigation.

Disciplinary hearing, Exhibit #1. Emphasis added.

Respondent failed to define what it meant by "established accounting procedures." Respondent failed to prove that any accounting procedures were "established." During Grievant's disciplinary hearing, the following colloquy occurred:

> Respondent's Counsel: Can you explain to the board the basis for your opinion that Mrs. Davis was not appropriately and correctly dealing with money at the school?
>
> Mr. Smith: It's very explicitly stated in the manual for individual school accounting that receipting is to be done at the point when money is transmitted to the office and that

> clearly wasn't being done here . . .
>
> ***
>
> Respondent's Counsel: Other than the issues you've identified with respect to receipting and depositing were there any other improprieties in your opinion with respect to Mrs. Davis' handling of money at North Jefferson Elementary School from an accounting prospective?
>
> ***
>
> Mr. Smith: What I concluded was that the general ledger ... was not being maintained. The only thing that was being maintained was a journal of cash receipts and a journal of cash disbursements. There was no posting to the individual accounts as required by the individual school accounting policy ...
>
> Respondent's Counsel: From an accounting prospective [sic] if no general ledger is maintained, what's the consequence of that in a general sense?
>
> Mr. Smith: You have no analytical ability to understand your finances at the school.

Disciplinary hearing, Tr. 46-48. Emphasis added.

Respondent failed to introduce the “manual for individual school accounting” referred to by Mr. Smith, nor did Respondent produce any evidence that Grievant was provided with a copy of this manual, or that she was ever instructed, by anyone, as to what Respondent considered “established accounting procedures.” Similarly, Respondent did not produce any evidence that Grievant was instructed to maintain a general ledger, or to “post” individual accounts. Moreover, the record lacks any evidence that Grievant has any educational course work in bookkeeping or accounting, or that she should know the difference between a general ledger (which Mr. Smith said she was supposed to keep), and “a journal of cash receipts and a journal of cash disbursements” (which she kept).

The record fails to contain any evidence that Grievant was ever instructed about deficiencies in her bookkeeping by Respondent. Moreover, Principal Blanc failed to testify about a single incident, to his knowledge, where Grievant did not comply with his instructions, or “established accounting procedures” before she was suspended.

Principal Blanc knew that Grievant was not making daily deposits, and did not tell her that such a procedure violated “established accounting procedures,” or that she must make daily deposits. There is no evidence in the record which establishes that Grievant was informed that she was required to make dailydeposits, probably because Principal Blanc did not remember the daily deposit requirement which Mr. Smith had told him. (See footnote 4)

Since the manual for individual school accounting was not entered into evidence, the undersigned Administrative Law Judge cannot determine whether Grievant violated the guidelines of the manual for individual school accounting, Respondent's bookkeeping policy, or “established accounting procedures.” Moreover, it is unreasonable, arbitrary, and capricious to hold Grievant accountable for a standard no one ever told her about, or to discipline Grievant for performing tasks, e.g., making weekly deposits, and simultaneously completing bank deposit forms and documenting amounts of money received (which she assumingly thought were proper), (See footnote 5) but which her Supervisor (Principal Blanc) knew, or should have known, were improper and allowed to continue.

Therefore, Respondent failed to prove by a preponderance of the evidence: (1) that Grievant was provided with the manual or policy, (2) that she was informed and trained as to what Respondent considered “established accounting procedures,” or (3) that Grievant failed to follow any directives from Principal Blanc concerning proper accounting methods. Not only did Respondent, and Principal Blanc, allow accounts and fund raisers to be poorly managed, it also allowed sloppy collection and operating procedures to exist. Principal Blanc testified that Grievant complained to him concerning the time and manner in which he allowed teachers to turn in money. The following colloquy occurred during Grievant's disciplinary hearing:

> Grievant's counsel: Shelly, I want to go back, you indicated you had complained to Pat about the way the money was coming in. Would you be a little more specific?

> Grievant: Mainly the way the teachers were sending the money up to me. That was one of my biggest complaints. During the one fund-raiser like I say they had their yellow manilla envelopes and the two aid[e]s would go get that money. That's what started us doing that manilla envelope because when they brought that money up, if they went to the kindergarten teacher [and] got money, they'd put it in this hand and the next teacher they'd just do it in this hand and this hand and I went back to put the mail away in the other room one day and when I came back the aid[e]s had laid all the money, all the order forms, everything that they had for that day in the middle of my desk and I just turned around and went and got [Principal] Pat [Blanc] and showed

> him.

Disciplinary Hearing, Tr. 140-1.

Moreover, the soda account, which included juices and water, was based on an honor system. At the disciplinary hearing, Grievant testified:

> The soda was kept in a soda machine. ... For a while when the Pepsi man brought in the sodas, he would just stack everything up that he could not get in the machine beside the refrigerator. Then Brenda Cotta would fill the machine up when it needed to be filled up and she complained about she knew people was [sic] getting it and wasn't [sic] paying for it so we moved it to a closet in the work room and she would still come in and say this one got this soda and this one got this, did they pay for it and I said no and we complained to Pat.

Disciplinary Hearing, Tr. 137-8. The ice cream freezer was not secure. Students could retrieve ice cream from this "locked" freezer, and a custodian chased children away from it after school hours on several occasions. Moreover, if ice cream could be retrieved from this "locked" freezer, (See footnote 6) the Undersigned fails to see why money could not just as easily be taken from a "money can" that teachers or parent volunteers would often place back in the freezer, instead of giving it back to Grievant. Sometimes volunteers or teachers would just leave the can on the counter in the office. Disciplinary hearing, Tr. 139.

Respondent also charged Grievant with "material and unexplained discrepancies in sums receipted and deposited" (See footnote 7) for two fund-raisers (the jewelry fund-raiser, and the Secret Santa fund- raiser) and three school accounts (the soda account, the ice cream account, and the T-shirt account). (See footnote 8) However, during the Level IV hearing, Mr. Smith testified that:

> Instead of receipting the money upon the transmission of money to the office, the receipt that was entered into the accounting records was being prepared at the same point in time that the deposit ticket was being prepared. Consequently, there will not be a difference in the amount received and the amount deposited, because the amount being receipted into the records is the same as the amount being deposited into the bank. Therefore, internal control is lost. Because the person bringing the money down to the office has nothing back from the office indicating what they gave.

Level IV hearing. Emphasis added. See Disciplinary Hearing, Tr. 46. Respondent failed to prove by a preponderance of the evidence the amount of money Grievant actually received. Internal control of the accounting system or procedure was lost. Respondent's evidence, including the testimony of

Mr. Smith, tried to recreate (or estimate) the amount of money that should have been generated. Respondent failed to prove Grievant actually recieved the amount of funds that should have been generated. Respondent simply failed to prove, by a preponderance of the evidence, that Grievant did not deposit all of the money she received. It is not Grievant's burden to prove what happened to the money or the merchandise, or that she did not receive the money.

With regard to the T-shirt, soda, and ice cream accounts, Respondent did not introduce any receipts from people who turned in money to the office. Mr. Smith's letter, dated February 9, 1996, to Superintendent Judson Romine, merely provides, in pertinent part:

> As of January 31, amounts recorded as received for sodas, t-shirts, and ice cream are less than expenditures for
>
> these items by $458.96, $396.00, and $1,057.94 respectively. These accounts are designed to make small profits. The shortfall of cash for these items has not been investigated at this point, and remains unexplained.

Disciplinary Hearing, Exh. #4. See also Level IV transcript.

Therefore, without sufficient documentation proving that money actually came into Grievant's possession, it cannot be maintained that she did not properly receipt and deposit the money.

With regard to the Secret Santa Shop, Mr. Smith could not determine the amount of money actually raised because a ledger was not being maintained, sales receipts were not used, and receiptswere not maintained from the amount of money exchanged between the teachers and volunteers, and Grievant. During Grievant's disciplinary hearing, Grievant testified:

> [Aides or parent volunteers would] either go in the morning or the afternoon and I would give them a money box and if they left at noon they'd bring that money box in to me and I would take most of the money out and leave them just enough change to get by for the afternoon. I would put that in a red money bag and then I'd do the same thing in the evening and I did that all week. I did not count it as they gave it to me.

Disciplinary Hearing, Tr. 130.

Mr. Smith merely determined the amount of money that should have been raised. Mr. Smith multiplied the quantity of the items (See footnote 9) by the retail price of the items to determine the amount of money which should have been received by the office. By using this method it is impossible to determine whether the discrepancy was a result of an occurrence after the funds reached Grievant, or if a discrepancy was the result of stolen items or disappearance of funds prior to

the funds reaching Grievant, or failure to make proper change, or charge the correct price. Funds could have also been stolen from her desk drawer, or from the filing cabinet.

With regard to the jewelry fund raiser, receipts were kept in the form of photocopied order/envelopes. Apparently, Grievant, out of her own volition, took this measure. However, Grievant testified that she did not perform any “cross checks” because she “knew what money [she] had.” Disciplinary Hearing, Tr. 131. See also Level IV transcript. Respondent failed to prove by apreponderance of the evidence that Grievant received more money than she deposited.

Again, Respondent failed to produce the evidence - the receipts (the order/envelopes), the manual for individual school accounting. Respondent merely provided a witness (Mr. Smith) who testified concerning the amount of money that should have been generated, that Grievant failed to comply with Respondent's elusive bookkeeping policy, and that he thought Grievant was culpable. However, just because Respondent produced a witness (Mr. Smith) who believes that Grievant is culpable, does not make it so. The facts in this case were not stipulated to, and sufficient evidence needs to be introduced, even though a witness may try to piece it together, to explain its relevance, to educate the trier of fact, and to offer opinions concerning the evidence.

In summary, since Respondent never defined “established accounting procedures” to the Grievant (or the Undersigned), it cannot be maintained, and is unreasonable, arbitrary and capricious, to discipline her for failing to adhere to a standard of which she had no knowledge. Respondent also failed to prove by a preponderance of the evidence that Grievant received more money than she deposited. Therefore, based on the foregoing findings of fact and discussion, Respondent simply failed to prove by a

preponderance of the evidence its stated reasons for Grievant's termination. (See footnote 10) In addition to the foregoing findings of fact and narration, it is appropriate to make the following conclusions of law.

CONCLUSIONS OF LAW

1. The employer must establish the charges in a disciplinary matter by a preponderance of the evidence. W. Va. Code §18-29-6; Bierer v. Jefferson County Bd. of Educ., Docket No. 95-29-558 (Apr. 8, 1996).

2. The power of a county superintendent to suspend or dismiss an employee must be exercised reasonably, and not arbitrarily or capriciously. See Beverlin v. Bd. of Educ., 158 W.Va. 1067, 216

S.E.2d 554 (1975).

3. A county board of education must exercise its discretion in personnel matters in a manner which is not arbitrary or capricious. Lilly v. Summers County Bd. of Educ., Docket No. 90-45- 040 (Oct. 17, 1990), citing State ex rel. Hawkins v. Tyler County Bd. of Educ., 375 S.E.2d 911 (W.Va. 1981).

4. Respondent failed to prove by a preponderance of the evidence the charges upon which Grievant's suspension and termination rest.

Accordingly, this grievance is **GRANTED**, and Respondent is **ORDERED** to instate Grievant to the position she held prior to her suspension, and to remove any record of this suspension/termination from Grievant's personnel file, and issue her all benefits, including back pay and seniority, as if she had not been suspended or terminated.

Any party may appeal this DECISION to the Circuit of Kanawha County or to the Circuit Court of Jefferson 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.

DATED: 2/28/97_____ _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE

Footnote: 1

The record in this case includes: (1) the audio tapes of the Level IV hearing; (2) a Level IV grievance form; (3) Respondent's two exhibits introduced at Level IV, which include Respondent's exhibit #1, a copy of the transcript of Grievant's disciplinary hearing, and the exhibits; Respondent's exhibit #2 consists of two pages, the cover page and a portion of an audit, from Perry & Associates, certified public accountants; and (4) the parties' post-hearing submissions.

The Undersigned considered all matters of record.

Footnote: 2

The soda account also included money from juice and water sales. Disciplinary Hearing, Tr. 137.

Footnote: 3

During the Level IV hearing, Grievant's counsel made a motion to exclude all evidence pertaining to any incidents not mentioned in this exhibit dated February 12, 1996, which was referred to as "the charging document." That motion was GRANTED. Therefore, the Undersigned Administrative Law Judge did not consider evidence beyond the specific charges and incidents cited in Respondent's Exhibit #1. To do so would violate W. Va. Code §18A-2-8.

Footnote: 4

Mr. Blanc testified, even during the Level IV hearing, that daily deposits were not required. He testified the standard was timely deposits. This testimony conflicts with that of Mr. Smith and Level IV Respondent's Exh. #2. The Undersigned found Mr. Blanc's testimony deficient. At Level IV, Principal Blanc changed his testimony from the lower level hearing. Given his role in the events at NJES, his demeanor, and testimony, the Undersigned did not find his testimony particularly persuasive in some areas.

Footnote: 5

There is not sufficient evidence in the record for the undersigned to conclude otherwise.

Footnote: 6

Disciplinary hearing, Tr. 113.

Footnote: 7

Emphasis added.

Footnote: 8

Respondent did not charge Grievant with theft or deception.

Footnote: 9

On exhibit number 6, Level III, some items were recorded as being broken and Mr. Smith took these items into account.

Footnote: 10

Respondent did not charge Grievant with theft or disception. Principal Blanc testified that he thought Grievant intentionallytried to deceive him, and Superintendent Romine testified that he thought there was something more here than just bad bookkeeping. However, if Grievant was disciplined for more egregious conduct than was charged or proved, then Respondent acted improperly.

In this case, even if Respondent proved that Grievant was guilty of bad bookkeeping, she should have been placed on an improvement period. If an employee is guilty of misconduct and if this conduct is correctable, he or she must be

given an opportunity to improve with the aid of regular evaluation and a plan of improvement. West Virginia Board of Education Policy No. 5330; Mason County Bd. of Educ. v. State Superintendent of Schools, 165 W.Va. 732, 274 S.E.2d 435 (1980).