SAMUEL WILSON,

Grievant,

v. DOCKET NO. 98-24-043

MARION COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Samuel Wilson, challenges his two-day suspension without pay based upon charges of insubordination. He requests reimbursement of two days of wages, benefits and seniority; removal of all reference to the suspension from his personnel file; and interest on all monetary sums. Pursuant to W. Va. Code § 18A-2-8, this matter was filed directly at level four on February 20, 1998. A level four hearing was conducted in this Grievance Board's office in Morgantown, West Virginia, on May 5, 1998, where Grievant was represented by attorney Kimberly Levy, and Respondent was represented by counsel, Stephen Brooks. The parties submitted post-hearing arguments on May 28, 1998, at which time this matter became mature for consideration.

The following findings of fact are made from a preponderance of the evidence of record.

Findings of Fact

1. Grievant has been regularly employed by the Marion County Board of Education (MCBOE) as a cabinet maker for approximately eight years.

2. Throughout Grievant's employment with MCBOE, employees of themaintenance shop have been allowed to use the Board's facilities to work on personal projects, so long as they did not do any such work on the Board's time.

3. In November of 1997, Grievant and another maintenance shop employee, Donald Cyphers, built two gun cabinets for Mr. Cyphers' children at the maintenance shop, using their

own materials. All work on the cabinets was performed after their normal working hours.

4. Upon discovery of the gun cabinets at the maintenance shop, Assistant Superintendent Nathan Crescenzi and Superintendent John Myers, on November 20, 1997, removed the cabinets and placed them in the Superintendent's office.

5. After being informed by other maintenance shop employees that the cabinets had been removed at the Superintendent's direction, Grievant and Mr. Cyphers went to the Superintendent's office the following Monday morning, November 24, 1997, to discuss the cabinets' removal.

6. In attendance at the meeting on November 24, 1997, were Grievant, Mr. Cyphers, Superintendent Myers, and MCBOE President James "Rat" Saunders.

7. During the November meeting, Superintendent Myers stated that the Board's facilities were not to be used to complete personal projects after working hours. However, he stated that small projects could continue to be performed at the shop, such as "sawing a board," and employees could borrow tools from the shop.

8. Superintendent Myers expressed much concern at the November meeting that Grievant and Mr. Cyphers may have built the gun cabinets during time when they should have been performing their work as MCBOE employees. Grievant and Mr. Cyphersrepeatedly assured the Superintendent that they had only worked on the project after regular working hours, and they provided him with receipts showing they used their own materials.

9. During the course of the November meeting, Superintendent Myers changed his mind about allowing exceptions for small projects, and told Grievant and Mr. Cyphers not to do any personal work on MCBOE property.

10. During the November meeting, Board President Saunders stated that he did not believe there was anything wrong with allowing employees to work on personal projects at the Board's facilities, so long as the work was performed with their own materials and on their own time. He also stated that there was no policy in the county regarding the issue, and told Superintendent Myers that, if he was going to implement such a rule, it would have to apply to all county employees.

11. Superintendent Myers did not commemorate the November discussion with a memorandum or writing of any kind.

12. On January 7, 1998, Grievant brought a computer table he had constructed at home to the maintenance shop. He brought it in for staining and finishing, because his home shop was unheated, and the stain would not dry there. He stained the table during his half-hour lunch period.

13. Grievant believed that spending 10 to 20 minutes of his lunch period to stain the table was permissible, because he recalled Superintendent Myers stating that "small projects" could be completed at the Board's facilities. Mr. Cyphers had the same understanding of the Superintendent's instructions.

14. On the basis of an anonymous phone call, Assistant SuperintendentCrescenzi visited the maintenance shop on January 16, 1998, and inquired whether all of the projects at the shop were for the MCBOE.

15. After being informed of Mr. Crescenzi's inquiry on January 16, Grievant voluntarily removed the table from the maintenance shop and informed Mr. Crescenzi that it was his own personal project.

16. Grievant was suspended for two days without pay for insubordination, as a result of working on a personal project on MCBOE property in January of 1998.

Discussion

As this grievance involves a disciplinary matter, MCBOE bears the burden of proving the charges by a preponderance of the evidence. Code § 18-29-6; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in Code § 18A-2-8, 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). The instant case is based upon a specific incident of alleged misconduct by Grievant, which has been characterized by MCBOE as insubordination, one of the specific causes for dismissal or suspension of a school employee listed in the statute.

Insubordination involves the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Riddle v. Bd. of Directors, 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, the employer must not only demonstrate that a policy or directive that applied to the employee was in existence at the time of theviolation, but that 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).

In the instant case, the "knowing and intentional" element of Grievant's failure to comply with Superintendent Myers' directive has not been proven by Respondent. MCBOE contends that it was insubordinate for Grievant to bring in a computer table for staining in January, after Superintendent Myers had instructed him, in November, not to work on personal projects at MCBOE's facilities. However, all parties present at the November meeting, including Superintendent Myers, acknowledged that many things were discussed, (See footnote 1) and the Superintendent placed great emphasis upon his concern that employees may be working on personal projects "on Board time." More importantly, the Superintendent testified that he did, in fact, tell Grievant and Mr. Cyphers that, while large projects such as their gun cabinets should not be worked on at the maintenance shop, exceptions would be made for small jobs. The Superintendent stated that he "changed his mind as they talked" during the November meeting, telling them "in the end" that they should not do any personal work at the shop, but there is no evidence that he explained to Grievant and the others present that his thinking changed midstream.

To add to Grievant and Mr. Cyphers' understandable confusion about the policy regarding personal work at the shop, MCBOE President Saunders stated during the November meeting that there was no written policy regarding the issue, and opined thathe "saw nothing wrong with it." When no policy was implemented, it was reasonable for Grievant and Mr. Cyphers to believe that it continued to be permissible to work on small projects at the shop.

Defiance of authority is an inherent element of insubordinate conduct. See Conner, supra; Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988). In the past, this Grievance Board has found, in cases where the evidence established the employee justifiably misunderstood or misinterpreted a superior's instruction, that insubordination did not occur. See Conner, supra; Ramey v. W. Va. Div. of Veterans Affairs, Docket No. 91- VA-115 (Aug. 2, 1991). In fact, it has even been found that an employee who intentionally disobeyed

instructions, but pursuant to advice of an attorney, did not possess the intent to "thwart the orders of the employer" essential to an insubordination charge. Rymer v. W. Va. Dept. of Tax and Revenue, Alcohol Beverage Control Adm., Docket No. 90-ABCC-204 (March 14, 1991). The undersigned finds that MCBOE has similarly failed to prove Grievant's intent to defy an order issued by the Superintendent.

Grievant's testimony that he understood the Superintendent to say that small personal projects were permitted in the maintenance shop was sincere and is accepted as true. Even if the Superintendent did, indeed, "change his mind" during the course of the conversation, it was incumbent upon him to explain this to those present, which he apparently did not do. It is also of some significance that, after the November meeting, no written county-wide policy on this issue was ever implemented, so that all employees would understand the "rules." There can be no question that, at the very least, MCBOE shop employees have received "mixed signals" regarding the issue of personal projects. It is something that all parties agreed has been allowed on a widespread basis in the past, andthe testimony of all witnesses in this case, both employees and administrative officials, indicates that each person had a different understanding of the rules regarding this issue. Grievant has established that he justifiably misunderstood the Superintendent's instructions, and, consequently, MCBOE has not proven by a preponderance of the evidence that Grievant was insubordinate. (See footnote 2)

Nevertheless, the decision in this grievance should not be interpreted by MCBOE to prohibit it from instituting a written policy of disallowing personal projects to be worked upon in its facilities. However, such a policy should be implemented clearly and consistently throughout the county, so that future misunderstandings will not occur.

Consistent with the foregoing findings and discussion, the following conclusions of law are made.

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; Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994).

2. Insubordination is one of the causes listed in W. Va. Code § 18A-2-8 for which an

education employee may be suspended or dismissed. See Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

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

4. "In order to establish insubordination, the employer must not only demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, but that 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).

5. Grievant justifiably misunderstood Superintendent Myers' instructions regarding work on personal projects at the MCBOE maintenance shop.

6. Respondent did not prove by a preponderance of the evidence that Grievant willfully or intentionally failed to comply with the directive of a superior. See Conner, supra.

Accordingly, this grievance is GRANTED, and Respondent is directed to remove all references to Grievant's two-day suspension for insubordination from his personnel file, and compensate him for all lost wages, benefits and seniority, with interest, for the suspension period.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Marion 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.

Date: June 23, 1998 _____

V. DENISE MANNING

Administrative Law Judge

Footnote: 1

All parties present testified that a large part of the meeting was spent discussing whether or not the Superintendent had any right to remove Grievant's personal property from the maintenance shop. However, that matter is not at issue in this grievance.

Footnote: 2

Due to the outcome of this Decision, Grievant's arguments regarding due process and notice need not be addressed.