PAUL A. LIEBIG,

Grievant,

v. **Docket No. 99-28-179**

MINERAL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Paul A. Liebig, employed by the Mineral County Board of Education (MCBE) as a Title I Reading teacher at Elk Garden School (EGS), filed a complaint directly to level four, pursuant to W. Va. Code §18A-2-8, after he received a ten day suspension, without pay. Grievant requests that the suspension be rescinded with the charges dropped, back pay, interest, costs, and attorney fees. An evidentiary hearing was conducted in the Grievance Board's Morgantown office on July 2, 1999. Grievant was represented by Larry Schultz, Esq., and MCBE was represent by Gregory W. Bailey, Esq. The matter became mature for decision with the submission of Grievant's Reply Brief on August 30, 1999.

Background

By letter dated April 19, 1999, MCBE Superintendent Charles Kalbaugh advised Grievant in pertinent part:

I am in receipt of several documents that have been supplied to me by your principal, Charles Keller. After a careful review of these documents, I have determined to notify you of the following-described charges.

During a conference held on November 10, 1998, you were asked by Mr. Keller if you had made a telephone call to the Durr residence. At that time you denied making such a call. Based upon Mrs. Durr's letter that was delivered on March 8, 1999, and based on further investigation, it had been determined that you, in fact, made the telephone call inquestion. Your response to Mr. Keller's November 10, 1998, inquiry was not honest.

The nature of the allegations that you relayed to Mr. and Mrs. Durr, if you felt them to be genuine, were in the nature of child abuse. Classroom teachers are under a mandatory obligation to report

such matters to the principal (W. Va. Code §49-6A-2). The course of action that you chose resulted in the creation of unnecessary anxiety for Mr. and Mrs. Durr concerning the welfare of their child. Your request that the Durrs withhold your identity as the source of information concerning the welfare of their son was unprofessional and only served to heighten the concern of these parents.

You have compounded the situation by failing to observe instructions that you refrain from further contact with the Durrs. Mr. Keller's memorandum of March 12, 1999, of which you acknowledged receipt, expressly warned against contact with the Durr family. During a meeting between Mrs. Durr and Mr. Keller on March 16, 1999, it was reported that you visited Mr. Durr's workplace and urged him to contradict the facts set forth in Mrs. Durr's letter. It was further reported that you called Mr. Durr on Sunday, March 14, 1999, and requested that he write a letter indicating that his wife was confused. During this conversation you acknowledged that you were directed by Mr. Keller to refrain from further contact with the Durr family. The decision to disregard Mr. Keller's instructions constitutes insubordination.

On April 16, 1999, I met with you and Principal Keller and presented a notarized statement from Mr. and Mrs. Durr. You did not admit to any of the allegations and continued to deny the contact on November 9, 1998.

Moreover, these charges, if true, constitute a violation of the Teacher Code of Conduct. Specifically, your conduct violated that provision requiring teachers to “exhibit a caring, honest and professional attitude.” Based upon the serious nature of these charges, I have determined to recommend that you be suspended for a period of 10 (ten) days beginning on April 20, 1999, without pay . . . .”

Grievant initially requested a hearing before the board, but withdrew the request theday it was scheduled to be held. Superintendent Kalbaugh notified Grievant by certified letter dated April 28, 1999, that MCBE upheld the suspension for ten (10) days, on the grounds set forth in the April 19, 1999, letter.

Discussion

Pursuant to W. Va. Code § 18-29-6, the burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a

preponderance of the evidence. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). The suspension of a teacher must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8. The authority of a board of education to suspend an employee must be exercised reasonably, and not arbitrarily and capriciously. Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

W. Va. Code § 18A-2-8 provides that professional personnel may be suspended at any time for immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, a felony conviction, entry of a guilty plea or a plea of nolo contendere to a felony charge. "[I]nsubordination involves `willful failure or refusal to obey reasonable orders of a superior entitled to give such order.' [Citations omitted.] 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." [Citations omitted.] Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995).

To support its assertion that the suspension was properly imposed, MCBE offeredthe testimony of Barbara and Patrick Durr, EGS Principal Charles Keller, and Superintendent Kalbaugh. The content of their testimony will be presented in narrative form to provide the reader with the chronological development of this matter.

Principal Keller testified that on November 9, 1998, Grievant came to his office and expressed concerns regarding Debbie Beverage, a kindergarten teacher at EGS. Specifically, Grievant alleged that Ms. Beverage screamed at the students, would not let them talk in the cafeteria during their lunch break, and was using blinders on the students. Later that day, Grievant provided Mr. Keller with a sheet of paper with the word “Sweetie” at the top, referring to Ms. Beverage, with the word “humor” printed to the side. This document listed seven complaints Grievant had with Ms. Beverage, as follows, “1. Computer use denying Lambka's students use of computer who had students during that time last week [sic], 2. Blinders, 3. Students to recess 15 minutes early, 4. Eating lunch early at 10:50 a.m., 5. No socialization at all during lunch for primary students, 6. Screaming at students, 7, Entering boys bathroom illegally.”

Mr. Keller stated that Grievant and Ms. Beverage had been engaging in a “feud”, and both had

expressed concerns regarding the other in the early fall. Mr. Keller investigated the claims by speaking with the kindergarten paraprofessional, Irene Hartman. He also spoke with Debbie Smith and found that Ms. Beverage did maintain a quiet lunchroom, but that it had previously been noisy, and, he opined, it is common to try and control that environment. He could not confirm that Ms. Beverage had been screaming at the students, and certainly there was no indication that she acted out of the ordinary. Mr. Keller did confirm that Ms. Beverage had been using blindfolds on the children, as part ofa reading program, Assured Readiness for Learning (ARL), which had been presented at a staff development session held in September. The principal also recalled speaking with the first grade teacher who was using the ARL program. The results of his inquires were reported to Grievant later that morning.

Later that same day, Mr. Keller stated that Ms. Beverage reported that she had received a telephone call from an unnamed family who had been called by a male teacher at the school. She opined that the teacher was Grievant. Reportedly, he had notified the family of her alleged use of blinders, and yelling at the students. Mr. Keller continued that he spoke with Grievant the following day regarding Ms. Beverage's report. Grievant denied making the call.

Patrick Durr, a parent whose child is assigned to Ms. Beverage's class, testified that on November 9, 1998, Grievant called him at work. Grievant stated that Ms. Beverage was mean and cold, and had been mistreating his son, using blinders and brainwashing. He suggested that Mr. Durr go to the principal to investigate these matters because Ms. Beverage would lie, if asked. Mr. Durr in turn telephoned Ms. Durr at work to tell her of Grievant's call. The Durrs spoke with their son that evening and he told them Ms. Beverage did not yell, and was not mean to him. Ms. Durr stated that her son did not know what blinders were, but after she explained, he said that they were not put on him. The Durrs concluded that there was no reason to be concerned for their son's welfare, but Ms. Durr called Ms. Beverage that evening to ask what was going on.

Within a few days, Grievant appeared at Mr. Durr's workplace to make sure that both he and Ms. Durr would not reveal his identity so that he would not “get into anytrouble.” Mr. Durr agreed; however, Mrs. Durr stated that she found Grievant's actions cruel considering their family losses, and because they were known to be very protective of their children. Additionally, she had experienced a mean teacher as a child, and was particularly sensitive to that allegation. After thoughtful consideration, Ms. Durr memorialized the November events in a letter to Mr. Keller and the members

of the board of education. She hand delivered the undated letter to Mr. Keller on March 8, 1999.

Upon receipt of the letter, Mr. Keller testified that he spoke with Superintendent Kalbaugh, and they agreed that Grievant should have no further contact with these parents in the future. On March 12, 1999, Mr. Keller expressed this decision to Grievant orally, and in a memorandum, which stated in pertinent part, "[n]ear the end of the conference I advised Mr. Liebig not to contact the Durr family, Miss Beverage, or any member of the Board. I told him that any contact could further jeopardize his position." Upon request, Grievant signed the document indicating the contents were discussed during the conference.

On the same day, Grievant again visited Mr. Durr at his workplace, at approximately 4:30 p.m. Mr. Durr recalled Grievant stating that he had seen the letter composed by Ms. Durr, that he was upset, and could only get out of trouble if Mr. or Ms. Durr wrote another letter saying that she had lied in the first letter. Grievant also confided that he had been told not to contact them again. The following day, Grievant called the Durr's home at 8:45 a.m., but hung up when their daughter answered. He called again at approximately 2:30 p.m. and told Mr. Durr to call Lynn Lambka, a teacher at EGS, who could clear the whole thing up. On March 15, 1999, Grievant once again appeared at Mr. Durr's workplace, this time to ask him to write a letter stating that Ms. Durr had not lied, but that she was confused and "got things mixed up". When Grievant called the Durrs at nearly 10:00 p.m. that evening, Ms. Durr hung up. He then called Mr. Durr's sister, and asked that she call Mr. Durr and tell him not to mention to anyone that Grievant had been back to his workplace, or had been calling their home. She refused. Later that evening, the Durrs received a call from David Berg who said that he was calling about the Liebig matter, and recommended they "think about the kids".

Mr. Keller stated that Grievant did not express any lack of understanding regarding the notice that there should be no further contact with the Durrs at the March 12 meeting, but the following week, on March 15 or 16, he asked for a clarification. Grievant inquired whether Mr. Keller was giving him advice or advising him to refrain from further contact with the Durrs. Mr. Keller recalled that he stated he did not know whether he could tell Grievant what he could do on his own time, but that he was not to contact the Durrs. Mr. Keller's next contact occurred on March 16, when Mr. Ashby, another teacher in the school, advised him that he had received a call from Ms. Durr regarding Grievant's contacts. Ms. Durr complained about Grievant's ongoing contacts to Mr. Keller on March 16, 1999.

(See footnote 1)

Superintendent Kalbaugh and Mr. Keller met with Grievant on March 16, 1999. Mr. Keller testified that Grievant refused to admit or deny the November contact with the Durrs at that time. Superintendent Kalbaugh testified that upon evaluation of all the informationavailable, he determined that Grievant had disobeyed the instruction to have no further contact with the parents, and by doing so had committed insubordination. Because this was not Grievant's first act of insubordination, the Superintendent determined the suspension was appropriate.

Grievant called two colleagues to testify on his behalf. Lynn Lambka is a teacher at EGS, and a parent of a middle school student who is hearing impaired. Ms. Lambka testified that she is not present when Ms. Beverage is on cafeteria duty, but has walked through the area when returning her tray, and knows that she keeps the students quiet. She also testified to having heard Ms. Beverage blow her whistle, and heard her scream when the kids were talking. She understands that Ms. Beverage now allows the students to talk quietly until the last person is seated, and then it is quiet time. As a parent of a hearing impaired child, Ms. Lambka expressed her concerns regarding the use of any device to visually impair students.

William Wahl, another EGS teacher, testified that he has observed Ms. Beverage at lunch and that she allows no talking until the last five minutes of the period. If a student does talk, she tells them to be quiet, puts their names on a board, and takes away part of their recess. Mr. Wahl stated that he has seen students cringe, put their hands in their laps, and freeze when Ms. Beverage has lunch duty. He also noted that other teachers enforce a no talking during lunch rule. Mr. Wahl revealed on cross-examination that he had no actual knowledge of lunch time protocol the past year, but had heard these things from others. He stated that he had not complained of Ms. Beverage's rules to the principal.

Testifying on his own behalf, Grievant stated that he had reported his concerns toPrincipal Keller regarding Ms. Beverage both verbally and in writing. He indicated that he disagreed with her practices, which he did not consider child abuse, but found to be “strange”, and opined that the students did not need to be constrained. Grievant admitted to contacting Mr. Durr in November because he felt that parents can sometimes get things changed when teachers cannot. He denied that he accused Ms. Beverage of brainwashing the students, but conceded that he did state that she was using blinders, such as those worn by horses, on the students. Grievant stated that his comparison was a poor choice of words, but that he did not believe Mr. Durr understood what he was

talking about, and was attempting to illustrate what the teacher was doing. Grievant asserts that he merely notified Mr. Durr of what was going on, and that if he wanted to do something it was fine, but if he did not do something, that would also be fine. He explained to Mr. Durr that he and Ms. Beverage did not get along, and asked that his name not be brought into it. Grievant stated that he believed his relationship with the Durrs was good, and that he had “no ax to grind” with them. He claims to have inquired on two occasions whether Mr. Durr felt Grievant was harassing him, and was advised that he did not. Grievant asserts that he could not have harassed Ms. Durr since he did not speak with her.

Grievant recalled meeting with Principal Keller on November 11, 1998, and being asked whether he had called the Durrs' residence. Grievant asserts that he truthfully responded “No”, because he had called Mr. Durr at work. Following the meeting with Principal Keller, Grievant stated that he twice returned to the principal to clarify whether he was advising Grievant not to engage in further contact with the Durrs, or simply giving him advice. He recalled that both times Principal Keller stated that it was only advice. Grievant opined that it was important for the principal to ask the question properly, and that he did not feel he had done anything wrong.

Grievant admitted that he again visited Mr. Durr at his workplace on March 12, 1999, to ask why Ms. Durr had filed a complaint. Grievant stated that he was shocked by the allegations because he believed that they were friends. He also admitted telling Mr. Durr that Ms. Durr's letter was inaccurate, and the situation was spinning out of control. He suggested that Ms. Durr should write another letter telling the truth. Grievant states that his next contact with the Durrs occurred on Saturday, to inquire if they had called any other teachers.

Grievant stated that on March 15, 1999, he again visited Mr. Durr at work, and told him what had been written was not true, and that he should do “something” to correct the false letter. He also confided to Mr. Durr that he had been advised not to talk with him. Grievant further admitted that he called Mr. Durr's sister to learn whether he had spoken with other teachers. Grievant asserts that based upon Principal Keller's responses that he was giving Grievant advice, he did not commit insubordination.

By his own admission, Grievant engaged in the actions upon which the charges leading to the suspension were based, but attempts to evade the discipline through the application of strict interpretation of certain statements. Grievant correctly asserts that he truthfully responded to the

question of whether he had called the Durrs' residence. Clearly, he had called Mr. Durr at work. Nevertheless, Grievant's argument is not persuasive because it contorts the obvious point of the inquiry, which was whether Grievant had contacted the Durrs, not where he had made the contact. Whatever his motivation,Grievant was attempting to involve the Durrs in his allegations regarding Ms. Beverage. Clearly, he did not want his name mentioned, and when the principal learned of the contact, he attempted to distance himself from the situation.

The undersigned finds that Grievant consciously did not respond to the inquiry of whether he had contacted the Durrs in a complete and forthright manner, in violation of State Board of Education Policy which requires a teacher to “exhibit a caring, honest and professional attitude.”

As a second argument relating to this issue, Grievant asserts that the April 19, 1999, letter from Superintendent Kalbaugh inaccurately stated that it had been determined Grievant called the Durrs' at their residence. Grievant argues that the implication of the W. Va. Code §18A-2-8 requirement that the charges be stated in writing, is to permit the preparation of a defense. He suggests that to allow MCBE to play “bait and switch” with the facts at the hearing renders the notice requirement meaningless. Superintendent Kalbaugh testified that his reference to the call being made to the Durrs' residence was an error. Because Grievant does not allege that he was unaware, or mislead regarding the actual charges being made against him, or was taken by surprise at hearing, with no opportunity to prepare a defense, it is determined that the mistake in the April 19, 1999, letter was harmless error.

Whether Principal Keller was giving Grievant advice, or advising him to discontinue the contacts with the Durrs, the record is replete with evidence that Grievant understood that there was to be no further contact. Not only did Grievant sign the March 12, 1999, memorandum which unequivocally notified him to cease the contact, but he conveyed thatunderstanding to Mr. Durr, and Mr. Durr's sister during subsequent conversations. Grievant's own actions undermine his argument that he was only given advice, which he could follow, or not, on his own initiative. When Grievant elected to engage in the post March 12, 1999, contacts with the Durrs he committed acts of insubordination.

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

Findings of Fact

1. Grievant has been employed as a teacher by MCBE for approximately twenty-three years,

and was assigned as a Title I Reading Teacher at Elk Garden School at all times pertinent to this decision.

2. On November 9, 1998, Grievant approached EGS Principal Charles Keller with a number of concerns regarding kindergarten teacher Debbie Beverage. That same day Grievant presented his concerns to the principal in written form.

3. After making inquiries of several individuals in the school, Principal Keller advised Grievant that he found no basis for Grievant's concerns.

4. On November 9, 1998, Grievant contacted Patrick Durr, a parent of one of Ms. Beverage's students, at his workplace and made a number of allegations regarding his colleague, including that she was placing blinders on the students.

5. Mr. Durr reported the call to Ms. Durr. After checking with their son, Ms. Durr telephoned Ms. Beverage to learn what was going on. Ms. Durr did not reveal Grievant's name at that time.

6. Ms. Beverage reported the call to Principal Keller. Because the allegationswere the same as those Grievant had raised with him, the principal asked Grievant whether he had called the Durr's residence. Grievant responded that he had not.

7. Grievant next appeared at Mr. Durr's workplace a few days later to request that neither he nor Ms. Durr reveal Grievant's identity as the source of the call, insuring that he would not “get into any trouble.”

8. On March 8, 1999, Ms. Durr hand delivered a letter to Principal Keller memorializing the events of November 1998.

9. On March 12, 1999, Principal Keller conducted a meeting with Grievant, and provided him a memorandum addressing the issues they discussed. Grievant was directed to have no further contact with the Durr's. Grievant signed the document indicating that the matter had been discussed with him.

10. On March 12, 1999, Grievant again visited Mr. Durr at his workplace to tell him he had learned of the letter written by Ms. Durr, and that the only way he could get out of the situation would be for Mr. Durr to write another letter stating that Ms. Durr's letter was untrue.

11. On March 13, 1999, Grievant called the Durr's residence twice. The first call was at 8:45 a.m., and he hung up when their daughter answered. The Durr's caller identification device revealed the call was from Grievant. That afternoon Grievant called again, and told Mr. Durr to contact another

teacher at the school who could help explain the matter.

12. On March 15 or 16, 1999, Grievant asked Principal Keller for a clarification on whether he had advised him not to contact the Durr's, or had simply given him advice. 13. On March 15, 1999, Grievant visited Mr. Durr's workplace and asked that he write a letter stating that Ms. Durr was confused when writing her letter.

14. Later that evening, Grievant called the Durrs' residence. Ms. Durr hung up, and he called her sister-in-law to ask her to call Mr. Durr and tell him not to reveal that Grievant had been back to his workplace or calling his home. She refused, and Grievant said that he would find someone else. At approximately 10:30 p.m. that evening yet another individual called the Durrs regarding the “thing with Liebig”.

15. On March 16, 1999, Ms. Durr again complained to Principal Keller regarding Grievant's contacts with her family.

16. On March 16, 1999, MCBE Superintendent Kalbaugh, and Principal Keller met with Grievant regarding Ms. Durr's complaint. Grievant refused to admit or deny the November contact.

17. On March 24, 1999, Grievant left a message on Mr. Durr's answering machine at work. Grievant asked that Mr. or Ms. Durr write a letter stating that Grievant and Ms. Beverage had worked out their differences. The Durrs refused.

18. Through conversations with Mr. Durr, and Mr. Durr's sister, Grievant expressed an understanding that the contact had been forbidden by his supervisors.

19. By letter dated April 19, 1999, Superintendent Kalbaugh advised Grievant that he was to be suspended, without pay, for a period of ten days. The grounds for the suspension were dishonesty and insubordination.

20. Grievant had previously engaged in an act of insubordination in an unrelated matter, during the 1997-98 school year. The one day suspension imposed at that time waslater rescinded as part of a settlement agreement.

Conclusions of Law

1. Pursuant to W. Va. Code § 18-29-6, the burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994).

2. The suspension of a teacher must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8. The authority of a board of education to suspend an employee must be exercised reasonably, and not arbitrarily and capriciously. Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

___3. W. Va. Code § 18A-2-8 provides that professional personnel may be suspended at any time for immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, a felony conviction, entry of a guilty plea or a plea of nolo contendere to a felony charge.

4. "[I]nsubordination involves `willful failure or refusal to obey reasonable orders of a superior entitled to give such order.' [Citations omitted.] 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." [Citations omitted.] McCloud v. Lincoln County Bd. of Educ., Docket No. 98-22-051 (June 17, 1998); Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995). 5. Respondent proved the charge of insubordination against Grievant

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mineral 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. However, the appealing party is required by W. Va. Code §29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: September 29, 1999 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

She later provided a notarized document listing Grievant's contacts on March 12, 13, 15, 16, and 24, 1999.