ROBERT L. SYPOLT,

Grievant,

v. **Docket Nos. 00-39-199/200**

PRESTON COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

___Grievant, Robert L. Sypolt, employed by the Preston County Board of Education (PCBOE or Respondent) as the Director of Child Nutrition/Title IX/Substitutes, filed two grievances directly to level four on June 12, 2000. In the first grievance (Docket No. 00-39- 199), Grievant stated, "[t]he suspension letter of June 6, 2000 was made in retaliation to me for contacting State Department of Education about Stanford Testing." For relief, Grievant requested the suspension be rescinded, back pay, and reimbursement for all legal expenses.

In the second grievance (Docket No. 00-39-200), Grievant stated, "[t]he actions of the superintendent in terms of the letter of reprimand was made in retaliation to me [after] contacting State Dept. of Education about Stanford Testing." For relief, Grievant requested that the letter of reprimand be removed from his personnel file, and reimbursement for all legal expenses.

A level four hearing was convened on the suspension grievance at the Grievance Board's Morgantown office on August 1, 2000, and concluded on August 28, 2000. (See footnote 1) The parties agreed that the grievance relating to the reprimand could be submitted on the record, supplemented with eighty-seven stipulated exhibits, stipulated findings of fact, andproposed conclusions of law. Due to the related nature of the grievances, the parties were advised by the undersigned that they would be considered simultaneously. The matters became mature for decision on December 6, 2000, with the submission of Respondent's response to Grievant's Brief.

Findings of Fact

1. Grievant, Robert Sypolt, has been employed by the Preston County Board of Education for approximately thirty-two years. During the 1999-2000 school year, Grievant held the position of Director of Child Nutrition/Title IX/Substitutes. During the 1998-99 school year, and the three previous years, Grievant's duties included those of County-Wide Testing Coordinator.

2. On February 17, 2000, David Friend, Director of Elementary Education & Special Projects, issued a memorandum to all county staff members reminding them “[w]e have an established chain of command in County Policy and **'Everyone'** needs to follow that chain of command. . . If you have any questions about the AEP program or any other procedure or policy, follow County Policy and refer your concerns to the next highest authority in the chain of command.”

3. By memo dated February 18, 2000, Grievant requested that Mr. Friend provide him a flow chart of the county organizational plan to illustrate the chain of command.

4. Mr. Friend forwarded the request to Mr. Hope Hill, Director I and Grievant's immediate supervisor. Mr. Hill provided the chart, and noted that while it reflected Grievant being directly responsible to him, due to the geographic separation of their offices, it maybe more convenient for Grievant to contact Superintendent Charles Zinn or Assistant Superintendent, Dr. Sharon Harsh.

5. Also on February 17, 2000, Grievant requested by memorandum that his immediate supervisor, Mr. Hope Hill, advise him of who would call substitutes on days Grievant was not available.

6. Mr. Hill responded to Grievant on February 25, 2000, advising that three secretaries, Karen Davis, Barbara Thomas, and Joyce Hardman, had called out substitutes in the past, and suggested that Grievant continue in that manner.

7. On or about March 15, 2000, Grievant requested and received a “drop-out list” from Preston High School, even though his name was not on the list of individuals who were authorized to receive the information.

8. During a reduction in force hearing conducted by Respondent on March 29, 2000, for Joe Schmidl, some discussion was ongoing regarding the number of students who withdrew from school in Preston County. Grievant provided Mr. Schmidl and Don Craft, his WVEA representative, with the list he had obtained from PHS earlier in the month to challenge the information being provided by Superintendent Zinn. The document contained personally identifiable information, including the students' names, addresses, identification numbers, grades, social security numbers, and the date and reason they withdrew from school.

9. At the conclusion of the hearing, Mr. Craft left with the document, which he later mailed to Grievant, who in turn returned it to PHS on July 11, 2000.

10 . The Stanford Achievement Test, Ninth Edition (SAT-9) was administered in the Preston

County Schools in April 2000. 11. On April 14, 2000, Lillie Boylan, Secretary for Food Services and Testing, sent fifty-seven administrative, secretarial and accounting employees, including Grievant, a message by electronic mail, stating in pertinent part:

SUBJECT: Testing Question/Answers

We have had Questions - and have called the State Department for Answers. If you have other questions, please call Mr. Davis or Lillie, DO NOT CALL THE STATE DEPARTMENT. Also, if you have a student that for some reason, did not take the test normally, (marked the sheet fast, randomly or whatever) if you will put a letter with that answer sheet, stateing [sic] the reason not normal[sic], the child[']s name, school, grade, ets [sic]. The state department will not include that answer sheet.

12. After reviewing her message, Ms. Boylan noted that she had mistakenly stated that the State Department “will not include that answer sheet”. She immediately called all the schools to explain that a State Department official would determine if they would be scored.

13. On May 8, 2000, at approximately 2:00 p.m., Secretary Karen Davis notified Secretary Joyce Hardman that Grievant had gone for the day, and no one was available to call substitutes.

14. On May 10, 2000, at 10:40 a.m. Ms. Hardman reported to Ms. Davis that Grievant was out of the office for the day, and there was no one to call substitutes because he had taken the substitute book with him.

15. Ms. Davis reported the matter to Ms. Boylan, who contacted Superintendent Zinn at a “discipline workshop” being conducted by PCBOE for principals at Alpine Lakes.

16. Superintendent Zinn located Grievant, who was also at the workshop, and directed him to respond to the situation. 17. A power outage occurred on Sunday, May 14, 2000, affecting Rowlesburg Elementary/Middle School (REMS). Upon his arrival at school on Monday, May 15, 2000, Principal Brian Flanagan directed custodian Willie Strawser to contact Grievant regarding transfer of food in the freezer.

18. After several attempts, Mr. Strawser located Grievant and reported the situation regarding the food. Grievant took no action at that time.

19. By 10:00 a.m., Principal Flanagan contacted Superintendent Zinn to request assistance with the food. At the Superintendent's direction, Mr. Hill ordered Grievant to remove the frozen food from REMS.

20. Some food had thawed to the point that it could no longer be used. Losses accounted for by Grievant were: ¼ case of dough balls; ¼ case of juice bars; one box of ice cream sandwiches; one case of ice cream cones; and ½ case of bacon.

21. On May 15, 2000, at 9:19 a.m., Grievant telephoned from his home Karen Nicholson, Assistant Director of the Office of Student Services and Assessment, at the West Virginia State Department of Education (SDOE), to report that, per Ms. Boylan's April 14 memo, he assumed that principals, or others, had pulled student answer sheets and did not send them to SDOE. Grievant then telefaxed Ms. Nicholson a copy of Ms. Boylan's memorandum.

22. Later that day, Ms. Nicholson called PCBOE and asked Ms. Boylan whether all the answer sheets had been submitted. Ms. Boylan replied in the affirmative.

23. Grievant again contacted Ms. Nicholson on May 18, 2000, telefaxing her a list of third and fourth grade student names with the message, “I have obtained a list ofstudents from Kingwood Elementary that was turned in to the Central Office as a result of the county memo. These students took the test under standard conditions.”

24. Superintendent Zinn, Assistant Superintendent Harsh, Testing Coordinator Eugene Davis, and Mr. Hill, met with Grievant on May 19, 2000, as part of an investigation concerning Grievant's reports to SDOE. Working through the chain of command was discussed with Grievant during this meeting. Grievant did not express any ongoing concerns regarding the testing with the administrators at this time.

25. Grievant again contacted Ms. Nicholson on May 25, 2000, to confirm her receipt of the student list he forwarded on May 18, 2000, and to ensure that SDOE had student test records for each of the students on the list.

26. By memorandum dated May 26, 2000, Ms. Nicholson advised Superintendent Zinn and Assistant Superintendent Harsh of the list of students from Kingwood which she had received from Grievant. Ms. Nicholson also stated, “[w]e have never verbally or in writing suggested that all questions about testing come only directly to the Office of Student Services and Assessment. We would hope that all concerns can be resolved at the county level. A person, when possible, should present the testing concern to the county test coordinator or an Assistant Superintendent, or the Superintendent. When an individual is not satisfied with the resolution at the local level that concern should be brought to the Office of Student Services and Assessment.”

27. PCBOE administrators conducted an exhaustive investigation of the SAT-9 testing procedures. No improprieties were discovered during the internal investigation, nor were any irregularities cited by SDOE. 28. On June 6, 2000, Superintendent Zinn issued Grievant a letter of reprimand citing his failure to follow the chain of command, and the “false and unsubstantiated allegation” to SDOE that the SAT-9 answer sheets were not processed properly.

29. By letter dated June 6, 2000, Superintendent Zinn advised Grievant that he would be suspended from his duties, without pay, for ten days. Reasons for the suspension were: (1) the release of a printout of personally identifiable student information on March 29, 2000, and to SDOE during the week of May 8, 2000; and, (2) leaving work on May 15, 2000, without notice, and being unavailable to address concerns regarding food spoilage; and, (3) leaving work on May 8 and 10, 2000, without making arrangements for calling out substitutes.

30. PCBOE ratified the suspension following a hearing conducted at Grievant's request on June 26, 2000.

Discussion

In disciplinary matters, the employer bears the burden of proving the charges 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); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989). A preponderance of the evidence is defined as “evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.” Black's Law Dictionary (6th ed. 1991), Leichliter v. W. Va. Dept. of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id. 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 and 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:

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 plea of nolo contendere to a felony charge.

In the correspondence notifying Grievant of the reprimand and the recommended suspension, Respondent did not specify which of the specific causes in the statute it was relying upon to support this disciplinary action. However, Respondent argued at level four that Grievant's conduct constituted insubordination and willful neglect of duty. In such cases, the proper focus is whether the charge of misconduct has been proven, not the label, or lack thereof, attached to such conduct. Ward v. Upshur County Bd. of Educ., Docket No. 00-49-101 (Nov. 16, 2000); Bradley v. Cabell County Bd. of Educ., Docket No. 99-06-150 (Sept. 9, 1999); Willis v. Jefferson County Bd. of Educ., Docket No. 96-19-230 (Oct. 28, 1998); Russell v. Kanawha County Bd. of Educ., Docket No. 90-20-415 (Jan. 24, 1991). See Jordan v. Mason County Bd. of Educ., Docket No. 99-22-080 (July 6, 1999).

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). This Grievance Board has previously recognized thatinsubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988) (citing Weber v. Buncombe County Bd. of Educ., 266 S.E.2d 42 (N.C. 1980)). 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).

An employee's belief that management's decisions are incorrect, absent a threat to the employee's health or safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. Lilly v. Fayette County Bd. of Educ., Docket No. 97-10-084 (Feb. 11, 1998). See Parker v. W. Va. Dep't of Health and Human Resources, Docket No. 97-HHR-042B (Sept. 30, 1997). See generally, Meckley v. Kanawha County Bd. of Educ., 181 W. Va. 657, 383 S.E.2d 839 (1989) (per curiam). "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dep't, Docket No. 90-H-128 (Aug. 8, 1990) (citing Meads v. Veterans' Admin. 36 M.S.P.R. 574 (1988)). Additionally, an employer has the right to expect subordinate personnel "to not manifest disrespect toward

supervisory personnel which undermines their status, prestige, and authority . . . ." McKinney v. Wyoming County Bd. of Educ., Docket No. 92-55-112 (Au g. 3, 1992) (citing Burton, supra). "Few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first[,] and expresses his disagreement later." Hundley v. W.Va. Div. of Corrections, Docket No. 96-CORR-399 (Oct. 27, 1997): See Maxey v. W. Va. Dep't of Human Resources, Docket No. 93-HHR-424 (Feb. 28, 1995). "Generally, an employee must obey a supervisor's order and then take appropriate action to challenge the validity of the supervisor's order." Reynolds, supra. "An employee may not disregard a direct order of a superior based upon the belief that the order is unreasonable." McKinney, supra. "Essentially, an employer can meet its burden [of proof] 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 color-workers at unnecessary risk." Surber v. Mingo County Bd. of Educ., Docket No. 96-29-15 (Dec. 12, 1996). See Hundley, supra; Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995).

To prove willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent one. Hoover v. Lewis County Bd. of Educ., docket No. 93-21-427 (Feb. 24, 1994). See Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990). Although the West Virginia Supreme Court has not formulated a precise definition of willful neglect of duty it does encompass something more serious than incompetence and requires “a knowing and intentional act, as distinguished from a negligent act.” Chaddock supra. Willful neglect of duty has also been defined as an employee's intentional and inexcusable failure to perform a work-related responsibility. Adkins v. Cabell County Bd. of Educ., Docket No. 89-06-656 (May 23, 1990). Having defined the charges, the disciplinary actions will be reviewed separately.

Letter of Reprimand

The June 6, 2000 letter of reprimand states as follows:Preston County policy 2-6 requires, among other things, that you refer matters requiring administrative action to the administrator or supervisor immediately in charge of the area in which the problem arises. Likewise, Preston County policy 2-9 requires the matters regarding the management of the school system be discussed with the proper administrator or supervisor. Preston County policy 2-15 further requires employees to work through the chain of command and provides an organizational chart for county administrators.

In your evaluation for the 1998-99 school year, a recommendation was made to you that you need to follow policy when making statements about the operation of the school system and that you should refrain from making public statements criticizing areas not within your area of responsibility. On February 24, 2000, you received a written directive from your direct supervisor to follow the lines of authority established in the county. I, too, verbally instructed you, along with other members of the county staff, to follow the lines of authority. Further, County Level Goal number nine requires all personnel to work through their immediate supervisor and be responsible to that person.

In violation of the above authority, you discussed with an employee from another county a testing memo prepared by another administrator. On May 15, 2000, you questioned the content of a testing memo prepared by another administrator and employee to whom you have no supervisory or programmatic authority. In addition, you obtained student testing information, which is not part of your duties, without working through your supervisor or the program administrator.

Further, you made a false and unsubstantiated allegation to the West Virginia State Department of Education that student SAT-9 answer sheets were not processed properly. You contacted the State Department again on May 26, 2000, with names of specific student answer sheets that you believed were not properly processed. You indicated that you were responding to questions that teachers had posed to you. You failed to report any of these questions to your supervisor or to the administrator responsible for testing. Had you done either of these actions, you would have found that all student answer sheets were accounted for and sent to the State Department of Education.
It is imperative that the county staff work together and follow county policies. Discussing the work of other administrators with persons inside and outside the county serves only to undermine the work done by those administrators. If you have any questions about the operations of the school system you should proceed with your immediate supervisor or come to me. Should you continue to fail to follow the chain of command and violate county policy and directives, further disciplinary action may be taken against you, and may include suspension and/or dismissal.

Respondent argues that Grievant committed insubordination and willful neglect of duty when he acted outside the chain of command to contact an SDOE official regarding testing procedures. Respondent notes that Grievant had been advised to follow the chain of command in memoranda, policies, on his 1998-99 performance evaluation, and by Superintendent Zinn at a meeting on May

19, 2000, yet he continued to contact the SDOE official without contacting his county supervisors.

Grievant does not deny that he contact the SDOE official, but denies that he engaged in a violation of policy, or other wrongdoing, by making such contact. On the contrary, Grievant asserts that a violation of testing security must be reported to SDOE, and that Superintendent Zinn cannot prohibit him from engaging in free speech. He concludes that the letter of reprimand was issued in retaliation for his inquires, a violation of W. Va. Code § 6C-1-2, the "Whistle-Blower Law".

The evidence establishes that Grievant was notified by David Friend on or about February 17, 2000, that any questions concerning a procedure or policy should be referred to the next highest authority in the chain of command. Further, Grievant requested, and was provided a chart illustrating the chain. In addition to these memoranda, several of Respondent's policies advise employees to report to the proper authority: PCBOE Policy 2-6, "Lines of Responsibility", establishes lines of authority, and provides that staff members shall report to the next higher authority.

PCBOE Policy 2-9, "Review of Administrative Decisions", provides that management of the school system requires that matters first be discussed with the proper administrator.

PCBOE Policy 2-15, "Administrative and Supervisory Personnel", provides that administrative and supervisory personnel shall be responsible to an immediate supervisor. Grievant's 1998-99 performance evaluation was not made part of the record; however, he does not dispute the assertion by PCBOE that it included a recommendation that he needed to follow county policy when making statements about the operation of the school system.

Perhaps most importantly, Grievant met with Superintendent Zinn, Assistant Superintendent Harsh, Director Hill, and Testing Coordinator Eugene Davis on May 19, 2000, at which time Grievant's contacts to SDOE, and administrators outside the county school system, were discussed. Notwithstanding Superintendent Zinn's warning to follow the chain of command, Grievant again contacted the SDOE official on May 25, 2000. This evidence establishes that Grievant was provided sufficient information advising him to work through appropriate county channels.

Grievant's comments offered at the May 19, 2000 meeting, and his testimony at the suspension hearing conducted by PCBOE, and at level four, was that despite the fact that he was no longer Testing Coordinator, PCBOE teachers, and administrators from other counties, had contacted him regarding the change PCBOE had implemented in the testing procedure, as set forth in Ms. Boylan's memorandum. He characterizes his contact with Ms. Nicholson at SDOE as making inquires to

insure that proper procedure was beingfollowed so that PCBOE's reputation would not be stained. He asserts that the reports were in compliance with both the West Virginia Department of Education Test Security Procedures Agreement for School Principals and the West Virginia Department of Education Test Security Procedures Agreement for County Test Coordinators which require that any violation of test security be reported to SDOE. Grievant offered no explanation as to why he did not refer those individuals who had made inquires to Mr. Davis, the current Testing Coordinator, or why he had not made any “in-house” inquiries to confirm or deny changes in the procedure prior to contacting SDOE.

An employee may qualify for protection as a “whistle-blower” in accordance with the state's “Whistle-Blower Law,” set forth in W. Va. Code §6C-1-1, et. seq. That statute provides in §6C-1-3(a) as follows:

No employer may discharge, threaten or otherwise discriminate or retaliate against an employee by changing the employee's compensation, terms conditions, location or privileges of employment because the employee, acting on his own volition, or a person acting on behalf of or under the direction of the employee, makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste.

This Grievance Board has jurisdiction to adjudicate an employee's claims of retaliation in violation of the “Whistle-Blower Law,” although an administrative law judge may not provide those remedies which are reserved by the statute for award through the circuit courts. Coddington v. W. Va. Dep't of Health & Human Resources, Docket Nos. 93- HHR-265/266/267 (May 19, 1994). See Graley v. W. Va. Parkways Economic Dev. & Tourism Auth., Docket No. 91-PEDTA-225 (Dec. 23, 1991). In general, a grievant allegingretaliation in violation of W. Va. Code § 6C-1-3, in order to establish a prima facie case, must prove:

(1) that the employee engaged in activity protected by the statute;

(2) that the employee's employer was aware of the protected activity;

(3) that, thereafter, an adverse employment action was taken by the employer;

and,

(4) that the adverse action was the result of retaliatory motivation or the action followed the employee's protected activity within such a period of time that retaliatory motive can be

inferred.

Coddington, supra. See Whatley v. Metropolitan Transit Auth., 632 F.2d 1325, 1328 (5th Cir. 1980); Hochstadt v. Worcester Found. for Experimental Biology, Inc., 425 F.Supp. 318 (D. Mass. 1976), aff'd, 545 F.2d 222 (1st Cir. 1976); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Parker v. W. Va. Dep't of Health & Human Resources, Docket No. 91-HHR-282 (Apr. 22, 1992); Graley, supra; Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989).

If a grievant establishes a prima facie case of retaliation, the inquiry then shifts to determining if the employer has shown legitimate, non-retaliatory reasons for the actions. Coddington, supra; Graley, supra. See McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973); Mace v. Pizza Hut, Inc., 180 W. Va. 469, 377 W.E.2d 461 (1989); Frank's Shoe Store, supra; Parker, supra. If the Respondent successfully rebuts the claim of retaliation, Grievant may nonetheless establish by a preponderance of the evidence that the offered reasons are merely pretextual. Graley, supra. See Tex. Dep't of Community Affairs v.Burdine, 450 U.S. 248, 252-253 (1981); Shepherdstown Vol. Fire Dep't v. W. Va. Human Rights Comm'n, 172 W. Va. 627, 309 S.E.2d 342 (1983).

Grievant's contacts with SDOE were to alert the agency to “wrongdoing” within the meaning of W. Va. Code §6C-1-3(a), when he advised authorities of possible testing irregularities. PCBOE was aware of this protected activity, and the letter of reprimand was issued less than one month later. Therefore, a prima facie case of retaliation will be inferred. See Coddington, supra.

However, PCBOE's stated reason for the letter of reprimand was not for contacting SDOE, but rather, was for Grievant's failure to proceed within the chain of command. Had Grievant made any preliminary inquires of the appropriate county officials, he would not have violated the policies and procedures regarding the chain of command. He willfully and knowingly chose not to make any inquiry of Ms. Boylan, Testing Coordinator Davis, Director Hill, or anyone who could have quickly clarified the misunderstandings. Grievant is neither a school principal or Testing Coordinator. While he is correct that all school personnel must ensure proper administration and processing of the tests, Ms. Nicholson confirmed that inquiries should be made at the local level first. By his own testimony, Grievant established that he ignored the chain of command, in violation of explicit directions to follow the guidelines. Respondent has established a legitimate, non-retalitory reason for the reprimand, and Grievant does not assert that the reason was pretextual. See Gruen, supra.

Suspension

The June 6, 2000 letter of suspension states in pertinent part:For the following reasons, I hereby suspend you from your duties, without pay, for ten (10) employment days effective immediately:

In violation of the Federal Family Education Rights and Privacy Act, State Board Policy 4350, and Preston County Policies 11- 47 and 11-47R, you obtained a confidential printout of personally identifiable student information
and on March 29, 2000, released the printout to a teacher when neither you nor the other teacher had the authority to obtain the records or to distribute the printout, and during the week of May 8, 2000, you obtained from Kingwood Elementary a list of personally identifiable student information and released the information without obtaining permission to release the information.

In violation of Preston County Policy 2-5, you left work on May 15, 2000, without notice, knowing that there was a power outage problem at a school that posed a problem with food spoilage. Because you left work without notice, you were unavailable to address concerns within your area of responsibility. Further, on May 8 and May 10, 2000, you left the office without making arrangements for calling out substitutes.

Respondent asserts that Grievant engaged in insubordination and willful neglect of duty when he: (1) released confidential student information, without permission, to individuals who were not entitled to said information, (2) failed to notify the appropriate
secretaries when he was leaving the office to make provisions for calling substitute employees; and, (3) failed to respond to a report that electricity was out at a school, threatening the frozen food. Respondent argues that the ten-day suspension was an appropriate measure of discipline for the multiple charges.

Grievant concedes that he provided student data to an SDOE official, and to another PCBOE employee, and his representative, during a RIF hearing, attended a workshop at Alpine Lakes with the substitute call-out book in his possession, and that he did notimmediately proceed to REMS to move the frozen food. Grievant denies that any of these events constituted insubordination or willful neglect of duty, and argues that the actions were either in compliance with policies and regulations, or were mischaracterized by Respondent.

Grievant specifically claims that the suspension was in retaliation for his having contacted SDOE, noting that neither the workshop or REMS incidents were mentioned as disciplinary offenses until the SDOE matter arose. Grievant again argues that his contacts with SDOE were protected under the "Whistle-Blower Law", since it involved a "believed irregularity" in the testing procedure. Grievant additionally raises a procedural matter, asserting that Respondent violated his due process rights and deprived him of a detached and independent hearing on the reasons for the suspension when Superintendent Zinn provided PCBOE members a copy of the letter of suspension prior to the hearing.

Grievant's claim of a due process violation is not supported by the evidence of record. The West Virginia Supreme Court, in Lavender v. McDowell County Board of Education, 174 W. Va. 513, 327 S.E.2d 691 (1984), held that school personnel are entitled to a detached and independent hearing prior to a decision being made in transfer cases, and that presentation of the matter to the board of education for ratification prior to the hearing requested by the employee was a violation of that individual's due process rights. In the present matter, Superintendent Zinn provided the PCBOE members with a copy of the suspension letter immediately preceding the meeting; however, there is no indication that he discussed the matter with any member, or that any predetermination was made on the disciplinary action. The release of confidential student information is not protected in this instance by W. Va. Code §6C-1-3. Even though Ms. Nicholson was in possession of the tests completed by the students whose names Grievant provided her, she testified at level four that she would not have known which specific students where involved in the allegations. Even if Grievant's act of providing the information to Ms. Nicholson should be considered protected by the "Whistle-Blower Law", the disclosure to another employee, and an indivual outside the system was not a protected activity.

Grievant testified that he requested, and was provided, information regarding students who had withdrawn from school, including personally identifiable information, by a secretary at Preston High School (PHS), for use in the course of his duties as Nutrition Coordinator. When he was present during a reduction in force hearing for Mr. Schmidl, and the number of dropouts became a point of concern, Grievant testified that he recalled having the information, which contradicted the facts being presented by Superintendent Zinn at the hearing. At that time, he proceeded to provide the printrout to Mr. Schmidl and Mr. Craft, to correct the misinformation being distributed to the board members.

Although the schools in Preston County have made efforts to protect student confidentiality, including the production of a list at PHS of those individuals who may have access to such information, the procedure was not effective in this instance. First, Grievant's name was not on the list, yet he was given the information without question. (See footnote 2) Certainly, he could have been provided the data necessary for his nutrition report withoutthe disclosure of the confidential information, but that was not done. Second, that Mr. Schmidl's name was on the list of individuals approved to receive the information at PHS does not support Grievant's assertion that he was entitled to the document. While Mr. Schmidl had previously been assigned to PHS, he was not a member of the faculty during the 1999-2000 school year, and his name had been erroneously included on the list. Finally, Mr. Craft, who is not an employee of PCBOE or SDOE, had no authorization for access to the confidential information included on the printout.

Grievant's disclosure of this information was in violation of SDOE Policy 5902, which requires that teachers “maintain confidentiality”, and PCBOE Policies 11-47, which provides that “records or files of students will not be released from the school system without written consent of the parent”, and 11-47R, which addresses the need for consent relating to the disclosure of personally identifiable information. The fact that no harm was suffered as the result of the disclosures is not relevant.

Addressing the issue of the frozen food at REMS, Grievant testified that he had spoken with Mr. Strawser, but knew that most frozen food would remain in good condition for approximately seventy-two hours, and he was waiting on a further report of a projected time when the electrical service would be restored before moving the food. This explanation does not address the fact that Grievant apparently did not know how long the electrical service had been malfunctioning over the weekend, or the condition of the food at that time. Further, as noted by Principal Flanagan, the situation involved food provided by the federal government which entails the completion of multitudinous reports, and generates considerable concern over its use and care. Further damaging to Grievant is the fact it was that very morning he had returned home to call and fax information to Ms.Nicholson at SDOE regarding the student testing, creating the perception that his attention was on matters other than food.

It is established by Grievant's own report that some food was lost when it was removed from REMS. Respondent's expectation that Grievant would take some affirmative action when notified of the threat to the food is reasonable. The fact that Grievant was aware of the situation, yet did not

take any action, may be characterized as willful neglect of duty.

Addressing the final incident which led to the suspension, Grievant asserts that the secretaries knew of his whereabouts on May 8 and 10, 2000, and that Superintendent Zinn knew that he was at the workshop on May 10. Additionally, Grievant notes that Respondent failed to prove that either the school system or the students were adversely affected by his alleged absences. Grievant testified that his duties securing substitute employees require he begin work at approximately 5:30 a.m., and that he calls substitutes for the following day later in the evening, from approximately 7:00 p.m. to 9:00 p.m. Given the time these duties are performed, Grievant stated that he may leave work for a period of time during the day. Director Hill testified that he had not discussed this modified work schedule with Grievant. Superintendent Zinn appeared to express some concern regarding Grievant leaving work during the day; however, it appears that Grievant's daily schedule has not been determined by any of his supervisors.

PCBOE Policy 2-5 provides in part:

[t]he school board annually shall establish the hours of employment for administrative and supervisory personnel. These hours shall be the minimum hours required to complete the work for which the personnel were employed. This groupof personnel is expected to be available to the board, staff, teachers, or parents, for conferences, meetings, etc.

The evidence establishes that no one has set a schedule for Grievant, and it appears that it may currently vary from day to day depending on the demand for substitute employees. If PCBOE administrators do not approve of the current schedule used by Grievant, the matter should be addressed. Grievant is correct that he cannot be expected to work from 5:30 a.m. to 9:00 p.m. on a daily basis; however, due to the nature of his remaining responsibilities, he must be accessible during regular working hours.

Although Grievant claims that the secretaries knew his location on May 8 and 10, 2000, a review of their memoranda indicates the problem was not his location, but the fact that he had taken the substitute book with him, leaving them unable to call a substitute. Accepting Grievant's testimony that he was never successful in locating the alleged individual who needed a substitute on May 10, does not lessen the fact that when he left his office, he did not make specific provisions with the secretaries for calling substitutes in his absence.

As a final issue, Grievant argues that even if the charges are determined to be valid, the

infractions do not warrant the suspension of a long-term employee who has an otherwise exemplary career record. The Grievance Board has previously held that a lesser disciplinary action may be imposed when mitigating circumstances exist. “When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee wasadvised of prohibitions against the conduct involved.” Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997).

It is undisputed that Grievant has been a satisfactory employee of PCBOE for more than thirty years, an accomplishment of no small measure. It may also be agreed that a ten day suspension is a substantial measure of discipline. However, within a period of approximately eighteen days, Grievant improperly disclosed confidential information, failed to react promptly when a school's frozen food supply was threatened, and neglected to make arrangements with secretaries to call substitute employees. It is true that the disclosure of the information carried the greatest potential for liability; however, the remaining incidents demanded the attention of a number of employees, and required the intervention of the Superintendent before action which would reasonably be expected of a long term employee was taken. As a recent, former Testing Coordinator, Grievant was well aware of disclosure restrictions. Further, he had specifically inquired about who would be responsible for calling substitutes in his absence, and had been directed to work with the secretaries. Grievant was not acting with a lack of knowledge. Although Grievant denied Superintendent Zinn's inquiry whether it was his intention to embarrass or undermine the administrator, certainly, the release of this information, together with Grievant's contacts with SDOE, provide a basis for the assumption.

Given the number of offenses within such a short period of time, the fact that Grievant was aware of information disclosure guidelines, and his responsibilities relating to Nutrition and Substitutes, it cannot be determined that the penalty is clearly disproportionate to the offenses proven. In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of proving the charges 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); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989).

2. 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 and 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).

3. "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 plea of nolo contendere to a felony charge." W. Va. Code §18A-2-8.

4. 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 ofinsubordination. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995).

5. To prove willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent one. Hoover v. Lewis County Bd. of Educ., docket No. 93-21-427 (Feb. 24, 1994). See Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990).

6. Grievant failed to present reports of alleged violations of testing procedures to his supervisors in violation of PCBOE Policies 2-6, 2-9, and 2-15.

7. W. Va. Code § 6C-1-3(a) provides as follows:

No employer may discharge, threaten or otherwise discriminate or retaliate against an employee by changing the employee's compensation, terms conditions, location or privileges of employment because the employee, action on his own volition, or a person acting on behalf of or under the direction of the employee, makes a good faith report or is about to report, verbally or in writing, to the

employer or appropriate authority an instance of wrongdoing or waste.

8. A grievant alleging retaliation in violation of W. Va. Code §6C-1-3, in order to establish a prima facie case, must prove:

(1) that the employee engaged in activity protected by the statute;

(2) that the employee's employer was aware of the protected activity;

(3) that, thereafter, an adverse employment action was taken by the employer;

and,

(4) that the adverse action was the result of retaliatory motivation or the action followed the employee's protected activity within such a period of time that retaliatory motive can be inferred.

Coddington, supra. See Whatley v. Metropolitan Transit Auth., 632 F.2d 1325, 1328 (5th Cir. 1980); Hochstadt v. Worcester Foundation for Experimental Biology, Inc., 425 F.Supp. 318 (D. Mass. 1976), aff'd, 545 F.2d 222 (1st Cir. 1976); Frank's Shoe Store v. W. Va. Human Rights Comm'n, 178 W. Va. 53, 365 S.E.2d 251 (1986); Parker v. W. Va. Dep't of Health & Human Resources, Docket No. 91-HHR-282 (Apr. 22, 1992); Graley, supra; Webb v. Mason County Bd. of Educ., Docket No. 89-26-56 (Sept. 29, 1989).

9. If a grievant establishes a prima facie case of retaliation, the inquiry then shifts toward determining if the employer has shown legitimate, non-retaliatory reasons for the actions. Coddington, supra; Graley, supra. See McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973); Mace v. Pizza Hut, Inc., 180 W. Va. 469, 377 W.E.2d 461 (1989); Frank's Shoe Store, supra; Parker, supra. If the Respondent successfully rebuts the claim of retaliation, Grievant may nonetheless establish by a preponderance of the evidence that the offered reasons are merely pretextual. Graley, supra. See Tex. Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-253 (1981); Shepherdstown Vol. Fire Dep't v. W. Va. Human Rights Comm'n, 172 W. Va. 627, 309 S.E.2d 342 (1983).

10. Grievant established a prima facie case of retaliation by showing that he engaged in a protected activity, that the employer was aware of the activity, and that shortly thereafter he received

a letter of reprimand.

11. PCBOE established that the letter of reprimand was issued as a result of Grievant's failure to follow the county chain of command, a legitimate, non-retaliatory reason for the action. Grievant does not assert the reason to be pretextual. 12. PCBOE has proven by a preponderance of the evidence that Grievant released confidential student information to individuals who were not authorized to have said material, that he willfully and intentionally did not respond to a request for assistance with frozen food threatened by an electrical outage, and that he knowingly failed to make arrangements with secretaries for securing substitutes when he was not on site. PCBOE has established that Grievant engaged in insubordination and willful neglect of duty.

13. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997).

14. The facts of this case do not support mitigation notwithstanding Grievant's long tenure with PCBOE.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Preston County. Any 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: January 23, 2001 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Grievant was represented by J. Bryan Edwards, Esq., of Cranston & Edwards, and Respondent was represented by Kimberly S. Croyle, of Bowles Rice McDavid Graff & Love.

Footnote: 2

Grievant's assertion that the individuals at PHS and KES who provided him the information were not subject to discipline is accurate, but does not support the contention that he should be immune from discipline for that reason.