ELAINE KOONTZ,

Grievant,

v. **DOCKET NO. 01-25-480**

MARSHALL COUNTY BOARD

OF EDUCATION,

Respondent.

DECISION

Grievant Elaine Koontz filed this grievance alleging that she "was illegally suspended for two days without pay for alleged violation of insubordination." As relief, Grievant seeks to have the suspension expunged from her personnel file and to be paid for those two days. Following a post-suspension hearing held before the Marshall County Board of Education on August 6, 2001, at which Grievant was represented by Owens Brown, WVEA Region I UniServ Consultant and Respondent was represented by Kimberly Croyle, Esq., the Board upheld the suspension recommendation of Marshall County Schools Superintendent David L. Wood. Grievant appealed directly to Level IV, and a hearing on the grievance was held in the Grievance Board's Wheeling Office on October 3, 2001. The parties agreed to file their proposed findings of fact and conclusions of law by November 2, 2001, whereupon the matter became mature for a decision.

Based on a preponderance of the evidence adduced at the Level IV hearing and a review of the lower-level record, the undersigned makes the following findings of fact:

FINDINGS OF FACT

1. Grievant Elaine Koontz is a custodian employed by Respondent Marshall County Board of Education at Center McMechen Elementary School (CME) and has held that position since 1990. She has been employed by Respondent for the past 28 years.

2. Grievant's immediate supervisor, during the school year and in the summer, is the principal of CME, Edward Sherman.

3. Between May 2 and May 9, 2001, Grievant was reprimanded by Mr. Sherman verbally and in writing for failing to keep the gymnasium/cafeteria floor clean.

4. While Grievant's contract is for 260 days per year, Mr. Sherman is paid for 210 days per

year. On June 7, 2001, Mr. Sherman met with Grievant to discuss the procedures and duties she was expected to complete over the summer when she was working but he was not.

5. Both Mr. Sherman and Grievant reviewed and signed a list of written duties for Grievant on June 7 [Joint Exh. 1, Tab 11] (See footnote 1) . These duties were:

1 * Pick up trash on school grounds prior to 8:00 [a.m.].

2 * Unlock playground [at] 8:30 and lock at 1:15.

3 * Use air conditioning on only one floor at a time.

4 * Leave front door open for deliveries (lock it when you go to lunch 9:00-9:30).

5 * Use the sign-in/sign-out form located on [Mr. Sherman's] office door.

6 * Contact the central office business manager, Jim Tuel, when there is any change in your work schedule.

6. Grievant refused to use the sign-in sheet. When confronted by Mr. Sherman on June 13, 2001, she expressed concern that it was on the front of his door, so he moved it to the back of his door. Grievant still did not use the sign-in sheet.

7. On June 15, 2001, Grievant was reprimanded in writing by Mr. Sherman for failing to comply with the June 7 list of duties and for failing to be at the school during her work hours. Grievant admitted the charges in the June 15 reprimand. [Joint Exh. No. 1, Tab 9]

8. On June 25, 2001, Mr. Sherman gave Grievant a written list of some of her summer maintenance and cleaning duties. [Joint Exh. No. 1, Tab 8] These duties were:

7 * During the week of June 25-29 apply one coat of paint to the boys bathrooms upstairs and downstairs.

8 * During the week of June 25-29 clean all of the lights upstairs and downstairs.

9 * Apply a second coat of paint to the boys bathrooms the next week you work.

10 * Strip and wax the front hallway and gym. Let me or Mr. Trowbridge know when you are going to begin this project.

11 *
Remove the black marks or paint over the black marks in the hallways and stairwells.

9. On June 25, 2001, Mr. Sherman arrived at CME during Grievant's work hours with Ron Trowbridge, Marshall County Schools General Supervisor, to deliver a letter of reprimand, and found Grievant sleeping on a table in one of the classrooms. Grievant refused to meet with Messrs. Sherman and Trowbridge to discuss her custodial duties without her Union representative present.

10. On July 2, 2001, Mr. Sherman sent a memorandum to Superintendent Wood regarding the "insubordinate acts of Elaine Koontz." [Joint Exh. No. 1, Tab 7] On July 9, 2001 Mr. Sherman sent a second memorandum to Mr. Wood and to the Board, requestingdisciplinary action be taken against Grievant for insubordination. [Joint Exh. No. 1, Tab 5] In that memorandum Mr. Sherman detailed the preceding events and stated, "a suspension without pay is in order."

11. On July 19, 2001, Superintendent Wood met with Grievant at the Board office to discuss her work. At this meeting Mr. Wood gave Grievant a letter [Joint Exh. No. 1, Tab 4] suspending her without pay for a period of two days, July 30 and 31, 2001. This letter lists several reasons for the suspension, as follows:

> On June 7, 2001, you and your supervisor signed a memorandum directing you to do certain duties and tasks during the summer. . . . You refused to follow these directives and were warned in a letter of reprimand on June 15, 2001, that disciplinary action would be requested if you did not follow the directives. . . . you continued to disregard these directives after the June 15, 2001, letter of reprimand when you were not at Center McMechen Elementary School at 7:25 a.m. on June 19, 2001 nor were you at the school at 7:20 a.m. on June 22, 2001, despite the fact that your workday begins at 5:30 a.m. You have not contacted the business manager with any change in schedule as you were instructed to do, nor have you used the sign-in sign- out sheets on the back of Mr. Sherman's door as you were instructed to do. One June 22, 2001, when Mr. Sherman entered the building at 4:00 p.m., the air conditioners were on in the building both upstairs and downstairs and lights were left on upstairs and in the room adjacent to the janitor's room. Further, the playground continues to remain unlocked when you leave for the day. On June 25, 2001, Mr. Sherman arrived at the school at 7:30 a.m. to find you asleep, on the table, covered with a sheet, in the fourth grade classroom. On June 25, 2001, you were given a list of duties that Mr. Sherman wanted you to perform. You have failed to complete those duties as instructed. . . . On July 2, 2001, you stated that you only worked a ½ day, yet you did not report this to the business office as you were instructed to do. On July 6, 2001, you did not work but failed to call in to report that you would not be working until almost noon, which prohibited a substitute from being called to replace you. On July 9, 2001, you were at home at 1:10 p.m., despite the fact that your work day does not end until 1:30 p.m. and you had not called the business office to report your schedule change.

DISCUSSION

In a grievance involving a disciplinary action such as a suspension, the Respondent bears the burden of proving the basis of the action by a preponderance of the evidence. W.Va. Code 18-29-6. The letter that Superintendent Wood sent to Grievant explicitly states the reasons for the disciplinary action, although it does not expressly state that W.Va. Code § 18A-2-8 ground for the suspension.

"The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). *See* Beverlin v. Bd. of Educ. [of Lewis County], 158 W. Va. 1067, 216 S.E.2d 554 (1975)." Graham v. Putnam County Bd. of Educ., Docket No. 99-40-206 (Sep. 30, 1999). W. Va. Code §18A-2-8 identifies the types of action that can result in disciplinary action and provides, in pertinent part:

> Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge. A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article.

Grievant admitted that she did not use the sign-in sheet, that she did not unlock the school in the mornings, and that she left the playground unlocked in the afternoons. She also admitted that she did not comply with some of the June 7, 2001 instructions. She admitted that she was lying on the table, but denies being asleep. She admitted that she was at home at 1:10 on July 9th when James Tuel, Marshall County Schools Treasurer andBusiness Manager, called her there. (See footnote 2) Grievant does not dispute other charges, such as Mr. Sherman's claims that Grievant was not at the school on June 14th when he arrived there at 1:00 and that he saw her driving down the street at 12:30 on the 15th. Superintendent Wood's letter charges that Grievant did not call in to the business office on June 16th to report her absence until almost noon. Grievant's dispute with this charge is that she called in at 11:00. With Grievant's schedule being from 5:30 a.m. to 1:30 p.m., I find the difference here to be insignificant. Each of these instances directly conflicts with clear instructions given Grievant by her

supervisor.

There are charges that Grievant denies entirely, such as whether she was at the school on June 22nd and whether she picked up the trash on the playground. Normally, when faced with directly opposing testimony, the undersigned must make a specific finding that one witness is more credible than the other. However, even if these particular instances of insubordination were not proven, the remaining charges are more the sufficient to uphold the relatively minor disciplinary action.

“Insubordination can be shown through an employee's "blatant disregard for the authority" of his second-level supervisor. Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988).” Graham v. Putnam County Bd. of Educ., Docket No. 99- 40-206 (Sep. 30, 1999). Grievant argues that Mr. Sherman was without authority to give her instructions as to her duties nor to initiate a disciplinary action during the summer months, because the duties covered a period of time for which she was paid to be workingand he was not. While the facts show that Grievant is paid for working more days that Mr. Sherman, there is no authority on which to affirm Grievant's argument that she is only responsible to the principal of the school on days that they both work. This argument demonstrates a complete disregard for the authority of the principal of the school to direct the work of subordinate personnel.

“Generally, an employee must obey a supervisor's order and take appropriate action to challenge the validity of the supervisor's order. Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions.” Stover v. Mason County Bd. of Educ., Docket No. 94-26-640 (Feb. 23, 1995). While there are exceptions to this rule, such as where the employee reasonably has health and safety concerns "[a]n employee is not justified i[n] disobeying a reasonable order simply because he/she does not agree with it." Id., McKinney v. Wyoming County Bd. of Educ., Docket No. 92-55-112 (Aug. 3, 1992). Grievant was given clear and reasonable instructions by her immediate supervisor, and she did not obey them. While she does argue that she has a safety concern with one of those instructions (leaving the doors unlocked while she is the only person in the building), she did not raise those concerns with anyone in authority. She should have complied with the order and then addressed her safety concerns through the proper channels.

Grievant further asserts as a defense that the July 19, 2001 suspension letter did not specify a specific W.Va. Code violation or the statutory authority to suspend her. Respondent's burden is to

prove the misconduct it charges, but it is not required to always identify the conduct in terms of one of the terms used in W.Va. Code § 18A-2-8. Theproper focus is whether the charge of misconduct is proven, not the label attached to such conduct. Gillespie v. Kanawha County Bd. of Educ., Docket No. 90-20-496 (June 6, 1991), citing Russell v. Kanawha County Bd. of Educ., Docket No. 90-20-415 (Jan. 24, 1991). Brown v. Mercer County Bd. of Educ., Docket No. 98-27-113 (July 30, 1998). Further, Grievant and her representative met with the Superintendent to discuss Mr. Sherman's contentions before the Superintendent gave Grievant the suspension letter. It is clear from the testimony that both Grievant and her counsel were made aware through this meeting of the specific reasons for the suspension, and the failure of the letter to be more specific did not deprive Grievant of proper notice of the charges against her.

Grievant's most compelling arguments are that the requisite Board approval was tainted by the Superintendent's providing Board members with a copy of the suspension letter prior to the hearing, and by his voting with the Board to uphold the suspension. A review of the transcript of the hearing before the board shows that Grievant's due process rights were not unduly compromised. W.Va. Code § 18A-2-8 requires the employee to be presented with a written statement of the charges "within two days" of presentation of the charges to the Board, but does not require that the two days come after the statement is given to the employee. Further, Grievant was afforded the opportunity to present her case to the Board with the assistance of counsel. In addition, this Level IV hearing reviewing that decision of the Board is an ample remedy for any possible defect in the prior proceeding.

The following conclusions of law support the above discussion:

CONCLUSIONS OF LAW

1. "In disciplinary matters, the employer bears the burden of establishing 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. "Generally, an employee must obey a supervisor's order and take appropriate action to challenge the validity of the supervisor's order. Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Department, Docket No. 90-H-128 (Aug. 8, 1990)], citing Meads v. Veterans

Admin., 36 M.S.P.R. 574 (1988) [other citations omitted]." Stover v. Mason County Bd. of Educ., Docket No. 94-26-640 (Feb. 23, 1995). While there are exceptions to this rule, such as where the employee reasonably has health and safety concerns (Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995)), "[a]n employee is not justified i[n] disobeying a reasonable order simply because he/she does not agree with it." Id. "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 (Aug. 3, 1992) (citing In re Burton Mfg. Co., 82 L.A. 1228 (Feb. 2, 1984))." English v. Div. of Corrections, Docket No. 98-CORR-082 (June 29, 1998). Wiley v. Bureau of Employment Programs/Workers' Compensation Div., Docket No. 00 BEP 205 (Oct. 14, 2000). 3. Respondent's burden is to prove the misconduct it charges, but it is not required to always identify the conduct in terms of one of the terms used in W.Va. Code § 18A-2-8. The proper focus is whether the charge of misconduct is proven, not the label attached to such conduct. Gillespie v. Kanawha County Bd. of Educ., Docket No. 90-20-496 (June 6, 1991), citing Russell v. Kanawha County Bd. of Educ., Docket No. 90-20-415 (Jan. 24, 1991). Brown v. Mercer County Bd. of Educ., Docket No. 98-27-113 (July 30, 1998).

4. "The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8, as amended, and must be exercised reasonably, not arbitrarily or capriciously. Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). *See* Beverlin v. Bd. of Educ. [of Lewis County], 158 W. Va. 1067, 216 S.E.2d 554 (1975)." Graham v. Putnam County Bd. of Educ., Docket No. 99-40-206 (Sep. 30, 1999). W. Va. Code §18A-2-8 identifies the types of action that can result in disciplinary action and provides, in pertinent part:

> Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge. A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article.

5. Respondent met its burden of proof that Grievant failed to obey the reasonable directives of her supervisor, and therefore properly suspended her for insubordination under W.Va. Code § 18A-2-8.

For the foregoing reasons, this grievance is hereby **DENIED**. Any party may appeal this Decision to the Circuit Court of Kanawha County or to the Circuit Court of Marshall 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 Grievance Board with the civil action number so that the record can be prepared and transmitted to the circuit court.

Dated: November 29, 2001

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M. Paul Marteney

Administrative Law Judge

Footnote: 1

The parties submitted as Joint Exhibit No. 1 at the August 6, 2001 hearing a compilation of twelve documents in one binder, divided by separate tabs.

Footnote: 2

Although Grievant claims she left early because she went to work early that morning, she did not call the office to report a schedule change as she was directed nor did she indicate her schedule on the sign-in/sign-out sheet as directed.