SHIRLEY BAISDEN,

Grievant,

v.

DOCKET NO. 00-23-364

LOGAN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Shirley Baisden, filed this grievance against her employer, the Logan County Board of Education ("Logan") on November 15, 2000:

> 18A-2-8 Suspension of school employee - appeal of suspension. Grievant was suspended Nov. 1 for 5 days, requested a hearing with Board on Nov. 9, has not received any charges in writing as required.
>
> Relief requested: To reinstate 5 days pay plus interest and to remove all reference to this incident from Grievant's personnel file.

The grievance was filed directly to level four, and a level four hearing was held in the Grievance Board's Charleston, West Virginia, office on January 22, 2001. This matter became mature for decision on February 1, 2001, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant was represented by Anita Mitter, West Virginia Education Association, and the Board was represented by Brian Abraham, Esq.

SUMMARY OF EVIDENCE

Board Exhibit

Ex. 1 -

October 31, 2000 handwritten notes by Shirley Baisden re: S.B.

Grievant's Exhibits

Ex. 1 -

November 14, 2000 letter from Barbara J. Browning to Shirley Baisden with enclosures: grievance form; November 13, 2000 letter from Ray Woolsey, Superintendent to Shirley Baisden; November 1, 2000 letter from Ray Woolsey to Shirley Baisden.

Ex. 2 -

United States Postal Service Return Receipt dated November 24, 2000.

Ex. 3 -

October 18 and October 30, 2000 handwritten notes by Shirley Baisden re: S.B.

Ex. 4 -

Photographs of Shirley Baisden's classroom showing location of S.B.'s chair.

Ex. 5 -

Transcript of Shirley Baisden's suspension hearing before the Logan County Board of Education, November 9, 2000.

Ex. 6 -

Teacher Evaluations of Shirley Baisden, 1998-1999 and 1999-2000; Professional Growth and Development Plan, 5/26/99; Plan of Improvement, November 29, 2000; Teacher Observation/Data Collection Forms for 12/8/2000, 12/11/2000, 1/10/2001, 1/16/2001.

Testimony

The Board presented the testimony of Ray Woolsey, Brenda Skibo, and Ernestine Sutherland. Grievant testified in her own behalf, and presented the testimony of Barbara Browning.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. Grievant is employed by the Board as a Special Education teacher at Logan Middle School.

2. On October 31, 2000, Halloween, Grievant had some problems with one of her students, S.B. (See footnote 1) 3. This child's normal behavior is to talk out loud, get out of his seat, wave his arms, move his feet and legs, and gesture to the other students.

4. Grievant has had problems with S.B. in the past, and has sent him to the office on several occasions. Grievant documented those incidents. G. Ex. 3.

5. On October 31, 2000, Grievant, in an attempt to get her class under control, asked S.B. to step out in the hall where she could speak to him.

6. S. B. refused, and Grievant directed two other special education students to walk him out into the hall.

7. The students tried to grab S.B. and force him into the hall.

8. This incident was witnessed by a parent visiting the school, who reported the incident to Superintendent Ray Woolsey that same day.

9. That afternoon, Grievant met with S.B.'s parents, and they informed her S.B. was, in the future, to be given his medication at 7:20 a.m. instead of 7:00 a.m., which would help alleviate his behavior problems.

10. After receiving the telephone call from the parent who witnessed the incident involving S.B. and the two other students, Superintendent Woolsey contacted Grievant's Principal, Ernestine Sutherland, and informed her of this report.

11. Principal Sutherland contacted the parent and had him come to the school to identify the teacher involved in the S.B. incident. The parent told Principal Sutherland the incident happened in “one of two rooms”, and after looking into the rooms, he identified Grievant. 12. On October 31, 2000, Grievant documented the incident involving S.B. Board Ex. 1.

13. The next day, November 1, 2000, Superintendent Woolsey called Principal Sutherland and asked her and Grievant to report to his office.

14. Grievant, Principal Sutherland, and Brenda Skibo, Director of Personnel, met with the Superintendent at 9:00 a.m. on November 1, 2000.

15. Superintendent Woolsey asked Grievant if she knew why she was there, and whether she wanted to give her side of story. Grievant did know why she was there, and gave her side of the story

regarding the S.B. incident.

16. Superintendent Woolsey told Grievant at that meeting that he was going to suspend her for five (5) days without pay, and asked her whether she wanted the suspension to start that day. Mr. Woolsey told Grievant her actions in directing two students to remove S.B. from the classroom jeopardized the students, as well as S.B., and constituted extremely poor judgment.

17. Mr. Woolsey also informed Grievant she could request a hearing before the Board on her suspension, which she did.

18. Grievant admitted the incident occurred as described, and admitted she exercised poor judgment in directing the students to remove S.B. from the classroom.

19. Following the meeting, Grievant and Ms. Skibo left the Superintendent's office. It was normal practice for Ms. Skibo to type up the letter of suspension following a meeting with the Superintendent, and immediately give it to the employee. However, Grievant did not accompany Ms. Skibo to her office, so Ms. Skibo typed up Grievant's letterof suspension that day, November 1, 2000, and presented it to the Superintendent for signature.

20. Ms. Skibo did not mail the letter herself, and went out of town that day or the next. Superintendent Woolsey thought Ms. Skibo had mailed Grievant the suspension letter. As a result of the misunderstanding, Grievant did not receive a suspension letter following the November 1, 2000 meeting. Nevertheless, Grievant did request a hearing before the Board on her suspension.

21. Grievant's suspension lasted from November 1 through 8, 2000. Grievant was also placed on an Improvement Plan following this incident.

22. Grievant's hearing before the Board took place on November 9, 2000, her first day back to work following her suspension. Grievant was represented by Ms. Anita Mitter, West Virginia Education Association. At that hearing, Grievant again admitted the incident occurred as described, and admitted she utilized poor judgment. Following Grievant's admission, the Board was not interested in hearing anymore about the incident, despite Grievant's attempts to explain the behavioral history of S.B., and cut her and her representative off in their attempts to present this testimony. G. Ex. 5.

23. Subsequently, upon Ms. Skibo's return to the office, she discovered Grievant's suspension letter had not been sent. She then directed, on November 14, 2000, a packet of information be sent to Grievant which included the original suspension letter notifying her of the reasons for the

suspension, as well as her right to request a hearing before the Board, and a November 13, 2000 letter from Superintendent Woolsey informing Grievant the Board had upheld his recommendation to suspend her. G. Ex. 1. 24. Grievant filed this grievance on November 15, 2000.

DISCUSSION

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). "A preponderance of the evidence is evidence 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. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.; See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

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., 158 W. Va. 1067, 216 S.E.2d 554 (1975). W. Va Code § 18A-2-8 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 contendre to a felony charge. A charge of unsatisfactory performance shall not be made except as the result of an employee evaluation pursuant to section twelve of this article.

Grievant was suspended by Superintendent Woolsey for “endangering the safety of children in [your] classroom, and [your] failure to maintain adequate classroom management.” G. Ex. 1. While one of the Code § 18A-2-8 charges is not specifically identified in the Superintendent's letter, it is not the label that is controlling, but the conduct. Grievant has admitted the incident involving S.B. on October 31, 2000, occurred as described, and acknowledged she exercised poor judgment and classroom management techniques; therefore, the Board has met its burden of proving Grievant engaged in the charged conduct in this grievance.

However, Grievant contends she was denied due process by the Board, first, through its failure to provide her with written notice of the charges, and second, through its refusal to allow her to present her testimony regarding S.B.'s behavioral history at the suspension hearing on November 9, 2000. Grievant's due process claim is an affirmative defense to her suspension, and she bears the burden of proving her defense by a preponderance of the evidence. Parham v. Raleigh County Bd. of Educ., Docket No. 91- 41-131 (Nov. 7, 1995). An employee has a recognized entitlement or property interest not only in the right to continued employment but also in the right to receive his or her benefits and pay. Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 20, 100 S. Ct. 2457, 1566, 56 L.Ed. 2d 30, ___ (1978). "[S]chool employees have a property interest in continued uninterrupted employment and due process safeguards must be provided when a county board of education seeks to deprive employees of that interest." Knauff v. Kanawha County Bd. of Educ., Docket No. 20-88-095 (Jan. 10, 1989). The West Virginia Supreme Court in Board of Education of the County of Mercer v. Wirt, 192 W. Va. 568, 453 S.E.2d 402 (1994), determined what due process is required to terminate a continuing contract of employment. However, the due process rights afforded an individual for less than a termination, or "a temporary deprivation of rights may not require as large a measure of procedural due process protection as a permanent deprivation.” Waite v. Civil Serv. Comm'n, 161 W. Va. 154, 241 S.E.2d 164 (1978) (citing North v. Bd. of Regents, 160 W. Va. 248, 233 S.E.2d 411 (1977)). Prior to a thirty-day suspension without pay, Waite, a civil service employee, had a sufficient property interest to require notice of the charges and an opportunity to present her side of the story to the decision-maker. Waite at 170. Further, the West Virginia Supreme Court of Appeals has recognized that "due process is a flexible concept, and that the specific procedural safeguards to be accorded an individual facing a deprivation of constitutionally protected rights depends on the circumstances of the particular case." Buskirk v. Civil Serv. Comm'n,

175 W. Va. 279, 332 S.E.2d 579 (1985) (citing Clark v. W. Va. Bd. of Regents, 166 W. Va. 702, 279 S.E.2d 169, 175 (1981)). "In determining 'what process is constitutionally due,' the United States Supreme Court, in Gilbert v. Homar, 520 U.S. 924 (1997), enunciated three factors to be balanced:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest." Matthews v. Eldridge, 424 U.S. 319, 335 (1976). See also, e.g., [FDIC v.] Mallen, [486 U.S. 230, 242 (1988)] . . . ; Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1982).

The West Virginia Supreme Court of Appeals has found these factors to be 'germane to a selection of an appropriate procedure under our [West Virginia Constitution] Due Process Clause,' and applied these factors in Waite, supra. The Court also found in Waite, discussing the de minimus concept espoused in Goss v. Lopez, 419 U.S. 565 (1975), that a ten-day suspension without pay was not such a minimal deprivation that no due process procedure need be afforded." Wall v. Putnam County Bd. of Educ., Docket No. 98-40-457 (June 9, 1999).

Accordingly, a tenured employee is entitled to a pre-suspension hearing, not a full adversarial hearing, and an opportunity to respond to the charges, when the suspension is without pay. Buskirk at Syl. Pt. 3. An employee is also entitled to written notice of the charges and an explanation of the evidence. Wirt, supra. In other words, a pre- suspension hearing, explanation of the evidence, and an opportunity to respond is all the due process that the Board was required to provide. Id. at Syl. Pt. 3; See W. Va. Code §18A-2-8.

In this case, Superintendent asked Grievant at the November 1, 2000, meeting in his office if she wished to begin serving her suspension that day, or at a later date. Grievant elected to start serving her suspension that day. Thus, even though Grievant was entitled to a pre-suspension hearing, she suffered no harm because she elected to serve the suspension before the hearing, and, had the Board denied the Superintendent's recommendation, she would have been reimbursed all salary and benefits owed for that time period.

It is true Grievant did not receive written notice of the charges prior to her suspension, and even prior to her suspension hearing. As there is no evidence the Board acted in bad faith, or deliberately set out to deprive Grievant of her right to written notice, and there is no dispute as to the events that occurred which caused the suspension letter to be overlooked following the November 1, 2000 meeting, the issue becomes one of harm suffered by Grievant as a result of this oversight. Grievant

presented no evidence that she suffered any harm from her failure to receive written notice of the charges prior to her suspension hearing, and that failure is deemed harmless error.

Grievant admitted she knew why she was called in to meet with Superintendent Woolsey on November 1, 2000; she admitted she exercised poor judgment with regard to S.B. and the other students; Superintendent Woolsey told her he was suspending her for five days, and asked her if she wanted to begin serving the suspension immediately, to which she replied in the affirmative; Superintendent Woolsey informed her she had the right to a hearing before the Board, and when the next Board meeting would be, and in fact, Grievant requested a hearing and appeared with her representative at that Board meeting. Had the Board denied the Superintendent's recommendation, Grievant would have been compensated for the five days' suspension she served. Thus, there simply isno evidence that Grievant was prejudiced in any way by not receiving written notice of the charges prior to her suspension hearing.

Finally, Grievant alleges she was denied her due process in the suspension hearing itself because the Board refused to allow her to call witnesses or provide evidence in her own behalf. It is not necessary for a pre-disciplinary hearing to be a full adversarial evidentiary hearing; however, an employee is entitled to written notice of the charges, an explanation of the evidence, and an opportunity to respond prior to a Board of Education's decision to discipline the employee. See Board of Educ. v. Wirt, 192 W. Va. 568, 453 S.E.2d 402 (1994). A review of the transcript of Grievant's suspension hearing before the Board indicates that Superintendent Woolsey laid out for the Board the incident involving S.B., and his reasons for suspending Grievant. While it is true that Grievant was not given an opportunity to explain everything that happened on October 31, 2000, nor was she allowed to delve into the S.B.'s past behavioral problems, she was given an opportunity to respond to the charges. She admitted the incident occurred, and that she used poor judgment in allowing two other students to attempt to remove S.B. from the classroom. Once the Board heard Grievant's admission to the incident, it decided to accept the Superintendent's recommendation to suspend Grievant for five days without pay. That is all that is required in a pre-disciplinary hearing. Thus, Grievant's claim that she was denied due process must fail in light of all the evidence.

CONCLUSIONS OF LAW

1. 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., 158 W. Va. 1067, 216 S.E.2d 554 (1975). W. Va Code § 18A-2-8 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 contendre to a felony charge. A charge of unsatisfactory performance shall not be made except as the result of an employee evaluation pursuant to section twelve of this article.

2. As Grievant admitted she engaged in the conduct charged by the Board, the Board has proven the charges against her by a preponderance of the evidence.

3. A superintendent's authority to suspend school personnel shall be temporary only pending a hearing upon charges filed by the superintendent with the board of education. W. Va. Code § 18A-2-7; See Pauley v. Kanawha County Bd. of Educ., Docket No. 99-20-462 (Feb. 29, 2000).

4. An employee has a recognized entitlement or property interest not only in the right to continued employment but also in the right to receive his or her benefits and pay. Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 20, 100 S. Ct. 2457, 1566, 56 L.Ed. 2d 30, ___ (1978). "[S]chool employees have a property interest in continued uninterrupted employment and due process safeguards must be provided when a county board of education seeks to deprive employees of that interest." Knauff v. Kanawha County Bd. of Educ., Docket No. 20-88-095 (Jan. 10, 1989).

5. It is not necessary for a pre-disciplinary hearing to be a full adversarial evidentiary hearing; however, an employee is entitled to written notice of the charges, anexplanation of the evidence, and an opportunity to respond prior to a board of education's decision to discipline the employee. Board of Education v. Wirt, 192 W. Va. 568, 453 S.E.2d 402 (1994).

6. It is undisputed Grievant did not receive written notice of the charges prior to her suspension or prior to her pre-disciplinary hearing; however, Grievant has shown no harm as a result of this failure, as she was clearly informed of the charges against her prior to her suspension and notified of her opportunity to request a hearing before the Board, and did so immediately after being so notified. Therefore, the Board's failure to provide Grievant written notice of the charges against her constitutes harmless error.

7. Grievant was provided with the charges against her, an explanation of the evidence, and an opportunity to respond to the charges at her pre-disciplinary hearing before the Board. That is all that is required by law, and Grievant has failed to prove by a preponderance of the evidence that she was denied due process at her pre-disciplinary hearing.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Logan 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.

_____

MARY JO SWARTZ

Administrative Law Judge

Dated: February 22, 2001

Footnote: 1

In keeping with Grievance Board practice, the student's initials will be used.