PATRICIA STARKEY,

Grievant,

v. **Docket No. 02-19-010**

JEFFERSON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

On January 15, 2002, Patricia Starkey ("Grievant") filed this grievance directly at level four, challenging a decision of the Jefferson County Board of Education ("JCBOE") which upheld a ten-day suspension without pay imposed by Superintendent Judson Romine. Upon agreement of the parties, this matter was submitted for a decision based upon the record developed at a hearing before JCBOE, supplemented by fact/law proposals received by the undersigned by April 2, 2002. Grievant was represented by counsel, William B. McGinley of WVEA, and Respondent was represented by counsel, Claudia W. Bentley.

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

Findings of Fact

1. Grievant has been employed by JCBOE as a classroom teacher for approximately four years. During that time, she has been assigned to teach ninth grade science at Charles Town Middle School. 2. On December 7, 1999, Grievant received a written reprimand from Principal Larry Mullin for saying to a student: "Don't fuck with me." Grievant's statement was made in response to the student's remark that his father was going to "kick the shit out of her." Principal Mullin advised Grievant that her language was inappropriate and that faculty members are expected to be good role models for students. He also advised that another similar incident would result in more serious consequences.

3. On April 2, 2001, Grievant received another written reprimand for saying in the school

hallway: “I am tired of this mother fucking school.” This statement was made in a conversation with another faculty member and was overheard by unnamed parties, who reported it to Principal Mullin. Grievant was again advised that her language was inappropriate and that more incidents would result in more serious consequences.

4. On November 1, 2001, Grievant's seventh period class was being disruptive and not paying attention to her. In frustration and anger, Grievant yelled: “This is bullshit.” (See footnote 1) She then began crying and told the class to read on their own for the remainder of the period.

5. Grievant's statements on November 1 were reported to Principal Mullin by one of her student's parents. Mr. Mullin met with Grievant on November 5, 2001, at which time Grievant admitted she said “This is bullshit.” During this meeting, Grievant's frustration with the class was discussed, along with possible ways the administration couldassist her. Mr. Mullin advised Grievant that, since this was the third incident involving her use of inappropriate language, he would be recommending discipline be taken against her.

6. In a letter dated November 7, 2001, Principal Mullin reviewed the matters discussed during his conference with Grievant and advised her he would be recommending to the superintendent that she be given “leave without pay” for the incident which occurred on November 1.

7. In a letter dated November 16, 2001, Superintendent Romine stated, in part:

> Based upon . . . your failure to cease use of inappropriate language when reprimanded, you are hereby suspended without pay effective immediately and to continue for a suspension period of ten (10) days. I will recommend that the Board of Education confirm this suspension without pay at its Board meeting on November 28, 2001, at 6:00 p.m. in the Board of Education offices.

8. Grievant served her suspension without pay, beginning on November 16, 2001, and for ten days thereafter.

9. For reasons not reflected in the record, the Board hearing regarding Grievant's suspension was rescheduled and held on January 10, 2002. Grievant appeared and was represented by counsel. At the conclusion of that hearing, the Board voted to ratify the previously-served suspension.

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 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. Dep't of Health & Human Resources, 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 suspend an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8, and must be exercised reasonably, not arbitrarily or capriciously. Parham v. Raleigh County Bd. of Educ., 192 W. Va. 540, 453 S.E.2d 374 (1994), 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 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.

W. Va. Code § 18A-2-8 provides, in part, that, when an employee is suspended or dismissed for the causes listed in the statute:

> The charges shall be stated in writing served upon the employee within two days of presentation of said charges to the board. The employee so affected shall be given an opportunity, within five days of receiving such written notice, to request . . . a level four hearing [before the Grievance Board].

Although Grievant contends that her conduct does not fall within any of the statutory reasons listed in W. Va. Code § 18A-2-8, she has argued, as a preliminary matter, that she was denied her due process rights. In that regard, Grievant contends that she was entitled to a hearing before the Superintendent imposed his suspension without pay. “[A]n allegation that an employer failed to follow a specific procedural requirement in accomplishing a disciplinary action is an affirmative defense, and Grievant has the burden of establishing the facts to support such allegation by a preponderance of

the evidence." Bradley v. Cabell County Bd. of Educ., Docket No. 99-06-150 (Sept. 9, 1999).

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 chargesand 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 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).

Gilbert v. Homar, 520 U.S. 924 (1997). Our 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 was not such a minimal deprivation that no due process procedure need be afforded.

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, the Board wasrequired to provide a pre-suspension hearing, explanation of the evidence, and an opportunity for Grievant to respond. Id . at Syl. Pt. 3; See W. Va. Code §18A-2-8.

This Grievance Board previously addressed a nearly identical issue, wherein the grievant was not given an opportunity to address either the superintendent or the board of education prior to imposition of a three-day suspension without pay. In Knauff, supra, the Administrative Law Judge ruled that, absent "compelling circumstances, clearly apparent on the record," the grievant was entitled to respond to the charges prior to the imposition of the suspension, and the suspension was overturned. Similarly, it has been held that the requirement set forth in W. Va. Code § 18A-2-7 that a superintendent's imposition of a suspension "be temporary only pending a hearing upon charges filed by the superintendent with the board of education," only pertains to situations in which the superintendent must immediately withdraw an employee from service "until such time that the Board can review the matter." Pauley v. Kanawha County Board of Educ., Docket No. 99-20-462 (Feb. 29, 2000); See Allison v. Kanawha County Board of Educ., Docket No. 20-86-273-1 (Dec.30, 1986).

Clearly this case does not involve a situation where Grievant's immediate removal was necessary. There is no evidence that she posed a threat to herself or others. Although her language may have been inappropriate, it was not threatening. If that had been the case, Respondent would have had the option of suspending Grievant with pay. In Loudermill, supra, the Court observed that, "in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem [of pre-deprivation due process] by suspending with pay." See also Gilbert, supra. Accordingly, Grievant was entitled to an opportunity to respond to the charges before theBoard and the superintendent prior to her suspension. Because Grievant's due process rights were violated, this grievance must be granted, and the merits of the case need not be addressed.

(See footnote 2)

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

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. Pursuant to W. Va. Code § 18A-2-8, professional personnel may be suspended or dismissed 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. The authority of a board of education to dismiss 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. "[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). These protections are afforded to employees who are suspended without pay, although "a temporary deprivation of rightsmay 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).

4. It is not necessary for a pre-termination 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. Bd. of Educ. v. Wirt, 192 W. Va. 568, 453 S.E.2d 402 (1994).

5. “Absent compelling circumstances, clearly apparent on the record,” an employee is entitled to a hearing prior to imposition of a suspension without pay. Knauff, supra.

6. Respondent has failed to demonstrate compelling reasons for suspending Grievant without pay prior to a hearing before the Board regarding her suspension without pay.

7. Prior to being suspended without pay, Grievant was entitled to an opportunity to respond to the charges before the Board and/or the superintendent. See Waite, supra; Pauley, supra; Knauff, supra.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to reimburse Grievant for all lost wages and benefits during her suspension period and to expunge its records of all reference to Grievant's suspension.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Jefferson County, and such appeal must be filed within thirty (30) days ofreceipt 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: April 8, 2002 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

It was also alleged by the students that Grievant said she hated the class. Grievant denies this, but due to the outcome of this Decision, it is not necessary to make the credibility determinations necessary to make a finding of fact on this issue.

Footnote: 2

Respondent did not address Grievant's due process claim in its written argument, although it was raised by Grievant at the Board hearing.