THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

CASSANDRA BROWN,

Grievant,

v.

Docket No. 07-20-222

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Cassandra Brown, employed by the Kanawha County Board of Education ("KCBOE") as a classroom aide, filed this grievance on May 24, 2007, challenging a one- half of a day suspension effective on May 28, 2007. For relief, Grievant requests restoration of the one-half day of salary (with interest) and all other benefits lost as a result of the suspension, including seniority. Grievant also seeks the expungement of her record of all references to this suspension. Grievant elected to bypass the lower levels by filing this grievance as a direct appeal to level IV. Accordingly, a level IV hearing was conducted on November 27, 2007, at the Grievance Board's Charleston Office. Grievant was represented by John Roush, Esq., WVSSPA, and Respondent was represented by James W. Withrow, Esq. The grievance became mature for decision on January 9, 2008, upon receipt of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant is employed by Respondent as a classroom aide. Respondent requires all of its employees to complete in service staff development. Respondent did not have record of

Grievant taking the in service training and testing for the 2005-2006 school year. In January 2007, Grievant received a letter advising her that Respondent did not haverecord of Grievant taking the course and/or test. Grievant explained to Respondent's Director of Staff Development that she was attempting to complete the on-line session when the computer “crashed” or shut down after she had completed one or two of the six required courses. At no other time did Grievant attempt to complete the staff development sessions.

Grievant received numerous letters advising her of the need to complete the required staff development sessions. Respondent's Superintendent sent Grievant a correspondence dated January 23, 2007, in which the Superintendent advised Grievant that he intended to recommend disciplinary action against her due to her failure to comply with the staff development requirement. Grievant was instructed if the information was incorrect or if she had other information she wished the Superintendent to consider, to provide that information by January 31, 2007. Grievant failed to respond. A final letter dated May 18, 2007, from the Superintendent notified Grievant that she would be suspended for one-half day without pay on May 28, 2007. Respondent provided Grievant with many opportunities to be heard prior to imposing her suspension.

After thorough review of the record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed by Respondent as a classroom aide at Ruffner Elementary School.

2. Respondent requires that all of its employees complete in service staff development in the areas of sexual harassment, bullying, English as a second language, cultural diversity, safety and drug free workplace. Training is provided through computeron-line classes.

3. Grievant acknowledged she failed to complete the in service training.

4. Carol Thom, Director of Staff Development, sent a memo dated August 29, 2006, to all employees who had not completed the required courses advising them to complete the required courses by September 30, 2006. This memo instructed Grievant to notify Staff Development in the event she had verification (proof) that she had taken the courses.

5. A letter from Respondent's Superintendent dated September 21, 2006, was sent to all employees who had not completed the training advising them to complete the training by September

30, 2006. The employees were further advised if they did not complete the training, disciplinary action may be recommended. Once again, Grievant was notified to contact Staff Development in the event she believed she had completed the requirements.

6. A letter from Respondent's Superintendent dated January 23, 2007, was sent to each of the employees who had not completed the required training. The letter advised the employees, including Grievant, that they had not completed the training, and he was considering recommending disciplinary action. The correspondence provided the following admonition:

> If you have information which shows that our records are incorrect, or if there is any other information you wish either the Board of Education or me to consider, please provide this information to the Office of Staff Development before January 31, 2007. Your prompt attention to this matter is requested.

7. A letter from Respondent's Superintendent dated April 3, 2007, was sent to Grievant indicating Respondent's records reflected a continued failure to come into compliance with the required sessions. This letter advised that the Superintendentintended to recommend to the Board of Education that Grievant be suspended for one-half day. No response was received from Grievant contesting this recommendation.

8. Grievant was advised by letter dated May 18, 2007, that the Board of Education had voted to suspend Grievant for one-half day without pay due to her failure to complete the required staff development training.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. *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). (See footnote 1) "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). In other words, "[t]he preponderance standard generally

requires proof that areasonable 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 Res.*, 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 grounds upon which a Board may discipline any person in its employment are immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance substantiated by an employee performance evaluation or conviction on a felony charge. W. Va. Code § 18A-2-8. The authority of the Board to discipline 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 and capriciously. *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991).

Respondent contends that by failing to complete the required staff development training, Grievant was insubordinate and displayed a willful neglect of duty. Respondent suspended Grievant for insubordination, and willful neglect of duty despite numerous reminders and warnings. Given this set of facts, Grievant's behavior can be labeled as insubordination. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). *See 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). "[F]or there to be 'insubordination,' the followingmust be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts*, *supra*. "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).

Grievant acknowledged she was aware of Respondent's requirement that she complete the development sessions. As noted above, this was accomplished by the employees through logging onto a computer and completing the sessions on-line. Grievant's explanation for her noncompliance centered around the computer that she was using shutting down after she had completed only one or

two of the six required courses. Grievant was unable to solve the computer mystery, and she indicated no one was available to assist her efforts.

The undersigned is sympathetic to Grievant's contempt of computers, as they are prone to be possessed of any number of gremlins on any given day. Nonetheless, the computer is a necessary evil in this day and age. The main problem with Grievant's assertion that she could not complete the computer sessions, is the abundant help offered to her to become comfortable with the technology. In fact, Respondent offered basic computer training, however, this went unnoticed because Grievant failed to read her emails. Possibly a Catch-22, one might argue, but at the same time this offer of basic computer training negates Grievant's explanation for noncompliance of the staff development. All of us, from time to time, experience computer problems. This unpleasant experience is not sufficient justification to quit trying to accomplish a required task. Afterthe computer shut down on Grievant, she made no further attempts at any time to complete the staff development sessions even after being placed on notice of the requirement to do so. These actions and non-actions demonstrate a willful neglect on the part of Grievant to complete an acknowledged requirement of her employment.

Grievant's acknowledged failure to perform the required staff sessions demonstrated a willful neglect of her duties. In fact, Grievant made one attempt to complete the sessions, and the computer failed. Grievant made no further attempts to fulfill her acknowledged obligations. Respondent has proved by a preponderance of the evidence that Grievant was in willful neglect of her duty when she failed to complete the required staff development sessions.

Additionally, Grievant asserts that her due process rights have been violated because there was no pre-suspension hearing. 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)). "What is required to meet procedural due process under the Fourteenth Amendment is controlled by the circumstances of each case." *Barker v. Hardway*, 238 F. Supplement . 228 (W. Va. 1968); *see Buskirk*, *supra*; *Edwards v. Berkeley County Bd. of Educ.*, Docket No. 89-02-234 (Nov. 28, 1989).

It is a well-settled principle of constitutional law, under both the State and Federal Constitutions, that an employee who possesses a recognized property right or liberty interest in his employment may not be deprived of that right without due process of law. *Buskirk*, *supra*; *Waite*, *supra*; *Clark*, *supra*. "An essential principle of due process is that a deprivation of life, liberty or property 'be preceded by notice and an opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494, (1985), *citing Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The question here is whether the due process protections afforded Grievant were sufficient.

It has previously been held that a full-blown hearing is generally not required before an employee may be terminated, but that employee has the minimum pre-deprivation right to at least have an opportunity to respond to the charges either orally or in writing. *Loudermill*, 470 U.S. at 542. An employee is also entitled to written notice of the charges and an explanation of the evidence. *Wirt*, *supra*. In other words, notice of the charges,explanation of the evidence, and an opportunity to respond is all the due process that KCBOE is required to provide. *Id*. at Syl. Pt. 3. This fact is especially true, given that Grievant was suspended not terminated. It should be remembered that the purpose of a pre-suspension hearing or opportunity to respond is to assure that there are reasonable grounds to support the suspension. *Gilbert v. Homar*, 520 U.S. 924, (1997); *Loudermill*, *supra*.

Grievant was informed, in writing, of the charges against her, and Respondent identified the conduct for which she was to be suspended. At least four different attempts were made to contact Grievant to advise her she had not completed the staff development sessions. Letters were sent advising Grievant to contact the Staff Development Office in the event the records were incorrect, or to offer an explanation to the Superintendent as to why the sessions had not been completed.

Grievant was given numerous opportunities to respond to the charges prior to her suspension. Accordingly, Grievant's contention that she was denied due process is without merit.

Respondent has met its burden of proof by a preponderance of the evidence. Respondent demonstrated Grievant committed insubordination and willful neglect of duty by failing to complete the staff development training sessions. Respondent provided Grievant with notice of the charges, explanation of the evidence, and a meaningful opportunity to be heard prior to imposing her suspension. As a consequence, Respondent provided Grievant with necessary due process protections and this grievance is therefore denied.

The following Conclusions of Law support this decision.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. *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 grounds upon which a Board may discipline any person in its employment are immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance substantiated by an employee performance evaluation or conviction on a felony charge. W. Va. Code § 18A-2-8. The authority of the Board to discipline 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 and capriciously. *Bell v. Kanawha County Bd. of Educ.*, Docket No. 91-20-005 (Apr. 16, 1991).

3. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). *See 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). "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts*, *supra*. 4. "Due process is a flexible concept, and . . . 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)). Prior to an unpaid suspension, an employee is entitled to notice of the charges, an explanation of the evidence, and an opportunity to respond. *Id.* at Syl Pt. 3; *Board of Education of the County of Mercer v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402 (1994); *See Starkey v. Jefferson County Bd. of Educ.*, Docket No. 02-19-010 (April 8, 2002).

5. Respondent has met its burden of proof by a preponderance of the evidence, and demonstrated Grievant committed insubordination and willful neglect of duty by failing to complete the staff development training sessions.

6. Respondent provided Grievant with notice of the charges, explanation of the evidence, and a meaningful opportunity to be heard prior to imposing her suspension. As a consequence, Respondent provided Grievant with necessary due process protections. Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7 (repealed, *See Footnote 1, supra*). Neither the West Virginia Public 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 appealingparty must also provide the Grievance Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: February 8, 2008

_____

Ronald L. Reece

Administrative Law Judge

Footnote: 1

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former

statutes and rules, which continue to control the proceedings in this case.