WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

PAMELA SHOWALTER,

Grievant,

v. **Docket No. 07-25-165**

MARSHALL COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Pamela Showalter ("Grievant") initiated this grievance on December 1, 2006, challenging a written reprimand. The grievance was denied at level one on that date, and following a level two hearing, it was denied on May 7, 2007. Level three consideration was bypassed, and Grievant appealed to level four on May 11, 2007. Due to legislative changes affecting the grievance procedure and the Grievance Board, a level four hearing was not held until January 23, 2008, in the Grievance Board's office in Westover, West Virginia. Grievant was represented by Owens Brown of the West Virginia Education Association, and Respondent was represented by counsel, Richard Boothby. This matter became mature for consideration upon receipt of the parties' final fact/law proposals on April 25, 2008.

Synopsis

Grievant received a written reprimand for using profanity during a conversation with another teacher, stating that a particular student could not "fucking read." Although there was no evidence that any students heard the statement, there were students in the next room and the door was open. Grievant contended that discipline for this statement violatedher right to free speech, and also

claimed that, because the superintendent had originally recommended a suspension and decided to only issue a reprimand, her due process rights were violated.

As previously held by the Grievance Board, the use of profanity by school personnel in the school setting violates the Employee Code of Conduct and constitutes insubordination. Grievant had previously been warned against the use of such language, also making the conduct clearly insubordinate. She failed to establish a violation of her free speech rights, and due process was not implicated in a situation where she was reprimanded, resulting in no deprivation of employment, wages, or benefits. The grievance is denied.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed by Respondent as a classroom teacher at John Marshall High School ("JM"). During the 2006-2007 school year, she was teaching art, but during previous school years had been assigned to teach special education students.

2. On October 5, 2006, JM Principal David Takach sent a memorandum to Grievant and several other teachers regarding the reassignment of an aide during certain class periods. As a result, the aide would no longer be assisting Grievant in her classroom.

3. Grievant was upset that the aide would no longer be assigned to her classroom, because the aide had worked frequently with one particular special needs student whom Grievant still believed needed the assistance. 4. Shortly after receiving the news that the aide was being reassigned, Grievant went to the classroom of Michelle Wells, a special education teacher at JM. Grievant had been informed that Connie Young, Assistant Principal, was in the room, and Grievant wanted to speak to her about the reassignment.

5. Ms. Wells' classroom is connected to another classroom by an office that is in between the classrooms, with doors on each side. Grievant did not find Ms. Young in the classroom, so she walked into the office to look for her.

6. Ms. Young was not in the office, but Ms. Wells was. Grievant and Ms. Wells had a conversation during which Grievant expressed her frustration that the aide had been reassigned. While explaining why she needed the aide to assist the special needs student in her class, Grievant

stated, “He can't fucking read.”

7. At the time of Grievant and Ms. Wells' conversation, the door leading into Ms. Wells' classroom was open. Although class was not in session, a small number of students may have been in the classroom at the time the statement was made.

8. Grievant was not speaking loudly at the time she made the statement to Ms. Wells, and it does not appear that anyone overheard the statement, including another teacher who was sitting in the office at the time.

9. Prior to this incident, Grievant had been advised by Principal Takach that her use of profanity was not acceptable.

10. Shortly after the conversation with Grievant, Ms. Wells and Assistant Principal Young were discussing the aide reassignment, and Ms. Wells advised Ms. Young as to what Grievant had said and her use of profanity. 11. On the same day, Ms. Young wrote a memorandum to Principal Takach, advising him that Grievant had “confronted” Ms. Wells and “yelled at her while using profanity.” She also stated in the memo that Ms. Wells was very upset and that “students in both rooms heard Mrs. Showalter and some appeared scared.”

12. By letter dated November 1, 2006, Superintendent Alfred Renzella advised Grievant that she was being suspended for one day for “inappropriate language used in front of students,” unprofessional behavior, and “inappropriate ethical behavior.”

13. At a Board meeting convened on November 14, 2006, testimony was taken regarding the events of October 5 and Grievant's statements to Ms. Wells. At the conclusion of the testimony, Superintendent Renzella withdrew his recommendation of a one-day suspension, deciding to issue a written reprimand for Grievant's conduct, which did not require Board approval.

14. The Marshall County Schools “Employee Code of Conduct” provides, in part, that all school employees shall “[e]xhibit professional behavior by showing positive examples of . . . communication [and] language” and “[d]emonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior.”

15. On November 17, 2006, Superintendent Renzella issued a formal Letter of Reprimand to Grievant, stating that her use of inappropriate language in a school setting violated the Employee Code of Conduct, along with State Department of Education Policy 5310, requiring that teachers “interact appropriately with . . . other educational personnel.”

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; (See footnote 1) *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). An employee of a county board of education may be suspended or dismissed only 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. W. Va. Code § 18A-2-8. “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).” *Graham v. Putnam County Bd. of Educ.*, Docket No. 99-40- 206 (Sep. 30, 1999). Although reprimands are not specifically addressed in W. Va. Code § 18A-2-8, the Grievance Board has previously recognized that lesser penalties can be imposed for the offenses listed in this statute. *See Wahl v. Mineral County Bd. of Educ.*,Docket No. 98-28-175 (Sept. 14, 1998); *See also Blankenship v. Mingo County Bd. of Educ.*, Docket No. 97-29-486 (Apr. 17, 1998).

Respondent contends that it was proper to discipline Grievant for conduct which was clearly inappropriate and violated both county and state policies regarding expected conduct from school employees. The Grievance Board has previously recognized that the use of profanity constitutes insubordination as set forth in W. Va. Code § 18A-2-8. *Parrish v. Jackson County Bd. of Educ.*, Docket No. 06-18-432 (June 11, 2007). 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.*, 569 S.E.2d 456 (W. Va. 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).

Grievant admits that she was previously counseled by Principal Takach regarding her use of profanity. Although she has not clearly admitted her use of the language alleged in this case, she has

stated that “if” she said it, students did not hear it and Ms. Wells was not offended. As has been held in previous cases, the use of profanity is clearly prohibited by the State Department's policy, and it is appropriate for employees to be disciplined for such violations. *See Parrish*, *supra; see also Trembly v. Preston County Bd. of Educ.*, Docket No. 00-39-355 (Mar. 30, 2001) (*rev'd* Cir. Ct. of Kanawha County, *County Bd. of Educ. v. Trembly,* Civil Action #01-AA-43, Nov. 1, 2002). (See footnote 2)

While the parties to this grievance put forth a substantial amount of evidence regarding whether or not students were present when Grievant's statement was made, the fact remains that it was made in an area where students could have been, and possibly were, within earshot. Moreover, it is undisputed that Grievant had been warned against similar conduct in the past and was aware of the code of conduct's provisions. Therefore, the undersigned concludes that Grievant's profane language constituted insubordination under these circumstances. Similarly, the issue of whether or not Ms. Wells was offended or upset by Grievant's statement has no relevance, because profanity in the school setting is prohibited conduct for school employees, regardless of its impact. *See Trembly*, *supra*.

Grievant has also contended that her “private” conversation with another teacher was protected free speech for which she could not be disciplined. However, in her post- hearing arguments, no explanation of this assertion has been provided nor any legal argument to support it. Nevertheless, the undersigned finds no basis for upholding any right of a school employee to use profanity in a school setting with other teaching professionals and/or in areas where students could hear the language.

Generally, "public employees are to be protected from firings, demotions and other adverse employment consequences resulting from the exercise of their free speech rights." *Orr v. Crowder*, 173 W. Va. 335, 315 S.E.2d 593 (1983)(*citing Pickering v. Bd. of Educ*., 391 U.S. 563 (1968)). However, this right is not absolute, and an employer's "interest in the efficient and orderly operation of its affairs must be balanced with the public employees' right to free speech . . .". *Orr,* 315 S.E.2d at 601. Three threshold issueswere identified in *Pickering* when an employee asserts a free speech violation. First, for this speech to be protected it "must be made with regard to a matter of public concern." Second, statements made "'with the knowledge [that they]. . . were false or with reckless disregard to whether [they were]. . . false or not' are not protected." *Orr* at 602 (*citing Pickering* at 569). Third, statements "about persons with whom [the speaker has] close personal contact which

would disrupt 'discipline. . . or harmony among co-workers' or destroy 'personal loyalty and confidence' may not be protected." *Id.* The undersigned concludes that Grievant's statement did not address a matter of public concern, was arguably made without regard to its truth or falsity, and could certainly be described as disruptive to harmony in the workplace and specifically with regard to her relationship with the students.

Grievant also argues that, because the superintendent decided at the conclusion of the Board hearing to withdraw the recommendation for a suspension, her due process rights were violated. 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). In the instant case, Grievant was reprimanded, and no deprivation of wages, benefits, or uninterrupted employment has occurred. Therefore, Grievant has failed to establish any due processviolation occurred when the superintendent declined to pursue a suspension, after having heard evidence which he evidently believed only warranted a reprimand.

Grievant's conduct clearly constituted insubordination, in light of the previous warning by her supervisor that she was not to use profanity in the workplace and the standards of conduct as stated in Respondent's Code of Conduct and state policy. A reprimand for her behavior was not unreasonable under the circumstances, and she has failed to establish that the reprimand should be removed from her personnel record.

The following conclusions of law are appropriate in this matter.

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. “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)." *Graham v. Putnam County Bd. of Educ.*, Docket No. 99-40-206 (Sep. 30, 1999).

3. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] anadministrative superior." *Butts v. Higher Educ. Interim Governing Bd.*, 569 S.E.2d 456 (W. Va. 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).

4. Grievant's use of profanity in a school setting, after having been warned previously against such conduct, constituted insubordination.

5. "[P]ublic employees are to be protected from firings, demotions and other adverse employment consequences resulting from the exercise of their free speech rights." *Orr v. Crowder*, 173 W. Va. 335, 315 S.E.2d 593 (W. Va. 1983)(*citing Pickering v. Bd. of Educ*., 391 U.S. 563 (1968)). However, this right is not absolute, and an employer's "interest in the efficient and orderly operation of its affairs must be balanced with the public employees' right to free speech . . .". *Orr* at 601.

6. Grievant has failed to establish that her use of profanity was protected speech.

7. "[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).

8. Grievant was reprimanded for her behavior, and no property interest was implicated; she has failed to establish any due process violation under these circumstances. Accordingly, this grievance is **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 (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 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: May 28, 2008

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DENISE M. SPATAFORE

Acting Chief 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, which continue to control the proceedings in this case.

Footnote: 2

Also of note is the fact that, while the Grievance Board had mitigated the suspension in that case to a written reprimand, because the employee's profane language was not directed toward a student or spoken in a threatening manner, the Circuit Court determined that any use of such language was prohibited by the Code of Conduct, and thesuspension was reinstated.