WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

BRUCE MARTIN

Grievant,

v. **Docket No. 2008-0197-PleED**

PLEASANTS COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Bruce Martin, filed this grievance against Respondent Pleasants County Board of Education directly to level three, as is permitted by *W. Va. Code* § 18A-2-8(c), on or about August 1, 2007, after he was suspended for ten consecutive days without pay. Grievant does not deny any of the facts forming the basis for the suspension, but contends that his due process rights were violated. For relief, Grievant seeks a reduction of the suspension from ten days to five days, and the payment of lost wages for five days.

A Level III hearing was convened in the West Virginia Public Employees Grievance Board's Charleston office on November 9, 2007. Grievant was represented by Owens Brown of West Virginia Education Association, and Respondent was represented by Rebecca Tinder of Bowles Rice McDavid Graff & Love LLP. This case became mature

for decision on December 10, 2007, the deadline for submission of the parties' proposed findings of fact and conclusions of law.

Synopsis

During the 2006-2007 school year, Grievant, Principal of a Pleasants County High School, neglected to conduct the mandatory number of fire drills and to properly prepare and submit associated documentation. During a meeting with the County Superintendentregarding this and related issues, Grievant acknowledged his non-compliance, and the Superintendent indicated it would be his recommendation that Grievant be suspended for five days without pay. This meeting was followed-up with an exchange of written correspondences. Several aspects of the situation were reiterated in writing, including information regarding the scheduled School Board meeting, and the opportunity to appear before the Board in person and/or by a representative to respond to the allegations, and recommendation by the Superintendent. Grievant declined the opportunity to appear before School Board. The Superintendent provided his recommendation of a five day suspension to the School Board, but the Board rejected that recommendation and unanimously approved a motion suspending Grievant for ten days.

Grievant contends that his due process rights were violated as he was not advised that the School Board would be conducting a hearing on the Superintendent's recommendation, and as a result, his suspension should be shortened to the five days recommended by the Superintendent.

Aware that the School Board was the decision making authority, Grievant was provided an opportunity to appear before the School Board, in person and/or by a representative to respond to the allegations and recommendation by the Superintendent. Grievant chose not to appear at the Board meeting, Grievant's due process rights were

not violated.

Grievance DENIED.

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

Findings of Fact

1 1. Grievant is employed as Principal of St. Marys High School by the Pleasants County Board of Education ("School Board").

2 2. Dr. Joseph Super, Superintendent of Pleasants County Schools, met with Grievant on July 3, 2007, in the presence of Assistant Superintendent Donna Barksdale, to discuss allegations that Grievant had failed to conduct the required number of fire drills and timely complete related paperwork for the 2006/2007 school term at St. Mary's High School.

3 3. Grievant was provided an opportunity to respond to the allegations during the meeting with the Superintendent on July 3, 2007, and Grievant availed himself of this opportunity.

4 4. At the July 3, 2007, conference, the Superintendent advised Grievant that his investigation revealed not only a failure to conduct the mandatory ten fire drills, but also a failure to display and submit the fire drill reports required by the State Fire Marshal. Further, Grievant had previously received a letter of reprimand dated April 10, 2007, for failure to follow proper procedures and timely attend to details in administrative matters.

5 5. The April 10, 2007, letter of reprimand warned Grievant that in the event that there was not improvement in his attention to proper procedure and timely execution of administrative matters serious consequences would follow.

6 6. Grievant admitted, both during the meeting and during the Level Three hearing, that he had failed to conduct the mandatory ten fire drills to be scheduled at

random during different hours of the day, as required by the State Fire Marshal.

7 7. At the July 3, 2007, meeting, the Superintendent advised Grievant that he would recommend to the School Board that Grievant be suspended for five consecutive work days.

8 8. The Superintendent and Grievant consulted their respective calendars to determine when, if approved, the suspension could be imposed at a time which would be least disruptive.

9 9. Grievant inquired of the Superintendent regarding the potential actions of the School Board. The Superintendent informed Grievant that the School Board could accept or reject the recommendation, that he (Superintendent Super) would only be making a recommendation. Assistant Superintendent Barksdale corroborated that this information was given to Grievant at that time.

10 10. A July 6, 2007, letter (Exhibit H) was sent by the Superintendent to Grievant confirming the meeting and several aspects of the conversation they had on July 3, 2007. Grievant does not dispute the accuracy of this document.

11 11. Specifically, the July 6, 2007 letter stated in relevant part that;

> As a result of the foregoing and under the provisions of West Virginia Code §18A-2-7, I am recommending to the Pleasants County Board of Education that you be suspended without pay for five (5) consecutive work days, beginning July 30, 2007 and continue through and including August 3, 2007.
>
> . . .
>
> I will present this matter to the Pleasants County Board of Education at the Board Meeting Room, 1009 Maple Street, St. Marys, West Virginia on the 27th day of July 2007, at 9:00 a.m. As I previously indicated in our meeting, you may also wish to contact your association representative. If you and/or your representative would like to appear at the Board meeting and be heard, please deliver written notice of the same to me on or before the 17th day of July, 2007, by 12 noon.
>
> . . .

> If the Board accepts my recommendation, you will, within two days thereafter, receive notice of the Board's action. Pursuant to § 18A-3-6 of the West Virginia Code, I will be forwarding any and all information related to the findings of the investigation to West Virginia State Superintendent of Schools.

Respondent's Exhibit H.

12 12. In response to the letter noticing the date that the School Board would be considering the Superintendent's recommended disciplinary action, Grievant wrote a letter dated July 13, 2007 (Exhibit I) to the Superintendent advising him that Grievant would not be at the Board meeting on July 27, 2007. Grievant made no mention of whether he intended to send a representative.

13 13. On July 27, 2007, a School Board meeting was called to order, and a motion was approved permitting the Board to conduct a personnel hearing in closed session. Thereafter, the Superintendent presented the evidence supporting his recommendation of a five-day suspension by calling and cross-examining witnesses, and testifying before the School Board.

14 14. The Superintendent presented the matter to the School Board in the presence of the Prosecuting Attorney, who was available to provide advice and guidance to the Board, but did not present the case.

15 15. Neither Grievant nor a designated representative appeared on behalf of Grievant before the School Board on July 27, 2007.

16 16. Grievant does not dispute the factual basis for the underlying disciplinary action (such facts are not in dispute). Nor does Grievant allege the information which was presented to the School Board on July 27, 2007, was presented inaccurately. 17 17. The Superintendent provided his recommendation of a five-day suspension for Grievant to the School Board, but the Board rejected that recommendation and unanimously approved a motion suspending Grievant for ten days.

18 18. Notice of the School Board's action was sent to Grievant by letter dated July 27, 2007, (Exhibit J) and it was from this decision, Grievant appealed to the West Virginia Public Employees Grievance Board.

Discussion

W. Va. Code § 18A-2-8 identifies the types of conduct that can result in disciplinary action and includes insubordination and willful neglect of duty. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 156-1-3 (2007); *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 thata 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).

In this case, Grievant does not dispute the underlying facts giving rise to the disciplinary action, nor that some form of disciplinary action was appropriate. As a result, Respondent has met its burden.

However, Grievant does argue that his due process rights were violated when he was not advised that the School Board would be conducting a hearing on the

Superintendent's recommendation. And as a result, Grievant avers his suspension should be shortened to the five days as recommended by the Superintendent, and he be awarded payment for five days lost wages.

In school disciplinary matters, only the School Board has the authority to make the final determination as to the suspension and its length, and it does so at a meeting. *W. Va. Code* § 18A-2-8 authorizes a board of education to:

> suspend or dismiss any person in its employment at any time for: insubordination, . willful neglect of duty, . . . The charges shall be stated in writing served upon the employee within two days of presentation of said charges to the board. The affected employee shall be given an opportunity within five days of receiving the written notice, to request, in writing, a level three hearing and appeals pursuant to provisions of article two [§ 6C-2-1 *et seq*.], chapter six-c of this code.

The July 6, 2007 letter to Grievant clarified that the Superintendent was presenting the matter to the School Board to act. Further, the letter advised Grievant that the Superintendent's recommendation for suspension was being made in accordance with the provisions of *W. Va. Code* § 18A-2-7.

Grievant was clearly notified of the date that the School Board would be considering the Superintendent's recommendation, and the Board would determine the ultimatedisciplinary action. Grievant's assertion that his July 13, 2007 response letter, Exhibit I, was only meant to confirm he was not going to contest the five day suspension is defeated by the language of the document, “I will not be at the Board meeting on July 27th 2007. Second this letter serves as the correspondence requested by you of such notice.”

Grievant was provided an opportunity to appear before the Board, in person and/or by a representative, and respond to the allegations and recommendation by the Superintendent. Grievant chose not to avail himself of this opportunity, which was certainly his right, but his failure to attend the meeting does not invalidate the procedure.

Grievant was never guaranteed a specific disciplinary sanction, either in writing or oral.

Grievant was not denied his constitutional right to procedural due process as it relates to notice of the charges for his suspension or an opportunity to be heard. Grievant was provided written notice of the allegations and advised of an the opportunity to respond before the Board of Education. 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)); *Also See Bd. of Educ. v. Wirt,* 192 W. Va. 568, 453 S.E.2d 402 (1994); *Bell v. Mingo County Bd. of Educ.*, Docket No. 97-29-172 (Mar. 10, 1998). The fact that Grievant's punishment for admitted malfeasance is more severe than he had envisioned, does not provide grounds to overturn the disciplinary action. Grievant has not established a violation of due process rights.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. 156 C.S.R. 1 § 3 (2007); *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. In that Grievant admitted to the underlying disciplinary charges, the charges have been established by a preponderance of the evidence.

3.. The West Virginia Supreme Court of Appeals in *Board of Education of the County of Mercer v. Wirt*, 192 W.Va. 569, 453 S.E.2d 402 (1994), determined the due process required to terminate a continuing contract of employment. A tenured employee is entitled to a pre-termination hearing, not a full adversarial hearing, and an opportunity to respond to the charges. An employee is also entitled to written notice of the charges,

and an explanation of the evidence. *Id*. at Syl. Pt. 3; *W. Va. Code* § 18A-2-8.

4. 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)). A pre-suspension hearing, explanation of the evidence, and an opportunity to respond is all the due process that was required to be provided. *Id*. at Syl. Pt. 7*; See W. Va. Code* § 18A-2-8.

5. Grievant received the due process to which he is entitled in the context of a suspension or for one or more of the causes specified in W. Va. Code § 18A-2-8. See *Bd. of Educ. v. Wirt,* 192 W. Va. 568, 453 S.E.2d 402 (1994); *Bell v. Mingo County Bd. of Educ.*, Docket No. 97-29-172 (Mar. 10, 1998). 6. In school disciplinary matters, only the Board has the authority to make the final determination as to the suspension and its length, and it does so at a meeting. Grievant was not denied his constitutional right to procedural due process as it relates to notice of the charges for his suspension and an opportunity to respond. Grievant received the due process protection required by law.

7. Where a grievant is alleging that the employer committed a procedural error in regard to a particular disciplinary action, in addition to demonstrating that the error actually occurred, it must also be shown that the error influenced the outcome. Otherwise, if the same result would have inevitably been reached, the procedural violation will be treated as "harmless error." *Bradley v. Cabell County Bd. of Educ.*, Docket No. 99-06-150 (Sept. 9, 1999); *Dadisman v. W. Va. Div. of Rehabilitation Serv.*, Docket Nos. 98-RS- 023/040 (Mar. 25, 1999). *See generally, Parker v. Defense Logistics Agency*, 1 M.S.P.B. 489 (1980).

8. Given that Grievant had received prior warning "in the event there was not improvement in his attention to proper procedure and timely execution of administrative

matters, serious consequences would follow," it is not clear the School Board's disciplinary actions would have been significantly different, in the event that Grievant had appeared to explain his failure to properly administer duly appointed duties.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the "circuit court of the county in which the grievance occurred." Any such appeal must be filed within thirty (30) days of receipt of this decision. *See W. Va. Code* § 18-29-7 (repealed) (but see Executive Order No. 2-07, May 8, 2007). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to suchappeal, 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.

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Landon R. Brown

Administrative Law Judge

Date: January 31, 2008