THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

TOM BLOOM,
Grievant,

v. **DOCKET NO. 2010-0551-MonED**

MONONGALIA COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

This grievance was filed by Grievant, Tom Bloom, on November 2, 2009, against his employer, the Monongalia County Board of Education ("MBOE"). The statement of grievance reads:

> The letter of reprimand issued by Assistant Principal Charlene Brown is without merit, discriminatory in nature, does not reflect progressive discipline, is based on hearsay, is untrue, conflicts with county state code guidelines and is arbitrary and capricious. Illegal mandates from Assistant Principal Brown unnecessarily breach counselor confidentiality and will have an adverse affect on the performance of the counselor's job responsibilities.

The relief sought by Grievant is:

> The letter of reprimand will be rescinded and removed from all files. Differences in treatment of the Grievant by Mrs. Brown will cease. Any and all mandates from the administration that unnecessarily breach counselor confidentiality and adversely affect the ability of the grievant to satisfactorily perform his job assignment will cease. Any other relief that the Administrative Law Judge deems appropriate.

A conference was held at level one of the grievance procedure on November 12, 2009, and a level one decision denying the grievance was issued on December 3, 2009. Grievant appealed to level two on December 8, 2009, and a mediation session was held on January 29, 2010. Grievant appealed to level three on February 17, 2010.

Two days of hearing were held at level three before the undersigned Administrative Law Judge, on May 5 and July 30, 2010, in the Grievance Board's Westover office. Grievant was represented by Frank Caputo, Staff Representative, AFT-West Virginia/AFL-CIO, and Respondent was represented by Jennifer S. Caradine, Esquire, Dinsmore & Shohl, LLP. This matter became mature for decision upon receipt of the last of the parties' Proposed Findings of Fact and Conclusions of Law on August 31, 2010.

Synopsis

Grievant, a guidance counselor, was given a written reprimand after he failed to turn his daily counseling log into his supervisor, after being directed by his supervisor, in writing, to do so. Grievant instead turned in a summary form which Grievant's supervisor had told him was not acceptable. Although Grievant offered various excuses for his behavior, none of them excused his insubordination.

The following Findings of Fact are made based upon the record developed at level three.

Findings of Fact

1. Grievant has been employed by the Monongalia County Board of Education ("MBOE") as a Guidance Counselor at University High School ("UHS") for 32 years.

2. In March of 2009, the Office of Performance Audits of the State Department of Education ("OEPA") performed an audit of UHS. The audit report concluded with regard to the counseling services provided at UHS, that they needed improvement, with students reporting that the department was not effective. Specifically, the report found that "all guidance counselors were not meeting with students at least 75 percent of the time.

Counseling logs were either incomplete or nonexistent. One counselor indicated that there was no contact with the middle schools to properly place students in high school classes." Respondent's Exhibit 14.

3. As a result of the OEPA report, UHS set up an Improvement Team for the purpose of developing methods to improve performance in all deficient areas. The Improvement Team recommended, among other things, that "[c]ounseling logs should be submitted on a weekly basis to the administration." The Improvement Team listed several "Action Steps" to be undertaken with regard to counseling services. The first action step reads, "[g]uidance and administration will develop a daily log of counseling activities to be reviewed by the administration on a weekly basis." The individuals listed as responsible for this Action Step were Charlene Brown, Assistant Principal at UHS, and Tonia Brennen, a Guidance Counselor at UHS. Respondent's Exhibit 3.

4. Ms. Brown was appointed by the MBOE Superintendent of Schools to monitor the counseling services provided at UHS during the 2009-2010 school year, in an effort to determine what services were being provided and to improve counseling services. She was charged with supervising the counseling department and making sure the department was accomplishing the established goals for the students.

5. The UHS counselors met in August 2009, to discuss various issues, including counselor logs. The UHS counselors agreed that Ms. Brennen would develop a daily counselor log for their use and submission to Ms. Brown. After the meeting, Ms. Brennen completed this task, and the counselors began using this log ("the UHS log") to record their daily activities, and submitting it to Ms. Brown on a weekly basis as required by Ms. Brown.

6. The UHS log consists of two pages for each day, with a time slot for every half hour of the day which provides space to record the services provided. At the top of the UHS log are codes which can be used by the counselors to identify the activity, such as phone calls, scheduling, testing, and other activities.

7. At the beginning of the 2009-2010 school year Grievant completed and submitted the UHS log to Ms. Brown. In October 2009, he also began completing a computerized form developed by an individual at the State Department of Education ("the state log"). Ms. Brown reviewed the information on the state log and determined that it was not sufficient for her purposes, because it did not provide the detail she needed to supervise the counselors and to assure that the counseling department was accomplishing its goals for the students. The state log only summarized the amount of time the counselor spent each day providing different types of services and performing other duties. The state log did not have space for the counselor to list to whom he was providing the services, or any notes about the services provided, nor did it provide the hourly detail of the services.

8. Ms. Brown told Grievant that the state log did not meet her requirements. Nonetheless, Grievant began submitting only the state log he completed to Ms. Brown each week.

9. On October 6, 2009, Ms. Brown sent Grievant an email telling him that the state log he had submitted did not provide her with the information she needed, and telling him that she needed "to see your detailed log of activity each week." Respondent's Exhibit 11. Ms. Brown also verbally advised Grievant of this.

10. Grievant continued to submit the state log to Ms. Brown, and did not submit his daily log he was keeping, which contained the detail of the services being provided.

Grievant told Ms. Brown she could come to his office and look at his daily log. Grievant submitted the state log rather than his daily logs to Ms. Brown for a two week period in October 2009.

11. Grievant received a written reprimand from Ms. Brown on October 16, 2009. The reprimand states that Ms. Brown had directed Grievant "to use the daily counselor's log that we, the counselors and assistant principal, agreed upon at the beginning of the school year. Last week, you turned in the state form to me. I called you into my office and asked you to submit the correct log. You told me you would not do that. . . . Again today, you have turned in the state form even though I asked you for a detailed daily log. Your refusal to comply with my request is insubordinate."

12. Grievant did not submit his detailed daily logs to Ms. Brown because she had written notes on his daily log which he found to be objectionable, such as, "that's impossible" and "that's untrue," he had reason to believe that she had discussed the detail of the counseling services he was providing with teachers in the building, which he found to be inappropriate, a breach of confidentiality, and not part of the purpose of submitting the logs to her, and she had given the daily logs to a student aide on one occasion and asked him to return them to the Guidance Counselors, which he found to be a breach of confidentiality. On Grievant's daily log for October 29, 2009, submitted after the reprimand, Grievant had written that he had taken a student to the hospital at 9:30 a.m. Ms. Brown wrote beside this entry, "[d]id you ask permission to go or inform office in any way?"

13. Steve Brannon, a Guidance Counselor at UHS, asked Ms. Brown if he could submit his calendar to her each week, rather than the log developed by the counselors. Mr. Brannon records on his calendar the time he meets or has telephone conversations

with students or parents, the name of the parent or student, and the topic of conversation. This was the information Ms. Brown needed, so she authorized Mr. Brannon to submit his calendar to her in lieu of a log.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges against the employee by a preponderance of the evidence. *Nicholson v. Logan County Bd. of Educ.*, Docket No. 95-23-129 (Oct. 18, 1995); *Landy v. Raleigh County Bd. of Educ.*, Docket No. 89-41-232 (Dec. 14, 1989). A preponderance of the evidence is 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 proven is more probable than not. *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 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 WEST VIRGINIA CODE § 18A-2-8, 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). WEST VIRGINIA CODE § 18A-2-8 provides that "[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." " 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)." *Showalter v. Marshall County Bd. of Educ.*, Docket No. 07-25-165 (May 28, 2008).

Insubordination has been defined as the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *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). In order to establish 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 v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). *See Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *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).

"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). As a rule, few defenses are available to the employee who disobeys a lawful directive; the prudent employee complies first and expresses his disagreement later. *See Day v. Morgan Co. Health Dep't*, Docket No. 07-CHD-121 (Dec. 14, 2007). "An employee's belief that management's decisions are incorrect or the result of incompetence, absent a threat to the employee's health and

safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. *Vickers v. Bd. of Directors/W. Va. State College,* Docket No. 97-BOD-122B (Aug. 7, 1998). *See Parker v. W. Va. Dep't of Health and Human Resources*, Docket No. 97-HHR-042B (Sept. 30, 1997)." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003).

Ms. Brown was Grievant's supervisor, she had the authority to give Grievant a directive, she gave Grievant a directive and he failed to comply with the directive. The only question is whether the directive was reasonable and valid. Despite Grievant's multiple excuses for his failure to comply with the directive, it was a reasonable directive. UHS's counseling services needed improvement, and Ms. Brown was charged with finding out what the counselors were doing on a daily basis and correcting any deficiencies. In order to do this, she needed the counselors to report the detail of their daily activities to her. While it does seem that Ms. Brown was using the daily logs to critique Grievant in ways which went beyond the intended purpose of her review, and that she did not take the confidential nature of the daily logs to heart, this did not excuse Grievant from complying with Ms. Brown's directive. Rather than defying Ms. Brown, the proper course would have been to discuss the matter either with Ms. Brown or her supervisor, and then pursue whatever additional avenues seemed appropriate, which Grievant did not do until after he received the written repriman. Grievant's concerns did not excuse him from following Ms. Brown's directive.

Grievant argued that Ms. Brown could not require him to submit a particular form of daily log, because MBOE Policy 8-16 states that, "[i]ndividual counselors may opt to develop/use another log format of his/her choosing." This Policy also provides that this log

is “for the counselor’s personal reflection as well as serving as documentation to the supervisor and/or monitoring team in terms of how a counselor spends his/her time on the job.” This Policy is not applicable to the situation at hand. The fact is that, as Grievant readily pointed out, Grievant was keeping a daily log in the form of the UHS log, which provided the detail of his activities, and Grievant did not voice any objection to using the UHS log. He also chose to summarize his time on the state log. What Grievant refused to do was submit the UHS log he was maintaining to Ms. Brown. It will be noted at this point that Grievant’s argument that he was not insubordinate because he did, in fact, maintain the UHS daily log is without merit, as it is clear that the reprimand was issued because Grievant refused to *submit* this log to Ms. Brown.

It further appears that Grievant is arguing that he could not be required to submit his daily logs to Ms. Brown on a weekly basis, because Policy 8-16 states that twice a year the counselor will summarize his month’s work and discuss it with his supervisor. First, this argument does not seem to be relevant here because there is no indication that Grievant ever declined to submit a log to his supervisor on a weekly basis; rather, it was the form of the log submitted which he found objectionable. Second, the undersigned does not find anything in this Policy which precludes an administrator from requiring reports more frequently than twice a year. To the contrary, the Policy states that the daily log will serve “as documentation to the supervisor and/or a monitoring team in terms of how a counselor spends his/her time on the job. . . . At any time, if a question arises concerning a counselor’s time use, the counselor must be prepared to use this log as a basis for responding.” Clearly, the OEPA report raised serious questions concerning how the UHS counselors were spending their time, and the MBOE administration had the right to

examine this issue at any time throughout the year, or continuously throughout the year under these circumstances. Grievant did not demonstrate that Ms. Brown's directive was not valid. Respondent proved that Grievant was insubordinate.

Grievant also argued he was treated differently from Mr. Brannon, because Mr. Brannon was allowed to use his own daily log, while Grievant was not. This has nothing to do with the issue at hand. The issue presented in this grievance is whether the written reprimand was warranted. Grievant was reprimanded for not following the directive of his supervisor. Mr. Brannon did not defy his supervisor. Mr. Brannon asked for permission to submit his calendar in lieu of the daily log developed for reporting purposes, Ms. Brown looked at the calendar and it provided her with the information she needed, so she approved his request. The fact that Ms. Brown did not give Grievant approval to submit a different daily log may be argued as discrimination in treatment because one person was given approval while the other was not, but it is not discrimination in discipline, and Grievant did not grieve Ms. Brown's decision not to grant him a waiver of the daily log requirement. Further, while it appears that Ms. Brown may not have interacted with Grievant in an appropriate manner at times,[1] the record reflects that she had a valid reason for not approving Grievant's request to submit his own log. The daily log Grievant asked Ms. Brown if he could submit was the state log, which did not provide Ms. Brown with the

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[1] For example, when Grievant took a student who was having a severe allergic reaction to the hospital at the mother's request, in what appeared to be an emergency situation, Ms. Brown confronted him upon his return in the presence of the Guidance Office secretary, telling him that he would get permission to leave the building the next time or he would be written up. She also confronted this same secretary about whether Grievant was showing her personal pictures from his trip to Amsterdam, suggesting there was something unseemly in the pictures, and then when she told Ms. Brown the pictures were of his new rescue dog, Ms. Brown commented that "they probably make a good pair."

information she needed, and it was for this reason that Grievant's request was not approved; thus, he was not treated differently than Ms. Brannon. After Ms. Brown denied Grievant's request, he submitted the state log anyway. Respondent demonstrated that Grievant was insubordinate, warranting a written reprimand.

Finally, Grievant argued that his due process rights were somehow violated because Ms. Brown did not afford him the right to "mediate his concerns," citing to Policy 8-16. While the undersigned is having some difficulty seeing this as a situation where the concept of due process is applicable, this need not be addressed, as Grievant simply is misreading Policy 8-16. The section being relied upon by Grievant states, "[i]f the counselor and principal are unable to reach consensus concerning *findings and implications for change,* the counselor and the principal *may* request to conference with the Coordinator of Guidance in an effort to resolve any point of disagreement or confusion." (Emphasis added.) First, this is not a situation where the findings and implications for change were at issue, and second, and most importantly, this provision clearly does not confer any right to a conference, nor does it require that the parties request one.

Grievant did demonstrate that Ms. Brown placed the UHS logs in the hands of a student aide to return to the counselors. These logs contain the personal notes of the counselors and the names of students with whom they have met. Whether this student seemed trustworthy or not, common sense dictates that Ms. Brown should not have placed these personal counselor logs in the hands of this student. However, neither party pointed to any statute, rule, regulation, or policy which would preclude this type of action. The undersigned would suggest that if Ms. Brown is going to take possession of the counselor's daily logs, that she take those steps necessary to assure that they remain confidential.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. *Ramey v. W. Va. Dep't of Health*, Docket No. H-88-005 (Dec. 6, 1988).

2. WEST VIRGINIA CODE § 18A-2-8 provides that "[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." "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)." *Showalter v. Marshall County Bd. of Educ.*, Docket No. 07-25-165 (May 28, 2008).

3. The authority of a county board of education to discipline an employee must be based upon one or more of the causes listed in WEST VIRGINIA CODE § 18A-2-8, 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).

4. Insubordination has been defined as the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *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). In order to establish 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 v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). *See Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *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).

5. Respondent demonstrated that Grievant was insubordinate when he intentionally refused a reasonable and valid directive given to him in writing by his supervisor.

6. In order to establish a discrimination claim asserted under the grievance statutes, an employee must prove:

> (a) that he or she has been treated differently from one or more similarly-situated employee(s);
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> (b) that the different treatment is not related to the actual job responsibilities of the employees; and,
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> (c) that the difference in treatment was not agreed to in writing by the employee.

Frymier v. Higher Education Policy Comm'n, 655 S.E.2d 52, 221 W. Va. 306 (2007); *Harris v. Dep't of Transp.*, Docket No. 2008-1594-DOT (Dec. 15, 2008).

7. Grievant did not demonstrate that the written reprimand constituted discrimination in treatment.

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. *See* W. VA. CODE § 6C-2-5. 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

BRENDA L. GOULD
Administrative Law Judge

Date: October 19, 2010