THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

NATHAN G. LEHMAN,
Grievant,

v. **Docket No. 2011-1046-MarED**

MARSHALL COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Nathan Lehman, Grievant, filed this grievance against his employer, Marshall County Board of Education, on January 26, 2011. Grievant requested that a level three hearing be held to address his suspension. Grievant states that he is "appealing his 1 day suspension. He contends that he did not violate any provisions of WV Code 18A-2-8. The Grievant also contends that his rights to due process were violated." Grievant seeks "his one day of lost wages back and the suspension expunged from his record."

The level three hearing was conducted before the undersigned Administrative Law Judge on July 7, 2011, at the Marshall County Board of Education office by agreement of the parties. Grievant appeared in person and with his representative, Owens L. Brown, West Virginia Education Association. Respondent appeared by its attorney, Richard S. Boothby, Bowles Rice McDavid Graff & Love LLP. This matter became mature for consideration upon receipt of the parties' proposed findings of fact and conclusions of law on July 25, 2011.

Synopsis

Grievant was teaching a class on the topic of human growth and development to a boys only class at his elementary school. At the conclusion of the class, a student asked to go to the restroom. Grievant then made a statement to the student asking if he was going to check for pubic hair. The student was naturally embarrassed and later complained to his mother. After an investigation, Grievant was suspended for one day without pay for violation of the Employee Code of Conduct. Respondent proved its charge of insubordination by a preponderance of the evidence. Grievant's due process violation claim was not established.

The following findings of fact are based upon the record submitted at level three and further developed at level three.

Findings of Fact

1. Grievant is employed by the Marshall County Board of Education as a fourth grade teacher at Central Elementary School.

2. On December 16, 2010, Grievant led a fifth grade boys' session on human growth and development.

3. S.P. was a fifth grade student who attended the human growth and development session taught by the Grievant.[1]

4. The human growth and development session made use of videos that included a short discussion on pubic hair.

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[1]The undersigned is going to use initials for the student in order to protect the juvenile's privacy.

5. At the end of the December 16, 2010, class, S.P. raised his hand and asked Grievant if he could go to the restroom.

6. In response to S.P.'s request, Grievant responded "Why? Are you going to check for hair?"

7. This response by Grievant resulted in laughter from the boys in the classroom. S.P. was embarrassed and humiliated.

8. Karen Klamut, principal of Central Elementary, conducted an investigation into allegations of inappropriate conduct made against Grievant.

9. Wayne Simms, assistant superintendent, served in the place of Superintendent Renzella in overseeing the disciplinary matter due to a family conflict.

10. Following a meeting with Grievant and after gathering statements from students that witnessed the event, Mr. Simms notified Grievant that he would recommend a one-day suspension.

11. The letter noted that "after teaching a lesson to a group of fifth grade boys on human growth and development of young boys as they go through puberty, a student asked if he could go to the restroom. You acknowledged him by asking if he was going to the bathroom to check to see if he had any hair - a reference to pubic hair in connection with the subject of the lesson. The response of the laughter from the class embarrassed and humiliated the student . . . I note that you have two previous letters of reprimand in your file concerning inappropriate comments and/or language directed towards [sic] students and your immediate supervisor. For that reason, and taking into account all other relevant factors, I find no reason to mitigate the discipline for the above-referenced incident."

12. The Marshall County Board of Education approved Mr. Simm's recommendation that Grievant receive a one-day suspension for making the remark to S.P.

Discussion

As this grievance involves a disciplinary matter, the Respondent bears the burden of establishing the charges against the Grievant 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 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 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 a reasonable person would accept as sufficient that a contested fact is more likely true than not." *Leichliter v. W. Va. Dep't of Health & 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*.

W. VA. CODE § 18A-2-7 provides that "[t]he superintendent, subject only to approval of the board, shall have authority to assign, transfer, promote, demote or suspend school personnel and to recommend their dismissal pursuant to provisions of this chapter." W. VA. CODE § 18A-2-8 goes on to state, in part, that:

> (a) 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 or a plea of nolo contendere to a felony charge.

Respondent contends that Grievant's behavior was in direct violation of the Employee Code of Conduct. Marshall County's policy on the matter makes clear that all Marshall County school employees shall:

> Exhibit professional behavior by showing positive examples of preparedness, communication, fairness, punctuality, attendance, language, and appearance.
>
> Contribute, cooperate, and participate in creating an environment in which all employees/students are accepted and are provided the opportunity to achieve at the highest levels in all areas of development.
>
> Maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, and/or violence, and free from bias and discrimination.
>
> Create a culture of caring through understanding and support.
>
> Immediately intervene in any code of conduct violation, that has a negative impact on students, in a manner that preserves confidentiality and the dignity of each person.
>
> Demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior.
>
> Comply with all Federal and West Virginia laws, policies, regulations and procedures.

Respondent maintains in its proposals that Grievant was insubordinate when he failed to follow the Employee Code of Conduct.[2] Insubordination "includes, and perhaps

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[2]An employer can establish insubordination by demonstrating a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Conner v. Barbour County*

requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *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*.

The undersigned finds that Respondent has proven by a preponderance of the evidence this charge of insubordination against Grievant. All the elements of insubordination are present in this case. Grievant's inappropriate question was not in keeping with the Employee Code of Conduct. Grievant's question to this student in front of his peers during a human growth and development class did not create a culture of caring through understanding and support. In addition, the behavior did not exhibit professional behavior by showing positive examples of appropriate language. Grievant's mistimed teasing was had at the expense of a young man for whom he should have been providing an example of mature adult behavior. Grievant's history of using inappropriate language would clearly indicate that this was a knowing and wilful refusal to comply with the policy on conduct. All in all, this episode represents an unfortunate happening at the elementary school. This is especially true when viewing Grievant's proposals in which he

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Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995).

calls in question the issue of whether the student suffered any embarrassment. In any event, hope springs eternal that this behavior will not be repeated.

Finally, Grievant contends his right to due process was violated when the Board of Education asked Mr. Simms and Ms. Fitzsimmons, Personnel Director, to take part in the deliberation of the hearing while the Board was in executive session. The record of this case does not establish that either of these individuals had any involvement in deliberations taking place in executive session. In any event, the Grievance Board has previously ruled that there is nothing in the suspension or dismissal statutes or in relevant case law to suggest that it is improper for a superintendent to go into executive session with the board of education following the presentation of the charges and Grievant's opportunity to respond to them at a predetermination hearing. *Floyd v. Fayette Co. Bd. of Educ.* Docket No. 93-10-247(Nov. 15, 1996).

Grievant also contends that he did not receive due process when appearing before the Marshall County Board of Education because he did not get the opportunity to face his accusers or the witnesses. It is not necessary for a pre-disciplinary 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. *Board of Education v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402 (1994). The record below established that Grievant was provided written notice of the charges, an explanation of the evidence in the case, and an

opportunity to respond to the charge prior to discipline being imposed. No due process violations can be found from this set of facts.[3]

The following conclusions of law support the decision reached.

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 (2008); *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. 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." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002) (*per curiam*).

3. Respondent has proven by a preponderance of the evidence that Grievant was insubordinate when he made the inappropriate comment to his student at the conclusion of the human growth and development class in question. This proven conduct on the part of Grievant was a wilful disobedience to the Employee Code of Conduct.

4. It is not necessary for a pre-disciplinary 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

[3]Respondent did give Grievant the opportunity to cross-examine the students involved in this incident when they were called as witnesses at level three.

decision to discipline the employee. *Board of Education v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402 (1994).

5. The record of this grievance established that Grievant was provided written notice of the charge against him, an explanation of the evidence, and an opportunity to respond to the charge prior to Marshall County Board of Education's decision to impose discipline.

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).

Date: August 9, 2011

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Ronald L. Reece
Administrative Law Judge