ANTHONY ROGLIANO,

Grievant,

v. DOCKET NO. 94-10-164

FAYETTE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Anthony Rogliano, filed this grievance at Level IV following the imposition of a five-day suspension by Respondent, Fayette County Board of Education. A hearing was held at Level IV on August 5, 1994, and post-hearing submissions were received on or about August 29, 1994, at which time this case became mature for decision.

Grievant's suspension was "the result of [your] use of tobacco on school property in violation of Fayette County Board policy A-28 and West Virginia State Board of Education policy 2422.5A." Board Ex. 1. Based on the testimony and evidence presented at Level IV, it is appropriate to make the following findings of fact.

Findings of Fact

1. Grievant is a teacher employed by Respondent and assigned to Mount Hope High School.

2. The West Virginia State Board of Education, pursuant to W. Va. Code § 16-9A-1, et seq., adopted Policy 2422.5A, Tobacco Control, which prohibits the use of tobacco products by any person in any building or other property owned or operated by any county board of education. Policy 2422.5A required that county boards of education adopt a tobacco control policy by January 1, 1992 containing, at a minimum, the restrictions of Policy 2422.5A. Board Ex. 5.

3. Respondent, in accordance with this directive, adopted Policy A-28 on December 16, 1991. That policy provides, in pertinent part, that "[b]oard personnel who violate this policy will be subject to penalties based on county personnel policies." Board Ex. 6.

4. Superintendent R. P. Powell met with all Principals regarding this policy. He told them that a first offense could technically warrant suspension as it does with students, but because he understood the addictive nature of the habit, he felt two warnings would be fair before recommending suspension.

5. On January 7, 1992, Mount Hope High School Principal Raymond Domingues conducted an in-service meeting with the Mount Hope staff regarding Policy A-28 and gave hand-outs of the state and county policies. He advised the staff of the consequences of non-compliance with Policy A-28, specifically that warnings would be issued for the first and second offenses, and after the third offense he would recommend suspension. Principal Domingues advisedthe staff that they could smoke off campus and out of the presence of the students.

6. Grievant was caught smoking a cigarette in the boiler room of Mount Hope High School by Principal Domingues on January 9, 1992, two days after the in-service meeting.

7. Principal Domingues issued a warning letter to Grievant dated January 13, 1992, reminding Grievant that smoking on school property was forbidden under the State's Tobacco Control Policy. Principal Domingues also stated, "[a]s per our meeting Jan. 7 I reminded everyone that Superintendent Powell had said disciplinary action would be taken after the 3rd such incident." Board Ex. 8.

8. On March 26, 1993, Susan Blake, another faculty member at Mount Hope High School assigned to monitor the girls' restrooms for smoking, reported to Principal Domingues that she had seen Grievant smoking a cigarette in his classroom. Board Ex. 9.

9. Principal Domingues issued Grievant a second warning letter as a result of this incident on March 29, 1993, stating, "[B]e reminded this is your second offense. I will recommend disciplinary action on the third." Board Ex. 10. Grievant denied at the Level IV hearing that he was smoking in his classroom, but never questioned or challenged Principal Domingues' second warning at the time of its occurrence. Grievant testified he must have had a piece of chalk in his hand that Ms. Blake mistook for a cigarette.

10. On March 23, 1994, Grievant was again caught smoking in the boiler room by Principal Domingues.

11. By letter of March 24, 1994, Principal Domingues advised Grievant that he was recommending a three-day suspension without pay for Grievant's continued failure to comply with

State Board Policy 2422.5A. Board Ex. 11.

12. Superintendent Powell met with Grievant and his representative and advised Grievant that he would recommend a five-day suspension in light of the fact that he had been previously warned twice not to smoke in the school.

13. Grievant was advised by Superintendent R. P. Powell by letter dated April 11, 1994 that he was suspended without pay for five days as a "result of evidence that you have been insubordinate by violating Fayette County Board of Education policy A-28 and West Virginia Board of Education policy 2422.5A." Grievant was also advised that approval of the suspension would be sought from the Board at its April 19, 1994 meeting at which time Grievant could appear and address the Board. Board Ex. 4.

13. Grievant notified Superintendent Powell on April 13, 1994 that he intended to appear before the Board at its April 19, 1994 meeting. Board Ex. 3.

14. The Board met on April 19, 1994 and, following a closed hearing, voted to uphold the five-day suspension without pay of Grievant for smoking on school property. Board Ex. 2.

15. Superintendent Powell notified Grievant by letter dated April 20, 1994, that the Board had upheld the five-day suspension.
Board Ex. 1.

16. At all times pertinent hereto, Grievant was free to leave the school campus at lunch and smoke and could also smoke before and after school.

Discussion

As in all cases dealing with disciplinary matters, the burden of proof rests with Respondent to prove the charges against Grievant by a preponderance of the evidence. Putnam v. Braxton County Bd. of Educ., Docket No. 04-88-022-4 (May 13, 1988). Based upon the testimony and evidence received at the Level IV hearing, the Respondent has succeeded in meeting its burden. Grievant was suspended for insubordination for repeatedly violating the tobacco control policy. Insubordination is defined as "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989).

State Board of Education Policy 2422.5A and Fayette County Board of Education Policy A-28 comply with the provisions of W. Va. Code § 16-9A-4 and it does not appear that Grievant is

challenging the authority of Respondent to adopt the tobacco control policy. See also, Asbury, et al. v. Fayette County Bd. of Educ., Docket No. 92-10-166 (July 14, 1992). Thus, Respondent and its agent, Principal Domingues, had the authority to implement Policy A-28 and require its employees to obey the directives of that policy. Grievant admits that he violated the tobacco control policy on the first and third occasions, and certainly after the first warning,Grievant became insubordinate when he continued to violate the policy.

Grievant asserts that the policy does not state in sufficient detail exactly what "penalties" would be assessed against an individual caught violating the policy, and thus, he was not given advance warning of the possible or probable consequences of his conduct. While the policy itself does not specify what penalties will be imposed for violation, Principal Domingues met with the staff and communicated to them the directive that two warnings would be given, and a third violation would result in disciplinary action, including suspension.

Grievant testified that he did not attend the in-service meeting on January 7, 1992. Principal Domingues testified that Grievant was in attendance. Whether or not Grievant attended the in-service becomes irrelevant in light of other existing facts.

In Grievant's first letter of warning dated January 13, 1992, Principal Domingues referred to the in-service of January 7, 1992, and that disciplinary action had been discussed at that meeting. Grievant's second warning letter indicated that a third offense would warrant disciplinary action. Grievant had ample opportunity to discuss this matter with Principal Domingues on both of those occasions prior to his third warning letter, or otherwise find out what was discussed at the in-service meeting. Grievant did not avail himself of the opportunities presented to him. Indeed, despite Grievant's denial that he was guilty of the second reported offense, he did not at any time attempt to discuss the matter withPrincipal Domingues. Finally, Grievant testified that he had made a written request to Principal Domingues asking that he be allowed to smoke during his planning period. That request was denied, but it demonstrates that Grievant must have had some knowledge of the smoking policy which would prompt such a request.

Conclusions of Law

1. West Virginia State Board of Education Policy 2422.5A and Fayette County Board of Education Policy A-28 comply with the provisions of W. Va. Code § 16-9A-4.

2. Grievant was given ample opportunity and notice that disciplinary action would be taken against him for further violations of the state and county tobacco control policies.

3. A county board of education may dismiss or suspend any person in its employment at any time for insubordination and upon an appeal of that action to the West Virginia Education and State Employees Grievance Board, must prove the charge by a preponderance of the evidence. Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989).

4. The Grievant's five-day suspension for insubordination for continued violations of the state and county tobacco control policies was not unreasonable given the repeated warnings provided to Grievant and his continued conduct in violation of those policies.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Fayette County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § 18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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MARY JO ALLEN

Administrative Law Judge

Dated: October 25, 1994