ETHEL NICHOLSON, .

.

Grievant, .

.

v. . Docket No. 95-23-129

.

LOGAN COUNTY BOARD OF EDUCATION, .

.

Respondent. .

D E C I S I O N

On March 28, 1995, Ethel Nicholson (Grievant) submitted this grievance directly to Level IV, in accordance with W. Va. Code § 18A-2-8, challenging her three-day suspension without pay by Respondent Logan County Board of Education (LCBE). An evidentiary hearing was held in this Board's office in Charleston, West Virginia, on June 26, 1995. Thereafter, this matter became mature for decision on July 21, 1995, upon receipt of Grievant's post-hearing submission. (See footnote 1)

Grievant is employed by LCBE as a classroom teacher at West Chapmanville Grade School (WCGS). This disciplinary matter concerns events which were alleged to have transpired on February 16, 1995, as set forth in LCBE Superintendent John Myers' letter of March 24, 1995, as follows:

> I have been contacted by your direct supervisor, Mr. T. Elkins, concerning an incident whereby you exhibited extremely unprofessional behavior, and what could be considered an act of harassment toward a student. On February 16, 1995, you made a comment, in front of your students, that another student, C.S. (See footnote 2), had "told a lie" on you. You previously received a written reprimand from Mr. Elkins concerning an incident with this student. Your comments are viewed, by me, as unprofessional and as designed and intended to harass this student. Your comments are in violation of Logan County Board of Education Policy VI.5.1, concerning the performance of your duties. You have failed to maintain a satisfactory and harmonious relationship with the public. Your actions also violated provisions of Logan County Board of Education Policy VI.5.2, concerning personal conduct. You have participated in an activity which could disrupt the school day, and you have betrayed student confidentiality. Violations of county policy are acts that are directly insubordinate.

> Based upon these violations of county policy and insubordinate actions I am suspending you without pay for three (3) days beginning on March 27, 1995. Should such acts continue I will be forced to take additional action as outlined in West Virginia Code § 18A-2-2 and 18A-2-8 which could lead to your termination.
>
> You are further advised, that in accordance with West Virginia Code §18A-2-8 you are entitled to request a Level IV hearing before the West Virginia State and School Employees Grievance Board within five days of the receipt of this letter.

R Ex 2.

The incident at issue in this grievance had its genesis in an earlier incident on January 25, 1995. That incident generated a "reprimand" letter which WCGS Principal Terry Elkins issued to Grievant on February 8, 1995. That letter stated the following:

> I have completed my investigation into the incident of January 25, 1995, concerning the [S.] child. Based upon my investigation I have come to the conclusion that the method you used to get the attention of the child was inappropriate. You should not have tapped her. You could have accomplished the same goal by tapping on her desk.
>
> At the beginning of the year we discussed the use of physical measures in the discipline of students. All personnel were told not to lay hands upon any student in a manner that could be deemed as punishment.
>
> Consider this a formal warning that you are not to touch students in this manner again.

R Ex 1.

This reprimand was grieved to Level I and not pursued beyond that. Accordingly, the propriety of the earlier reprimand is not at issue in this grievance. See Womack v. Dept. of Admin., Docket No. 93-ADMN-430 (Mar. 30, 1994); Perdue v. Dept. of Health & Human Resources, Docket No. 93-HHR-050 (Feb. 4, 1994). However, it is clear that Grievant did not agree with the letter, contending that the incident was exaggerated out of proportion.

On March 8, 1995, Mr. Elkins received a telephone call from C.S.' mother, complaining about another incident that was alleged to have transpired on February 16, 1995. Mr. Elkins investigated the new complaint by talking to Grievant and a witness to the incident, Teacher's Aide Alice Price. Grievant gave a written statement to Mr. Elkins denying that she had discussed C.S. with any other child. The instant disciplinary action ensued.

In regard to the events of February 16th, various questions of fact necessary to resolution of this grievance are in controversy. Ultimately, the outcome in this matter hinges upon determinationsof witness credibility and appropriate inferences that may be drawn from pertinent facts.

On February 16, 1995, a small group of WCGS students were being instructed by Grievant in Higher Order Thinking Skills (HOTS), a computerized portion of the Chapter One reading program. Alice Price, a Teacher's Aide at WCGS for the past twenty-three years, testified that she was present in the classroom with approximately five fifth grade students working on computers. Grievant had some photographs she had taken during a previous "sleep-over" at her home for the students in her Chapter One class. Near the end of the class period, after they had completed their work, Grievant allowed the students to look at photographs of the sleep-over in which they had participated.

After looking at the pictures, one of the children asked Grievant when they were going to have another sleep-over. The children had been discussing the sleep-over and there was a "high level of excitement." Ms. Price recalled that Grievant responded that her lawyer and her husband had advised against such activities. The children "rebelled" and became "emotional," making comments in reference to the previous incident with C.S. Some of the students said that Grievant did not hit C.S. and they should not be "punished" for what C.S. had done.

Ms. Price indicated that she was "stunned" by some of the things the children were saying about C.S., noting that she was not sure which child made which comment. Indeed, Ms. Price indicated that she was apprehensive about where this conversation wasleading, remarking that, as an aide, she was "not in authority" in the room at the time. Ms. Price stated that Grievant told the children C.S. had "lied" and she had to hire a lawyer because C.S. "got her in trouble." There was considerable conversation regarding the prior incident.

Ms. Price testified that on other occasions, both before and after the February 16th incident, when the children attempted to raise this matter, Grievant would cut them off, permitting no further conversation on the topic. Ms. Price was not questioned about the incident until a month later. She

stated that she deliberately refrained from reporting the incident, hoping that things would "smooth out."

Grievant testified in regard to the January incident involving C.S. in considerable detail and described the events of February 16th substantially the same as Ms. Price, except for denying that she told the children that C.S. had told a lie or that C.S. had gotten her in trouble. Grievant could think of no reason why Ms. Price would fabricate any such statements, indicating that there was no animosity between them.

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; 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). Moreover, the authority of a county board of education to discipline an employeemust 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).

This grievance involves a single incident of alleged misconduct by Grievant, characterized by LCBE as insubordination, one of the explicit causes for dismissal or suspension of a school employee in W. Va. Code § 18A-2-8. Resolution of this grievance essentially boils down to the word of Grievant against that of Ms. Price. Having observed the testimony of these two individuals under direct and cross-examination, the undersigned administrative law judge finds that Ms. Price was the more credible witness. In reaching this difficult conclusion, the undersigned notes that Ms. Price was a disinterested party who had no motivation to fabricate any testimony that would be detrimental to Grievant. Likewise, Ms. Price was not a participant in the discussion with the students, allowing her to observe who said what more objectively.

Ms. Price did not come forward to report the February 16th incident. She simply responded to questioning about the incident at a later date. Ms. Price's testimony was candid and straightforward, without displaying any effort to advocate the cause of either party. Nonetheless, it was clear that she was disturbed by Grievant's failure to cut off the student's conversations about C.S. on the 16th, something which Grievant handled appropriately on both prior and subsequent occasions. Moreover,

contrary toGrievant's contentions, Ms. Price did not indicate any doubt or confusion regarding Grievant's involvement in this conversation. While Ms. Price was unsure about which student made which comment about C.S., she was unwavering in regard to what Grievant told the students.

Grievant testified regarding both the earlier incident of January 25th, and the incident of February 16th which is the subject of this grievance. Even four months after these events, Grievant more clearly and forcefully refuted the actions and statements of C.S. and her parents regarding the first incident than she contradicted Ms. Price's version of the second incident supporting the instant suspension. There is a strong implication that Grievant allowed her feelings about the perceived injustice of the first incident to overcome her normally sound professional judgment, causing her to make the improper comments alleged by LCBE on February 16th. In any event, Ms. Price's testimony was not credibly refuted by Grievant.

In her post-hearing brief, Grievant's counsel notes that LCBE did not introduce into evidence at Level IV the county policies referred to in the suspension letter which Grievant allegedly violated through her conduct on February 16th. This issue was not properly raised because Grievant did not indicate that her conduct on February 16th, as alleged by LCBE, was in accordance with acceptable standards. Instead, Grievant denied that she made the offensive statements attributed to her. The suspension letter from Superintendent Myers (R Ex 2) paraphrases the gravamen of thepolicies and provides specific notice to Grievant regarding multiple reasons why telling students that one of their peers had "told a lie" on their teacher was unacceptable. Regardless of what those policies may read, Grievant's refusal to accept the warning letter from Principal Elkins, by telling students that C.S. had lied to get her into trouble, represents defiance of authority, making her actions insubordinate. See Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988), aff'd 387 S.E.2d 529 (W. Va. 1989). Under these circumstances, LCBE acted in accordance with W. Va. Code § 18A-2-8 in suspending Grievant for three days without pay for her insubordinate conduct on February 16, 1995.

In addition to the foregoing discussion, the following findings of fact and conclusions of law are appropriate in this matter.

FINDINGS OF FACT

1. Grievant has been employed by the Logan County Board of Education (LCBE) as a Chapter One reading teacher at West Chapman-ville Grade School (WCGS) for the past six years.

2. On February 8, 1995, WCGS Principal Terry Elkins issued a written reprimand to Grievant, based upon an allegation by a student, C.S., that Grievant had struck her on the head for not paying attention in a reading class on January 25, 1995.

3. Grievant submitted a grievance under W. Va. Code §§ 18-29-1, et seq., regarding the February 8, 1995 reprimand, but did not pursue the matter beyond step one of the grievance procedure. 4. On February 16, 1995, Grievant, with assistance fromTeacher's Aide Alice Price, was conducting a Higher Order Thinking Skills (HOTS) class for approximately five fifth grade students in the Chapter One reading program.

5. Near the end of the class period, the students were permitted to look at photographs taken during a prior sleep-over at Grievant's home in which these same children had participated.

6. In response to questions from the children regarding when Grievant would be hosting the next sleep-over, Grievant told them that she would not be hosting any more sleep-overs based on advice from her husband and her lawyer.

7. Following comments by the children that they should not be punished for the incident involving C.S. and that they knew Grievant did not strike C.S., Grievant stated that C.S. had "lied" and "got her in trouble."

8. On other occasions, both before and after February 16, 1995, when the children brought up the subject of the prior incident with C.S., Grievant appropriately stopped the conversation.

CONCLUSIONS OF LAW

1. The employer must establish the charges in a disciplinary matter by a preponderance of the evidence. W. Va. Code § 18-29-6; Froats v. Hancock County Bd. of Educ., Docket No. 91-15-159 (Aug. 15, 1991); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989).

2. Insubordination is one of the causes listed in W. Va. Code § 18A-2-8 for which an education employee may be disciplined. SeeBeverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

3. Insubordination encompasses more than an explicit order and refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer. Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988), aff'd 387 S.E.2d 529 (W. Va. 1989).

4. Ordinarily, the propriety of a prior disciplinary action, properly documented in the employee's record and which the employee had an opportunity to challenge, is not an appropriate matter for

consideration in a grievance involving a subsequent disciplinary action. See Womack v. Dept. of Admin., Docket No. 93-ADMN-430 (Mar. 30, 1994); Perdue v. Dept. of Health & Human Resources, Docket No. 93-HHR-050 (Feb. 4, 1994).

5. Where Grievant had been previously reprimanded by her principal for improperly touching a student (C.S.), LCBE established by a preponderance of the evidence that Grievant engaged in insubordination prohibited by § 18A-2-8 by telling students in her classroom that the student, C.S., had "lied" and "got her in trouble."

6. LCBE's imposition of a three-day suspension for Grievant's single act of insubordination was not such an excessive penalty as to be arbitrary or capricious. See Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994); Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991).

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Logan 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.

LEWIS G. BREWER

Administrative Law Judge

Dated: October 18, 1995

Footnote: 1Respondent did not file a post-hearing submission.

Footnote: 2As "C.S." is a juvenile, this Board will follow the practice of the West Virginia Supreme Court of Appeals by not using the student's name. See Bd. of Educ. v. Chaddock, 398 S.E.2d 120, 121 at F.N. 1 (W. Va. 1990); Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994).