

**MELANIE JUDE,**

**Grievant,**

**v.**

**Docket No. 96-29-136**

**MINGO COUNTY BOARD OF EDUCATION,**

**Respondent.**

### **DECISION**

Melanie Jude (Grievant) initiated this grievance against Respondent Mingo County Board of Education (MCBE) on February 21, 1996, contesting a written reprimand she received from Principal B. Thomas Slone on January 29, 1996. Principal Slone denied the grievance at Level I and Grievant appealed to Level II where an evidentiary hearing was conducted on March 21, 1996. Assistant Superintendent John Fullen, the Superintendent's designee, denied the grievance at Level II in a written decision dated March 26, 1996. Grievant by-passed Level III, as authorized by W. Va. Code § 18-29- 4(c), appealing to Level IV on March 29, 1996.

Grievant requested that her grievance be adjudicated at Level IV on the record developed through Level II. MCBE objected, requesting an evidentiary hearing at Level IV to supplement the record. Accordingly, a Level IV hearing was set for May 24, 1996, at which the parties appeared through their designated representatives. As Grievant was not present at the Level IV hearing, MCBE's counsel moved to dismiss this grievance for failure to prosecute, noting that Grievant was the only witness he had intended to call at Level IV.

Respondent's Motion to Dismiss was **DENIED** on an interlocutory basis, noting that W. Va. Code §§ 18-29-1, et seq., does not compel a grieving employee to appear at Level IV, in order to prosecute her grievance. ([See footnote 1](#)) Upon further review, it appears that the provision in W. Va. Code § 18-29-3(f) stating "[a]n employee may have the assistance of one or more fellow employees,

an employee organization representative or representatives, legal counsel or any other person in the preparation and presentation of the grievance," allows an employee to prosecute her grievance without personally appearing at Level IV. Therefore, the previous ruling denying MCBE's Motion to Dismiss is hereby **AFFIRMED**.

No additional evidence was added to the record at Level IV. This matter became mature for decision on June 14, 1996, upon expiration of the time limits for filing of written post-hearing submissions. Neither party availed themselves of this opportunity to further argue the merits of this grievance.

### **DISCUSSION**

The letter of reprimand at issue was issued by Burch Middle School (BMS) Principal Slone on January 29, 1996, stating the following:

As you are aware, Mingo County School policy requires any person visiting a school to sign in, in the school office. This was the subject of a discussion I had with you approximately two months ago.

During this time, you were receiving visits from Mr. Greg Swisher. I then reminded you about the policy and told you he must sign in when he enters the building. You agreed to give him this information.

On Thursday, January 25, 1996, Mr. Greg Swisher entered the building at the rear exit, and went to your room without reporting to the office. You left your room to talk to him in the hallway. This is strictly against county and school policy. Should this happen again, I will be forced to take the necessary steps toward asking Mr. Conn to suspend you.

R Ex 1 at L II.

According to the credible testimony introduced at Level II, Grievant has been employed by MCBE at BMS for 10 years. Grievant explained that she needed to provide MCBE with certain documents from Marshall University verifying her teacher certification. She asked Mr. Swisher to assist her in obtaining these documents. After learning that Marshall University required Grievant's signature to release the documents, Mr. Swisher brought the necessary paperwork to Grievant's classroom at BMS, and she stepped out into the hall and signed the document. Mr. Swisher then left BMS to pick up the document personally at Marshall.

Grievant noted that Mr. Swisher did not sign in at the office when he brought the paperwork to BMS for her to sign. She further agreed that the policy at BMS was for all visitors to register at the Principal's Office. Grievant recalled that Principal Slone had previously told her "it might be a good idea not to have visitors at the school" and to "make sure they check in at the office." Principal Slone testified that he discussed Mr. Swisher's visits with Grievant on two separate occasions prior to the incident at issue, and that she indicated she would tell Mr. Swisher not to come to BMS without signing in at the office.

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 employee must 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).

Although not explicitly stated in the reprimand, it is apparent that Principal Slone considered Grievant insubordinate for not following his instructions to have Mr. Swisher sign in at the office when he came to BMS. There does not appear to be any dispute that Mr. Swisher had a legitimate reason to appear at BMS, and that reporting to the office to sign in would briefly delay him in accomplishing his errand to obtain Grievant's certification documents from Marshall University. However, Grievant's contention that Mr. Swisher's actions were completely beyond her control is not supported by the evidence of record. To the contrary, Mr. Swisher was assisting Grievant and essentially came to BMS as her invitee. Grievant had previously been told by her supervisor to have Mr. Swisher sign in at the office when he came to BMS. There was no evidence that she made any effort to remind Mr. Swisher to sign in on this occasion, simply disregarding her supervisor's instructions as inconvenient. ([See footnote 2](#)) Under these circumstances, Grievant's actions amounted to insubordination. See Nicholson v. Logan County Bd. of Educ., Docket No. 95-23-129 (Oct. 18, 1995); Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988), aff'd 387 S.E.2d 529 (W. Va. 1987).

Grievant further complained that MCBE could not issue a written reprimand without having first issued an oral reprimand for the same offense. While Principal Slone testified that the two prior warnings he gave Grievant regarding Mr. Swisher signing in at the office were oral reprimands,

Grievant testified that she had never been reprimanded by Mr. Slone, characterizing their conversations as nothing more than discussions. Assuming Principal Slone did not orally reprimand Grievant, there was no evidence that any law, rule, regulation or policy limits MCBE's discretion to issue a written reprimand in the absence of a prior disciplinary action of less severity. Under the circumstances present here, a written reprimand does not represent such a harsh penalty for Grievant's insubordination as to constitute arbitrary and capricious conduct. 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).

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 Mingo County Board of Education (MCBE) as a teacher at Burch Middle School (BMS) for the past ten years. 2. BMS has a long-standing policy requiring all visitors to register at the Principal's Office. Grievant was aware of this policy prior to January 25, 1996.

3. On at least one occasion between September 1995 and January 25, 1996, BMS Principal B. Thomas Slone verbally told Grievant that it "might be a good idea not to have visitors at the school," and to "make sure they check in at the office."

4. On January 25, 1996, Grievant requested assistance from a friend, Greg Swisher, in obtaining documentation from Marshall University to verify her teaching certification. This documentation had been requested by an MCBE employee with responsibility for maintaining such records.

5. In order to obtain the documentation from Marshall University, Mr. Swisher came to BMS on January 25, 1996, to obtain Grievant's signature on a document. Mr. Swisher came to Grievant's classroom through a back entrance and she came out of the classroom briefly, signed the document, and returned to her class. Mr. Swisher did not sign in at the Principal's Office as required by BMS policy.

6. On January 29, 1996, Principal Slone issued a written reprimand to Grievant, based upon her failure to have Mr. Swisher sign in at the BMS office on January 25, 1996, before visiting her in the school.

## **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. See Beverlin 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. MCBE established by a preponderance of the evidence that Grievant engaged in insubordination prohibited by W. Va. Code § 18A-2-8. See Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995).
5. Principal Slone's imposition of a written reprimand for Grievant's single act of insubordination was not such an excessive penalty as to be arbitrary or capricious. See Nicholson v. Logan County Bd. of Educ., Docket No. 95-23-129 (Oct. 18, 1995); Conner, supra; 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 Mingo 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: July 29, 1996**

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[Footnote: 1](#)

*Grievant was not under subpoena to appear at Level IV.*

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[Footnote: 2](#)

*Given that Mr. Swisher was willing to drive from Mingo County to Marshall University to pick up a document for Grievant, it does not seem logical that he would not sign in at the BMS office, had Grievant communicated such a reasonable request.*