WILLIAM R. ARNOLD,

Grievant,

v. DOCKET NO. 96-28-065

MINERAL COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

William R. Arnold, (See footnote 1) Grievant, submitted this grievance directly to Level IV, in accordance with W. Va. Code §18A-2-8, challenging his five-day suspension without pay by the Mineral County Board of Education, Respondent. On June 13, 1996, an evidentiary hearing was held in this matter at the Grievance Board's office in Elkins, West Virginia. On July 23, 1996, this case became mature upon receipt of Respondent's post-hearing submission.

The following Findings of Fact were derived from the record. (See footnote 2)

FINDINGS OF FACT

1. Grievant is a Behavior Disorder elementary school teacher. Grievant has taught at Keyser Primary Middle School (KPMS) since the 1988-89 school year, and in Mineral County since the 1983-84 school year, approximately fourteen years.

2. Grievant became chairman of the Faculty-Senate Building Wellness Committee which was concerned with heating and ventilation problems thought to be causing illness to faculty members. (See footnote 3)

3. On January 18, 1996, at approximately 1:00 p.m., Grievant, during his planning period, went to Mrs. Alvaro's room to see if she had any extra text books. When Grievant was returning to his room he noticed Mrs. Wallizer's door was open and that she was writing math problems on the board.

4. Grievant believed, correctly, that Mrs. Wallizer motioned to him, indicating that she wanted to talk with him. A short conversation between Mrs. Wallizer and Grievant occurred. The conversation lasted less than one minute, (See footnote 4) and concerned information about a Faculty-Senate meeting which was scheduledlater in the day.

5. Before and during the conversation, Mrs. Wallizer's students continued to work on the math problems as they copied them from the board, and Mrs. Wallizer continued to write problems on the board.

6. At the conclusion of the conversation, but before Grievant left, Mr. Albani and Mr. Gary Koech (See footnote 5) came down the hallway. After Grievant left Mr. Albani asked Mrs. Wallizer why Grievant was in her classroom. She told Mr. Albani that they had discussed Faculty-Senate business.

7. Mr. Albani and Mr. Koech had planned to stop at Mrs. Wallizer's room because Mr. Koech wanted to speak personally with Mrs. Wallizer about the upcoming Faculty-Senate meeting, and to perform a routine site inspection of her room. Mrs. Wallizer already knew the Faculty-Senate information which Mr. Koech relayed, and, while the record is unclear, it appears that Mr. Albani and Mr. Koech left Mrs. Wallizer's room without inspecting it.

8. Mr. Albani informed Superintendent Charles Kalbaugh of Grievant's alleged infraction that same day. Mr. Albani wrote a letter, dated January 25, 1996, to Grievant memorializing theevents of January 18, 1996. Mr. Albani also wrote the following letter, dated January 29, 1996, to Superintendent Kalbaugh which provides, in pertinent part:

> On January 18, at approximately 2:00 PM, I verbally reported this incident to you. I was instructed to take no further actions until you contacted an attorney.
>
> On January 23, I was informed by you to proceed with an investigation.
>
> I spoke with two third grade teachers on January 23, to determine if they had any information concerning Mr. Arnold[']s interrupting their classes. (I was informed that Mr. Arnold had done so). They told me that he did not.
>
> On January 25, at approximately 10:00 AM[,] I met with Mrs. Wallizer. I asked her to confirm what she told me on January 18. She confirmed her story of January 18, that William Arnold was interrupting her class during her teaching time with non-school related business.
>
> On January 29, at approximately 11:50 AM, I confronted William Arnold with the accusations. He admitted being in Mrs. Wallizer[']s room but denied discussing non-

> school business. He stated that Mrs. Wallizer nodded her head indicating she wanted him to come into her room.
>
> On March 16, 1994, I issued an order, in writing, to Mr. Arnold not to interrupt teachers during their instructional time. On June 6, 1995, Mr. Arnold was suspended by the Mineral County Board, for two days, for interrupting teachers on May 15 and May 16.
>
> I am requesting that you take appropriate disciplinary action that would be consistent with Mr. Arnold's failure to follow a direct order.

Level IV, Respondent's #7.

9. Mr. Albani asked Mrs. Wallizer to reduce to written form the events of January 18, 1996. Her letter, dated February 6, 1996, provides:

> On January 18, 1996, Mr. Bill Arnold stopped at my door and asked if Mr. Ko[e]ch was coming to Faculty Senate. I answered yes, while writing multiplication problems[on] the chalkboard. He then came into the room and continued the conversation. I continued to put multiplication problems on the board. Mr. Albani and Mr. Ko[e]ch came to my door and asked to speak to me. Mr. Arnold left. I finished with the problems, then went to the door.

Level IV, Respondent's #3.

10. Grievant was suspended without pay for five days for interrupting Mrs. Wallizer's instructional time for 30-35 seconds on January 18, 1996. However, Mrs. Wallizer interrupted her own instructional time.

11. Grievant has not interrupted Mrs. Wallizer's instruction- al time more than other professional educators have.

12. Mr. Albani, principal at KPMS, has never disciplined any teacher, other than Grievant, for interrupting another teacher's instructional time. Mr. Albani has never sent a memo to the faculty at KPMS warning that interrupting another teacher's instructional time is prohibited, nor has he ever asked KPMS faculty to report any occasions when their instructional time is interrupted. The Mineral County policy manual does not prohibit interrupting another teacher's instructional time.

13. A teacher's instructional time at KPMS is regularly interrupted several times a day by other teachers. (See footnote 6)

14. Grievant is the only teacher ever given a direct order by Mr. Albani not to interrupt other

teachers' instructional time.

15. On March 1, 1996, at approximately 2:15 p.m., AssistantPrincipal John Campbell interrupted Grievant's instructional time for approximately four minutes to deal with a disciplinary matter. This interruption could have waited until Grievant's instructional time was over.

16. On March 7, 1996, between 2:15-2:30 p.m., Mr. Albani witnessed two interruptions by KPMS teachers (Mrs. Fertig and Mrs. Delawder) of Grievant's instructional time during a formal observation for his 1995-96 evaluation. Neither Mrs. Fertig nor Mrs. Delawder were disciplined.

POSITION OF THE PARTIES

Respondent claims Grievant interrupts instructional time more than other teachers, and was ordered in writing, on March 16, 1994, to stop interrupting other teachers' instructional time. On June 6, 1995, Grievant was suspended by Respondent for two days without pay. Respondent maintains Grievant was again interrupting another teacher's instructional time on January 18, 1996. Therefore, Respondent felt a harsher penalty was appropriate, and suspended him for five days without pay. (See footnote 7)

Grievant does not contest the fact that he was previously suspended for interrupting instructional time. He contends that his behavior was not a problem until he became actively involved in the Faculty-Senate Building Wellness Committee at his school, and that Respondent's policy is arbitrary and capricious, and applies only to him.

Grievant also challenges the procedural aspects of this case. Grievant asserts that W. Va. Code §18A-2-12 (See footnote 8) and State Board of Education Policies 5300 and 5310, entitles him to an improvement period and an opportunity to correct his "deficiencies." (See footnote 9)

DISCUSSION

The employer must establish the charges in a disciplinary matter by a preponderance of the evidence. W. Va. Code §18-29-6; Bierer v. Jefferson County Bd. of Educ., Docket No. 95-29-558 (Apr. 8, 1996). Respondent suspended Grievant for five days because:

> [o]n January 18, 1996, [he] was observed disrupting the instructional time of another teacher. This is in direct violation of a written warning issued to [Grievant] on March 16, 1994, by Mr. David Albani, Principal, and the same violation on May 15 & 16, 1995, which resulted in a two (2) day suspension.

Level IV, R. Ex. #1.

However, Mr. Albani's letter, dated March 16, 1994, did not prohibit all interruptions of instructional time. Mr. Albani's letter provides:

> It has come to my attention that you solicited signatures on a petition from teachers during instructional time.
>
> No matter how noble the cause you are not to interrupt teachers during instructional time for such matters. Interruptions for official school business that are part of your regular duties are the only type permitted.
>
> You are to follow your daily schedule which does not provide time for such activities.
>
> Any other incidences of this will result in actions taken against you.

Level IV, R. Ex. #4. Emphasis added.

Therefore, interruptions for official school business that are part of Grievant's regular duties were clearly permitted. Grievanttestified that during this time period he was President of the Faculty Senate Building Wellness Committee at KPMS. Therefore, discussing Building Wellness Committee issues was part of his regular duties. Furthermore, the record clearly shows that on January 18, 1996, Mrs. Wallizer and Grievant were discussing faculty senate business. Respondent apparently does not think that Faculty Senate matters involve school business. However, Faculty Senates are creatures of statute, and they have substantial authority and responsibility. See, W. Va. Code §18-5a-5, entitled "Public school faculty senates established; election of officers; powers and duties."

Faculty senates are also mentioned by the Legislature in the following the following five statutes: W. Va. Code §18-5A-2, entitled "Local school improvement councils; election;" W. Va. Code §18-5A-6, entitled "Establishment of school curriculum teams;" W. Va. Code §18-9A-9, entitled "Foundation allowance for other current expense and substitute employees"; W. Va. Code §18A-4-8f, entitled "Seniority rights, school consolidation"; and W. Va. Code §18A-5-1a, entitled "Possessing deadly weapons on premises of educational facilities; possessing a controlled substance on premises of educational facilities; assaults and batteries committed by pupils upon teachers or other school

personnel; temporary suspension, hearing; procedure, notice and formal hearing; extended suspension; sale of narcotic; expulsion; exception." Consequently, faculty senate business is school business. Therefore, Respondent suspended Grievant for five daysover an incident which was not prohibited by Mr. Albani's "order" or his March 16, 1995, letter. In summary, Respondent failed to prove by a preponderance of the evidence that Grievant was insubordinate. However, and more importantly, Grievant did not

interrupt Mrs. Wallizer's instructional time. Mrs. Wallizer interrupted her own instructional time, and Grievant can not be held responsible or disciplined for the actions of another.

Moreover, insubordination is usually defined by this Grievance Board as "a deliberate, willful or intentional refusal or failure to comply with a reasonable order of a supervisor." Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990), citing Gill v. W.Va. Dept. of Commerce, Docket No. COMM-88- 031 (Dec. 23, 1988). See, Thompson v. Logan County Bd. of Educ., Docket No. 95-23-127 (July 17, 1995). Furthermore, in order to establish a charge of insubordination, the employer must demonstrate that the employee's failure to comply with a directive was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995); Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995). The record does not contain any evidence that Grievant intended to stop and speak to Mrs. Wallizer before she motioned to him. Nor does Grievant's brief conversation constitute a defiance of authority in this case. Grievant stopped only long enough to see what another professional educator wanted, and continued hisunsuccessful journey, to retrieve texts books, back to his room. Merely stopping at another teacher's classroom, after being beckoned by that teacher, is not a deliberate premeditated act of insubordination. (See footnote 10)

The Grievance Board has also stated that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." Sexton v. Marshall University, Docket No. BOR2-88-029-4 (May 25, 1988), citing Weber v. Buncombe County Bd. of Educ., 266 S.E.2d 42 (N.C. 1980). (See footnote 11) At Levels III and IV, prior sanctions issued against Grievant, for alleged instances of interruption of instructional time, were addressed. Even though Grievant did not seek any relief in this area, and none could be granted by the Undersigned, the background

was helpful in determining whether Respondent's actions were arbitrary and capricious in issuing Grievant a five day suspension. (See footnote 12) It is well established that the power of a county superintendent to suspend a teacher must be exercised reasonably, and not arbitrarily or capriciously. See Beverlin v. Bd. of Educ., 158 W.Va. 1067, 216 S.E.2d 554 (1975). It appears that Mr. Albani initially issued his March 16, 1994, "direct order" to Grievant to stop interrupting other teacher's instructional time after one KPMS teacher, Lark Anderson, complained "long and hard" about Grievant asking him to sign a petition during his instructional time. Mr. Albani then asked other teachers whether Grievant had also asked them to sign the petition. Some teachers stated that Grievant had asked them to sign the petition during their instructional time. During the Level III and IV hearings, Mr. Albani mischaracterized at least four such instances as "complaints," when, in fact, only Mr. Anderson came to him to complain. (See footnote 13) At the Level IV hearing, Grievant produced evidence that at least one of those teachers who Mr. Albani testified at Levels III and IV had complained, actually did not complain, and did not feel that her instructional time had been interrupted. See, Level IV, Grievant's Ex. #1. (See footnote 14) Nor did Mrs. Wallizer complain to Mr. Albani about the alleged January 18, 1996,interruption. Furthermore, Respondent failed to call a single professional educator who had a complaint against Grievant.

Grievant did not interrupt another teacher's instructional time. Mrs. Wallizer interrupted her own interrupted instructional time. The record reveals that during Mrs. Wallizer's conversation with Grievant, she continued to write math problems on the board, and her students continued working and stayed on task. The record also reveals that when Mrs. Wallizer went to the door, because of the appearance of Mr. Albani and Mr. Koech, her instructional time was interrupted. Mr. Albani was allowing Mr. Koech to commit the same act for which he requested Respondent suspend Grievant for five days.

However, Respondent argued in closing, during the Level IV hearing, that "it's a matter of degree." Respondent's assertion that Grievant interrupts instructional time more than other teachers' is rejected by the Undersigned because the record does contain sufficient evidence to support this assertion. (See footnote 15) Respondent did not offer any documentation, nor does it appear that Respondent makes an effort to collect this type of documentation, concerning the number of times that its KPMS personnel interrupt instructional time and the reason for the interruption. The record is devoid of any evidence that Respondent has ever issued any type of memorandum to its personnel

prohibiting or requesting that non-official school business interruptions be kept to a minimum. As to the Grievant,the record merely shows that he has interrupted other teachers' instructional time on or about March 16, 1994, and May 15, 1995. Two events spanning academic three years. However, the record contains testimony from several professional educators that instructional time interruptions occur frequently at KPMS. Even KPMS administrators interrupt instructional time on matters that could wait, even though Principal Albani testified that a teacher's instructional time should not be interrupted unless a situation cannot wait until class is over. (See footnote 16)

Therefore, even assuming arguendo that Mrs. Wallizer did not motion Grievant to her door, Respondent has still singled out Grievant unfairly. In summary Respondent's exercise of power in suspending Grievant in this case was unreasonable, and arbitrary and capricious because: (1) Respondent suspended Grievant for an interruption, if there was an interruption, caused by another employee, Mrs. Wallizer, (2) Respondent suspended Grievant for an interruption which was permissible according to Mr. Albani's letter, (3) the definition of insubordination includes a “wilful” component, and Grievant's response to Mrs. Wallizer was not a deliberate premeditated act of insubordination, (4) sufficient evidence was not produced which showed that Grievant interrupts instructional time more than other teachers at KPMS, and (5) Grievant has been unfairly singled out for behavior which otherteachers and administrators frequently engage in at KPSM.

Grievant's contention that Respondent has retaliated against him need not be considered since Respondent has failed to meet its burden, and has unreasonably, and arbitrarily and capriciously suspended him. In addition to the foregoing findings of fact and narration, it is appropriate to make the following conclusions of law.

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; Bierer v. Jefferson County Bd. of Educ., Docket No. 95-29-558 (Apr. 8, 1996).

2. A county board of education must exercise its discretion in personnel matters in a manner which is not arbitrary or capricious. Lilly v. Summers County Bd. of Educ., Docket No. 90-45- 040 (Oct. 17, 1990), citing State ex rel. Hawkins v. Tyler County Bd. of Educ., 375 S.E.2d 911 (W.Va. 1981).

3. 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).

4. The intended purpose of Policy 5300 evaluations is to encourage improvement of school personnel skills which, in turn, will benefit the students. Hosaflook v. Nestor, 346 S.E.2d 798 (W.Va. 1986).

5. "The factor triggering the application of the evaluationprocedure and correction period is 'correctable' conduct. What is 'correctable' conduct does not lend itself to an exact definition but must, ... be understood to mean an offense or conduct which affects professional competency." Rovello v. Lewis County Bd. of Educ., 381 S.E.2d 237 (W.Va 1989), citing Mason County Bd. of Educ. v. State Superintendent of Schools, 165 W.Va. at 739, 274 S.E.2d at 439.

6. Grievant has not established a violation of W. Va. Code §18-2-12 or State Board of Education Policy 5300 or 5310.

7. The power of a county superintendent to suspend a teacher must be exercised reasonably, and not arbitrarily or capriciously. See Beverlin v. Bd. of Educ., 158 W.Va. 1067, 216 S.E.2d 554 (1975).

8. Respondent has failed to prove by a preponderance of the evidence that Grievant was insubordinate.

9. Grievant proved by a preponderance of the evidence that his suspension was unreasonable, and arbitrary and capricious.

Accordingly, this grievance is **GRANTED** and Respondent is **ORDERED** to remove any record of this suspension from Grievant's personnel file, and issue him appropriate backpay, and seniority within thirty days from receipt of the decision.

Any party may appeal this DECISION to the Circuit of Kanawha County or to the Circuit Court of Mineral 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.

DATED: 12/6/96 _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE

Footnote: 1

The undersigned Administrative Law Judge initially recused himself from this case because of prior association with a William Arnold, who teaches in the same geographic area. However, after the case was assigned to a different ALJ, it was discovered that Grievant was a different William Arnold. Subsequently, the case was reassigned to the Undersigned for administrative reasons.

Footnote: 2

The record in this case includes: (1) the transcript of Respondent's board meeting suspending Grievant for five days; (2) the audio tapes of the Level IV hearing; (3) a letter dated February 8, 1996, from Grievant's union representative requesting a Level IV hearing; (4) a Level IV grievance form; (5) Grievant's two exhibits admitted at Level IV; (6) Respondent's twelve exhibits admitted at Level IV; and (7) the parties' post-hearing submissions. The Undersigned considered all matters of record.

Footnote: 3

For more on this committee, it's concerns, and further background, see Guerin and Tenney v. Mineral County Bd. of Educ., Docket No. 92-28-422/459 (Jan. 31, 1996).

Footnote: 4

Respondent did not contest that the conversation lasted 30-35 seconds. Level IV, Respondent's Closing Argument.

Footnote: 5

At the Level III hearing, Mr. Albani testified that Mr. Koech was the building and grounds inspector. However, at the Level IV hearing, he testified that Mr. Koech was the maintenance supervisor. While the record is not clear, it appears that the Marriott Corporation has a contract with Respondent which requires inspection of the building, and Mr. Koech performs the inspections.

Footnote: 6

Respondent did not contest that instructional time is frequently interrupted and that other teachers do it "all the time." Level IV, Respondent's Closing Argument. Respondent asserted "its a matter of degree."

Footnote: 7

Respondent moved to dismiss the case, at the beginning of the Level IV hearing, asserting that the appeal was not timely filed because it did not have proper notice of the appeal, and because it was not informed of the basis for the grievance. However, on February 8, 1996, Grievant's union consultant wrote a letter to the Grievance Board stating that his client was appealing his five-day suspension, and requested a Level IV hearing. Respondent was not sent a copy of this letter. Grievant's attorney filed a Level IV grievance form on the date of the hearing, and Respondent objected. Respondent's verbal Motion to Dismiss, which was taken under advisement, is DENIED. The undersigned Administrative Law Judge's

ruling is based on Spahr v. Preston County Bd. of Educ., 182 W.Va.726, 391 S.E.2d 739 (1990); Fayette County Bd. of Educ. v. Lilly, 184 W.Va. 688, 403 S.E.2d 431 (1991); Triggs v. Berkeley County Bd. of Educ., 425 S.E.2d 111 (W.Va. 1992); and the reasons asserted on the record by Grievant's counsel.

Footnote: 8

W. Va. Code §18A-2-12 provides, in pertinent part:

> *[a] professional whose performance is deemed to be unsatisfactory shall be given notice of deficiencies. A remediation plan to correct deficiencies shall be developed by the employing county board of education and the professional. The professional shall be given a reasonable period of time for remediation of the deficiencies and shall receive a statement of the resources and assistance available for the purposes of correcting the deficiencies.*

Footnote: 9

Grievant's reliance on W. Va. Code §18A-2-12 and State Board of Education Policies 5300 and 5310 is misplaced. In this case, the problem is not a deficiency in Grievant's professional skills. The intended purpose of Policy 5300 evaluations is to encourage improvement of school personnel skills which, in turn, will benefit the students. Hosaflook v. Nestor, 346 S.E.2d 798 (W.Va. 1986). Furthermore, "the factor triggering the application of the evaluation procedure and correction period is 'correctable' conduct. What is 'correctable' conduct does not lend itself to an exact definition but must, ... be understood to mean an offense orconduct which affects professional competency." Rovello v. Lewis County Bd. of Educ., 381 S.E.2d 237 (W.Va. 1989), citing Mason County Bd. of Educ. v. State Superintendent of Schools, 165 W.Va. at 739, 274 S.E.2d at 439. Therefore, W. Va. Code §18A-2-12 and State Board of Education Policies 5300 and 5310 do not apply.

Footnote: 10

Even assuming arguendo that Respondent proved Grievant committed a technical violation of insubordination, the record is devoid of any evidence that Respondent considered Grievant's lack of intent when melting out a five day suspension as required in Devito v. Bd. of Educ., 285 S.E. 411, 412.

Footnote: 11

It should be noted that Sexton was affirmed in part and reversed in part by the Kanawha County Circuit Court, Docket No. 88-AA-154. On appeal the Supreme Court reversed the Circuit Court's ruling. See, Sexton v. Marshall University, 387 S.E.2d 529 (W.Va. 1989).

Footnote: 12

At the Level IV hearing, Respondent did not have any burden in defending prior disciplinary sanctions imposed against Grievant. Only the five day suspension is at issue in this case. However, Respondent basis for initially disciplining Grievant is relevant tothis case.

Footnote: 13

At first, during the Level III hearing, Mr. Albani testified on direct examination that as many as "9 or more" teachers complained. LIII, TR. 6. Later, after reviewing his notes, he stated that "at least four" teachers complained about Grievant.

However, during the Level IV hearing, Mr. Albani, reviewing the same notes, could only say for sure that Mr. Anderson came to him complaining about the petition.

Footnote: 14

Respondent did not produce any of the teachers alleged to have complained at either Level III or Level IV.

Footnote: 15

Mrs. Wallizer testified that Grievant has not interrupted her instructional time more than other professional educators have.

Footnote: 16

Furthermore, if Respondent is serious about limiting instructional time interruptions, this standard should be applied to everyone, administrators as well as teachers, because as Mr. Albani said "an interruption is an interruption."