TAMELA E. BIERER,

Grievant,

v. DOCKET NO. 95-29-558

JEFFERSON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

On December 12, 1995, Tamela E. Bierer (Grievant) submitted this grievance directly to Level IV, in accordance with W.Va. Code § 18A-2-8, challenging her one-day suspension without pay by the Jefferson County Board of Education (Respondent). On February 8, 1996, an evidentiary hearing was held in this matter at the Grievance Board's office in Elkins. On February 26, 1996, this case became mature upon receipt of Respondent's brief.

Grievant alleges "I received a one day suspension without pay for failure to turn in a lesson plan." As relief, Grievant "request[s] that the suspension be overturned and my pay reinstated."

BACKGROUND

Mr. Michael Martin, Principal at Blue Ridge Elementary School periodically checks the lesson plans of teachers at his school to determine whether they are timely preparing their lesson plans. On November 13, 1995, while performing a routine inspection of lesson plans, Mr. Martin went to Grievant's classroom and asked to see her lesson plans. Grievant responded that she had not written lesson plans for that week. Mr. Martin also discovered that Grievant's last entry in her lesson plan book was for the week of October 23- 27.

On November 16, 1995, Grievant was asked to report to the Principal's office. At this time, Mr. Martin handed her a letter dated November 13, 1995, which stated:

> During a routine inspection of lesson plans this morning (approximately 9:45 a.m.) you were unable to produce any evidence of prior planning for the current week.

> Jefferson County Board of Education Policy 7.5.1 states that 'appropriate lesson plans shall be available at least one week in advance.' You are surely aware that the failure to plan for instruction is considered a serious breach of your duty as an [sic] teacher at Blue Ridge.
>
> In reviewing your personnel file[,] I compiled the following list of dates on which you were unable to comply with the county policy concerning lesson plans:
>
> February 7, 1990 April 9, 1990
>
> December 9, 1991 February 3, 1992
>
> February 18, 1992 October 28, 1992
>
> November 28, 1994
>
> Your record also reflects that you have been placed on an Improvement Plan two different times (December 11, 1991 and February 20, 1992) for failure to comply with the county policy regarding lesson planning.
>
> You have proven in the past that you are capable of creating adequate lesson plans and yet you continue to exhibit the same deficiencies. Due to the recurring nature of your Unsatisfactory Performance, I am recommending to the Superintendent of Schools that you receive a one-day suspension without pay. I will continue to monitor your compliance with the lesson plan policy by requiring that you present to me your completed lesson plans on the last scheduled work day of each weekfor the following week. I will continue to work with you through the development of an Improvement Plan and the appointment of an Improvement Team. I believe the county administration and I have demonstrated great patience in dealing with your continued violation of the lesson plan policy. Be advised that you are placing your continued employment with Jefferson County Public Schools in jeopardy (refer to WV Code §18A-2-8).

By letter dated November 22, 1995, Grievant was informed by Associate Superintendent John W. Rose that her suspension was being recommended to Respondent. Grievant's suspension was approved by Respondent in a 5-0 vote. Therefore, Respondent suspended Grievant without pay on Wednesday, December 13, 1995.

POSITION OF THE PARTIES

Respondent cites the Principal's history of being "extremely tolerant and considerate" to Grievant while attempting to gain her compliance by utilizing State Board of Education Policies 5300 and 5310. Respondent further asserts that Grievant is capable of writing lesson plans but fails and refuses to comply because she does not take the lesson plan policy seriously.

Grievant does not contest the fact that her lesson plans were not prepared timely as required by county policy. Grievant challenges the procedural aspects of this case. Grievant asserts that based on W.Va. Code §18A-2-12 and State Board of Education Policies 5300 and 5310, she is entitled to

an improvement period and an opportunity to correct her "deficiencies." Grievant buttresses her position by citing the following section of W.Va. Code § 18A-2-12:

> [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 andthe 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.

Grievant also asserts that it was wrong for Respondent to take into consideration deficiencies, contained in past performance evaluations, which were satisfactorily remedied with the successful completion of an Improvement Period. To that end, Grievant cites another section of W.Va. Code § 18A-2-12:

> [a]ny professional personnel whose performance evaluation includes a written improvement plan shall be given an opportunity to improve his or her performance through the implementation of the plan. If the next performance evaluation shows that the professional is now performing satisfactorily, no further action shall be taken concerning the original performance evaluation. If such evaluation shows that the professional is still not performing satisfactorily, the evaluator shall either make additional recommendations for improvement or may recommend the dismissal of such professional in accordance with the provisions of section eight [§ 18A-2- 8] of this article.

DISCUSSION

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. It is not disputed that Grievant has the skill, knowledge, and ability to write satisfactory lesson plans. (See footnote 1) The problem is that Grievant failed to perform part of her job and the failure appears to have been willful.

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 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. Therefore, W.Va. Code § 18A-2-12 and State Board of Education Policies 5300 and 5310 do not apply.

During the Respondent's board meeting, Grievant's actions were called incompetent and insubordinate. Incompetent is defined by Webster's II New Riverside University Dictionary, copyright 1994, as not properly qualified. Clearly, Grievant's failure to write timely lesson plans is not incompetence. However, Grievant's actions, or lack thereof, do constitute insubordination.

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). It has also been 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 2) Furthermore, in order to establish 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).

Respondent's county policy, Policy 7.5.1, states "[a]ppropriate lesson plans shall be available at least one week in advance." Moreover, Grievant was aware of the county policy because she had been on an improvement plan twice for this behavior and staff handbooks are handed out each year to teachers. The staff handbook states: "(1) lesson plan books shall continue to be provided for classroom teacher use; (2) teachers are required to prepare written lesson plans which will be adequate to serve their needs, or those of a substitute in case such is needed; (3) plans shall be available at least one week in advance. (It is understood that adjustments need to be made from time to time in any plans made for future use.); and (4) plans shall be checked periodically." (See footnote 3) Moreover, Grievant testified, at the Level IV hearing, she was aware of the policy and that she was in violation of this policy by failing to comply with the lesson plan policy. Grievant cited illness as the excuse for not being in compliance with county policy. However, when Grievant was asked why she was able to work, but not able to write her lesson plans, she responded:

> because coming to school and carrying out the entire day was about all I could do; to

> come to school and do that. Upon returning home, I would get in bed and I would be there most of the evening. Other than just checking on my son a few times and ... I would try to get up and come the next day because I would try not to miss.

Furthermore, Grievant was unable to give a reason when she was asked if illness was the reason for all of the other times she failed to write her lesson plans. The Undersigned finds Grievant's reason to be a poor excuse at best. Again, it should be noted that on November 13, 1995, Grievant wrote two and a half days of satisfactory lesson plans in approximately an hour and a half.

In summary, Respondent proved by a preponderance of the evidence that (1) Grievant had satisfactorily completed two improvement periods for not timely complying with the county lesson plan policy; (2) Grievant knew how to write lesson plans; (3) Grievant's failure to write lesson plans resulted from insubordination and misconduct, not incompetency; and (4) that Grievant's actions, or lack thereof, constituted insubordination.

Even though Respondent has proved that suspension in this case was proper, Grievant may offer evidence in hope of mitigating the punishment. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties imposed by the employer against other employees guilty of similar offenses;and the clarity with which the employee was advised of prohibitions against the conduct involved." Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1991).

Grievant has not offered sufficient evidence to warrant mitigation of the punishment in this case. Respondent has cited Grievant for this type of conduct on at least seven occasions and has placed her on an Improvement Plan twice. Grievant has repeatedly engaged in insubordinate behavior by failing to perform her job. Therefore, suspension was not an abuse of discretion.

The following Findings of Fact were derived from the record, which includes the transcript of Respondent's board meeting during

which Respondent acted upon the recommended suspension of Grievant. (See footnote 4)

FINDINGS OF FACT

1. Grievant is employed by Respondent as a third grade teacher at Blue Ridge Elementary School.

2. Respondent documented seven times Grievant failed to comply with the county policy concerning lesson plans; February 7, 1990; April 9, 1990; December 9, 1991; February 3, 1992; February 18, 1992; October 28, 1992; and November 28, 1994.

3. Grievant successfully completed two Improvement Plans for failure to comply with the county lesson plan policy. TheImprovement Plan periods began on the following dates: December 11, 1991 and February 20, 1992.

4. Grievant failed to prepare lesson plans for the week beginning on November 13, 1995, in accordance with county policy.

5. Mr. Martin, Principal at Blue Ridge Elementary School, recommended to the Superintendent that Grievant be suspended for one day.

6. Mr. Rose, Associate Superintendent, recommended to Respondent that Grievant be suspended without pay on Wednesday, December 13, 1995.

7. On December 11, 1995, following a board meeting, Respondent voted 5-0 to suspend Grievant.

8. Grievant was suspended without pay for one day on December 13, 1995.

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; 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).

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. and Roy Truby, State Superintendent, 375 S.E.2d 911 (W.Va. 1981). 3. Incompetency and insubordination are among 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 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 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 was insubordinate when she wilfully failed to comply with the county lesson plan policy.

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

8. The Grievance Board is empowered to fashion relief which is "deemed fair and equitable" in the circumstances of a particular case. W.Va. Code 18-29-5(b). The authority to mitigate the punishment imposed on a school employee is encompassed by the statute. Phillips v. Summers County Bd. of Educ., Docket No. 93- 45-105 (Mar. 31, 1994); Bell v. Kanawha County Bd. of Ed., Docket No. 91-20-005 (Apr. 16, 1991). 9. When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties imposed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved. Parham v. Raleigh County Bd. of Educ., Docket No. 91-41-131 (Nov. 7, 1991).

10. Respondent's imposition of a one-day suspension for Grievant's failure to have lesson plans completed was not such an excessive penalty as to be arbitrary or capricious. See, Nicholson, 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 must be **DENIED**.

Any party may appeal this DECISION to the Circuit of Kanawha County or to the Circuit Court of Jefferson 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: April 8, 1996 _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE

Footnote: 1

On November 13, 1995, Grievant wrote two and a half days of satisfactory lesson plans in approximately an hour and a half.

Footnote: 2

It should be further noted that Sexton was affirmed in part and reversed in part by the Kanawha County Circuit Court, Docket No. 88-AA-154. It was then appealed to the Supreme Court which reversed the Circuit Court's ruling. The cite to that Supreme Court case is Sexton v. Marshall University, 387 S.E.2d 529 (W.Va. 1989).

Footnote: 3

Exhibit 2 from Respondent's Board meeting.

Footnote: 4

The record in this case also includes: (1) the four exhibits used during the Respondent's board meeting; (2) the audio tapes of the Level IV hearing; (3) a Level IV grievance form; (4) Grievant's two exhibits admitted at Level IV; (5) Respondent's nine exhibits admitted at Level IV; and (6) Respondent's brief. The Undersigned considered all matters of record.