PAUL SLACK,

Grievant,

v. DOCKET Nos. 96-32-148/156

MORGAN COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

On April 5, 1996, Paul Slack, Grievant, submitted his grievance directly to Level IV, in accordance with W. Va. Code §18A-2-8, challenging his suspension. Grievant alleged that he:

> was suspended with pay April 1, 1996, pending a termination recommendation from Mr. Charles Montgomery. The suspension and proposed termination are clearly wrong and are based upon a series of administrative procedures clearly violative of West Virginia Code and the policies of the West Virginia Board of Education. Grievant demands reinstatement to his teaching position and elimination of this matter from his personnel file.

On April 24, 1996, the Grievance Board received Grievant's termination grievance, which alleges:

> Grievant's employment was terminated [on] April 18, 1996. The Morgan County Board of Education's decision was clearly wrong, unsupported by the evidence, illegal, unwarranted, based upon invalid evaluations, and otherwise in violation of his rights and the Board's duties. Grievant alleges all the statutory grounds of appeal and seeks reinstatement, back pay and attorney fees.

The two matters were consolidated. As relief, Grievant seeks reinstatement, back pay, and attorney fees. Level IV evidentiary hearings were held on October 25, 1996; January 3, 1997; April 15, 1997; and July 28, 1997. (See footnote 1) This case became mature for decision on September 18, 1997, upon receipt of Grievant's response concerningadmission of Grievant's Exhibit A, which was attached to his post- hearing submission. (See footnote 2) The following facts are derived from the record.

FINDINGS OF FACT

1. Grievant, during periods relevant to this grievance, was a classroom teacher assigned to Great Cacapon Elementary School (GCES).

2. During the 1995-96 school year, Grievant taught in a split classroom, teaching third and fourth grade students. (Tr. Oct. 25, 1996, p. 13).

3. During the 1995-96 school year, and continuing through the time of the grievance hearings in this matter, Charles W. Montgomery, III, Ph.D. served as Superintendent for Morgan County Schools (Tr. Oct. 25, 1996, p. 3). (See footnote 3)

4. Prior to assuming the Superintendent's position in Morgan County, Dr. Montgomery did not know Grievant, having first met himin July, 1995. (Tr. Oct. 25, 1996, pp. 4, 13-14). (See footnote 4)

5. During periods relevant to this grievance, Mrs. Janet Goodhand served as Director of Elementary Education, as well as having responsibilities for certain federal programs, such as Title I.

6. Given her capacity as Director of Elementary Education, Mrs. Goodhand generally serves on all improvement committees or teams involving elementary teachers, although it is the principal's decision whether to involve her. (Tr. July 28, 1997, pp. 96-97).

7. After Dr. Montgomery assumed the Superintendency in Morgan County, the principal at GCES, Mr. Heavner, resigned to accept another position. Mrs. Montgomery, the spouse of the Superintendent, applied for the principal's position (actually a position with responsibilities both for administrative and teaching duties), and, ultimately, was appointed to the principalship, with

teaching responsibilities, for the 1995-96 school year. (Tr. Oct. 25, 1996, pp. 14-16).

8. Superintendent Montgomery, in addition to having experience as an educator and administrator, also has extensive training in the evaluation of professional personnel, both in Ohio, where he was previously employed, and in West Virginia. The Superintendent fulfilled the responsibilities required by theCenter for Professional Development related to the evaluation of personnel, receiving his certificate in September of 1995. (Tr. Oct. 25, 1996, p. 5-9; R. Ex. 1).

9. Mrs. Montgomery, in addition to having experience as a professional educator, and administrator, also has completed training with the Center for Professional Development, successfully completing the program and receiving her certificate enabling her to evaluate professional personnel in this state. (R. Ex. 8).

10. Prior to her employment in West Virginia, Mrs. Montgomery had evaluated professional personnel and was experienced with, having designed and implemented, plans of improvement in her former position in Ohio. (Tr. Oct. 25, 1996, pp. 91-92).

11. Mrs. Goodhand, in addition to having experience as a professional educator, and

administrator, with some nineteen (19) years of experience in Morgan County, had also successfully completed training with the Center for Professional Development, receiving a certificate enabling her to evaluate professional personnel and principals in August, 1992. (Tr. Jan. 3, 1997, pp. 103-105; R. Ex. 15 & 16).

12. Grievant was on an Improvement Plan dated June 13, 1994, developed while Mr. Heavner was principal and implemented during the 1994-95 school year, with a final assessment on November 18, 1994. (R. Rebuttal Ex. 3).

13. On or about June 8, 1995, while Grievant was also assigned to GCES, he was placed upon an Improvement Plan based upon unsatisfactory performance in the area of classroom climate. Atthis time, Mr. Heavner was Principal at GCES. See, Slack v. Morgan County Board of Education, Docket No. 95-32-404 (Oct. 18, 1995).

14. Grievant filed a grievance relative to this Improvement Plan, claiming that he was being harassed “by being placed on one Improvement Plan after another”. The relief sought by Grievant was that the “Improvement Plan be declared null, void and of no effect and that the Board of Education order county administrators Mrs. Goodhand and Mr. Heavner cease harassment of Grievant.” See, Slack, supra. In Slack, at Level IV, Grievant sought to raise the issue of a procedurally flawed Improvement Plan, in addition to his allegations of harassment. The Grievance Board determined that the issue of a flawed Improvement Plan had not been properly raised, was not incorporated into the grievance, and that the issue would not be addressed in the decision.

Relative to Grievant's claim that he was being harassed by virtue of being placed upon an Improvement Plan, to address poor performance in the area of classroom climate, the Grievance Board held as follows:

> Grievant has failed to meet his burden of proof in establishing the administration's actions in placing him on a plan of improvement were harassment, or that the actions were for the purpose of harassing the Grievant. The plan itself sets forth specific areas that need improvement, with specific suggestions on how Grievant can effectuate positive changes in those areas. These items were discussed previously with Grievant both orally and in writing. There is nothing in the plan that would suggest Grievant was being set up for failure, as the suggestions for improvement are reasonable and capable of implementation. That Grievant personally finds the Improvement Plan an annoyance, irritation or disturbing, is not of itself evidence that the plan was developed for the purpose of harassing Grievant.Id.

15. Classroom climate is an area of teacher performance, relating to the learning environment and the presence, or absence, of positive and rewarding feelings and expectations and fairness to all

despite individual learning styles. (Tr., 1/3/97, pp. 126-130, 148-151).

16. At the end of the 1994-95 school year, the Improvement Plan which had been developed by Mr. Heavner "was put on hold" while Slack, supra, was proceeding. (See footnote 5) (Tr. Oct. 25, 1996, p. 115).

17. After Slack was decided, the 1995-96 Improvement Plan, at issue in this case, was revised October 25, 1995, and Mrs. Montgomery began the process of implementing the Improvement Plan. (See footnote 6)

It identifies deficiencies, specifies the corrective action to remediate the deficiency, contains the time period for monitoring, deadlines, and satisfactory performance to be achieved, was of a duration no longer than one semester, and described the resourcesand other assistance available to Grievant. (Tr. Oct. 25, 1996, p. 117, Exhibit Notebook, pp. 7-10).

18. Improvement Team members, in addition to the Grievant, were Mrs. Montgomery (Grievant's immediate supervisor), Mrs. Goodhand, and Kay Rohrbaugh, the teacher selected by Grievant, from a list of two, to participate in his plan.

19. The Improvement Plan, as revised, provided that a final assessment would be made by March 25, 1996. Prior to this time, Improvement Team members, Mrs. Goodhand and Mrs. Rohrbaugh, were to conduct observations, and Mrs. Montgomery was to complete an evaluation, or final assessment, on timeliness identified in the plan. (Exhibit Notebook, p. 8).

20. Observations and evaluations were conducted timely, as described by the plan, and Grievant was provided with timely conferences and written reports, as outlined in the Improvement Plan. Observations made by Mrs. Montgomery and Mrs. Goodhand during the period of the Improvement Plan noted a variety of deficiencies. The information set forth in the observations, and the information provided to the Grievant in the form of conference discussions and written summaries, was detailed information, relevant to the ongoing Improvement Plan and aimed toward improvement of performance. Additionally, information was set forth concerning remediation as well as the availability of assistance to improve performance. (Exhibit Notebook, pp. 7-9, 30- 33, 36-39, 71-74, 108-116, 154-159, 171, 176-179, 183-186, 190).

21. Mrs. Goodhand asked Mrs. Rohrbaugh after her firstobservation if she would like to be present to go over that observation with Grievant, or offer additional suggestions. Mrs. Rohrbaugh responded that she would rather not be there. Mrs. Montgomery asked Grievant if he wanted Mrs.

Rohrbaugh present to make additional comments, and Grievant indicated “no, that he didn't want that.” (Tr. July 28, 1997, p. 41-42).

22. By memo dated February 23, 1996, but not received by Mrs. Montgomery until February 26, 1996, at 8:50 a.m., Grievant requested that Mrs. Rohrbaugh be present at a 9:00 a.m. conference February 26, 1996. Attempts were made to obtain Mrs. Rohrbaugh's attendance, however, with such short notice, she was unable to attend. Mrs. Rohrbaugh did state that if Grievant wanted to speak with her he should call her and she could arrange a time to meet with him. (Tr. July 28, 1997, p. 83).

23. Mrs. Rohrbaugh's observations, as well as her testimony at hearing, were relatively positive. (Tr. Jan. 3, 1997, pp. 270- 275).

24. By final evaluation dated March 20, 1996, Mrs. Montgomery assessed Grievant's performance. Grievant was found to have performed unsatisfactorily in all areas noted on the teacher evaluation form (Programs of Study, Classroom Climate, Instructional Management System, Student Progress, Communication, and Professional Work Habits). (Exhibit Notebook, pp. 193-196).

25. Noting Grievant's inadequate performance throughout the year, and the unsatisfactory completion of the Improvement Plan, Mrs. Montgomery advised that she would recommend dismissal to theSuperintendent. (Exhibit Notebook, p. 195).

26. The evaluation did contain a commendation, for Grievant's “punctual and reliable attendance” as well as a willingness to assist with the computer problems. (Exhibit Notebook, p. 196).

27. The final evaluation was not based upon the observations of improvement team members, Mrs. Goodhand and Mrs. Rohrbaugh. Following completion of the final evaluation, Mrs. Montgomery found Grievant's performance to be generally unsatisfactory. Further, she found that Grievant had not improved pursuant to the criteria set forth in the Improvement Plan. (Tr. Oct. 25, 1996, pp. 121- 125).

28. After completion of the final evaluation, and recognizing that she had two options -- either to place Grievant upon another Improvement Plan or recommend his termination, Mrs. Montgomery chose to recommend termination. She concluded that Grievant's performance throughout the school year had been unsatisfactory and,
further, that he had not satisfactorily completed the terms of his Improvement Plan. (Tr. Oct. 25, 1996, p. 126).

29. By memo dated March 20, 1996, Mrs. Montgomery advised the Grievant that she would

like to meet with him on Friday, March 22, at 2:30 p.m. to discuss the final evaluation. (Exhibit Notebook, p. 197).

30. Grievant signed the evaluation form, stating that it only meant he received it, and that he believed the evaluation was “too vague to respond to”. The conference with Grievant was memorialized in a memo from Mrs. Montgomery to Grievant dated March26, 1996 (Exhibit Notebook, p. 199).

31. By memorandum dated March 25, 1996, and following the principal's conference with the Grievant, Mrs. Montgomery recommended to the Superintendent the dismissal of the Grievant “due to his inadequate performance throughout the year, and his unsatisfactory completion of his Improvement Plan.” A copy of Grievant's final teacher evaluation was attached, and the Superintendent was advised that supporting documentation, as referenced in the final teacher evaluation, would be made available upon request. (Exhibit Notebook, p. 5).

32. By memorandum dated March 28, 1996, the Superintendent requested this additional information from the principal. (Exhibit Notebook, p. 1).

33. By letter dated April 1, 1996, and hand delivered to Grievant that date, Dr. Montgomery advised Grievant that he would
be recommending Grievant's termination at an upcoming Board of Education meeting. (Exhibit Notebook, p. 2).

34. The Superintendent received a recommendation for termination, or any information relative to termination Mrs. Montgomery, who provided her information in writing, both in the form of her March 25, 1996 letter to the Superintendent and the additional documentation provided to the Superintendent at his request. (Exhibit Notebook, pp. 1, 5; Agency's Exhibit 7).

35. Dr. Montgomery made an independent inquiry, upon review of the materials referenced above, in order to determine if the principal's recommendation for termination should be pursued. (Tr.Oct. 25, 1996, pp. 42-43).

36. It was based upon a review of this material that Dr. Montgomery concluded he would recommend termination and a suspension with pay, preceding the Board's action on his recommendation with respect to termination. (Tr. Oct. 25, 1996, p. 43).

37. In deciding whether to provide Grievant with more opportunity for improvement or proceed to termination, the Superintendent concluded that the documentation he reviewed indicated that

Grievant had not satisfactorily completed his Improvement Plan, in fact, “he was unwilling with many of the suggestions if not all of them referred to in the Plan”, and that Grievant was having a negative impact on students in the classroom. (Tr. Oct. 25, 1996, pp. 43-44).

38. Therefore, a determination was made based upon the final evaluation and the observations, memoranda and documentation referenced in that final evaluation.

39. Grievant was advised that the basis for the Superintendent's recommendation for termination would be unsatisfactory performance and insubordination. The Superintendent made specific reference to the final teacher evaluation, and supporting documentation referenced in that evaluation, in his letter to Grievant. (Exhibit Notebook, p. 2).

40. Grievant was advised that the recommendation would be made at a Board of Education meeting scheduled for April 18, 1996. The location of the meeting was made known to Grievant, and he wasadvised that he could appear before Agency to make a statement or submit other information prior to it acting on the Superintendent's recommendation. Further, Grievant was advised that he had a right to be accompanied by counsel, at his own expense, or by another representative at the meeting. (Exhibit Notebook, pp. 2-3).

41. The Superintendent, again in the letter of April 1, 1996, advised Grievant that he would be suspended with pay between the date of the letter and the time Agency would take action on the recommendation. (Exhibit Notebook, p. 3).

42. Agency held Grievant's termination hearing on April 18, 1996.

43. The Superintendent's recommendation, both with respect to affirmation of the suspension and termination, passed, upon motion
duly seconded, by a 4-0 vote. (Tr. Oct. 25, 1996, p. 26; Agency's Exhibit No. 3)

44. Agency's policy is that its president casts a vote only in the case of a tie. There were no dissenting votes with respect to Grievant's suspension or termination (Tr. Oct. 25, 1996, p. 24- 27).

CONCLUSIONS OF LAW

1. In cases dealing with disciplinary matters, including suspension and termination, the burden of proof rests with a board of education to prove the charges by a preponderance of the evidence. W. Va. Code §18-29-6; Arnold v. Mineral County Bd. of Educ., Docket No. 96-28-065 (Dec. 6, 1996); 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. W. Va. Code §18A-2-8, in pertinent part, provides: "[a] charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article".

4. The corrective actions sought in the Improvement Plan were reasonable and capable of being implemented.

5. The record in this case supports a finding that Grievant received specific notice of his deficiencies, not only in his evaluation but, also, in observations, memoranda and other documentation, all of record and referenced specifically in the findings of fact in this matter, and that he was given several

opportunities, more than is required, to remediate or improve his performance.

6. The evidence of record in this case establishes that, with respect to the Improvement Plan, Grievant failed to satisfactorily complete the plan and improve his performance.

7. 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).

8. To establish insubordination, the employer mustdemonstrate 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).

9. The Superintendent's letter of April 1, 1996, advised Grievant that the basis for the recommendation for suspension with pay and termination was grounded both in unsatisfactory performance and in insubordination. The final evaluation, as well as observations, memoranda and documents referenced in that final evaluation, all of which had been received by Grievant, clearly placed Grievant on notice that his attitude and behavior were considered insubordinate and should be remediated.

10. Agency proved by a preponderance of the evidence that Grievant was insubordinate.

11. The Grievance Board will not intrude on the evaluations of employees, and recommendations related thereto, unless there is evidence to demonstrate "such an arbitrary abuse

on the part of the school official to show the primary purpose of the policies [i.e., W. Va. Code §18A-2-12] has been confounded". Jones v. Braxton County Board of Education, Docket No. 96-04-282 (June 28, 1997); Kinder v. Berkley County Bd. of Educ., Docket No. 02-87-199 (June 16, 1988). See Higgins v. Randolph County Bd. of Educ., 286 S.E.2d 682 (W. Va. 1981).

Accordingly, this grievance is **DENIED**.

Any party may appeal this DECISION to the Circuit of Kanawha County or to the Circuit Court of Morgan 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: 9/30/97 _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE

Footnote: 1 The gray notebook Respondent offered as an Exhibit during the Level IV hearing is admitted. It will be referred to in this decision as Exhibit Notebook.

Footnote: 2 Grievant included additional documentary evidence with his post-hearing argument. Because this document was not presented during the Level IV hearing (and Respondent did not have an opportunity to cross-examine a pertinent witness, to conduct voir dire with respect to the document, or to present evidence in rebuttal), the document has not been considered in rendering this decision. See Mills v. W. Va. State Soil Conservation Agency, Docket No. 96-AGR-153 (July 30, 1996); Jessen v. Bd. Of Trustees, Docket No. 94-MBOT-1059 (Oct. 26, 1995); Woo v. Putnam County Bd. Of Educ., Docket No. 93-40-420 (June 2, 1994).

Footnote: 3 After being appointed Superintendent for the 1995-96 school year, but prior to assuming his formal responsibilities on July 1, 1995, Dr. Montgomery did have a ten (10) day contract, for consultant work with the County to assist in the transition between the outgoing and incoming Superintendent. This brief contract pertained to work performed by Dr. Montgomery in the Spring of 1995, just prior to his move to Morgan County.

Footnote: 4 Dr. and Mrs. Montgomery came to West Virginia from Ohio, and neither individual had a relationship with Morgan County Schools, or any of its personnel, prior to coming to Morgan County in the 1995-96 school year (Tr. 10/25/96, pp. 4-6, 90-91).

Footnote: 5 The Improvement Plan developed during Principal Heavner's tenure was predicated upon a prior evaluation showing unsatisfactory performance by the Grievant as well as documentation in the form of observations, memoranda, and Heavner's frequent oral requests that the Grievant "adapt or change his practices or procedures both in the classroom and school-wide in an effort to improve problems that he was having with his classroom." (Tr. Oct. 25, 1996, p. 115-116; Slack v. Morgan County Board of Education, Docket No. 95-32-404 (Oct. 18, 1995) at p. 2, ¶ 3.

Footnote: 6 Because applicable timeliness identified on the Improvement Plan developed during Mr. Heavner's tenure were no longer appropriate, given that the implementation of the plan had been held in abeyance pending a decision by the Grievance Board, Mrs. Montgomery revised the dates, making them relevant to the 1995-96 school year, and an Improvement Team was formed to proceed with implementation of the plan. (Tr. Oct. 25, 1996, p. 117).