DENNIS BENNETT,

Grievant,

v. Docket No. 98-34-150

NICHOLAS COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Principal Dennis Bennett (Grievant), grieves his three day suspension without pay by the Nicholas County Board of Education (NCBE) for insubordination. A Level II hearing was held May 4, 1998 before Jerry Wright, Esq. Grievant was represented at this hearing by Henry Hills, Esq. and NCBE was represented by Erwin Conrad, Esq. A Level III decision was issued by NCBE on May 4, 1998. (See footnote 1) A Level IV hearing was held before the undersigned on August 24 and September 10, 1998 at the Grievance Board's Beckley office. Grievant was again represented at this hearing by Henry Hills, Esq. and NCBE was again represented by Erwin Conrad, Esq. The parties waived submission of proposed findings of fact and conclusions of law, and this case became mature for decision at the conclusion of the Level IV hearing.

The following Findings of Fact pertinent to the resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievant has been employed by NCBE as Principal of Richwood High School (RHS) for eight years, and has been an educator for 29 years. 2. Officials of the Nicholas County school system were encouraged to, and did, seek funding for various school needs from their legislators. During the period of time pertinent to the resolution of this grievance, many such requests for funding were pending.

3. Officials of the Nicholas County school system were very happy and excited to receive money from various funding sources whenever it became available, to meet the needs of the students of Nicholas County.

4. NCBE is the only fiscal agent within the Nicholas County School system authorized to receive money from the legislature.

5. NCBE received approximately $1,400,000.00 in grant funds during the 1997- 1998 school

year.

6. RHS is adjacent to Richwood Junior High School (RJHS). The two schools share a common football field, with the athletic facility located at RJHS.

7. Unbeknownst to Grievant, officials at RJHS had submitted, and had lobbied their legislators for, a grant application for $40,000.00 for a weight room. The weight room would be constructed on the far side of RJHS from RHS, but would be shared by RJHS and RHS students. The grant application was on RJHS letterhead. RHS assistant football coach J. B. Miller wrote the grant application, and was one of four signatories of it. The other three signatories were officials of RJHS.

8. At the same time, Mary Jane Williams, a teacher at RHS, had prepared a grant application totaling $14,000.00 for computers for RHS. Ms. Williams was a skilled, prolific grant writer, who had secured hundreds of thousands of dollars in grant funds for RHS.

9. Senator Randy Schoonover told Grievant, at the state basketball tournament,that his computer grant had been authorized by the legislature.

10. Also at this time, Grievant was seeking grant funds for new curtains and stair treads for RHS.

11. On March 24, 1998, Grievant received a memo from Nicholas County School Superintendent William Grizzell (Grizzell). This memo informed Grievant that RHS had received a grant of $15,000.00. The memo did not state the purpose of the money, which was for a weight room.

12. Similar memos were sent to three other principals.

13. Grizzell called each of the three other principals to discuss the grants' purposes, which varied from school to school. He was unable to reach Grievant.

14. The memo directed Grievant to let Superintendent Grizzell know if he had any questions, and directed him to complete parts three and four of a grant application form and return it to Grizzell.

15. Grizzell thought that he had informed Grievant that the grant was for a weight room, but he had not.

16 Grievant was excited to learn of the $15,000.00 grant, and thought it was in response to the $14,000.00 computer grant proposal written by Williams.

17. As part of preparing parts three and four, as directed by Grizzell's memo, Williams contacted Grizzell and learned that the grant was, in fact, for a weight room for RJHS.

18. Grievant contacted the Department of Education and the Arts to determine whether the

computer grant he had sought for RHS had been confused with the weight room grant for RJHS. 19. Grievant spoke to Tracy Carr of the Department of Education and the Arts, and they agreed that he would send a partial copy of the computer grant to her, to determine whether that was the grant the legislature had intended to fund.

20. At the time Grievant sent the partial grant application to Tracy Carr, the legislature had already determined which grants would be funded, and there was no process underway by which new grant proposals could be funded.

21. When Grizzell learned that Grievant had sent the partial grant application to the Department of Education and the Arts, he became upset, because supporters of the weight room at RJHS had been complaining to him for some time about the lack of money for the weight room.

22. RJHS eventually received the $15,000.00 grant for its weight room.

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). A preponderance of the evidence is defined as “evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.” Black's Law Dictionary (6th ed. 1991), Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

The authority of a county board of education to suspend an employee must bebased upon one or more of the causes listed in W. Va. Code § 18A-2-8, and must be exercised reasonably, not arbitrarily or capriciously. Parham v. Raleigh County Bd. of Educ., 192 W. Va. 540, 453 S.E.2d 374 (1994), 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).

W. Va. Code § 18A-2-8 provides, in pertinent part:

> Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea of nolo contendere to a felony charge. 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.

This is a tale of unfortunate coincidences, understandable mistakes, and misunderstandings among well-intentioned people. Grievant was charged with insubordination and suspended for three days without pay for his actions in response to the following memo from Superintendent Grizzell:

> Your school has been given $15,000 in grant funds from the Dept. of Education and the Arts. You need to complete parts 3&4 and send to me so we can get your money. If you have any questions let me know. This is great for your school. You need to send a letter of thank [sic] to Senators Shirley Love and Randy Schoonover and Delegate White. I have their address [sic] if you need them. The sooner you get me the information the sooner you get your funds.

Insubordination is the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Riddle v. Bd. of Directors, So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). Insubordination may also be found when anemployee shows a willful disregard for the implied directions of an employer. Sexton v. Marshall Univ., 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).

To prove insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995). An employer also has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority . . ." McKinney v. Wyoming County Bd. of Educ., Docket No. 92-55-112 (Aug. 3, 1992)(citing In re Burton Mfg. Co., 82 L.A. 1228 (Feb. 2, 1984)).

Superintendent Grizzell felt that Grievant willfully disregarded his memo's instructions, and tried to change the purpose of the grant, when he sent the partial computer grant application to Tracy Carr at the Department of Education and the Arts. (See footnote 2) However, the evidence paints a more benign picture of Grievant's actions.

Mary Jane Williams, the teacher at RHS who prepared the computer grant application, was in a better position than any other witness to observe the events that led to this grievance. She credibly testified at Level IV that she had worked on a number of grants at RHS, including the computer grant.

When Superintendent Grizzell's memoarrived, Grievant was excited, and thought that the computer grant request had been funded. Part of the reason Grievant thought this was that the computer grant had requested $14,000.00, and the memo said that $15,000.00 had been awarded. Williams and Grievant had no doubt that this was the money they had asked Senator Randy Schoonover for, and that Schoonover had told Grievant, at the state basketball tournament, had been authorized by the legislature. Williams then prepared parts three and four as the memo directed. As part of preparing them, she called Grizzell and learned that the grant was for a weight room. Grizzell incorrectly told Williams that his memo had specified that the grant was for a weight room.

Williams told Grievant. Both Grievant and Williams were confused, because Grizzell's memo said that the money was for “your school,” RHS, and they were unaware of any proposal for a weight room at RHS. To resolve the confusion, Grievant called Tracy Carr of the Department of Education and the Arts, and they agreed that he would send a partial copy of the computer grant to her, to determine whether that was the grant the legislature had funded. At the time Grievant sent the partial grant application to Tracy Carr, the legislature had already determined which grants would be funded, and there was no process underway by which new grant proposals could be funded. The partial application did not contain a signature or cover page, and Williams, as an experienced grant writer, knew that an actual application required a blue-ink signature from Superintendent Grizzell. This view of the events at issue was confirmed by the consistent and credible testimony of Grievant, Grievant's secretary Lois Schoolcraft, Tracy Carr, and her boss, Secretary of Arts and Education David Ice. It was also undisputed that a principal can not receive grant monies, and that NCBE was the only fiscal agent within the Nicholas County school systemauthorized to receive such money from the legislature.

Grievant credibly testified that he never knew of the weight room proposal. In fact, no witness testified that Grievant knew of the weight room grant; and its author, Coach Miller, testified that he never told Grievant of it. Grievant was one of many Nicholas County school officials who commendably sought grant money from legislators for student needs at every opportunity. Grievant thought that Grizzell's memo meant that he had received his computer grant, which he had again requested in a letter to Senator Schoonover on January 7. When Williams told him that the grant was for weights, and was for a different school than his, he was “thrown for a loop.” He called Tracy Carr to get information to pass on to Superintendent Grizzell, because he wanted the money to go to the

right school, for the right purpose. He wanted to effectuate the legislature's intent. Grievant thought that perhaps Ms. Carr was unaware that RHS and RJHS were separate, but adjacent, schools.

Grievant also credibly testified to his good employment record, and stated that he never intended to disobey Superintendent Grizzell, that he never intended the partial grant application that he sent to Carr as a request for funds, only as an attempt at clarification. Indeed, no witness testified that Grievant attempted to change the grant's purpose. Grievant also thought his subordinate Williams' call to Grizzell would suffice as a response to Grizzell's memo.

It is clear that Superintendent Grizzell sincerely believed he had told Grievant that the grant was for a weight room. However, he had not. He incorrectly told Williams that his memo had specified that the grant was for a weight room. His letter informing Grievant of his suspension incorrectly stated "[y]ou were informed on March 24, 1998 [the date of the memo] that your school had received a $15,000.00 grant for the purchase of weightroom equipment." Grizzell also maintained that he told Grievant about the weights in an informal side conversation during a break at a principals' meeting in early March. However, testimony on this issue was contradictory, and NCBE failed to establish this by a preponderance of the evidence. Grizzell also testified that he probably told Grievant about the weights when the call from Senator Love, announcing the grants, reached him in Grievant's secretary's office. However, the preponderance of the evidence showed that Grievant was in his own office when Grizzell took Love's call.

It is also clear that the memo did not tell Grievant to submit grant materials only to Superintendent Grizzell, or forbid him to make the reasonable inquiries that he made of Ms. Carr. Another unfortunate coincidence was that Grizzell tried to telephone Grievant about the grant, but Grievant's line was busy.

Although four words, "for a weight room," added at the end of the memo's first sentence, could have prevented this entire dispute, it is understandable that Superintendent Grizzell omitted them. He was thinking about weights, and all witnesses testified that getting a grant for the students of Nicholas County was very exciting. However, Grievant was thinking about computers, and a series of unfortunate coincidences, understandable mistakes, and misunderstandings among well-intentioned people came to a head.

It is clear that Grievant did not attempt to apply for money for a purpose other than the one desired by Superintendent Grizzell, which would have been impossible in any event, but merely took

reasonable steps to clarify the confusing situation he faced. Grievant's conduct simply did not rise to level of the knowing, intentional, and willful disregard for Superintendent Grizzell's instructions, or the defiance of his authority,inherent in a charge of insubordination. See Maxey v. McDowell County Bd. of Educ., Docket No. 97-33-208 (Apr. 30, 1997) (Grievant held insubordinate for stomping on her evaluation and threatening to blow her principal's head off with a shotgun); Dilley v. Cabell County Bd. of Educ., Docket No. 97-06-164 (Sep. 19, 1997)(Grievant held insubordinate for falsifying student records); Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17- 219 (Dec. 31, 1996)(Grievant held insubordinate for grabbing, threatening, and cursing student); Thompson v. Logan County Bd. of Educ., Docket No. 95-23-127 (July 17, 1995)(Grievant held insubordinate for refusing to meet with his supervisor and refusing to acknowledge his refusal); Arbaugh v. Putnam County Bd. of Educ., Docket No. 90-40-437 (May 22, 1991)(Grievant held insubordinate for refusing to work).

Because Grievant's conduct did not constitute insubordination, his suspension by NCBE was unreasonable. Parham, supra. As all involved in this grievance clearly had the best interests of the students foremost in their consideration, the outcome of this grievance should not be completely unwelcome to NCBE.

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

CONCLUSIONS OF LAW

1. 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).

2. 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, and must beexercised 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).

3. W. Va. Code § 18A-2-8 states that a board of education may suspend or dismiss any person

in its employment at any time for immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, the conviction of a felony or a guilty plea of nolo contendere to a felony charge.

4. Insubordination involves the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Riddle v. Bd. of Directors, So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). Insubordination may also be found when an employee shows a willful disregard for the implied directions of an employer. Sexton v. Marshall Univ., 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).

5. In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995).

6. NCBE has failed to meet its burden of proof and demonstrate, by a preponderance of the evidence, that Grievant was guilty of insubordination.

Accordingly, this grievance is **GRANTED**, and Respondent MCBE is **ORDERED** to nullify Grievant's three day suspension without pay, to remove any mention of it from hispersonnel file, to pay him the salary he would have earned during the three days of his suspension, with interest, and to restore all seniority, leave and other benefits he would have earned during his suspension.

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

-

ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated: September 29, 1998

Footnote: 1 *It is unclear from the record how this could have occurred.*

Footnote: 2 *NCBE's charge that Grievant was also insubordinate for telephoning other principals for clarification of Grizzell's memo instead of Grizzell was abandoned at Level IV, after it was established that other principals who received this memo also were confused by it and made telephone calls to clarify its meaning.*