DORRIS WALLS,

Grievant,

v. Docket No. 98-20-325

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Dorris Walls, alleges the Kanawha County Board of Education ("KCBOE") denied him due process with regard to bringing charges against him for sexual harassment of a student. Grievant contends these charges and the subsequent hearing caused him to take sick leave and to incur attorney fees. Relief sought is to be granted the return of all personal sick leave days and payment of legal fees of $1,000.00. (See footnote 1) **This grievance was denied at all lower levels. Grievant appealed to Level IV, and a hearing was conducted on October 13, 1998. This case became mature for decision on October 27, 1998, the deadline for the parties' final proposed findings of fact and conclusions of law.** (See footnote 2)

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed by KCBOE as a vocational teacher at the Ben Franklin Vocational School ("BFVS") for many years.

2. On September 24, 1997, a student's mother called Diana Long, the Director of Vocational Education, and stated her son C had been a victim of sexual harassment at the hands of Grievant, and when C had complained he had been suspended. (See footnote 3)

3. The mother also informed Ms. Long that C had complained to the principal, Mr. Alvin Brown, about the sexual harassment, and had been informed by Mr. Brown that he could not do anything about the behavior, because if the principal watched the teacher in the classroom,

the teacher would act properly while Mr. Brown was in attendance.

4. On September 24, 1997, Ms. Long called Mr. Brown and asked about the complaint. Mr. Brown indicated he had a lot of trouble with C, and did not do anything about the complaint or investigate it in any way. **(See footnote 4)**

5. On September 25, 1997, Ms. Long called Mr. Bill Courtney, Director of Personnel, and asked for advice. He directed her to interview C and other students in the class. Mr. Courtney indicated Mr. Brown should not be involved in the investigative process because he was now a part of the situation, as he had failed to investigate the initial complaint. 6. Ms. Long made arrangements to interview students that day in their regular school setting and had the school counselor present for all the interviews. Ms. Long told the students the interviews would be confidential, and directed the students not to discuss their conversations with anyone else.

7. Ms. Long interviewed C, and he indicated Grievant made nasty comments in class, he asked Grievant to stop, and then he got suspended. He stated Grievant made statements about "whacking", wanting things to shine like "in a ghost's rectum", **(See footnote 5)** **and general sexual remarks.**

8. C also discussed an incident when he had gone with another student to borrow some WD40. C complained that when they brought the lubricant back that Grievant had asked the other boy, D, if D had "lubed him up good."

9. Ms. Long also talked with four other students. D indicated Grievant had asked him when he returned the WD40, "Did you lube C up good?" D thought this was a homosexual remark, and D replied that he was not like that.

10. CP reported Grievant did not allow "cussing" in the classroom and he had never heard any inappropriate remarks in the classroom.

11. N indicated it was common for Grievant to tell dirty jokes, he was not offended by them, and he had never heard anyone object to them. He also reported Grievant had told him he was "dumber than a pig's hind end." He stated Grievant was a great teacher. 12. T stated Grievant called students "wussy" and "wimps" and that Grievant teased C about masturbating by calling C "Flash Hands" and "Lightning Jack." He had not been offended by these remarks and thought they were funny.

13. On September 26, 1997, Ms. Long again called Mr. Courtney for direction. She also indicated she thought the situation was one of inappropriate remarks being made in the classroom, but that this was probably the norm. Mr. Courtney directed Ms. Long to have a meeting with Grievant and Mr. Brown.

14. Ms. Long met with Grievant, Mr. Brown, and Grievant's representative, Mr. Bryant on September 26, 1997. Grievant denied all the charges, but did say he used the term about "the goat's rectum", when he wanted them to get something really clean. He had also asked the boys when they brought the WD40 back if they had "greased her up good" or something to that effect. Additionally, Grievant had said something to a student about playing with himself, but he only meant the student was not paying attention.

15. At this meeting, Mr. Bryant objected to the investigation, and specifically indicated Ms. Long should not have interviewed any students. Mr. Bryant also believed it went against Grievant's right to confidentiality to have a counselor in the room because she was part of the administration. Mr. Bryant also told Ms. Long she was trying to ruin Grievant's career.

16. Mr. Brown indicated that C had told many falsehoods and he had not investigated the complaint because he considered the sources.

17. After this meeting, Ms. Long wrote up her report and sent it to Superintendent Jorea Marple. 18. On October 3, 1997, Superintendent Marple sent a confidential letter to Grievant, specifically indicating the charges, explaining a hearing would be necessary to determine if disciplinary action should be taken, and setting the hearing for October 14, 1997.

19. This hearing was conducted on October 28, 1997. Several of the students who talked to Ms. Long did not appear. C appeared and repeated his allegations. D appeared and declared he had never talked to Ms. Long, but that he remembered seeing papers indicating she had talked to him. D also indicated he was directed to attend the hearing by Grievant.

20. On November 14, 1997, Karen Williams, the designated Hearing Examiner, sent her recommendation to Superintendent Marple. She found that the allegations of inappropriate remarks of a sexual nature were not substantiated by the reliable evidence.

21. On November 24, 1997, Superintendent Marple wrote Grievant attaching Ms. Williams' report. Superintendent Marple agreed with the report and indicated all references to the allegations would be removed from his personnel file. She also apologized for the stress

the proceedings had created and indicated that if it had been handled properly when the complaint first arose "it is likely it would not have reached the hearing stage."

22. On February 17, 1998, Mr. Bryant wrote Superintendent Marple requesting that KCBOE pay Grievant's attorney fees and reimburse him for the thirty days of sick leave Grievant took because the stress exacerbated a preexisting condition, hypertension. These expenses were incurred during the pre-disciplinary hearing.

23. Superintendent Marple responded on March 11, 1998, indicating she sympathized with Grievant, but that when allegations of misconduct were brought forward KCBOE had a statutory duty to investigate the complaints. She found no due process violations, and noted there was no legal basis or grounds upon which to reimburse Grievant for his attorney fees and to return the days of sick leave.

24. On or about March 23, 1998, Grievant filed this grievance.

25. Ms. Long had no reason to be upset with Grievant, and did not have negative feelings toward Grievant.

Issues and Arguments

Grievant argues his due process rights were violated, but when he filed the grievance initially he did not indicate in what way and which rights. At Level I, Grievant only stated "denial of due process". In his appeal to Level II, Grievant did clarify what he viewed as his failure to receive due process. Grievant alleged "the county policy on sexual harassment was not followed," "the investigation was seriously impaired," and that "sexual harassment is a serious claim needing proper procedures and policies enforced." Grievant argued he had suffered due to these identified problems. It almost appears Grievant's argument is that when sexual harassment charges are brought, the employee should be talked to first, and if he denies the charges, then that would be the end of the investigation. Grievant contends Respondent is guilty of extreme bad faith, and this extreme bad faith should result in the relief sought. Grievant did not cite any Code Section of the grievance process to support the giving of this relief.

Respondent argues Grievant received all the required due process rights to which he was entitled. He was informed of the charges, given a chance to explain those charges and, in fact,

those charges were found to be unsubstantiated. KCBOE asserts the sexual harassment policy was followed, and although this process was difficult for Grievant, it is required to investigate throughly all sexual harassment charges when a complaint is made.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

A review of all the evidence presented clearly reveals Grievant's allegations are without merit. Although the need to defend himself against unproven charges was clearly upsetting to Grievant, this does not mean KCBOE did anything wrong in taking the issue through an investigation and a pre-disciplinary hearing. In fact, if KCBOE had not throughly investigated the charges, it would have been remiss in meeting its required duty to protect the students entrusted to its care.

The first issue to examine is whether the sexual harassment policy was followed. Section 22.26 -.28 of the KCBOE Manual states:

> **22.26 Reporting Sexual Harassment Complaints _ Any student who has a complaint of sexual harassment by anyone, including teachers, school administrators, other school employees, other students, or other persons must report the problem to the principal, other staff member(s) designated to receive such complaints or the Title IX Coordinator (348-6603). If the complaint involves the principal, the student may report the problem directly to the superintendent [348-7732].**

> **22.27 Investigation/Sexual Harassment _ All complaints will be promptly and throughly investigated. A written report of the investigation and its findings will be prepared and submitted to the Title IX Coordinator. Absent exceptional circumstances, the investigation shall be completed and a report submitted within ten (10) school days. Complaints involving complaints ofsexual harassment of a student by an employee must be reported immediately to the superintendent. The privacy of the complaining student and the persons accused of sexual harassment will be kept strictly confidential to the extent permitted by law, as will all reports, documents, statements, and other information generated by the investigation.**

22.28 Discipline _ It shall be a violation of the code of conduct for any student to engage in sexual harassment. Students found guilty of sexual harassment shall be subject to discipline in accordance with the code of conduct. An employee found guilty of sexual harassment of students shall be subject to disciplinary action.

A complaint of sexual harassment was made. This complaint was investigated and sufficient corroborating evidence was found to warrant a hearing. The sexual harassment policy was followed, and it is of no moment that the investigation began with Ms. Long, because Mr. Brown, who should have investigated the charges brought to him, did not do so. The mother then took the charges to Mr. Brown's supervisor. It would have been inappropriate to then ask Mr. Brown to investigate the complaint. He had already decided the complaint was baseless without an investigation.

Grievant contends a sexual harassment complaint must be investigated by his school based team. This allegation is incorrect. The policy allows the student to take the complaint to a variety of people, and C did take the complaint to one of the identified people, his principal. His principal then failed to take any action, and C's mother when up the supervisory chain of command and contacted Mr. Brown's supervisor, Ms. Long. Ms. Long checked to see if she should refer the complaint to someone else or investigate it herself. She was directed to complete the investigation, because of Mr. Brown's prior failure to follow the policy. This method cannot be seen as incorrect or as a failure to follow the policy. In the interest of fairness the complaint needed to be investigated by an individual who had not already decided it on its merits. To say Ms. Long could notinvestigate the complaint in this situation, because her name was not on the list, is to raise form over substance. Clearly, the policy did not provide an alternative to follow if an employee, such as Mr. Brown, did not follow the directions.

Grievant also argues he was not allowed to subpoena witnesses at his pre- disciplinary hearing. As explained by KCBOE's counsel both before and after the pre- disciplinary hearing, no subpoena power exists to compel the attendance of witnesses at employee disciplinary hearings. This inability holds true both for KCBOE, as well the employee. KCBOE did what it could to insure that the students Grievant wished to have testify would be in attendance, and it is noted that several students did attend.

Further, Grievant was given proper notice of the charges and an opportunity to answer the charges. Grievant's argument about Respondent's failure to provide required due process is without merit. The West Virginia Supreme Court of Appeals in Board of Education of the County of Mercer v. Wirt, 192 W. Va. 568, 453 S.E.2d 402 (1994), determined what due process is required to terminate an employee with a continuing contract of employment. A tenured employee is entitled to a pre-termination hearing, not a full adversarial hearing. An employee is also entitled to written notice of the charges and an explanation of the evidence. Id. at Syl. Pt. 3; W. Va. Code §18A-2-8. Additionally, Wirt found an employee is entitled to an opportunity to respond to the charges. Grievant was given all these due process protections by KCBOE, even though his hearing was to assess whether disciplinary action should be taken, not a pre-termination hearing. He had a pre- disciplinary hearing, written notice of the charges, explanation of the evidence, and an opportunity to respond. KCBOE's actions meet the specified requirements. No bad faith was demonstrated in this case, much less extreme bad faith. KCBOE received a complaint and investigated it pursuant to its policy. **(See footnote 6)**

Grievant has asked this Grievance Board to award attorney fees and to return the sick days Grievant took during this stressful period. An administrative law judge is not at liberty to grant attorney's fees at Level IV of a grievance procedure much less to award attorney's fees for a pre-disciplinary proceeding. As to the issue of whether attorney fees, expenses, and costs can be awarded at the lower levels, W. Va. Code § 18-29-8 states:

> **Any expenses incurred relative to the grievance procedure at levels one through three shall be borne by the party incurring such expense except as to the costs of transcriptions as provided for in section six [§ 18-29-5] of this article.**
>
> **In the event an employee or employer appeals an adverse level four decision to the circuit court or an adverse circuit court decision to the supreme court, and the employee substantially prevails upon such appeal, the employee or the organization representing the employee is entitled to recover court costs and reasonable attorney fees, to be set by the court, from the employer.**

The Code Section clearly does not allow the undersigned to award attorney's fees or expenses at Level IV for a pre-disciplinary hearing; thus, the requested relief could not be granted. As for the return of sick leave days Grievant seeks, this relief is similar to "pain and suffering" damages. In Snodgrass v. Kanawha County Board of Education, Docket No.

97-20-007 (June 30, 1998), this Grievance Board stated, "[a]n administrative law judge may 'provide such relief as is deemed fair and equitable in accordance with the provisions of this article . . .'. W. Va. Code § 18-29-5(b). This Grievance Board has applied this Code Section to encompass such issues as back pay, travel reimbursement, seniority, and overtime, to make grievants whole. It has not utilized this Section to award "tort-like" damages for pain and suffering, and will not choose to do so in this case." Accord, Vest v. Bd. of Educ. of County of Nicholas, 193 W. Va. 222, 225, 227 n.11, 455 S.E.2d 781 (1995). Again the undersigned Administrative Law Judge declines to award this type of relief.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving his grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 § 4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ., Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code § 18-29-6.

2. Grievant has not met his burden of proof and demonstrated that his due process rights were violated in any way.

3. Grievant has failed to meet his burden of proof and demonstrate KCBOE was guilty of bad faith. 4. W. Va. Code § 18-29-8 states "any expenses" incurred during the first four levels of the grievance procedure are the responsibility of the party incurring them. Attorney's fees, expenses, and costs cannot be awarded at these levels. Additionally, this Grievance Board has no authority to grant the return of sick leave.

5. The relief Grievant seeks occurred during a pre-disciplinary hearing, and there are no provisions for the relief requested in W. Va. Code § 18-29-8.

6. Grievant has not demonstrated, pursuant to W. Va. Code § 18-29-5(b,), that the relief requested would be within the provisions of the education employees grievance process.

Accordingly, this grievance is DENIED.

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

JANIS I. REYNOLDS

Administrative Law Judge

Dated: December 30, 1998

Footnote: 1

The day Grievant was required to take for the pre-disciplinary hearing was replaced by the Grievance Evaluator at Level II.

Footnote: 2

Grievant was represented by Susan Hubbard from the West Virginia Education Association, and Respondent was represented by KCBOE's General Counsel, Greg Bailey.

Footnote: 3

The minor students who were involved in this matter will be identified only by their initials, consistent with this Board's practice respecting the privacy of individuals in such circumstances. See, e.g., Edwards v. McDowell County Bd. of Educ., Docket No. 93-33- 118 (July 13, 1994); Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994).

Footnote: 4

The complaint filed by C was verbal not written.

Footnote: 5

This comment was later clarified by Grievant as goat's not ghost's.

Footnote: 6

It should be noted that the grievance procedure for education employees differs somewhat from the grievance process for state employees. W. Va. Code § 29-6A-7(e) states that:

> ***Both employer and employee shall at all times act in good faith and make every possible effort to resolve disputes at the lowest level of the grievance procedure. The hearing examiner may make a determination of bad faith and in extreme instances allocate the cost of the hearing to the party found to be acting in bad faith. The allocation of costs shall be based on the relative ability of***

the party to pay the costs.