DALE E. HAYS,

Grievant,

v. **Docket No. 03-14-327**

HAMPSHIRE COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

On October 22, 2003, Dale Hays, Teresa Stine, and Linda Carder filed this grievance, alleging wrongful suspension from their positions of employment with the Hampshire County Board of Education ("HCBOE"). Subsequently, by Order dated January 26, 2004, the grievance was dismissed as to Ms. Stine and Ms. Carder. During a telephone conference conducted on January 5, 2004, it was agreed that the issues currently presented in this matter could be decided without a hearing, based upon stipulations of fact contained in the findings of fact set forth below, supplemented by written arguments received by the undersigned on January 16, 2004. (See footnote 1)

The following facts are undisputed by the parties.

Findings of Fact

1. Grievant has been employed as Finance Director of HCBOE since July 1, 2002. 2. On October 8, 2003, Grievant, along with Ms. Stine and Ms. Carder (also employees of the Finance Department), was escorted from his office by Hampshire County sheriff deputies. At that time, Grievant was served with a letter from Superintendent David E. Friend, stating that he was being suspended with pay "immediately and until an investigation into possible irregularities in the finance office is completed."

3. On an unspecified date subsequent to October 8, 2003, HCBOE voted to extend the period of Grievant's suspension while the audit of financial records was conducted.

4. An investigative audit was conducted by a private accounting firm, hired by HCBOE, during

the period of October 8, 2003, through mid-December, 2003.

5. Although meetings with Grievant, Ms. Stine, and Ms. Carder were scheduled for December 17, 2003, so that the findings of the audit could be discussed with them, their counsel, and the superintendent, only Ms. Stine and Ms. Carder were interviewed during the allotted time. Grievant's meeting was rescheduled for January 7, 2004, because there was not enough time to conduct it on December 17.

6. Ms. Stine and Ms. Carder were returned to their positions on January 6, 2004.

7. Grievant and his counsel met with the superintendent to discuss the findings of the audit on January 7, 2004. Grievant requested supportive documentation of the findings, which was provided to him on January 14, 2004.

8. To date, no formal charges against Grievant have been presented to the Board by Superintendent Friend. Respondent's counsel has represented to theundersigned that charges and recommendations concerning Grievant's employment will likely be presented to the Board at its next meeting.

9. During the period of his suspension with pay, Grievant has received his full salary and benefits and has continued to accrue seniority and other benefits as if he were working in his position.

Discussion

This grievance presents a unique situation. Grievant contends that, because he has not yet received a hearing before the Board and specific notification of charges against him, Respondent has acted beyond its authority by suspending him, albeit with pay, for this extensive period of time. He seeks to be returned to work immediately. Respondent counters that, by suspending Grievant with pay, it has protected his interests and those of HCBOE while a thorough investigation is completed, at which time Grievant will either be returned to his duties or disciplined through formal charges presented to the Board, of which he will be notified and allowed to defend himself. Further, Respondent contends that Grievant has not yet been disciplined, and a grievable event has not occurred to date, rendering this Grievance Board without jurisdiction in this matter.

Both parties agree that the issues presented here are governed by the provisions of W. Va. Code §§ 18A-2-7 and 18A-2-8. The latter provision governs the suspension and dismissal of school

personnel, stating 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 or a plea of nolo contendere to a felony charge. . . . The charges shall be stated in writing served upon the employee within two days of presentation of said charges to the board.

In turn, W. Va. Code § 18A-2-7 states that "[t]he superintendent, subject only to approval of the board, shall have authority to . . . suspend school personnel." Further, and of particular pertinence to the instant case, that statute provides in subsection (c) as follows:

> The superintendent's authority to suspend school personnel shall be temporary only pending a hearing upon charges filed by the superintendent with the board of education and such period of suspension shall not exceed thirty days unless extended by order of the board.

Although the substance of the charges against Grievant is not at issue at this time, he has, contrary to Respondent's assertions, been "disciplined" by his employer. As noted recently by this Grievance Board in Blaney v. Wood County Board of Education, Docket No. 03-54-169 (Jan. 16, 2004), the above-cited Code sections do not differentiate between suspensions with pay and those without pay, and both courses of action have been taken by boards of education. Accordingly, the undersigned finds Respondent's contention that this Grievance Board lacks jurisdiction in this matter to be without merit.

The remaining issue to be determined is whether Respondent's lengthy suspension of Grievant with pay is legally permitted. Although the question presented involved the propriety of an indefinite suspension *without pay*, the reasoning set forth in Blaney, supra, is helpful. Citing a decision of the Merit Systems Protection Board, a federal employment law tribunal, it was noted:

> The most essential criterion of an action, if it is to meet the definition of "suspension" . . . is that it be "temporary." Accordingly, while the exact duration of an indefinite suspension may not be ascertainable, such an action must have a condition subsequent such as the completion of a trial or investigation which will terminate the suspension.

Id. (Citing Martin v. Customs Serv., 12 MSPR 12, 10 MSPB 568 (1982)). The administrative law judge in Blaney, supra, concluded that it was not improper for the board of education to suspend the grievant indefinitely, without pay, pending a criminal investigation into the charges against him. As in the instant case, the board had yet to hold a hearing regarding the charges against its employee.

As pointed out by Respondent, Grievant has not suffered any harm by virtue of his suspension. Indeed, the United States Supreme Court, in discussing the due process protections to which employees are entitled prior to being subject to disciplinary actions, suggested in Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), that an employer should suspend an employee *with pay* if it believes that its best interests would be served by removing the employee from the work site without a pre-termination hearing. Of course, in the instant case termination has not even been proposed or recommended at this time, so it is unclear if "pre-termination" is even implicated. Nevertheless, it is clear that temporary suspensions, either with or without pay, are sanctioned by the legal system as an appropriate mechanism for protecting an employee's rights during an investigation.

Accordingly, the undersigned concludes that Grievant's suspension with pay has not violated the provisions of W. Va. Code §§ 18A-2-7 or 18A-2-8. Respondent acted within its statutory authority to suspend Grievant pending an investigation, and properly extended that suspension so that the investigation could be concluded. Grievant is not entitled to be returned to his duties at this time.

Consistent with the foregoing findings and discussion, the following conclusions of law are made.

Conclusions of Law

1. 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, as amended, and must be exercised 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).

2. The superintendent's authority to suspend school personnel shall be temporary only pending a hearing upon charges filed by the superintendent with the board of education and such period of suspension shall not exceed thirty days unless extended by order of the board. W. Va. Code § 18A-2-7.

3. The indefinite suspension of an employee, pending investigation, is not arbitrary or capricious, a violation of statute, or an abuse of discretion. See Blaney v. Wood County Bd. of Educ., Docket No. 03-54-169 (Jan. 16, 2004).

4. Respondent's suspension of Grievant with pay, pending an investigation, was not improper in any respect.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Marion 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 andState Employees Grievance Board nor any of its administrative law judges is a party to such appeal and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: January 30, 2004 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant was represented by counsel, Lawrence M. Schultz, and Respondent was represented by counsel, Norwood Bentley.