THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

GENE FARMER,

Grievant,

v.

Docket No. 2008-0404-LogED

LOGAN COUNTY

BOARD OF EDUCATION,

Respondent.

DECISION

Grievant is employed by Respondent as a Teacher at Chapmanville High School. He filed this grievance on September 6, 2007, alleging he was improperly suspended without pay for ten days for insubordination. For relief, Grievant seeks pay for the ten days and to be made whole. A hearing was held on September 16, 2008, in the Grievance Board's Charleston office. Grievant represented himself, (See footnote 1) and Respondent was represented by Leslie Tyree, Esq. This case became mature for decision on October 16, 2008, upon the parties' submissions of Findings of Fact and Conclusions of Law. (See footnote 2)

Synopsis

Respondent suspended Grievant for 10 days without pay, alleging insubordination for failing to follow an individualized plan created for a student with a disability. Respondent asserts Grievant failed to implement the plan despite repeated discussions requiring him to implement the plan to assist the student.

Grievant avers he followed the individualized plan.

This grievance is denied. After a detailed review of the entire record, the undersignedAdministrative Law Judge makes the following Findings of Fact.

Findings of Fact

1.

Grievant is employed by Respondent as a Teacher. He teaches history at Chapmanville High School.

2.

On August 21, 2007, Respondent was provided with a letter from N's (See footnote 3) treating physician requesting Respondent assist her with her schoolwork due to a medical diagnosis.

3.

On January 5, 2007, a team consisting of school personnel and N's guardian met to formulate an individual plan to assist the Student in succeeding at school. This plan is commonly referred to as the 504 Plan.

4.

A 504 Plan comes from Section 504 of the Rehabilitation Act of 1973 which is a federal law requiring accommodations be made for individuals who need accommodations as verified by a medical professional.

5.

After the team met on January 5, 2007, N's 504 Plan was reduced to writing and provided to her teachers.

6.

Grievant received his copy of N's 504 Plan on January 23, 2007, and signed confirming the receipt.

7.

Near the last ten weeks of school, N met with Linda Burgess, Assistant Principal of Chapmanville High School, to discuss her grades.

8.

N indicated to Ms. Burgess that she had passing grades in all classes except Grievant's.9.

Ms. Burgess spoke with Grievant to determine what could be done to assist N in passing the class.

10.

Grievant informed Ms. Burgess N would have to pass the final test.

11.

Ms. Burgess asked Grievant to provide N with a study guide pursuant to paragraph 6 of the 504 Plan.

12.

Grievant informed Ms. Burgess that N could obtain the notes of another student.

13.

N failed Grievant's class. It was the only class she failed.

14.

Upon learning N had failed Grievant's class, Principal Terry Elkins requested a meeting with Grievant.

15.

Mr. Elkins, Ms. Burgess, and Mr. Godby, Superintendent at the time, all met with Grievant to discuss what, if anything, he did to comply with N's 504 Plan.

16.

At that meeting, Grievant admitted that he did not implement the modifications required by the 504 Plan.

17.

During the meeting, Grievant was given clear instruction to review N's grades and make the appropriate modifications. This was memorialized in a letter sent to Grievant on June 8, 2007, by Mr. Elkins.

18.

Grievant did not comply with this order, and when grades were submitted to the Board Office, N was still failing.

19.

Because N did not get the benefit of the 504 Plan in Grievant's class, Mr. Godby ordered Mr. Elkins to change her grade to a passing one.

20.

On June 22, 2007, Mr. Godby called and spoke with Grievant to inquire as to why

Grievant had not reviewed N's grades and implemented the 504 Plan as instructed earlier that month prior to turning in her final grade.21.

Grievant requested Mr. Godby provide clarification of the violation in writing.

22.

By letter date June 25, 2007, (See footnote 4) Mr. Godby clarified that Grievant had failed to implement the 504 Plan after being told repeatedly to do so. He then asked that Grievant contact him or Ms. Burgess as she was taking over as Superintendent upon Mr. Godby's retirement.

23.

Grievant never contacted either Mr. Godby or Ms. Burgess.

24.

On August 22, 2007, Ms. Burgess sent Grievant a letter indicating that he would be suspended for ten days starting at the beginning of the first day of work for teachers for the 2007-2008 school year. This suspension was without pay and was the result of insubordination due to Grievant's continued failure to implement the 504 Plan.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. 156 C.S.R. 1 § 3 (2008); *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). An employee of a county board of education may be suspended or dismissed only 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. W. Va. Code § 18A-2-8. “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). *SeeBeverlin v. Bd. of Educ*., 158 W. Va.1067, 216 S.E.2d 554 (1975).” *Graham v. Putnam County Bd. of Educ*., Docket No. 99-40- 206 (Sep. 30, 1999). Respondent contends Grievant was insubordinate in that he refused to implement the 504 Plan specifically designed to assist N in passing all of her classes. His refusal came after the administration repeatedly attempted to address the issue with him and provided him with several direct orders to implement some portion of the plan into his grading of this student.

Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a

reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002) (*per curiam*). *See 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). "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts, supra*.

In the current case, Grievant refused to obey an order, or more specifically a law. The law allowing for 504 Plans for students who need accomodations was created for a reason. Former Superintendent Godby explained it best by indicating that some students come to the classroom with special needs and this law was created to assist in leveling the playing field for those who need accommodations. Mr. Godby testified that following the 504 Plan is important, not simply because it is federally mandated, but because it assists the student in succeeding. There is no doubt in the undersigned's mind that Mr. Godby tried to impress upon Grievant the importance of following this plan. Yet, time and time again, Grievant refused to follow the Plan. Grievant seemed to argue that he followed the plan by providing the student with study notes. Yet, he presented no testimony as to how these notes met the objectives of the 504 Plan, nor did he present any testimony that these notes were different from those provided to other students in his class. During the numerous meetings between Grievant and Respondent, he made no effort to bring information to show that he attempted to conform to the 504 Plan. In this case, Grievant's refusal to implement the 504 Plan was clearly wilfull. From testimony presented, it appears Grievant is opposed to the Plan, as he believes all students should be treated equally. While Grievant is entitled to his opinion as an educator with years of experience, he is under a duty to follow federal law, as is Respondent. Grievant was given several chances to follow the 504 Plan beginning with the first time he was approached, prior to the final test being administered. Then he was given a second opportunity when grades were in, yet, he did nothing to adhere to the plan. This clearly was wilfull on his part.

Lastly, the rule or law is clearly valid, as it is part of the Rehabilitation Act of 1973. It was implemented for a reason, and the school system is under a duty to follow it.

Clearly Grievant was insubordinate by failing to implement the 504 Plan designed pursuant to federal law. Respondent has met its burden, and this grievance must be denied. The undersigned,

therefore, makes the following Conclusions of Law.

Conclusions of Law

1.

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. 156 C.S.R. 1 § 3 (2008); *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.

An employee of a county board of education may be suspended or dismissed only 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. W. Va. Code § 18A-2-8.

3.

"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)." *Graham v. Putnam County Bd. of Educ*., Docket No. 99-40- 206 (Sep. 30, 1999).

4.

Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *Butts v. Higher Educ. Interim Governing Bd.*, 212 W. Va. 209, 569 S.E.2d 456 (2002)(*per curiam*). *See 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).

5.

"[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order

(or rule or regulation) must be reasonable and valid." *Butts, supra*. WHEREFORE, based upon the foregoing, the grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any suchappeal must be filed within thirty (30) days of receipt of this Decision. *See* W. Va. Code § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: January 12, 2009

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Wendy A. Campbell

Administrative Law Judge

Footnote: 1

Grievant was represented by Rebecca E. Mick, Esq. until she withdrew on June 13, 2008.

Footnote: 2

Submissions were not received by Respondent.

Footnote: 3

Because this grievance involves a juvenile, the undersigned will follow the West Virginia Public Employees Grievance Board precedent and refer to her by initials.

Footnote: 4

The letter was drafted and sent on June 22, 2007, after the phone conversation. The date on the letter was incorrect. This was verified by the Certified Mail Receipt.