JAMES HANSHAW,

Grievant,

v.

DOCKET NO. 03-20-087

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, James Hanshaw, filed this grievance against his employer, the Kanawha County Board of Education ("Board"), directly to level four on March 24, 2003, protesting a 15-day suspension. A level four hearing was held in the Grievance Board's Charleston, West Virginia office on May 5, 2003, and this matter became mature for decision on June 5, 2003, the deadline for the parties' submission of proposed findings of fact and conclusions of law. Grievant was represented by Anita Mitter, West Virginia Education Association, and the Board was represented by James W. Withrow, Esq.

SUMMARY OF EVIDENCE

Disciplinary Hearing Board Exhibits (See footnote 1)

Ex. 1 -

November 7, 2002 letter from Ronald E. Duerring to James A. Hanshaw.

Ex. 2 -

November 25, 2002 letter from William H. Courtney to James A. Hanshaw.

Ex. 3 -

Title 126, Series 162 Employee Code of Conduct (5902).

Ex. 4 -

Photograph of student.

Ex. 5 -

Photograph of leg.Ex. 6 -
Photograph of binder.

Ex. 7 -

Photograph of open binder.

Ex. 8 -

October 30, 2002 statement of James Allen Hanshaw.

Ex. 9 -

Students' statements.

LIV Board Exhibits

Ex. 1 -

February 26, 2002 letter from Ronald E. Duerring to Alan(sic) Hanshaw.

Ex. 2 -

March 18, 2002 letter from Ronald E. Duerring to James A. Hanshaw.

LIV Grievant's Exhibits

Ex. 1 -

February 21, 2002 letter from Ronald E. Duerring to Cheryl and James Courts.

Ex. 2 -

2001-2002 Teacher Evaluation of James A. Hanshaw.

Testimony

The Board presented the testimony of Thomas Perdue, Beverly Mullins, Elizabeth Ball, Natasha Hudnall, Jeane-Ann Herscher, Karolyn Hall, and Stephen Brown. Grievant testified in his own behalf, and presented the testimony of Forest Hall, Debbie Murray- Zeitz, and Karolyn Hall.

Based upon a review of the record in its entirety, I find the following facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant teaches Health and Physical Education at DuPont Middle School, and has taught for the Board for twenty-three years.

2. At the time of the incident giving rise to this grievance, T.P. was a seventh grade student at DuPont Middle School, and was in Grievant's third period health class during the 2002-2003 school year. (See footnote 2) 3. T.P. was in the “top three” problem students at DuPont Middle School during the 2002-2003 school year. He was frequently disruptive, disrespectful, calculating, and dishonest.

4. On October 31, 2002, earlier in the day, and prior to third period, T.P. approached Grievant and asked him if he had anything to fix his glasses with. T.P. had also gone to the school office to report his glasses were broken that morning. His mother had been called, but could not leave work, and told him they would take care of the glasses later.

5. During Grievant's third period Health class, T.P. asked Grievant if he could go to the office to get his glasses fixed. Grievant told him no, and to “drop it” regarding his glasses.

6. T.P. started smart-mouthing Grievant, and Grievant became angry and frustrated at T.P.' s disruption. Grievant walked back to T.P.'s desk, picked up the corner of the desk, lifting the front two legs off the floor, dropped the desk, and repeated the action once more.

7. Grievant then picked up T.P.'s binder and slammed it down on T.P.'s desk.

8. A girl sitting next to T.P.'s desk was frightened when Grievant picked up the binder, fearing he was going to hit her with it.

9. Grievant did these things to try to get T.P.'s attention, and to get him to stop being disruptive.

10. T.P. was still talking and disrespectful, so Grievant took him out of the room, and across

the hall to an empty classroom to call T.P.'s mother. 11. Then, because T.P. said he was going to the office, Grievant went back to his room to give his students an assignment, and then took T.P. to the office.

12. T.P. called his mother from the office, and told her what happened. He did not tell her he had injured his leg. Grievant spoke to her as well, apologizing for calling her at work. Grievant told T.P.'s mother the child was unruly, and that he had become frustrated with him.

13. The next day, November 1, 2003, T.P. went to a counselor and asked for the number for Child Protective Services. He did not tell the counselor his leg was injured.

14. On November 2, 2003, the Assistant Principal heard about the situation, and took statements from Grievant and the students in his third period Health class.

15. Approximately a week later, on November 7, 2003, T.P. complained that Grievant had injured his leg when he lifted the desk, and photographs were taken of T.P.'s leg, showing a fresh “carpet burn” type scrape.

16.

At no time during the incident did Grievant place his hands upon T.P.

17. Approximately one year earlier, in connection with an intramural sports activity, Grievant took hold of a student's arm and conducted the student to the office, for which the parents filed a citizens' complaint with the Board. A meeting was held with Grievant, the Superintendent, Grievant's representative, and various other school officials, and Grievant was counseled about anger and classroom management, and about his discipline techniques. Grievant was cautioned not to physically touch students. 18. On November 7, 2003, Superintendent Ronald Duerring notified Grievant he was suspended with pay pending further investigation and hearing. Disc. Hrg. Bd. Ex. 1. 19. On November 25, 2003, William H. Courtney, Director, Employee Relations, notified Grievant a disciplinary hearing had been set before the Board for December 4, 2002.

20. Following the disciplinary hearing, the Hearing Examiner recommended Grievant be suspended for 15 days without pay.

21. On February 26, 2003, Superintendent Duerring informed Grievant he was accepting the Hearing Examiner's recommendation.

22. On March 18, 2003, Superintendent Duerring informed Grievant the Board had accepted his recommendation to suspend Grievant for 15 days without pay.

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 evidence 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. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true thannot." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id. See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

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).

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 or a plea of nolo contendre to a felony charge. A charge of unsatisfactory performance shall not be made except as the result of an employee evaluation pursuant to section twelve of this article.

The Board alleges Grievant is guilty of insubordination, willful neglect of duty, and cruelty, likening Grievant's actions on the day in question to “corporal punishment.” See Board Proposed Findings of Fact and Conclusions of Law.

Grievant does not deny he lifted T.P.'s desk and dropped it twice, or that he slammed T.P.'s binder down on his desk. Grievant does deny injuring T.P., and contends his actions do not support the charges leveled against him, that he should have been afforded an improvement plan prior to discipline, and that the Board's discipline is arbitrary and capricious. 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). 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). "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990).

The Board contends Grievant violated the Board's Employee Code of Conduct. Additionally, Grievant had been counseled a year before about appropriate ways to discipline students, specifically not to place his hands upon students, and the Board claims his conduct with T.P. was another instance of inappropriate discipline.

The Employee Code of Conduct provides, in pertinent part, that all school employees shall:

4.2.1
exhibit professional behavior by showing positive examples of preparedness, communication, fairness, punctuality, attendance, language, and appearance.

4.2.2
contribute, cooperate, and participate in creating an environment in which all employees/students are accepted and are provided the opportunity to achieve at the highest levels in all areas of development.

4.2.3
maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, and/or violence, and free from bias and discrimination.

4.2.4
create a culture of caring through understanding and support.

4.2.5
immediately intervene in any code of conduct violation, that has a negative impact on students, in a manner that preserves confidentiality and the dignity of each person.

4.2.6
demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior.

4.2.7
comply with all Federal and West Virginia laws, policies, regulations and procedures.

Disc. Hrg. Bd. Ex. 3.

Arguably, Grievant's conduct could be found to be in violation of some of the provisions set forth above, particularly 4.2.6, although the Board is not specific which provisions Grievant has violated.

Approximately one year earlier, in connection with an intramural sports activity, Grievant took hold of a student's arm and conducted the student to the office, for which the parents filed a citizens' complaint with the Board. A meeting was held with Grievant, the Superintendent, Grievant's representative, and various other school officials, and Grievant was counseled about anger and classroom management, and about his discipline techniques. Grievant was cautioned not to physically touch students. There is no evidence Grievant had any further problems until the October 31, 2002 incident.

Grievant did not touch T.P. in any manner during the October 31, 2002 incident. The Board claims, however, that lifting T.P.'s desk and slamming his binder are acts of “physical” discipline equal to “corporal punishment,” and because Grievant was previously cautioned about that, his actions constitute insubordination. The Board is exaggeratingwhen it likens Grievant's conduct to “corporal punishment,” which is the physical beating or hitting of a student, and had Grievant engaged in such conduct, there is no doubt he would now be protesting his dismissal, not a 15-day suspension.

The Board makes much of the fact that Grievant's method of discipline is not taught to educators

through seminars or training. However, the Board did not point to any authority, document, training manual, or textbook, which conclusively holds that Grievant's method is not allowed or is even inappropriate. Indeed, even the professional educator witnesses could not testify unequivocally that Grievant's method would never be appropriate or uncalled for, and maintained that it all depended upon the facts and circumstances of the moment.

The issue of insubordination is a close call, but the undersigned is not convinced the Board has proven this charge by a preponderance of the evidence.

The Board also charges Grievant with willful neglect of duty. To prove willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). See Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990). Although the West Virginia Supreme Court has not formulated a precise definition of “willful neglect of duty,” it does encompass something more serious than incompetence and imports “a knowing and intentional act, as distinguished from a negligent act.” Chaddock, supra.

Although not clearly set forth, it appears the Board is arguing that Grievant's “duty” was to discipline T.P. in some other manner, which he neglected when he chose the method he did. The Board could also be arguing that it was Grievant's duty to maintainself-control, which he neglected by losing his temper. However, Grievant did not lose control. Grievant admits his method of discipline was part of a controlled effort to get T.P.'s attention. Grievant was angry and frustrated with T.P., but he did not lose control. Ultimately, Grievant had to have done or refrained from doing something wrong. As discussed above, the undersigned finds the Board's evidence lacking, and it has failed to prove by a preponderance of the evidence, that Grievant engaged in wrongful conduct. Therefore, he cannot be guilty of willful neglect of duty.

Finally, the Board alleges Grievant engaged in cruelty. Cruelty is a deliberate act to inflict pain and/or suffering. Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17- 219 (Dec. 31, 1996). In Pinson v. Cabell County Board of Education, Docket No. 06-87- 100-1 (July 21, 1987), a fourth grade teacher's "continued practice of physical and emotional abuse" by name-calling, placing his hands on students, angry outbursts, and threatening behavior was found to constitute cruelty.

In Nida v. Boone County Bd. of Educ., Docket No. 91-03-268 (July 13, 1991), and Slack v. Morgan County Bd. of Educ., Docket No. 92-32-420 (June 23, 1993), this Grievance Board did not

find teachers guilty of cruelty who threw "plastic" chairs, kicked furniture, raised their voices, and knocked things over, as these actions were not directed toward a student, and the teacher had not "harassed, chastised or belittled the students in front of their peers." Slack at 7.

The undersigned does not find that Grievant's action constitute cruelty. Clearly, he did not inflict pain or suffering on T.P., despite T.P.'s claims of an injured leg. There is no evidence that Grievant harasses, chastises, or belittles T.P.; to the contrary, the evidence shows that T.P. had serious behavioral problems at school, and was frequently in the officefor one infraction or another. While reasonable minds may differ as to the wrongness or inappropriateness of Grievant's conduct, it simply does not rise to the level of conduct necessary for a finding of cruelty.

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, 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).

3.

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 or a plea of nolo contendre to a felony charge. A charge of unsatisfactory performance shall not be made except as the result of an employee evaluation pursuant to section twelve of this article.

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). In order to establish insubordination, an employer must demonstrate that a policy or directive

that applied to the employee was inexistence 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).

5. The Board has failed to prove by a preponderance of the evidence that Grievant's conduct constitutes insubordination.

6. To prove willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). See Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990). Although the West Virginia Supreme Court has not formulated a precise definition of “willful neglect of duty,” it does encompass something more serious than incompetence and imports “a knowing and intentional act, as distinguished from a negligent act.” Chaddock, supra.

7. The Board has failed to prove by a preponderance of the evidence that Grievant's conduct constitutes willful neglect of duty.

8. Cruelty is a deliberate act to inflict pain and/or suffering. Behavior which is directed toward a student, and which may include harassment, belittling, threatening, and/or grabbing, slapping, and restraining, without the need for self-defense, meets this definition. Sinsel v. Harrison Couny Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996). See Slack v. Morgan County Bd. of Educ., Docket No. 91-03-268 (July 13, 1991); Adkins v. Cabell County Bd. of Educ., Docket No. 89-06-656 (May 23, 1990); Pinson v. Cabell County Bd. of Educ., Docket No. 06-87-100-1 (July 21, 1987).

9. The Board has failed to prove by a preponderance of the evidence that Grievant's conduct constitutes cruelty.

Accordingly, this grievance is **GRANTED**. The Board is hereby **ORDERED** to compensate Grievant back pay with interest, for the 15-day suspension served, and any other benefits to which he is entitled, and to remove any evidence of the suspension from Grievant's personnel file.

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

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MARY JO SWARTZ

Administrative Law Judge

Dated: June 27, 2003

Footnote: 1

The Disciplinary Hearing transcript and exhibits were incorporated into the record by agreement of the parties.

Footnote: 2

In accordance with Grievance Board practice, the initials of the minor students involved will be used to protect their privacy.