BRENDA TOLER,

Grievant,

v. **Docket No. 03-20-369**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Brenda Toler, an employee of the Kanawha County Board of Education ("KCBOE"), filed this grievance on December 1, 2003. Grievant grieves her five day suspension and seeks to have it overturned or decreased.

As this grievance was a suspension, it was filed directly to Level IV. A hearing was held on January 22, 2004, at the Grievance Board's Charleston Office. (See footnote 1) The parties elected not to submit proposed findings of fact and conclusions of law. Accordingly, this grievance became mature for decision on the day of hearing.

The parties agreed to utilize the pre-disciplinary hearing transcript instead of taking extensive evidence at the Level IV hearing. After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed as an Itinerant Special Education Aide at Elk Elementary Center since the 1999 - 2000 school year.

2. In the Spring of 2003, Grievant was on an Improvement Plan for unsatisfactory performance. 3. For the 2003 - 2004 school year, Grievant was to be mainly in Valerie Redman's classroom with Student T. F. She was also expected to change the "diapers" of Students S.S. and H.Y.

4. Grievant was frequently gone from the classroom, and Ms. Redman frequently paged the office to find her. Often Grievant could not be found, and she would be gone as long as two hours. Ms. Redman was a new teacher, and during the first days of class the schedule was changed

frequently.

5. On August 26, 2003, the first day of classes, Grievant left work around 11:15 a.m., without permission, to check of her dog who had just had puppies.

6. Grievant's electric meter started smoking, and her landlord called the school between 11:15 - 11:30 a.m. to report the problem. He also called the Appalachian Power Company.

7. The office Secretary checked for Grievant to tell her about the message and also sent a volunteer to look for Grievant. Grievant could not be found, and she did not receive the landlord's message, as she had already left the school building.

8. Grievant was very angry when she returned to work because she believed no one had tried to contact her about the problem at home.

9. Grievant confronted Dr. Sharon Martin, her principal, in the hallway in a loud tone, pointed her finger in her face, and complained because she was not informed about her phone calls.

10. At the time of this outburst, Dr. Martin was not aware of the prior phone calls.

11. Grievant stated something about being accused of lying, and Dr. Martin directed Grievant to calm down. 12. Grievant informed Dr. Martin she was never going to calm down about what had happened and left.

13. As she left Grievant stated, "She's lucky we're on school property, otherwise I'd bloody her mouth." (See footnote 2) This threat was overheard by a waiting parent and child.

14. On Wednesday, August 27, 2003, Grievant failed to carry out her assigned tasks of changing S.S. and H.Y., and was frequently gone from the classroom.

15. On Thursday, August 28, 2003, Dr. Martin saw Grievant walking with a student and directed her to return to the classroom shortly.

16. When Grievant returned to the classroom, she was angry and believed Ms. Redman had told lies about her to Dr. Martin. Grievant began complaining to Ms. Redman in front of the students in a loud voice. Grievant said Ms. Redman was not going to get her out of the school, and Ms. Redman was calling her a liar. During this barrage, Grievant started opening the doors to the cabinets in the room saying she was looking for a ball. With the children becoming upset, Ms. Redman lined them up, marched them down to the office, found another teacher to watch them, and complained to Dr. Martin.

17. Grievant was suspended immediately with pay on August 28, 2003, and a pre-disciplinary

hearing was held on September 8, 2003.

18. Superintendent Ron Duerring received the Recommended Decision on October 16, 2003, and on October 24, 2003, he wrote Grievant informing her she was suspended without pay for five days from October 27, 2003, to October 31, 2003. Upon her return to work Grievant would be expected to perform her assigned duties in aprofessional manner, and she was to treat the principal and classroom teacher with respect. Further, Grievant was to have a counseling session with Dr. Bill Mullet, and that would be followed with additional counseling as he saw fit. Grievant would also be placed on an Improvement Plan.

19. On November 21, 2003, KCBOE approved the Superintendent's recommendation.

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 than not." 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 notmet 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).

Grievant asserts she did not do the things she is accused of, and if she did do them, is because she has been unfairly treated for so long that she had finally decided it was time she started standing up for herself. (See footnote 3) Respondent maintains the evidence clearly shows Grievant has committed the acts that she is accused of and the discipline was appropriate.

I. Credibility

An issue that must be addressed is credibility. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Resources, Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993). "The fact that [some of] this testimony is offered in written form does not alter this responsibility." Browning v. Mingo County Bd. of Educ., Docket No. 96-29-154 (Sept. 30, 1996). The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. (See footnote 4) See Holmes v. Bd. of Directors/W.Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.

In assessing the testimony presented, the undersigned Administrative Law Judge notes Grievant's perceptions and interpretations of events were different from the testimony of the other witnesses. In many of these incidences the credibility of Grievant must be called into question. "[A] [f]actor to be considered in making and explaining credibility determinations is [the] possibility that [the] witness is biased and may consciously or unconsciously shade his or her testimony for or against one of the other witnesses or parties." Chin v. Dep't of Treasury, 44 M.S.P.R. 201 (1990). See Loundman-Clay v. Higher Educ. Policy Comm'n, Docket No. 02-HEPC-013 (Aug. 29, 2002).

Grievant's assessments and interpretations were not supported by other witnesses. Additionally, Grievant basically believes she can adapt the students' schedule as she sees fit and remove them from scheduled activities. When her actions are challenged, she becomes upset and thinks she is being looked down on because she is an Aide. Theundersigned Administrative Law Judge finds the witnesses presented by KCBOE were telling the truth because of the absence of bias, interest, or motive; the consistency of their statements with each other; and the plausibility of their information.

Grt. No. 1 at Level IV.

II. Merits

W. Va. Code §18A-2-8 identifies the types of conduct that can result in disciplinary action and 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 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.

The next issue to decide is whether the evidence substantiates the charges against Grievant.

A. Insubordination

While the word insubordination was not used by Respondent, the suspension letter found Grievant had failed to follow the directions of the classroom teacher and her principal, threatened the principal, and had left the school premises without permission. These actions will be viewed as insubordination. Grievant admitted she did point her finger at Dr. Martin's face and say she would bloody her mouth.

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." 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, DocketNo. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89- 004 (May 1, 1989). Insubordination involves the “willful failure or refusal to obey reasonable orders of a superior entitled to give such order.” Riddle, supra; Webb, supra. In order to establish insubordination, an employer must demonstrate 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 Dep't, Docket No. 90-H-128 (Aug. 8, 1990).

This issue is clear. Grievant disobeyed orders of her supervisors when she left school property

without permission, failed to return to the classroom, and failed to change students as directed. Additionally, Grievant showed disrespect for her supervisor and threatened her supervisor. The charge of insubordination is proven.

B. Willful Neglect of Duty

Again, while Respondent did not call Grievant's behavior willful neglect of duty, it is clear Grievant did not complete her assigned duties, and she was aware of them. These charges will be viewed as willful neglect of duty.

Respondent must prove a charge of willful neglect of duty by a preponderance of the evidence. Arbaugh v. Putnam County Bd. of Educ., Docket No. 90-40-437 (May 22, 1991). Although the West Virginia Supreme Court of Appeals 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 anegligent act." Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990). Hence, 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 Chaddock, supra.

Grievant was assigned to care for several students who cannot care for themselves. She did not complete her assigned tasks, and Grievant was aware that she was responsible for completing these tasks. Further, Grievant was not in the classroom when she was expected to be in order to assist T. F. Grievant willfully neglected her duty toward these students.

The Findings of Fact demonstrate Grievant acted in an inappropriate, angry, and threatening manner both toward the classroom teacher and to her principal. The Findings of Fact also demonstrate Grievant did not complete her assigned tasks and frequently could not be found, leaving others to perform her work.

III. Mitigation/Severity of Penalty

The argument Grievant's suspension is excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).

"When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to

the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employeewas advised of prohibitions against the conduct involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997). Mitigation of a penalty is considered on a case by case basis. Conner v. Barbour County Bd. of Educ., Docket No. 95-01-031 (Sept. 29, 1995); McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. Pingley v. Div. of Corrections, Docket No. 95-CORR-252 (July 23, 1996). This Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge will not substitute her judgement for that of the employer. Tickett v. Cabell County Bd. of Educ., Docket No. 97-06-233 (Mar. 12, 1998); Huffstutler v. Cabell County Bd. of Educ., Docket No. 97-06-150 (Oct. 31, 1997).

The undersigned Administrative Law Judge cannot find a five-day suspension was excessive given the actions of Grievant. The above-discussion will be supplemented by 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. 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. "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 than not." 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).

3. A county board of education possesses the authority to suspended an employee, but this authority cannot be exercised in an arbitrary and capricious manner. W. Va. Code §18A-2-8. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23- 235 (Dec. 29, 1995).

4. Insubordination and willful neglect of duty are among the causes listed in W. Va. Code §18A-2-8 for which an education employee may be disciplined. See Rovello v. Lewis County Bd. of Educ., 181 W. Va. 122, 381 S.E.2d 237 (1989); Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975); Woo v. Putnam County Bd. of Educ., Docket No. 93-40-420 (June 2, 1994), aff'd 202 W. Va. 409, 504 S.E.2d 644 (1998); Jones v. Mingo County Bd. of Educ., Docket No. 95-29-151 (Aug. 24, 1995).

5. 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." 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).

6. “Insubordination encompasses more than an explicit order and refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer.” Nicholson, supra; Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 20, 1988), aff'd 182 W. Va. 294, 387 S.E.2d 529 (1989).

7. "Employees are expected to respect authority and do not have the unfettered discretion to

disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dep't, Docket No. 90-H-128 (Aug. 8, 1990), citing Meads v. Veterans Admin., 36 M.S.P.R. 574 (1988); Daniel v. U.S. Postal Serv., 16 M.S.P.R. 486 (1983); Davis v. Smithsonian Inc., 13 M.S.P.R. 77 (1983). 8. An employer 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)).

9. Grievant's behavior toward the classroom teacher and Dr. Martin, and Grievant's failure to follow the directions she has been given constitutes insubordination.

10. 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).

11. "Willful neglect of duty," encompasses something more serious than incompetence and imports "a knowing and intentional act, as distinguished from a negligent act." Chaddock, supra.

12. KCBOE has met its burden of proof by a preponderance of the evidence and demonstrated Grievant is guilty of willful neglect of duty under W. Va. Code § 18A-2-8.

13. An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. Conner v. Barbour County Bd. of Educ., Docket No. 94- 01-394 (Jan. 31, 1995). See Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989). 14. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997).

15. "Mitigation of the punishment imposed by an employer is extraordinary relief, and is

granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v. Dep't of Health and Human Resources/Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996).

16. Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge will not substitute her judgement for that of the employer. Tickett v. Cabell County Bd. of Educ., Docket No. 97- 06-233 (Mar. 12, 1998); Huffstutler v. Cabell County Bd. of Educ., Docket No. 97-06-150 (Oct. 31, 1997).

17. Given the charges proven against Grievant, the penalty is not disproportionate or excessive, nor is the penalty arbitrary and capricious. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994); Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). Accordingly, this grievance is **DENIED**.

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

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: January 30, 2004

Footnote: 1

Grievant represented herself, and Respondent was represented by James Withrow, Esq.

Footnote: 2

The exact words have varied a little bit from witness to witness, but Grievant agrees that this was close to what she said.

Footnote: 3

Grievant also asserted she had been demoted since her return to work. Since this was not part of the original disciplinary action, and Respondent's attorney was unaware of any subsequent actions on the part of Respondent, this issue was not considered at this time. Grievant was informed she could file a grievance on this matter, and the undersigned Administrative Law Judge indicated to Grievant that it was important to follow the timelines.

Footnote: 4

The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984).