DONALD DALTON,

Grievant,

v. **Docket No. 04-30-184**

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Donald Dalton ("Grievant") filed this grievance directly at level four on May 14, 2004, following a three-day suspension without pay. After a level four hearing was scheduled, the parties elected to have this matter submitted for a decision based upon the record developed at a hearing before the Monongalia County Board of Education ("Board") on May 4, 2004. (See footnote 1) This grievance became mature for consideration upon receipt of the parties' fact/law proposals on August 24, 2004.

The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

1 Grievant is regularly employed by the Board as a classroom aide.

2. Since 2001, Grievant's primary assignment has been to assist a student with spina bifida, who is catheterized and must wear a diaper. That student was in the seventh grade during the 2003-2004 school year. 3. Although the student can catheterize himself, Grievant must be with him to offer any assistance needed, and he is required, pursuant to the student's formal health care plan, to change his diaper after each catheterization.

4. Since he began caring for this particular student, Grievant has known that the health care plan requires that the diaper be changed at least twice daily, after catheterization.

5. In early 2002, the student's parents complained that their son was coming home with a urine-soaked diaper, and they were concerned that he was not being changed twice daily.

6. After the 2002 complaint, Rebecca Wise, Special Education School Nurse, met with Grievant

and reviewed the student's health care plan, explaining specifically that the student's diaper needed changed after each catheterization. A list of specific instructions was formulated and reviewed with Grievant, which he signed on April 9, 2002.

7. The student's parents complained to the school nurse in January of 2003 that their son was again coming home with a urine-soaked diaper. The issue was again discussed with Grievant, who was advised that the diaper must be changed twice daily.

8. In March of 2004, the student's parents again complained that their son was coming home with a soaked diaper. They had also been keeping track of the number of diapers used (which they provided), which did not indicate that the child was being changed twice a day.

9. When confronted with the parents' complaint, Grievant admitted that he sometimes put the same diaper back on the child after catheterization, because he did not believe it was wet. 10. Grievant was suspended without pay on April 6, 2004, for willful neglect of duty and unsatisfactory performance.

11. After the hearing on May 4, 2004, Grievant's suspension was confirmed by the Board.

11. Since Grievant's suspension, the student's parents have contacted Ms. Wise to inform her that they are very pleased with the improvement in Grievant's care of their son, particularly with regard to the diaper changes.

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 Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met itsburden. 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.

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. In terms of unsatisfactory performance, a county board of education is prohibited from "discharging, demoting or transferring an employee for reasons having to do with prior misconduct or incompetency that has not been called to the attention of the employee through evaluation, and which is correctable." Syl. Pt. 3, Trimboli v. Bd. of Educ., 163 W. Va. 1, 254 S.E.2d 561 (1979);*See also* Holland v. Bd. of Educ. of Raleigh County, 174 W. Va. 393, 327 S.E.2d 155 (1985).

Although Grievant claims that he was completely unaware that there was a problem with the student's diapers until he was confronted with this issue just prior to his suspension, his contention is in direct contravention of all of the other evidence in this case. Accordingly, the undersigned must determine which version of events is credible. 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 2) See Holmes v. Bd. of Directors/W.Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue v. Dep't of Health & Human Res./Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993).

Applying the standards set forth above, the undersigned has no choice but to find Grievant's testimony to not be credible. There appears to be no reason for Ms. Wise to manufacture her testimony regarding the previous discussions with Grievant regarding the parents' concerns over the diaper changing, and the documentary evidence indicates that there were specific instructions to change the child at least twice daily whencatheterizations were performed. Having taken care of the child for three years, it is simply not credible that Grievant would not be fully aware of this requirement. Moreover, Grievant admitted to placing the same diaper back on the child on occasion, allegedly believing it was not wet, in direct violation of the child's health care plan and his supervisor's instructions. Accordingly, the undersigned concludes that Respondent has proven by a preponderance of the evidence that Grievant willfully and knowingly ignored this requirement, constituting willful neglect of duty and unsatisfactory performance.

Similarly, Grievant argues that, because he was previously unaware of the complaints regarding this particular issue, a three-day suspension is too severe a punishment for his misconduct. 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).

"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). "Mitigation of the punishment imposed by anemployer 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).

Under the circumstances given, the undersigned cannot find that a three-day suspension was a disproportionate punishment for Grievant's conduct. Despite the requirement in the child's health care plan and specific instructions, Grievant neglected to change the child's diaper twice a day. Since he was already present for the catheterizations, it is inexplicable why Grievant would fail to change the child's diaper each time the process was completed.

The following conclusions of law support the decision in this case.

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. 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).

4. 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).

5. Respondent has proven by a preponderance of the evidence that Grievant's conduct constituted willful neglect of duty and unsatisfactory performance, and a three-day suspension without pay was not a disproportionate punishment for his conduct.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Monongalia 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 theGrievance 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: September 15, 2004 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant was represented by counsel, John E. Roush of the School Service Personnel Association, and Respondent was represented by counsel, Kelly J. Kimble.

Footnote: 2

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).