JAMES R. GRIFFITH,

Grievant,

v. **Docket No. 04-01-346**

BARBOUR COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

James R. Griffith ("Grievant") appealed the termination of his employment by the Barbour County Board of Education ("BOE") directly to level four. Following his initial suspension, he filed a grievance on September 20, 2004, which was later consolidated with his grievance regarding his termination, by Order dated February 8, 2005. After a level four hearing was scheduled, the parties elected to submit this matter for a decision based upon the record developed at the BOE pre-termination hearing conducted on January 20, 2005, supplemented by additional exhibits and fact/law proposals. This matter became mature for consideration upon receipt of the parties' final submissions on May 31, 2005. Grievant was represented in this matter by counsel, Jerry Blair, and BOE was represented by counsel, Diana L. Johnson, at the BOE hearing, and by Kimberly S. Croyle, Esquire, at level four.

The following facts have been proven by a preponderance of the credible evidence of record.

Findings of Fact

1. Prior to his termination, Grievant had been employed by BOE as a classroom teacher for approximately 15 years. His most recent assignments were teaching shop anda "basic skills" class for ninth graders at the vocational center at Philip Barbour High School ("PBHS").

2. During the 2003-2004 school year, Grievant taught a skills class in which J.C., J.P., K.C., A.S., C.G., and S.M. were students; they are all female. (See footnote 1)

3. Grievant has a daughter who was also a ninth grade student at PBHS during the 2003-2004 school year. Grievant's daughter was acquainted with J.C., K.C., C.G., and A.S., and J.C. admitted to

being “friends” with her prior to the allegations which were made against Grievant.

4. The classroom in which Grievant taught the skills class was adjacent to the larger shop room, where his shop classes were conducted. The two rooms were connected by an adjoining door.

5. Occasionally, when specific grades on particular projects needed to be discussed with individual students, Grievant would take the student into the shop room, leaving the door between the two rooms propped open. The other students would remain in the classroom on these occasions.

6. In late January of 2004, it was brought to Grievant's attention that two boys in the skills class were spreading a rumor that Grievant was having sex in the shop room with girls from the class. Grievant had a history of problems with some of the boys in the class using foul language, and some of them had been given a large number of demerits because of this and for attempting to tell jokes of a sexual nature. 7. Grievant spoke to the girls and the boys in his skills class separately regarding the rumors, explaining to them that the rumors had better stop or it could ruin his career and family. He also told them that they would be fully punished if the rumors continued.

8. Grievant reported to his supervisor, Kenna Barger, that rumors had been started by some of his students, as set forth above.

9. After Grievant was informed by his class about the rumors, he increased the students' workload.

10. The specific female students in Grievant's skills class, referred to in Finding of Fact # 2 above, complained to Grievant frequently about his daughter, about having to come to the vocational building for the class, and about their workload. J.C. and A.S. “tattled” to Grievant practically every day about things his daughter allegedly did, like talking in class or looking at boys.

11. Shortly after Grievant admonished his class about the rumors that had been started, the female students identified above went to the school counselor, Cheryl Fridley, and reported that, since the beginning of the school year, Grievant had repeatedly touched them on their breasts and buttocks, made lewd comments, and used profane language in class. Only S.M. reported not having been touched by Grievant, but stated that she had witnessed him touching the other girls.

12. J.C., J.P., K.C., A.S., and S.M. gave conflicting and inconsistent testimony regarding where and how many times they were touched by Grievant, whether others were present, whether they had witnessed other girls being touched, and the everyday events in Grievant's skills class. Examples of these inconsistencies are:

K.C. testified that Grievant touched her breast on only one occasion, when she was alone with him in the shop room discussing a grade. However, J.P., S.M., and A.S. testified that they personally witnessed Grievant touching K.C. on both the breast and buttocks, while they were present. K.C. said she did not recall this.

K.C. also testified that she never saw Grievant touch any of the other girls. However, A.S.,, J.P., and J.C. testified that they were all together when each of them were "smacked on the butt" by Grievant and when he "grabbed their boobs" on multiple occasions in the shop room. Notes taken during the investigation indicate that two boys from the class who were questioned did not see Grievant touch any of the girls at any time, and the boys were not called to testify.

S.M., A.S., and J.P. testified that they, along with J.C., K.C., and C.G., (See footnote 2) "hung out" with Grievant in the shop room on a frequent and regular basis, during class, which Grievant told them they could do. However, J.C. testified that this did not occur, and the only time these girls were in the shop room was on one occasion when Grievant took the whole class there to show them some wood sculptures.

J.P. testified that she did not recall how many times Grievant touched her, whether other people were present, or where she was when the incidents occurred.

A.S. testified that, on an occasion when Grievant allegedly put his hand down the front of her pants, she was wearing underwear. When confronted with a statement she had previously given the police, in which she stated she was NOT wearing underwear on that occasion, she could not explain the contradiction.

13. After the six girls from Grievant's skills class made their allegations against Grievant in early February of 2004, another student, C.S., came forward with allegations that Grievant had asked her to have sex with him. C.S. was not in any of Grievant's classes, but she knew him from entering his classroom on occasion to take food orders fora "prostart" class she was taking. (See footnote 3) Around Thanksgiving of 2003, Grievant asked for C.S. to be sent to see him in his classroom, and when she got there, he asked if she would have sex with him. He discussed how he was having an unsatisfying sex life with his wife, and was lonely for intimate companionship. C.S. said "hell, no," and Grievant then asked if she would help him find a girlfriend. C.S. agreed to help, because she "felt sorry" for him.

14. On a second occasion shortly after the incident described above, Grievant again sent for

C.S., and she told her teacher she did not want to go. The teacher, Amanda Carter, was a new teacher and unaware of the school policy prohibiting teachers from taking students out of other teachers' classes. Therefore, she told C.S. she had to go see Grievant. Once there, Grievant asked if she had found him a girlfriend and apologized for his previous statement to her.

15. Grievant's explanation of his reason for having C.S. taken out of class was that he heard two boys in his class discussing how they had been partying with C.S., and guns and drugs were involved. Grievant said he spoke with C.S. on these two occasions about his concerns for her safety, due to her association with these individuals.

16. In an undated letter to Grievant's daughter, C.G. stated that she had “never said anything about [Grievant],” chastised Grievant's daughter for calling her and J.C. “bitches,” and stated “You always think your [sic] better than everybody just because your dad works here!” 17. Sometime in the fall of 2003, it came to Grievant's attention during a staff meeting that there was a pornographic website entitled “whitehouse.com,” which could easily be confused with “whitehouse.gov,” which is the official website for the United States Whitehouse. He explained this to students in his skills class.

18. None of the girls who alleged Grievant touched them inappropriately reported these incidents at the time they happened. The report to Ms. Fridley was made after A.S. told some of the other girls that Grievant had put his hand down the front of her pants while they were discussing one of her projects in the shop room. The six girls went to Ms. Fridley the following day after this allegedly occurred.

19. The six female students identified above also alleged that Grievant frequently used profanity and inappropriate language in the classroom. Grievant denied doing this, and no other students in the class were called to testify to confirm that Grievant engaged in this conduct.

Discussion

Grievant is challenging his termination, a disciplinary action in which 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). The grounds upon which a Board may dismiss any person in its employment are immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance substantiated by an employee

performance evaluation, or conviction on 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, and must be exercised reasonably, not arbitrarily and capriciously. Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). Generally, an action is considered arbitrary and capricious if the agency did not rely on criteria intended to be considered, explained or reached the decision in a manner contrary to the evidence before it, or reached a decision that was so implausible that it cannot be ascribed to a difference of opinion. Trimboli v. Dep't of Health and Human Resources, Docket No. 93-HHR-322 (June 27, 1997). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." State ex rel. Eads v. Duncil, 196 W. Va. 604, 474 S.E.2d 534 (1996). "While a searching inquiry into the facts is required to determine if an action was arbitrary and capricious, the scope of review is narrow, and an administrative law judge may not simply substitute her judgment for that of a board of education." Blake v. Kanawha County Bd. of Educ., Docket No. 01-20-470 (Oct. 29, 2001).

Respondent alleges that Grievant's misconduct, as reported by the students discussed herein, constituted immorality, insubordination, and willful neglect of duty. Immorality has been defined by the West Virginia Supreme Court of Appeals as “conduct not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially, not in conformity with the acceptable standards of proper sexual behavior.” Golden v. Bd. of Educ. of County of Harrison, 169 W. Va. 63, 67, 285 S.E.2d 665, 668 (1981). “Immoral conduct is conduct which is always wrong. Just as one can never be accidentally or unwittingly dishonest, immoral conduct requires atleast an inference of conscious intent.” Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997) (citations omitted).

Additionally, Respondent contends that Grievant has been insubordinate in his blatant violation of school and BOE policies regarding appropriate conduct by teachers. 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 (W. Va. 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).

Finally, Respondent alleges willful neglect of duty as a justification for Grievant's termination. 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.

The undersigned certainly cannot disagree that, if proven, Grievant's conduct would constitute immorality, insubordination, and willful neglect of duty. The five girls from Grievant's class who testified at the BOE hearing were, unfortunately, not credible witnesses. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinationsare required. Jones v. W. Va. Dep't of Health & Human Res., Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Res., 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 Res./Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993).

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 a case such as this, where the undersigned did not have the opportunity to observe any of the witnesses' demeanor, credibility assessments are that much more difficult. However, as set forth in the factual findings above, these students gave inconsistent and conflicting testimony in many respects. In addition, due to some apparent personality conflicts between Grievant's daughter and some of the girls, along with Grievant's increased workload and discipline imposed upon this particular class, thereappears to be some motivation for these students to have been dishonest about

Grievant's actions, in an effort to “get him into trouble.”

However, with regard to C.S., who was not Grievant's student, no motivation has been established that would justify why she would fabricate her allegations against Grievant. While she did not come forward at the time Grievant first propositioned her, she testified that she felt compelled to do so, once she heard about the allegations made by the other girls. She wanted to make sure they would be believed, so she came forward with her story, and there is no evidence that she had any prior relationship with the other girls. While Grievant has contended that he was merely discussing C.S.'s “running with the wrong crowd,” his justification simply does not ring true. C.S. was not his student, and he supposedly had no previous relationship with her, so his “concern” for her welfare seems somewhat unbelievable. Also, Grievant testified that he knew very well that it was against policy to have a student taken out of another teacher's class for a private discussion, and he “should have done it differently.”

This Grievance Board has repeatedly upheld the termination of employees for conduct which constitutes sexual harassment, which has been found to be immoral as contemplated by W. Va. Code § 18A-2-8, and also constitutes insubordination, due to the employee's violation of BOE sexual harassment policies. See Noland v. Pleasants County Bd. of Educ., Docket No. 02-37-402 (Apr. 9, 2003); Jones v. Braxton County Bd.of Educ., Docket No. 00-04-220 (Dec. 29, 2000); See also Harry v. Marion County Bd. of Educ., 203 W. Va. 64, 506 S.E.2d 319 (1998). Also, as discussed in Noland, supra, even an isolated incident which involves approaching a student in a sexual manner is sufficient justification for termination, due to the irreparable damage done to the employment relationship andthe destruction of the trust which must exist between teachers and students. See Bell v. Mingo County Bd. of Educ., Docket No. 97-29-172 (Mar. 10, 1998); Graziani v. Monongalia County Board of Education, Docket No. 92-30-082 (Nov. 19, 1992). This conduct would also constitute willful neglect of duty, due to its obviously intentional nature. Accordingly, the undersigned finds that Respondent has proven by a preponderance of the evidence that Grievant sexually propositioned a student, constituting immorality, insubordination, and willful neglect of duty, for which termination was justified.

The following conclusions of law support this decision.

Conclusions of Law

1. In a disciplinary action, 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 grounds upon which a Board may dismiss any person in its employment are immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance substantiated by an employee performance evaluation, or conviction on a felony charge. W. Va. Code § 18A-2-8.

3. Immorality has been defined by the West Virginia Supreme Court of Appeals as “conduct not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially, not in conformity with the acceptable standards of proper sexual behavior.” Golden v. Bd. of Educ. of County of Harrison, 169 W. Va. 63, 67, 285 S.E.2d 665, 668 (1981). 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." Butts v. Higher Educ. Interim Governing Bd., 212 W.Va. 209, 569 S.E.2d 456 (W. Va. 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. 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).

6. Respondent has proven by a preponderance of the evidence that Grievant had a student taken out of another teacher's class, met with her privately, and asked her to have sex with him, constituting immorality, insubordination, and willful neglect of duty.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of Barbour 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 GrievanceBoard. 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: June 13, 2005

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Consistent with Grievance Board practice, the privacy of minor students will be protected by identifying them only by their initials in this Decision.

Footnote: 2

C.G. had moved away from the area, so she did not testify at the BOE hearing.

Footnote: 3

Apparently, this program allowed students to participate in the running of a "fast food" type of restaurant, whereby students took food orders from other students, the students paid for their food, and the orders were delivered to them in class.

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).