SUE COSNER,

Grievant,

v. **Docket No. 05-DOE-198** (See footnote 1)

WEST VIRGINIA DEPARTMENT OF
EDUCATION/SCHOOLS FOR THE
DEAF AND THE BLIND,

Respondent.

DECISION

Sue Cosner ("Grievant") challenges a five-day suspension imposed by her employer, Respondent Schools for the Deaf and the Blind ("SDB"). (See footnote 2) After a hearing before the West Virginia Board of Education on May 31, 2005, a formal suspension was imposed effective June 6-12, 2005. Thereafter, Grievant initiated this grievance at level four on June 9, 2005. A hearing was held in Westover, West Virginia, on September 21, 2005, at which time Grievant was represented by Anita L. Mitter of the West Virginia Education Association, and Respondent was represented by Heather L. Deskins, General Counsel. This matter became mature for consideration upon receipt of the parties' fact/law proposals on October 17, 2005.

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

Findings of Fact

1. Grievant has been employed as a teacher at SDB for approximately 18 years. She is certified to teach grades 7-12, with specializations in Deaf Education and Reading.

2. Grievant originally taught at the secondary deaf school, but she is now assigned mainly to the elementary deaf school. However, during the 2004-2005 school year, Grievant taught a Reading class at the secondary deaf school for one student, L.W. (See footnote 3), who is fifteen years old. (See footnote 4)

3. L.W. is a Down Syndrome child, is partially deaf, and is almost non- communicative.

Although he is an affable and affectionate child, it has been difficult for Grievant to teach him, because he can say very little and was often sleepy during her class. L.W. frequently fell asleep during Grievant's class and would not leave when the period was over.

4. Grievant spoke with Principal J.D. Corbin about her problems with L.W. sleeping and/or refusing to leave her class. Because Grievant had her planning period after the class with L.W. and had to leave the building, she often missed her planning period to deal with the child. In addition, after Grievant's class, L.W. was to join a group of students to travel to a different location, and he often “missed” his group; in these instances, Grievant also had to escort him to the other location. Mr. Corbin advised Grievant to let him know if she could not get L.W. to leave the classroom, and he often went to the room to coax L.W. into leaving, after Grievant left the building. 5. On January 31, 2005, L.W. had fallen asleep, and Grievant could not wake him at the end of the class period. Grievant and a classroom aide tried unsuccessfully to rouse L.W., and then requested the assistance of a male teacher, Tom Engleman.

6. After not being able to awaken L.W. on January 31, 2005, Mr. Engleman dragged L.W. from the classroom by his ankles. Grievant filed an incident report the same day, explaining what happened.

7. L.W. suffered some minor injuries (carpet burns), which were brought to the administration's attention by a school nurse. After an investigation into the incident, Mr. Engleman was disciplined with a lengthy suspension, and Grievant received a written reprimand. The reprimand letter, authored by Mr. Corbin, stated as follows:

> On January 31, 2005, an incident occurred in your 6th period class that was inappropriately handled. According to your incident report your sole student, [L.W.], had fallen asleep and you could not awaken him. Near the end of the class period, you requested assistance from a teacher's aide. Then you requested a male teacher's assistance and determined it best for [L.W.] to be removed from your classroom.
>
> Students should not be dragged from a room unless they are a danger to themselves or others or it is a life threatening emergency. You allowed your student to be inappropriately dragged from your classroom without intervention. Furthermore, you should have contacted me, the administrator for assistance.
>
> In past instances, for the same problem, you had stopped by the office and advised that [L.W.] was asleep in your classroom, you could not get him up and you had to leave. That would have been a better choice. You also failed to advise me, the

administrator, that the incident had taken place.

Anytime a student must be physically removed from your classroom an administrator must be notified.

Allow this letter to serve as a written warning for your inappropriate actions in this matter.

8. After this incident with L.W., Mr. Corbin also called a meeting with all teachers and advised them, except in an emergency situation, a child should not be forcefully removed from a classroom without summoning an administrator.

9. On April 29, 2005, at the end of Grievant's class with L.W., he refused to leave the room and crawled under a table. When coaxing him did not work, Grievant went to a nearby classroom and asked a student to find Mr. Corbin and bring him to her classroom to assist with the situation. Grievant then waited by her classroom door for Mr. Corbin to arrive, and L.W. remained under the table.

10. Within a few minutes, a substitute teacher came into Grievant's classroom to assist, (See footnote 5) and he was soon followed by a student, who also came into the room to help remove L.W. As the teacher and student were moving the table and attempting to get L.W. off the floor, Grievant yelled to the student several times to stop what they were doing and leave, but the student ignored her. Grievant did not yell to the teacher, because he is deaf, and he also had his back turned to her. In addition, this substitute had previously served as an interim principal at the school, so Grievant was somewhat uncomfortable questioning his authority.

11. The substitute teacher and student picked L.W. up under his arms and moved him into the hallway, and Mr. Corbin arrived as they were seating him in the hallway. L.W. was not injured during the incident, and the entire incident lasted only a minute or two. 12. As a result of the incident on April 29, 2005, the State Board of Education (pursuant to the recommendation of SDB Superintendent Jane McBride) suspended Grievant for five days, from June 6-10, 2005.

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). The grounds upon which a Board may suspend or 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 Res., 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 factsis 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 contends that, in view of the prior incident regarding L.W.'s removal from the classroom and the resulting reprimand, Grievant's conduct constituted insubordination. 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., 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). Although the cases are not clear as to what constitutes "wilfulness," they seem to suggest that for a refusal to obey to be "wilful," the motivation for the disobedience must be contumaciousness or a defiance of, or contempt for authority, rather than a legitimate disagreement over the legal propriety or reasonableness of an order. Butts, supra; Smith v. Parkways Economic Dev. and Tourism Auth., 05-PEDTA-166 (Aug. 26,

2005).

Grievant's uncontroverted testimony was that she believed she followed Mr. Corbin's previous directive by sending a student to summon him to her classroom on the day in question. She also credibly testified that both the substitute teacher and the student came into her room unsolicited, and that she immediately began yelling to the student that they should leave L.W. alone and leave the room. Since the substitute was deaf, had his back turned to her, and she was unsure whether he had been sent to assist her by Mr. Corbinhimself, Grievant was reluctant to cross the room, touch him, and attempt to stop him from moving L.W. Moreover, these events unfolded in a matter of seconds, leaving Grievant to make a split second decision as to whether or not to attempt to intervene. Grievant also explained that the substitute involved was a well-respected teacher and administrator who had served at SDB often and whom she had seen intervene in difficult situations before. All of these factors combined led Grievant to react as she did.

Given the legal standard for insubordination as set forth above, the undersigned simply cannot conclude, under the circumstances presented, that Grievant was insubordinate. Indeed, there was some ambiguity in the reprimand issued by Mr. Corbin, who merely advised Grievant (and other teachers in a meeting) that an administrator should be summoned if a child needs to be physically removed. Grievant did, in fact, comply with that directive by sending a student to get Mr. Corbin. The series of events which followed understandably caused Grievant to be confused as to what her responsibilities were at that point in time. She did attempt to stop the student, who ignored her and apparently did not feel it necessary to advise the deaf teacher that Grievant was upset with their actions in moving L.W. Faced with the possibility of getting physically involved in the situation by attempting to stop the teacher, whose authority she was unsure of at the time, Grievant chose not to act. Whether this was the best course of action or not, the evidence does not reveal any intentional defiance of authority or willful disobedience on Grievant's part. A questionable choice, made quickly and under confusing circumstances, simply does not constitute insubordination.

The following conclusions of law support this Decision.

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 grounds upon which a Board may suspend or 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. 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).

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., 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. Grievant's actions on April 29, 2005, did not arise from willful disobedience or refusal to obey the directives of her superiors, so they did not constitute insubordination.

Accordingly, this grievance is **GRANTED**, and Respondent is ordered to remove the five-day suspension from Grievant's record and reimburse her for any lost pay, benefits and seniority during the suspension period.

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

Date: October 28, 2005

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

This grievance originally carried an incorrect docket number of 05-DOE-197, which was an administrative error. All parties should correct their records to indicate the docket number reflected above.

Footnote: 2

The Schools are located in Romney, which is in Hampshire County.

Footnote: 3

As has been Grievance Board practice of longstanding, minor students will be identified only by their initials, in order to protect their privacy.

Footnote: 4

Apparently, Grievant had previously taught the same child, so she was asked to continue to instruct him for purposes of continuity.

Footnote: 5

None of the witnesses seemed to know how or why the substitute got involved in the situation or how he knew that there was a problem in Grievant's classroom.