THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

KATHERINE PARRISH,

Grievant,

v. **Docket No. 06-26-483**

Denise M. Spatafore

Administrative Law Judge

MASON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Katherine Parrish ("Grievant") initiated this proceeding on December 27, 2006, in response to correspondence from the Mason County Board of Education ("the Board") dated December 19, 2006, suspending her and notifying her that termination of her employment was being recommended. Grievant's employment was subsequently terminated following a Board meeting on January 18, 2007, which Grievant did not attend. A level four hearing was conducted in Charleston, West Virginia, on April 10, 2007, before Administrative Law Judge Wendy Campbell. Grievant was represented by counsel, James M. Casey, and the Board was represented by counsel, Gregory W. Bailey. The parties submitted post-hearing fact/law proposals on May 15, 2007. Due to the resignation of Judge Campbell, this grievance was transferred to the undersigned for a final decision on June 8, 2007.

Synopsis

Grievant was terminated as the result of allegations that she had physically mistreated students in her special needs preschool classroom on several occasions. Twoincidents involved Grievant's improper use of a "body sock," which is meant to be used as a calming mechanism for children with

sensory issues. Grievant used the sock as a disciplinary/control tool when children misbehaved, by pulling the sock over the entire child while laying on a cot, tucking the ends under the cot so that the child was covered head to toe. Evidence established this was not an accepted use of the device. On other occasions, Grievant was accused of being physically abrupt and harsh with young children, pulling them by the ankle and seating them very hard, sometimes causing physical pain. Respondent established that Grievant engaged in willful neglect of duty. Also, there was no due process violation, as Grievant has alleged, in that her removal prior to a Board hearing was necessary to protect the safety of children in her classroom.

Findings of Fact

1. Grievant had been employed by Respondent as a Special Education Preschool teacher since January of 2000. She has a masters degree in Preschool Special Needs Education.

2. Grievant was assigned to a preschool classroom at New Haven Elementary School; the class had twelve students, eight with disabilities.

3. A “body sock” is a device used by educators for children who have sensory issues, such as autism. The device is a stretchy tube-like piece of lycra fabric, which is open on either end. Teachers allow students to play with it, such as by crawling through it like a tunnel or contorting their body into different shapes while inside it. It is also, and perhaps chiefly, used to provide comfort and a sense of “location in space” for children. When used in this manner, teachers allow the child to put the device over his or her body, sometimes up to the waist for activities such as circle time, or sometimes up to theshoulders to be used as a sleeping bag for rest time. This allows the child to feel comfortable enough to focus on the activity at hand.

4. Grievant's preschool classroom had three body socks, two of which were open on either end, and the other hand been tied in a knot on the other end to make a “bag.”

5. J.C. (See footnote 1) was a 3-year-old student in Grievant's preschool classroom in the fall of 2006. He was severely delayed, unable to communicate using words, and developmentally was approximately the age of an 18-month-old child.

6. On the second day of school, September 11, 2006, J.C. was crying and upset throughout the day. He was also throwing things and screaming. At rest time, Grievant was still crying, so she put him on a cot with the body sock over him. She used the sock with the knotted end, pulling the

sock over the cot and completely over J.C.'s body and head, tucking the open ends under the legs of the cot. Grievant's aide, Susan Howard, discovered J.C. in the body sock screaming, crying and flailing his arms and legs. She concluded that he was distressed that he could not get out, so she removed him.

7. C.F. was also a 3-year-old student in Grievant's 2006-2007 classroom. He was also developmentally delayed, but not as much as J.C. He had problems transitioning from one activity to another and demonstrated frequent troublesome behavior.

8. On December 7, 2006, C.F. was having a “rough day” and misbehaving, so Grievant decided to put him in the “sad chair,” which is basically a time-out chair. As Grievant was putting C.F. in the chair, it moved and pinched his arm between the chair anda cabinet, causing a “pinch bruise.” C.F. cried because of his injury, and Grievant held him to comfort him. She also advised his parents about the injury.

9. C.F. also behaved badly on December 13 and 14, 2006. On both days, he was placed in the sock by Grievant several times. On December 14, C.F. was difficult to control, particularly at lunch, when he played with his food, threw food, and had to be placed away from the other children. He had been placed in the sad chair, but would not stay in it. That afternoon, Grievant put C.F. in the sock several times with it pulled up to his shoulders, but (in Grievant's words) he “figured out how to get out of it,” and would then run around the room misbehaving again. At rest time, he stepped on another child, so Grievant put him inside the sock, completely covered with the ends tucked under the cot. Grievant left the room, and Ms. Howard saw C.F. moving and struggling under the body sock. Although C.F. was not crying, Ms. Howard took him out of the sock.

10. Body socks are sometimes recommended for use in a special needs child's IEP (Individualized Education Plan), under the direction of an Occupational Therapist. They are not to be used for restraint or punishment, and their purpose is to comfort the child. Neither C.F.'s nor J.C.'s IEP contained any recommendation for use of a body sock.

11. Although daily notes are sent home with the children in Grievant's class, describing their activities and behavior, she never advised either C.F.'s or J.C.'s parents that they had been put in the body sock.

12. On several occasions in the fall of 2006, Grievant put children down on the bleachers in the gym “very hard.” One child complained that his arm was hurt, but no investigation of that incident

was conducted at the time. 13. Grievant had a practice of pulling children by the ankle toward her on the floor during circle time, if they were misbehaving or not paying attention. She did this to both C.F. and J.C.

14. When C.F. was injured on December 7, Ms. Howard reported the incident to Robert Vaughn, Principal at New Haven. He discussed the incident with Grievant, and concluded that, while she did not intentionally hurt the child, there was “abruptness” in how she placed him in the chair, which led to the injury occurring.

15. After the incident on December 14, Ms. Howard reported to Linda Rollins, Administrative Assistant, that Grievant had placed children in body socks with their heads covered, and had also been physically harsh with students on several occasions. Ms. Rollins reported the incident to Child Protective Services (“CPS”), which also conducted an investigation, concluding that maltreatment/abuse had occurred.

16. During an investigation of the complaints against Grievant, she was interviewed by Ms. Rollins and Don Bower, Assistant Superintendent. Grievant indicated that she used the body sock as a “problem solving” tool, and stated that the children could get out of the sock “if they worked at it.”

17. Grievant was notified in writing on December 19, 2006, that she was being suspended without pay, and that her termination was being recommended, due to the incidents involving the body sock and other rough treatment of students. This was also the day that Grievant met with Ms. Rollins and Mr. Bower to discuss the allegations against her. 18. The December 19 correspondence notified Grievant that the Board would discuss her potential termination on January 18, 2007, and that she could appear and be heard.

19. Grievant filed a level four grievance on December 27, 2006, alleging she was wrongfully terminated.

20. Grievant did not attend the Board hearing on January 18, 2007, after which the Board formally approved her termination.

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). An employee of a county board of education may be suspended or dismissed only 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. 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, 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).” *Graham v. Putnam County Bd. of Educ.*, Docket No. 99-40- 206 (Sep. 30, 1999). In the December 19 letter, notifying Grievant of her suspension and recommended termination, the superintendent did not state specifically which of the causes in W. Va. Code § 18A-2-8 was being alleged as the basis for the action. However, “[i]t is not the label a county board of education attaches to the conduct of the employee in the termination notice that is determinative. The critical inquiry is whether the board's evidence is sufficient to substantiate that the employee actually engaged in the conduct.” *Allen v. Monroe County Bd. of Educ.*, Docket No. 90-31-021 (July 11, 1990); *Duruttya v. Mingo County Bd. of Educ.*, Docket No. 29-88-104 (Feb. 28, 1990).

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. *Williams v. Cabell County Bd. of Educ.*, Docket No. 95-06-325 (Oct. 31, 1996); *Jones v. Mingo County Bd. of Educ.*, Docket No. 95-29-151 (Aug. 24, 1995); *Hoover v. Lewis County Bd. of Educ.*, Docket No.93-21-427 (Feb. 24, 1994). Willful neglect of duty encompasses something more serious than incompetence. *Bd. of Educ. v. Chaddock*, 183 W. Va. 638, 398 S.E.2d 120, 122 (1990); *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996). Willful neglect of duty may be defined as an employee's intentional and inexcusable failure to perform a work-related responsibility. *Adkins v. Cabell County Bd. of Educ.*, Docket No. 89-06-656 (May 23, 1990).

The undersigned finds that the evidence establishes that Grievant's conduct constituted willful neglect of duty. It is clear that she intentionally placed children in the body sock, with their heads completely covered and the ends tucked under the cot, as a method of restraint and/or discipline. Also, the evidence offered by Respondent from itsformer special education coordinator and other special needs preschool teachers established that no one ever used a body sock in this manner. It was repeatedly stated by these witnesses, and also by Grievant, that the body sock's purpose is to

comfort and calm and child who has sensory issues. Grievant knowingly used it in a manner contrary to this purpose. (See footnote 2)

Grievant's actions are also of great concern when considering the age and disabilities of the children involved, especially in the case of J.C., who was developmentally little more than an infant and traumatized by separation anxiety on his second day of preschool. To place him in a restrained position with this device completely covering him and basically “tying him down” is completely inexcusable, and Grievant should have known of the potentially traumatic effect her actions could have had on this type of child. Similarly, Grievant's description of the events of the day on December 14, when she placed C.F. in the body sock in a similar fashion, demonstrates that the child was being very difficult, and she restrained him in the body sock as a form of discipline and/or control. This was completely inappropriate, and Grievant's conduct was knowing, intentional, and inexcusable. The various other incidents described, in which Grievant was clearly “harsh” or “abrupt” with children physically, also support a finding of knowing, inappropriate conduct, which constitutes willful neglect of duty.

Grievant also alleges that a due process violation occurred here, because she was suspended without pay prior to a hearing before the Board. In support of this allegation,she cites this Grievance Board's decision in *Starkey v. Jefferson County Board of Education*, Docket No. 02-19-010 (Apr. 8, 2002). In that case, the employee was suspended for ten days without pay, and she was not presented with an opportunity to be heard by the Board until after the suspension had taken place. It was held that this did, indeed, constitute a due process violation, based upon the following reasoning:

> [A] tenured employee is entitled to a pre-suspension hearing, not a full adversarial hearing, and an opportunity to respond to the charges, when the suspension is without pay. [Syl. Pt. 3, *Buskirk v. Civil Serv. Comm'n* , 175 W. Va. 279, 332 S.E.2d 579 (1985)]. An employee is also entitled to written notice of the charges and an explanation of the evidence. [*Board of Education of the County of Mercer v. Wirt* , 192 W. Va. 568, 453 S.E.2d 402 (1994)]. In other words, the Board was required to provide a pre-suspension hearing, explanation of the evidence, and an opportunity for Grievant to respond. Id . at Syl. Pt. 3; See W. Va. Code §18A-2-8.

Starkey, *supra*.

However, the instant case must be distinguished from *Starkey* in one very important respect: while Ms. Starkey was disciplined for using inappropriate language when being reprimanded by a superior, Grievant in the instant case was disciplined for inappropriate and potentially harmful conduct toward

children entrusted to her care. As discussed in *Starkey*, *supra*:

> [I]t has been held that the requirement set forth in W. Va. Code § 18A- 2-7 that a superintendent's imposition of a suspension 'be temporary only pending a hearing upon charges filed by the superintendent with the board of education,' only pertains to situations in which the superintendent must immediately withdraw an employee from service 'until such time that the Board can review the matter.' *Pauley v. Kanawha County Board of Educ.,* Docket No. 99-20-462 (Feb. 29, 2000); *See Allison v. Kanawha County Board of Educ.*, Docket No. 20-86-273-1 (Dec.30, 1986).

> Clearly this case does not involve a situation where Grievant's immediate removal was necessary. There is no evidence that she posed athreat to herself or others. Although her language may have been inappropriate, it was not threatening.

The evidence in this case establishes that the superintendent was justified in ordering Grievant's immediate removal from her position, pending a Board hearing. The allegations against Grievant were indicative of misconduct potentially endangering the safety and well-being of very young children. Grievant's immediate removal was necessary and appropriate in order to ensure that no further incidents occurred.

One final issue to be addressed, although not discussed in the parties' fact/law proposals, is whether or not Grievant's filing at level four in December of 2006 was premature. At the level four hearing, Administrative Law Judge Campbell preserved her ruling on this issue until a final decision was issued. Although Grievant had not technically been terminated on the date of her grievance filing, she did, in fact, allege on the grievance form that her termination was unjustified. Obviously, both parties came to the level four hearing prepared to submit evidence regarding the termination issue, so no party was prejudiced by proceeding with the grievance in this manner.

The following conclusions of law are appropriate.

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. An employee of a county board of education may be suspended or dismissed only for

immorality, incompetency, cruelty, insubordination, intemperance, willful neglectof duty, unsatisfactory performance, the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge. If the disciplinary action is taken for unsatisfactory performance, it must follow an employee performance evaluation. 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, 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)." *Graham v. Putnam County Bd. of Educ.*, Docket No. 99-40-206 (Sep. 30, 1999).

4. 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. *Williams v. Cabell County Bd. of Educ.*, Docket No. 95-06-325 (Oct. 31, 1996); *Jones v. Mingo County Bd. of Educ.*, Docket No. 95-29-151 (Aug. 24, 1995); *Hoover v. Lewis County Bd. of Educ.*, Docket No.93-21-427 (Feb. 24, 1994).

5. Respondent has proven by a preponderance of the evidence that Grievant's conduct constituted 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 Mason 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 byW. 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: July 9, 2007

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

As has always been Grievance Board practice, the names of young students will not be used, in order to preserve privacy concerns.

Footnote: 2

The undersigned also feels compelled to note that my own inspection and observation of the cot and body sock indicate that, if a child were placed inside the sock with the ends tucked under the cot, the fit would be extremely tight and to be confined under it would clearly be terribly unpleasant, if not frightening (especially for a young child).