THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

TRACI HAUKLAND,

Grievant,

v. **Docket No. 06-16-471**

Sue Keller

Senior Administrative Law Judge

HARDY COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Traci Haukland ("Grievant"), employed by the Hardy County Board of Education ("HCBE") as a teacher, filed a grievance directly to level four on December 19, 2006, in which she alleged violations of *W. Va. Code* §§ 18A-2-7, 18A-2-8, and 18-29-2, occurred when she was suspended for ten days. For relief, Grievant seeks expungement of her record, reimbursement for the time without pay, plus 20% interest, and all other benefits to which she is entitled. A level four hearing was conducted on April 24, 2007, at the Grievance Board's Westover office. Grievant was represented by Garry G. Geffert, Esq., and HCBE was represented by Kimberly S. Croyle, Esq., of Bowles Rice McDavid Graff & Love, LLP. The grievance became mature for decision upon receipt of proposed findings of fact and conclusions of law filed by the parties on, or before, June 1, 2007.

Synopsis

Grievant challenged a two-week suspension imposed after a parent complained about a picture in the high school yearbook in which two boys were sticking their fingers out of their shorts to look like penises. HCBE argued that using the picture after it was brought to her attention by the yearbook printer constituted violations of the "SexualHarassment Policy" and the "Teacher Code of Conduct", resulting in insubordination and willful neglect of duty.

Although Grievant did not exercise good judgement in using the picture, it cannot be determined to have violated either the "Sexual Harassment Policy" or the "Code of Conduct". Further, pictures of

a similar nature had appeared in recent editions of the yearbook, when Grievant was not the advisor, and no discipline had been imposed. However, Grievant had been advised of the inappropriate material, and past practice does not support continued poor judgement. Mitigation is appropriate in this instance.

The following facts have been derived from the evidence admitted into the record at the predetermination hearing conducted by HCBE, and at level four.

Findings of Fact

1. Grievant has been employed by HCBE as a Language Arts teacher at Moorefield High School for the past three years, and served as the yearbook advisor during the 2005-2006 school year.

2. The yearbook advisor position is not a paid position, but is considered a class in the language arts/journalism program. The faculty advisor is required to commit many hours outside the classroom to ensure the project's completion and management of the attendant fiscal responsibilities.

3. Moorefield High School has no editorial policies, guidelines, or other mechanisms for pre-publication review of yearbook material by administrative staff. 4. HCBE Policy JGB “Student Publications” states in part:

All student publications should be pupil designed, pupil organized, and pupil directed under the advisorship of a faculty member(s) of the Board. Publications must be centralized under school direction and control. Nopublication will be produced or exist in a school without the approval of the principal. Final veto power on all publications will be in the hands of the principal. The principal will give authoritative sanction for any and all publications of the school. The principal will be the final arbitrator in all cases requiring decisions.

* * *

Supervision: All publications must have a faculty advisor/supervisor who will be present at meetings and activities and to provide guidance and leadership. The faculty advisor/supervisor is responsible for editing the material to insure [a] high-quality publication.

* * *

Liability: The pupil, faculty advisor/supervisor, principal, superintendent, and the board may be liable for court action because of slander, libel, and defamation of character.

5. Moorefield High School Principal Douglas Hines asked Grievant to fill the position of faculty advisor for the yearbook prior to the second year of her employment. Grievant initially declined because she had no prior experience as a yearbook advisor, and knew the program was $5000 in debt from the previous year. Grievant agreed to undertake the assignment after Mr. Hines asked her a second time, stating that everyone else had refused, and there was no one else to do the job.

6. HCBE uses the Josten's company to produce the Moorefield High School yearbook, *The Yellowjacket*. The company provides the faculty advisors with publishing guidelines which address, among other issues, student free speech rights, the powers of editorial control that may be exercised by school faculty and administrators over the material in the student publication, and the need for a publications policy.___7. If a company representative finds a picture or copy inappropriate, he or she will contact the faculty advisor to confirm that the material should be included in the final draft of the yearbook.

8. Josten's customer service consultant, Val Mease, contacted Grievant concerning a picture of two, then-senior boys standing back to back, each with a hand shoved into their shorts with one finger protruding through the zipper of their fly, simulating male genitalia.

9. In addition to this photo, there were several quotes from students, including one of the students in the picture, who stated, “I like my shirts like my kitties - PINK.” The title of the page was “Real Men Wear Pink!”

10. Mr. Mease advised Grievant that page seventy-eight might be inappropriate, and requested that she look over the page and let him know if she would like to change anything or leave it as is. Mr. Mease specifically asked her to “please take special note to the phrase by A.J.” (See footnote 1)

11. Grievant responded, “78 looks good to me. What are they saying is wrong? Too much finger?”

12. On November 8, 2006, a parent complained to HCBE Superintendent Ronald V. Whetzel that the picture and comment on the “Real Men Wear Pink!” page “are very sexually provocative and should not have been approved for such a publication.” The parent opined that the advisors and administration have the responsibility to keep the publication 'clean,' and that someone needed to be

held accountable. 13. Grievant sent an undated letter to the complaining parent, Superintendent Whetzel, and MHS Principal Douglas Hines, stating:

I truly apologize that the 2006 edition of *The Yellowjacket* is marred by controversy concerning the Real Men Wear Pink pages . . . The students were having fun, not trying to offend anyone. As such, although the language has innuendo, it is not out-right derogatory, and considering previous issues of the yearbook, I found that the images and language on these pages in question were tame in comparison. Therefore, I approved them.

However, should any questionable content appear in the future, I will be more conservative in judgment. Furthermore, before the 2007 edition is submitted to the printer, I will have Mr. Hines review the content.

After the 2007 edition, I resign as yearbook advisor . . . Again, I am truly sorry to anyone who was offended by the content of these pages.

14. Superintendent Whetzel placed Grievant on suspension with pay, for five days, pending further investigation into the matter.

15. Following a hearing before HCBE on December 11, 2006, Superintendent Whetzel's determination that Grievant be suspended, without pay, for a period of ten days was affirmed.

16. Prior yearbooks contained pictures and next of a similar nature, including a male student who appears to be receiving a head massage from two female students. He is pointing down to a sign he is holding which states, “Give Me Head.” The caption reveals that “the ladys [sic] love [the student's] new Marine haircut.”

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.” *Leichliter v. W. Va. Dep't of Health and*

Human Res., Docket No. 92- HHR-486 (May 17, 1993).

W. Va. Code § 18A-2-7 states that "[t]he superintendent, subject only to approval of the board, shall have authority to . . . suspend school personnel." In turn, *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. . . .

HCBE asserts that Grievant violated the "Racial, Sexual, Religious/Ethnic Harassment and Violence Policy," which includes "unwelcome or inappropriate letters, pictures, telephone calls, or materials of sexual nature," and the "Employee Code of Conduct," which imposes duties upon all teachers to "maintain a safe and healthy environment, free from harassment" and to "demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior." Because Grievant knowingly violated these policies when she intentionally determined the inappropriate picture and comment would remain in the yearbook, HCBE asserts that her actions constituted insubordination and willful neglect of duty. Grievant concedes that she approved the content, but lacking any formal guidance, did so based on an honest beliefthat the page was not any more offensive than what she had observed in earlier yearbooks.

HCBE Policy GAD "Racial, Sexual, Religious/Ethnic Harassment and Violence Policy," defines sexual harassment as:

Unwelcome sexual advances, requests for sexual favors, sexually motivated physical conduct, or communication of a sexual nature when:

1) Submission to that conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining or retaining employment, or of obtaining an education; or

2) Submission to, or rejection of, that conduct or communication by an individual is used as a factor in decisions affecting that individual's employment or education; or

3) That conduct or communication has the purpose or effect of substantially or unreasonably interfering with an individual's employment or education or creating an intimidating, hostile, or

offensive employment or educational environment.

Superintendent Whetzel testified that the applicable sections of the “Employee Conduct of Conduct” were:

4.2.1 exhibit professional behavior by showing positive examples of preparedness, communication, fairness, punctuality, attendance, language, and appearance.

4.2.3 maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, and/or violence, and free from bias and discrimination.

4.2.6 demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior.

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). "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).

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).

It cannot be determined that Grievant violated the sexual harassment policy, as it is written. H.O., the student who took the picture in question, testified at level four that the boys posed themselves in the picture, and that it was typical behavior for them, something they would do to be funny. There is no evidence that the students were adversely affectedin obtaining an education, or subject to a

hostile environment, as a result of the picture which they had set up, because they had graduated by the time the yearbook was distributed. Similarly, to find that Grievant violated the “Employee Code of Conduct” would require an unreasonably strict interpretation/application given the facts of this case. While teachers are, and should be, held to a high moral standard, there is no evidence that Grievant was condoning immoral behavior. At worst, she exercised poor judgment in allowing a vulgar picture and comment in the yearbook.

The argument that the 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 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 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 generallydefined 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 Corr*., 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 Res./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 judgment 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).

A ten-day suspension, under the facts of this grievance, was excessive and disproportionate to the offense. Although Superintendent Whetzel testified that this was the first time in eight years that he has received a complaint about the content of the yearbook, pictures in previous yearbooks are comparable to the one at issue.

In 2005, a picture of a male student with his leg lifted and dressed in short, t-shirt, pantyhose, and bunny ears, appears to have material under his shirt to create a bust line, and clearly has a stick with a sort of tassel dangling from the inside leg of the shorts. In the same year, a picture of a group of students at a dance includes a female in a very short dress which exposing her crotch. The 2004 yearbook has a picture of a sixth grade boy licking a fold of skin on his chest. This picture has a caption asking, “Josh, do you have problems?”

In 2002, a picture of two males and two females standing in front of a Sheetz billboard advertising coffee. Different size cups of coffee were shown with the caption “Size doesn't matter 69¢ Any Size.” The two females had their backs to the camera, and were bent over from the waist. One of the boys had a hand on a girl's waist. The caption for this picture was, “the size of what doesn't matter?”

Also in 2002, a picture of a male student who appears to be receiving a head massage from two female students. He is pointing down to a sign he is holding which states, “Give Me Head.” The caption reveals that “the ladys [sic] love [the student's] new Marine haircut.”

These photos establish that innuendo and poor taste are not new to the Moorefield High School yearbook, even if there were no complaints lodged. No discipline was imposed on the advisors of those yearbooks; however, the inappropriate nature of the material had been brought to Grievant's attention, and the past practice of was not valid basis for continued inclusion such material. When all the factors are reviewed, suspension is excessive, but some measure of discipline is appropriate. Therefore, the discipline is reduced to a written reprimand.

The foregoing findings of fact and 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). The 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).

2. "The superintendent, subject only to approval of the board, shall have authority to . . . suspend school personnel." *W. Va. Code* § 18A-2-7.

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. HCBE has failed to prove that Grievant acted in violation of the county "Sexual Harassment Policy" or the "Employee Code of Conduct", and therefore failed to prove that she was guilty of insubordination and willful neglect of duty.

5. 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).

6. "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).

7. "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 Res./Welch Emergency Hosp.*, Docket No. 96-

HHR-183 (Oct. 3, 1996).

8. The penalty imposed in this case was disproportionate, excessive, 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 **GRANTED**, and HCBE ORDERED to compensate Grievant for the lost pay, with interest at the legal rate of 10%, and reinstate all the benefits to which she is entitled. A letter of reprimand may be placed in her personnel file. Any party may appeal this decision to the Circuit Court of Kanawha or Hardy 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: JULY 10, 2007

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1 *Consistent with Grievance Board practice, the students will be identified only by their initials.*