THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

CHIQUITA SHELTON,

Grievant,

v.

Docket No. 07-20-227

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Chiquita Shelton, employed by the Kanawha County Board of Education ("KCBOE") as a classroom aide, filed this grievance on May 24, 2007, challenging a one-half day suspension effective on May 28, 2007. For relief, Grievant requests restoration of the one- half day of salary (with interest) and all other benefits lost as a result of the suspension, including seniority. Grievant also seeks the expungement of her personnel file concerning all references to this suspension. Grievant elected to bypass the lower levels by filing this grievance as a direct appeal to level IV. Accordingly, a level IV hearing was conducted before the undersigned Administrative Law Judge on November 27, 2007, at the Grievance Board's Charleston Office. Grievant was represented by John Roush, Esq., WVSSPA, and Respondent was represented by James W. Withrow, Esq. This grievance became mature for decision on January 9, 2008, upon receipt of the parties' proposed findings of fact and conclusions of law.

Synopsis

Grievant is employed by Respondent as a classroom aide. Respondent requires that all of its employees complete in service staff development. Respondent did not have record of

Grievant taking the in service training and testing for the 2005-2006 school year. It should be noted, Grievant missed a significant portion of the 2005-2006 school year as a result of a serious health condition. Grievant was notified by letter advising her that Respondent did not have record of Grievant taking the course and/or test. Grievant responded by letter advising she had completed the training and testing with the assistance of a classroom teacher at her school.

Grievant continued to maintain she had completed the training, but for some unknown reason, it was not recorded by the computer program. Respondent's Superintendent sent out a series of letters, beginning June 2006, to individuals who had not completed the required training advising that the Superintendent was considering disciplinary action. A final letter, almost one year later, from the Superintendent notified Grievant that she would be suspended for one-half day without pay on May 28, 2007.

Having carefully reviewed the evidence presented in this case, the undersigned concludes that the sole eyewitness corroborated the assertion of Grievant that she completed the assigned staff development training was a credible witness. In fact, many of Grievant's assertions were conceded by Respondent's Staff Development Director. Respondent did not prove the charges against Grievant.

After thorough review of the record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed by Respondent as a classroom aide at Ruffner Elementary School. 2. Respondent requires that all of its employees complete in service staff development in the areas of sexual harassment, bullying, English as a second language, cultural diversity, safety and drug free workplace. Training is provided through computer on-line classes.

3. Grievant maintains she completed the in service training for the 2005-2006 school year. This was corroborated by Mary Hutchinson, the classroom teacher with whom she works as a classroom aide.

4. Grievant received a letter from the Director of Staff Development advising that Respondent did not have record of Grievant taking the training. Grievant responded by preparing a letter, with the assistance of Mary Hutchinson, and delivering it the Director of Staff Development. Grievant asserted

that the training had been completed with the assistance of Mary Hutchinson.

5. By letter dated April 3, 2007, Respondent's Superintendent notified Grievant that he would recommend that Grievant be suspended without pay for one-half of a day due to her failure to complete the staff development sessions.

6. By letter dated May 18, 2007, Respondent's Superintendent notified Grievant that she would be suspended for one-half of a day without pay on May 28, 2007 due to her continued failure to complete the staff development sessions.

7. Ms. Hutchinson corroborated the assertion of Grievant that she had completed the assigned staff development, and she was a credible witness.

8. Grievant's assertions that she completed the required in service session were conceded by Respondent's Staff Development Director, Carol Thom.

DISCUSSION

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2007); *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). 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 its burden. *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). (See footnote 1) The grounds upon which a Board may discipline 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 the Board 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).

Respondent contends that by failing to complete the required staff development training, Grievant was insubordinate and displayed a willful neglect of duty. Respondent suspended Grievant for insubordination, and willful neglect of duty after numerous reminders and warnings. Grievant's behavior cannot be labeled as 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.*, 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). "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful;and (c) the order (or rule or regulation) must be reasonable and valid." *Butts*, *supra*. "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).

Grievant prevails because Respondent failed to prove the elements of the charge against her by a preponderance of the evidence. Nothing from this set of facts demonstrates a wilful disobedience or the refusal of Grievant to obey the Respondent's required training sessions. The undersigned agrees with Grievant that the weight of the evidence establishes that Grievant did take the required training.

As noted above, Mary Hutchinson, the classroom teacher with whom Grievant works as an aide, testified that she assisted Grievant in completing the training sessions. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are 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 Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD- 216 (Dec. 28, 1999); *Perdue, supra*.

Ms. Hutchinson did not possess any bias or motive in this matter to be anything but truthful. In addition, she clearly and concisely communicated her recollection of events that go to the heart of the matter asserted. Ms. Hutchinson confirmed that she and Grievant completed the sessions after school and registered the appropriate responses. The reason for this assistance was the difficulty in which Grievant had completing the sessions on a computer. Her demeanor during her testimony was that of someone being completely forthright and honest, and it was clear to the undersigned that she was providing first hand recollections that corroborated Grievant's testimony. In fact, Ms. Hutchinson provided the specific date and times in which she assisted with completing all components of the training session. (See footnote 2) Incidentally, Grievant testified prior to Ms. Hutchinson at the level IV hearing; nevertheless, her testimony was consistent with that of Grievant.

Furthermore, the Director of Staff Development, Carol Thom, acknowledged that Grievant communicated, on more than one occasion, that she had completed the training sessions, and Grievant was perplexed as to why her results did not register in the system. Ms. Thom went on to concede that other personnel had experienced the same difficulty with results not registering. Respondent did not prove, or even attempt to prove, that Grievant had failed to complete the amount of staff development necessary for the 2005-2006 school year. Respondent merely asserted that Grievant did not take the training sessions. This assertion does not satisfy their burden of proof, even at a preponderance standard.

The weight of the evidence offered at the level IV hearing established it was more probable than not Greivant completed the required training sessions imposed on her by Respondent. Grievant accomplished this feat after a valiant recovery from a stroke. In fact, Grievant was on medical leave from May 2005 to December 2006.

Respondent failed to meet its burden of proof and this grievance is therefore granted. Respondent

is directed to restore the one-half day of salary, and all other benefits lost as a result of the suspension. Respondent is directed to remove this suspension from the employment personnel file of Grievant.

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. Procedural Rules of the W. Va. Public Employees Grievance Board, 156 C.S.R. 1 § 156-1-3 (2007); *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 discipline 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 the Board 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).

3. 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). "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." *Butts*, *supra*.

4. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are 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). 5. 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 Holmes v. Bd. of Directors/W. Va. State College*, Docket No. 99-BOD- 216 (Dec. 28, 1999); *Perdue, supra*.

6. The only witness with first hand knowledge of Grievant's actions called to testify at the level IV hearing, Mary Hutchinson, was a credible witness.

7. Respondent failed to prove Grievant was insubordinate.

Accordingly, this grievance is GRANTED. Respondent is ORDERED to reimburse Grievant for all lost wages and benefits during her suspension period. Respondent is directed to remove this suspension from the employment personnel file of Grievant.

Any party may appeal this decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code § § 18-29-7 (repealed, *See Footnote 1*, *supra.*) Neither the West Virginia Public 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 Grievance Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: January 31, 2008

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Ronald L. Reece

Administrative Law Judge

Footnote: 1

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to 6C-3-6 (2007). Grievances which were pending prior to July 1, 2007, are decided under the former statutes, W. Va. Code §§ 18-29-1 to 18-29-11, for education employees, and W. Va. Code §§ 29-6A-1 to 29-6A-12, for other state and higher education employees. See Executive Order No. 2-07, May 8, 2007. References in this decision are to the former

statutes and rules, which continue to control the proceedings in this case.

Footnote: 2

The undersigned granted Respondent leave to provide any evidence that rebutted this testimony by way of computer records from that specific date. Respondent did not file any pleadings with the Board subsequent to the hearing other than Proposed Findings of Fact and Conclusions of Law.