THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

PHYLLIS KIRK,
Grievant,

v. **DOCKET NO. 2010-0152-LinED**

LINCOLN COUNTY BOARD
OF EDUCATION,
Respondent.

DECISION

Grievant Phyllis Kirk filed this grievance directly to level three on August 8, 2009, stating, "I was unfairly suspended for 13 days with no pay and no investigation after an altercation occurred on May 15, 2009 between myself and another teacher in my class. I received no investigation reports. I wasn't allowed to return to school; therefore, I couldn't even turn in a time sheet for class coverage." Her stated relief sought is "I want the days I was suspended added back to my time worked for the school year of 2008-2009 and my pay for those days. I want an apology from Benjamine [sic] Shew for indicating in his report and decision on my level II hearing that I lied."[1]

A level three hearing was held in the Grievance Board's Charleston office on November 6, 2009. Grievant appeared *pro se*, and Respondent was represented by counsel, Rebecca Tinder. The matter became mature for decision at the conclusion of the hearing, the parties having declined the opportunity to file proposed findings of fact and conclusions of law.

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[1]The prior hearing was actually a pre-determination hearing before the Board of Education, not a level two grievance hearing.

Synopsis

Grievant was suspended without pay for striking another school employee at school. She does not dispute that she should have been suspended, but challenges the length of her suspension, thirteen days, as excessive. Grievant cited no law, rule, or policy that may have been violated by the suspension. Respondent met its burden of proving the suspension was proper, and Grievant did not show it should be lessened; hence the grievance is denied.

Findings of Fact

Based on a preponderance of the evidence, I find the following material facts have been proven:

1. Grievant is employed as a classroom teacher at Harts Middle School in Lincoln County.

2. On May 15, 2009, Grievant was in the library of her school with her class and her co-teacher, participating in a pizza party to reward the students for their fundraising for a charity cause.

3. At the same time, another teacher, Debra “Misty” Browning and some of her students were preparing decorations for a school dance to be held that evening in the adjacent cafeteria.

4. The library, which apparently is not used as a library, has doors on either end connecting it to a classroom on one side and the cafeteria on the other. Instead of using the encircling hallway, Ms. Browning and her students had been using the library as a

pass-through from a room they were preparing balloons in and the cafeteria where they were decorating.

5. When Grievant and her class came to occupy the library, after several disruptions caused by students passing through with balloons, Grievant locked the door on the side opposite the cafeteria. Ms. Browning had been using that door, and she knocked on or rattled the door, catching Grievant's attention, and demanded to be let through.

6. At the time, Grievant's class was seated around some tables listening to a presentation from their charity's representative, while Holly Duncan, Grievant's co-teacher, prepared the pizza and water for the students.

7. As Ms. Browning passed through the room, Grievant commented to her that she needed "to change her attitude." Grievant then approached Ms. Browning, getting very close, whereupon a vitriolic exchange occurred wherein Grievant told Ms. Browning she needed to stop acting like a little girl, and Ms. Browning said "What are you going to do about it old woman?"

8. Grievant then slapped Ms. Browning's face.

9. Grievant and Ms. Browning then exchanged a few more words, and then both left the room to go to the principal's office.

10. Ms. Browning called Assistant Superintendent Randy Huffman, who conducted a brief investigation and reported the incident to Superintendent David Roach. David Roach then suspended Grievant pending the outcome of the investigation, and on June 3, 2009, suspended Grievant without pay for the remainder of the school year. In all, Grievant's unpaid suspension was for thirteen days.

11. Grievant admitted to Mr. Roach at the start that she slapped Ms. Browning.

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence.[2] Grievant was suspended for thirteen days for striking another school employee, at school, in a room where students and another teacher and a member of the public were present. 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.[3]

Although none of the statutorily enumerated reasons were mentioned in the final letter implementing Grievant's suspension, the letter did identify the act for which she was being suspended, and identified the policy this behavior violated. Despite the wording of her Statement of Grievance, Grievant does not deny the behavior she was charged with or that suspension was an appropriate penalty, she only contends now that the suspension was too long. "The authority of a county board of education to suspend a teacher under W. VA. CODE, 18A-2-8 [1990] must be based upon the causes listed therein and must be exercised reasonably, not arbitrarily or capriciously."[4] Here, Grievant alleges the thirteen-day length of her suspension without pay is unreasonable.

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[2]156 C.S.R. 1 § 3 (2008); *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).

[3] W. VA. CODE § 18A-2-8.

[4]*Syl. Pt. 2, Parham v. Raleigh County Bd. of Educ.*, 192 W.Va. 540, 453 S.E.2d 374 (1994).

The undisputed evidence is that Grievant slapped another teacher at school. All West Virginia school employees shall: maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, and/or violence; and free from bias and discrimination and demonstrate responsible citizenship by maintaining a high standard of conduct, self-control, and moral/ethical behavior. See 126 C.S.R. 162 § 4 (W. Va. Dept. of Educ. Policy 5902). Striking another person at school is a violation of this Policy. Proper punishment for violations of the policy effectively addresses incidents, deters future incidents, and affirms respect for individuals. 126 C.S.R. 162 § 3.2.

"The argument a disciplinary action was 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.'"[5] "[M]itigation 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."[6] "Respondent has substantial discretion to determine a penalty in these types of situations, and the [Grievance Board] shall not substitute [its]

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[5]*Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

[6]*Overbee v. Dept. of Health and Human Resources*, Docket No. 96-HHR-183 (Oct. 3, 1996).

judgment for that of the employer."[7] A penalty disproportionate to other employees guilty of similar offenses is a factor to be considered in determining whether a particular penalty is excessive.[8]

There is no maximum or minimum penalty provided for in the Code, Rules or policies for infractions of this type. Grievant provided no reference to any cases she thought were comparable. A review of past Grievance rulings on similar suspensions shows that a ten day suspension was upheld in a case where a teacher struck a student;[9] a teacher who slapped an aggressive student in the face was given a twelve-day suspension;[10] a bus driver who struck another bus driver had his 120-day suspension reduced to 60 days;[11] an altercation between two school employees at the central office resulted in termination that was reduced to a 20-day suspension by the Grievance Board;[12] and a 40-day suspension was reduced to 10 days for a teacher who struck a student.[13] Although Grievant has not been convicted of a criminal violation stemming from this incident, charges are pending. Under the criminal code, the possible penalty for battery

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[7]*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)." *Meadows, supra*.

[8]*See Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994); *Austin v. Kanawha County Bd. of Educ.*, Docket No. 97-20-089 (May 5, 1997).

[9]*Parham v. Raleigh County Bd. of Educ.*, 192 W.Va. 540, 453 S.E.2d 374 (1994).

[10]*Gobeli v Tucker County Bd. of* Educ. Docket No. 47-87-257-2 (Mar. 14, 1988).

[11]*Hoover v Lewis County Bd. of Educ.*, Docket No. 93-21-427 (Feb. 24, 1994).

[12]*Hicks v. Mingo County Bd. of Educ.*, Docket No. 02-29-216/257 (June 24, 2003).

[13]*Wilkerson v. Lincoln County Bd. of Educ.*, Docket No. 99-22-420 (Mar. 27, 2000).

on a school employee is "jail not less than ten days nor more than twelve months and fined not less than one hundred dollars nor more than five hundred dollars." W. VA. CODE § 61-2-15. Given this range of acceptable discipline, a thirteen-day suspension is not clearly unreasonable.

On the other hand, self defense negated a disciplinary action for a bus driver who struck another employee's husband while on the job.[14] The facts of this case do not support a finding that Grievant acted in self defense. She testified that, despite the other teacher's provocative words, she had an opportunity to retreat, or just walk away. There was no evidence that the other teacher raised her hands or made any threatening gestures. Grievant's version of how she and the other teacher came to be face to face is not credible, because both she and the other teacher testified that they were at the door to the library at the same time, and the other teacher started to walk through. Given Grievant's and everyone else's testimony as to where the altercation occurred, Grievant had to have followed the other teacher and approached her. Even if the other teacher is a bully as Grievant alleges, Grievant started the confrontation by making provocative comments to the other teacher first. In any event, slapping the other teacher was in no way defensive and only served to escalate the confrontation.

Grievant also argues that her positive performance record should have been considered when deciding the length of her suspension. She had no prior disciplinary actions against her. In past cases where the Grievance Board or the West Virginia Supreme Court of Appeals has reduced a school board's disciplinary actions, they "took

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[14] *Blake v. Cabell County Bd. of Educ.*, Docket No. 92-06-150 (Dec. 10, 1992).

note of an employee's twenty-seven year record of exemplary service, his outstanding job performance evaluations, and his lack of a prior disciplinary record, as well as his admission of [misconduct] and his truthfulness and cooperation throughout the disciplinary proceedings, his remorse for his actions, and his apologies therefor."[15] "Taking into account such factors to mitigate a punishment previously imposed upon a school board employee pursuant to W. VA. CODE § 18A-2-8 is not without precedent."[16]

Respondent has clearly met its burden of proof that discipline was warranted in this situation, and Grievant did not establish that the length of the suspension should be mitigated.

The following conclusions of law support this discussion:

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. 156 C.S.R. 1 § 3 (2008); *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 authority of a county board of education to suspend a teacher under W. VA. CODE, 18A-2-8 [1990] must be based upon the causes listed therein and must be exercised reasonably, not arbitrarily or capriciously. *Parham v. Raleigh County Bd. of Educ.*, 192 W.Va. 540, 453 S.E.2d 374 (1994).

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[15] *See Kanawha County Bd. of Educ. v. Sloan*, 219 W.Va. 213 632 S.E.2d 899 (2006).

[16] *Id.*

3. 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. W. VA. CODE § 18A-2-8.

4. Respondent met its burden of proving suspension was warranted for Grievant's act of slapping Ms. Browning during the course of her employment at Harts Middle School.

5. "The argument a disciplinary action was 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)." *Meadows v. Logan County Bd. of Educ.*, Docket No. 00-23-202 (Jan. 31, 2001).

6. "[M]itigation 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. Dept. of Health and Human Resources*, Docket No. 96-HHR-183 (Oct. 3, 1996). "Respondent has substantial discretion to determine a penalty in these types of situations, and the [Grievance Board] shall 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)." *Meadows, supra*.

7. A penalty disproportionate to other employees guilty of similar offenses is a factor to be considered in determining whether a particular penalty is excessive. *See Phillips v. Summers County Bd. of Educ.*, Docket No. 93-45-105 (Mar. 31, 1994); *Austin v. Kanawha County Bd. of Educ.*, Docket No. 97-20-089 (May 5, 1997).

8. In deciding whether to mitigate a penalty imposed under W. VA. CODE § 18A-2-8, the Grievance Board may take note of an employees record of exemplary service, outstanding job performance evaluations, lack of a prior disciplinary record, the employee's admission of misconduct, his truthfulness and cooperation throughout the disciplinary proceedings, his remorse for his actions, and his apologies therefor. *See Kanawha County Bd. of Educ. v. Sloan*, 219 W.Va. 213 632 S.E.2d 899 (2006); *Rovello v. Lewis County Board of Education*, 181 W.Va. 122, 381 S.E.2d 237 (1989) (per curiam).

9. Grievant has not shown that the thirteen day suspension was disproportionate or should otherwise be mitigated to a lesser penalty.

For the foregoing reasons, this grievance is hereby DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty days of receipt of this Decision. See W. Va. Code § 6C-2-5. 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 Civil Action number should be included

so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

November 17, 2009

M. Paul Marteney
Administrative Law Judge