THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

KIMBERLY COTTRILL,
Grievant,

v. **Docket No. 2010-0898-GilED**

GILMER COUNTY BOARD
OF EDUCATION,
Respondent.

DECISION

Grievant Kimberly Cottrill filed a grievance against her employer, Gilmer County Board of Education, on January 11, 2010. Her statement of grievance reads:

> Grievant appeals the decision of the Gilmer County W.Va. Bd. of Education to suspend her from teaching 30 days, mandated counseling, and exclusion from all Gilmer County Athletic events for the remainder of the school year. Decision dated Dec [sic] 22, 2009.

Her requested relief is, "Reinstatement, back pay, attorney fees, expungement of record(s) all in violation of W.Va. Code section 18, et seq. and the W.Va. Const."

A level three hearing was held at the Grievance Board's Charleston office on March 4, 2010. Grievant was represented by Ron L. Tucker, Esq., and Respondent was represented by Richard Boothby, Bowles Rice McDavid Graff & Love. This case became mature for decision on March 16, 2010, upon the parties' filing proposed findings of fact and conclusions of law.

Synopsis

Respondent suspended Grievant for 30 days for slapping a fellow teacher at a scrimmage basketball game. Respondent avers the incident constituted intemperance, cruelty, insubordination, and immorality. In addition to the suspension, Respondent also excluded Grievant from all Gilmer County Schools athletic events for the remainder of the

school year and required Grievant obtain counseling at Respondent's expense. Respondent asserts the exclusion from athletic events and the counseling were required because Grievant has a pattern of undesireable behavior at athletic events.

Grievant admits she slapped a fellow teacher at the sporting event, but she argues Respondent's actions are unreasonable, as Respondent did not take all the facts and circumstances into account. Grievant further avers Respondent failed to establish a rational nexus between off-duty misconduct and Grievant's duties.

Respondent has met its burden of proof, and therefore this grievance is DENIED.

Findings of Fact

1. Grievant is employed by Respondent as a fifth grade teacher at Sand Fork Elementary School.

2. Grievant dates John "Pat" Roberts. Mr. Roberts' ex-wife, Mary Jo Roberts, is a teacher and a basketball coach for the Sand Fork Elementary fifth and sixth grade team.

3. Mr. and Ms. Roberts have a son who is in Grievant's fifth grade class at Sand Fork. Their son plays basketball for the Sand Fork team.

4. On November 24, 2009, Sand Fork Elementary and Normantown Elementary had a basketball scrimmage between the fifth and sixth grade basketball teams. The game was played at Normantown Elementary.

5. Grievant attended to watch her son who plays for Sand Fork Elementary.

6. At the end of the game, Mr. Roberts went onto the floor to speak with his son about his performance.

7. Both Ms. Roberts and Grievant went to the area where Mr. Roberts and his son were standing.

8. A verbal argument ensued between Grievant and Ms. Roberts.

9. Grievant raised her hand and slapped Ms. Roberts and then went outside to her vehicle.

10. At the time of this incident, there were parents from both teams, spectators, and some students still in the gym.

11. The Roberts' son witnessed both the verbal and physical altercation that occurred between his mother and his teacher.

12. After being slapped, Ms. Roberts attempted to make her way toward Grievant, but was stopped by a number of people.

13. This incident was relayed to Superintendent John D. Bennett via email from Patricia Lowther, Normantown Elementary School Principal.

14. On November 30, 2009, Superintendent Bennett met with Grievant and sent a letter on December 1, 2009, memorializing his decision to suspend Grievant due to intemperance, cruelty, insubordination, and immorality. Superintendent Bennett also prohibited Grievant from participating in school activities.

15. On December 21, 2009, the Board of Education met and voted to ratify Grievant's suspension without pay for a total of 30 days. The Board voted to accept the Superintendent's recommendation that Grievant be excluded from all Gilmer County Schools athletic events for the remainder of the year. Grievant was also required to obtain counseling to be paid by Respondent.

16. In 2006, Grievant was charged with Assault of Athletic Official in Braxton County as a result of her conduct at a basketball game. She was given a pre-trial diversion pursuant to W. Va. Code § 61-11-22.

17. Superintendent Bennett took this prior offense into consideration when determining the appropriate disciplinary action.

Discussion

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). 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).

"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 & Human Res.*,

Docket No. 93-HHR-322 (June 27, 1997)(citations omitted). "Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable." *State ex rel. Eads v. Duncil*, 198 W. Va. 604, 474 S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)). Grievant was suspended for conduct which Respondent asserts constitutes intemperance, cruelty, insubordination, and immorality.

"'Intemperance,' as used in W. VA. CODE § 18A-2-8 refers to the effect of habitual or excessive intoxication upon one's ability to function in a given capacity." *Belcher v. Logan County Bd. of Educ.*, Docket No. 06-23-156 (Jan. 25, 2007). This does not apply in this case, as there are no allegations that Grievant was intoxicated.

Respondent also asserts Grievant's actions constituted cruelty. "Cruelty is a deliberate act to inflict pain and/or suffering." *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996). Clearly, Respondent has met its burden on this charge. Grievant has admitted to slapping Ms. Roberts.

Insubordination includes "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *Riddle v. Bd. of Directors*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1,1989). In order to establish insubordination, the employer must not only demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, but that the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Jones v. Mingo Co. Bd.*

of Educ., Docket No. 95-29-151 (Aug. 24, 1995); *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995).

The undisputed evidence is that Grievant slapped another teacher at a scrimmage game. 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 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. *See Kirk v. Lincoln Co. Bd. of Educ.*, Docket No. 2010-0152-LinED (Nov. 11, 2009).

Respondent has a no tolerance policy when it comes to violence. Clearly, Grievant violated the policy by striking Ms. Roberts, a fellow teacher and coach. Respondent has met its burden on this charge.

The term immorality as used in the statute "connotes conduct 'not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially, not in conformity with the acceptable standards of proper sexual behavior.'" *Golden v. Bd. of Educ. of County of Harrison*, 169 W. Va. 63, 285 S.E.2d 665, 668 (1981); *Hayes v. Kanawha County Bd. of Educ.*, Docket No. 94-20-1143 (June 28, 1995). "'Immoral conduct is conduct which is always wrong. Just as one can never be accidentally or unwittingly dishonest, immoral conduct requires at least an inference of conscious intent.' *See Hayes, [supra], citing Youngman v. Doerhoff*, 890

S.W.2d 330 (MOCC. 1994)." *Bell v. Mingo County Bd. of Educ.*, Docket No. 97-29-172 (Mar. 10, 1998); *Petry, supra.*

Slapping a co-worker is conduct not in conformity with the accepted principles of right and wrong behavior. Teachers function as custodians, care takers, role models, and disciplinarians of the students each day while the children are in their custody. In this case, Grievant has admittedly displayed inappropriate physical conduct with a fellow teacher, and this was witnessed by parents, spectators, and students. This conduct certainly conflicts with the example of self control and moral behavior which teachers are expected to set for their students. See *Hurley v. Logan County Bd. of Educ.*, 97-23-024 (Apr. 14, 1997). Respondent has met its burden of proving Grievant's conduct was immoral.

Grievant argues Respondent did not establish a rational nexus between her off duty conduct and her position as a teacher. In order to discipline a school employee for acts performed at a time and place separate from his employment, the board must demonstrate a "rational nexus" between the conduct performed outside the job and the duties the employee is to perform. A rational nexus exists if the conduct performed outside of the job directly affects the performance of the occupational responsibilities of the employee. Misdemeanor criminal acts directly involving a school board employee's occupational responsibilities constitute a rational nexus for which an employee may be dismissed. *Reed v. Summers County Bd. of Educ.*, Docket No. 06-45-002 (Jan. 26, 2006)(footnotes omitted).

In *Reed*, the Administrative Law Judge upheld the respondent's conclusion that there was a rational nexus between the grievant's off-duty misconduct where he had pled

guilty to a misdemeanor charge of impersonating a conservation officer, in violation of W. VA. CODE § 20-7-7, and to nine counts of passing worthless checks, totaling $643.92, and his job as a custodian on night shift, where he often worked alone and had keys to the facilities. In *Rogliano v. Fayette County Board of Education*, 176 W. Va. 700, 347 S.E.2d 220 (1986), the Supreme Court of Appeals of West Virginia stated that a "'rational nexus' exists in at least two circumstances:

> (1) if the conduct directly affects the performance of the occupational responsibilities of the teacher; or (2) if, without contribution on the part of school officials, the conduct has become the subject of such notoriety as to significantly and reasonably impair the capability of the particular teacher to discharge the responsibilities of the teaching position."

Id. [347 S.E.2d] at 224(citations omitted).

The Court in *Powell v. Paine,* 221 W. Va. 458, 655 S.E.2d 204 (2007), further stated:

> The teacher in *Golden* [supra.] had been charged with felony shoplifting and pled no contest to the misdemeanor offense of petty theft. Thus the discipline was for conduct occurring outside of the school setting. We observed in *Golden* it would be an unwarranted intrusion on a teacher's right to privacy to discipline a teacher solely on evidence that statutorily delineated misconduct occurred outside of the school environment. To overcome the privacy interest, a legitimate interest of the school board has to be at stake, that is, there must be additional evidence of a resulting unfavorable impact on the teacher's fitness to teach or upon the school community. *Id.* at 69, 285 S.E.2d at 669. We further observed that dismissal based solely on the off-the-job misconduct of a teacher and not its effect on the teacher's fitness to teach or upon the school community would result in a statute which would be void for vagueness under substantive due process constitutional standards.

Id. at 68-69, 285 S.E.2d at 669.

Respondent has proven there was a rational nexus between Grievant's conduct at the sporting event and her ability to perform her duties as a teacher.

This incident occurred at a school sponsored event in front of Grievant's students and parents. In addition, Respondent has a no tolerance policy for violence. Grievant violated that policy, and failed to remember she is a role model to her students.

Grievant asserts the disciplinary action was excessive. "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).

The 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). "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).

There seems to be no issue over Grievant's past work history. Grievant has worked at Sand Fork Elementary as a teacher for approximately 15 years and, until this incident, has never been disciplined, and has always met or exceeded expectations on her evaluations.

Turning then to whether the penalty is disproportionate to the offense(s) proven, it is important to look at the circumstances surrounding the incident. As often happens, there are several versions of what occurred to cause Grievant to slap Ms. Roberts. What is uncontested is that words were exchanged between Grievant and Ms. Roberts, and then Grievant slapped Ms. Roberts. Regardless of what words were said, it is unacceptable to strike another person.

Superintendent Bennett also explained that he took into consideration Grievant's prior incident in Braxton County. He testified that he believed Grievant may have anger issues. Superintendent Bennett also testified that he was concerned because Grievant did not seem remorseful, and therefore, he believed Grievant should undergo counseling and be prohibited from attending sporting events for the remainder of the year.

The punishment imposed by Respondent is not disproportionate to the offense committed by Grievant.

This grievance is DENIED.

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). 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).

2. "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 & Human Res.*, Docket No. 93-HHR-322 (June 27, 1997)(citations omitted). "Arbitrary and capricious actions have been found to be closely related to ones that are unreasonable." *State ex rel. Eads v. Duncil*, 198 W. Va. 604, 474

S.E.2d 534 (1996). An action is recognized as arbitrary and capricious when "it is unreasonable, without consideration, and in disregard of facts and circumstances of the case." *Eads, supra* (citing *Arlington Hosp. v. Schweiker*, 547 F. Supp. 670 (E.D. Va. 1982)).

3. "'Intemperance,' as used in W. VA. CODE § 18A-2-8 refers to the effect of habitual or excessive intoxication upon one's ability to function in a given capacity." *Belcher v. Logan County Bd. of Educ.*, Docket No. 06-23-156 (Jan. 25, 2007). This does not apply in this case, as there are no allegations that Grievant was intoxicated.

4. Respondent did not prove the allegation of intemperance.

5. "Cruelty is a deliberate act to inflict pain and/or suffering." *Sinsel v. Harrison County Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996).

6. Respondent has proven its allegation of cruelty.

7. Insubordination includes "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." *Riddle v. Bd. of Directors*, Docket No. 93-BOD-309 (May 31, 1994); *Webb v. Mason County Bd. of Educ.*, Docket No. 26-89-004 (May 1,1989). In order to establish insubordination, the employer must not only demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, but that the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. *Jones v.Mingo Co. Bd. of Educ.*, Docket No. 95-29-151 (Aug. 24, 1995); *Conner v. Barbour County Bd. of Educ.*, Docket No. 94-01-394 (Jan. 31, 1995).

8. Respondent has proven its allegation of insubordination.

9. The term immorality as used in the statute "connotes conduct 'not in conformity with accepted principles of right and wrong behavior; contrary to the moral code of the community; wicked; especially, not in conformity with the acceptable standards of proper sexual behavior.'" *Golden v. Bd. of Educ. of County of Harrison*, 169 W. Va. 63, 285 S.E.2d 665, 668 (1981); *Hayes v. Kanawha County Bd. of Educ.*, Docket No. 94-20-1143 (June 28, 1995). "'Immoral conduct is conduct which is always wrong. Just as one can never be accidentally or unwittingly dishonest, immoral conduct requires at least an inference of conscious intent.' *See Hayes, [supra], citing Youngman v. Doerhoff*, 890 S.W.2d 330 (MOCC. 1994)." *Bell v. Mingo County Bd. of Educ.*, Docket No. 97-29-172 (Mar. 10, 1998); *Petry, supra.*

10. Respondent has proven its allegation of immorality.

11. In order to discipline a school employee for acts performed at a time and place separate from his employment, the board must demonstrate a “rational nexus” between the conduct performed outside the job and the duties the employee is to perform. A rational nexus exists if the conduct performed outside of the job directly affects the performance of the occupational responsibilities of the employee. Misdemeanor criminal acts directly involving a school board employee’s occupational responsibilities constitute a rational nexus for which an employee may be dismissed. *Reed v. Summers County Bd. of Educ.*, Docket No. 06-45-002 (Jan. 26, 2006)(footnotes omitted).

12. Respondent has proved a rational nexus between Grievant's conduct at a scrimmage game and her position as a teacher.

13. "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).

14. "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). "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).

15. Grievant has not shown that the 30 day suspension, mandatory counseling and prohibition from attending all sporting events for the remainder of the year was disproportionate or should otherwise be mitigated to a lesser penalty.

Accordingly, this grievance is **DENIED**.

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. *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 (2008).

DATE: April 14, 2010

_____

Wendy A. Elswick
Administrative Law Judge