THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

BRENDA WELLS,
Grievant,

v. **Docket No. 2009-1714-UpsED**

UPSHUR COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Brenda Wells ("Grievant") filed this grievance on June 22, 2009, challenging a five-day suspension without pay. Her Statement of Grievance reads as follows:

> Dr. Wells grieves the 5 day suspension without pay that was directed. The Administration had no proper foundation to support the adverse employment action and the decision was unreasonable, arbitrary and capricious. The 10 second circumstance - an act of playfulness with seniors on their last day of public education - giving rise to the adverse employment action did not violate either the County's or the State's employee code of conduct.
>
> Assuming, arguendo, that Dr. Well's [sic] behavior constitutes a violation of Board and/or State policies - which she denies - the adverse employment action chosen to be implemented by the administration is unreasonable, arbitrary, capricious, discriminatory and outside the scopes of its discretion.

For relief, Grievant seeks the following: Rescind suspension, wages and benefits.

This matter was remanded to level two by agreement of the parties. Level two mediation was conducted by a private mediator on September 29, 2009, November 17, 2009, and February 23, 2010. Appeal to level three was perfected on March 19, 2010. A level three hearing was conducted before the undersigned Administrative Law Judge on January 14, 2011, in Elkins, West Virginia. Grievant appeared in person and was represented by Andy Katz, Esquire. The Respondent appeared by its counsel, Rebecca Tinder, Bowles Rice McDavid Graff & Love LLP. The matter became mature for

consideration upon receipt of the last of the parties' proposed findings of fact and conclusions of law on March 2, 2011.

Synopsis

Grievant, at the time of this incident, was a principal at Buckhannon Upshur High School. The unfortunate events that led up to the incident centered around the seniors' last day of class, ensuing chaotic behavior, and difficulty in getting seniors to conform to school rules. Close to the end of the first lunch period on that day a food fight broke out. Grievant responded to the area of the food fight. Thereafter, a crowd of students gathered at the opposite end of the commons area and engaged in what was described as a dog pile. Grievant leaned onto the pile of students for a brief second or two, inciting laughter from the students. Grievant was suspended for five days. Grievant did not have any record of prior discipline for participating in an inappropriate student activity. While Grievant demonstrated a lapse in judgement, the penalty for this lapse was excessive. Accordingly, the suspension is reduced to one day pursuant to the principles of mitigation.

The following findings of fact are based upon the record developed at level three.

Findings of Fact

1. Grievant was employed by Respondent as the principal of Buchannon-Upshur High School at the time of this suspension.

2. Prior to the allegations leading to her suspension, the record established that Grievant did not have any prior discipline involving physical contact with students or participating in an inappropriate student activity.

3. Grievant's stated goal as principal was to improve the culture of the school,

the relationship between the students and teachers, and in addition, the relationship between students and the school administration.[1]

4. To increase the student spirit and comradery with the administration, Grievant participated in the talent show, increased the number of pep rallies, increased senior activities, and, in general, tried to meet her stated goals.

5. May 19, 2009 was the last of day of class for most seniors at Buchannon-Upshur High School. True for most high schools, the seniors' last day of class has been chaotic due to the difficulty in getting seniors to conform to school rules. Historically, senior students have every year "embraced the opportunity to act out and leave their finger print on the last day of school." Testimony of Assistant Superintendent Roy Pettit, Level Three.

6. Seniors in the past, on their final day of school, have engaged in food fights, taking real estate signs from around town and placing them on school grounds, painting the water tower that is across from the school, painting the word "seniors" across a pool facility, and taking forks from the cafeteria and hiding them around the school.

7. Students are permitted to go into the gym during lunch period, which is next to the commons area, and separated from the commons area by a set of double doors. Students are permitted to go back and forth between the gym and the commons area.

8. Close to the end of the first lunch period on May 19, 2009, a food fight broke out. When this happened Assistant Principal Frashure stepped to the perimeter and took note of who was throwing food. Grievant heard the commotion during the food fight and

---

[1]Grievant's catch phrase was "the students do not care what you know until they know that you care."

came out of her office located next to the commons areas. When Grievant had made her way to the cafeteria and commons areas, the food fight had ended.

9. Shortly after the food fight, a crowd of students started to gather on the other side of the commons area. Grievant and Mr. Frashure thought that this was also some type of fight and went to investigate.

10. Rather than a fight, this second disruption was a group of five to six male students piling on top of each other. They were surrounded by a crowd of students.

11. Grievant jumped onto one side of the pile of students for no more than a couple of seconds. Her action was caught on a cell phone video recording device by a student and was electronically shared with members of the community. Respondent Exhibit 2.

12. The students laughed at the action of Grievant, the male students broke up the pile, and began separating. Students joked with Grievant about her not being able to get her feet off the floor when she leaned on the pile. In fact, Mr. Frashure appears amused in the video of the incident, along with the surrounding students.

13. Yet another incident followed in which a student climbed on top of a table in the cafeteria and launched off the table onto the overhead arms of a crowd of students standing in the cafeteria.

14. Superintendent Lampinen directed the Facilities and Maintenance Director to immediately go to the high school and secure a copy of the videos from the security camera to review and determine what took place. The dog pile was in an area outside the range of the security camera.

15. On May 20, 2009, Superintendent Lampinen and Assistant Superintendent Pettit met with Grievant to discuss the alleged activities. When asked about the incidents of the previous day, Grievant admitted that there was a dog pile where students were piled on top of one another. Grievant reported that "she walked up to the pile and put her arms to the side and just fell onto the pile . . . my feet never left the ground." Grievant indicated that her participation "was a way to diffuse the situation. She thought it was funny." Testimony of Assistant Superintendent Roy Pettit, Level Three.[2]

16. Respondent found that the actions of Grievant violated safety, role model, and the responsible citizen provisions of the Employee Code of Conduct. Grievant was suspended for five days without pay by Superintendent Lampinen by letter dated June 5, 2009.

Discussion

Respondent contends Grievant was insubordinate, and therefore suspended, due to inappropriate behavior on May 19, 2009. 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

[2]The video of the incident does reveal that Grievant did manage to get her feet off the ground, if ever so slightly. The end result was that Grievant placed her body against the side of the pile, and bounced back off the pile.

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).

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." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *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*.

The underlying facts of this case are basically not in dispute due to the cell phone video that captured the event. Respondent set out in the letter of suspension that Grievant violated the Upshur County Code of Conduct by failing to promote a safe and positive learning environment, and failing to be a good adult role model. In addition, Respondent concluded that Grievant violated the West Virginia Code of Conduct, Policy 5902, by failing to maintain a safe and healthy environment, free from harassment, intimidation, bullying, substance abuse, and/or violence, and free from bias and discrimination. Further, Grievant

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

Respondent established by a preponderance of the evidence that Grievant participated in the dog pile incident by attempting to jump on the pile of students. Accordingly, Grievant was insubordinate in that she was aware of her duties under the county and state policy, but failed to comply with them. Respondent demonstrated that Grievant's behavior was such that she was properly subject to discipline in accordance with W. VA. CODE § 18A-2-8.

The central issue in this case is whether the five-day suspension assessed by Respondent was too severe and should be mitigated. 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).

Grievant was suspended for five days because Respondent perceived that Grievant had been untruthful about her participation in the dog pile incident in that she indicated that she did not jump onto the pile of students. In addition, the five-day suspension was viewed as consistent with other similar disciplinary events. The undersigned agrees with Grievant that neither of these justifications has been established in support of the level of discipline imposed.

After viewing the video more times than the undersigned cares to recall, it is responsible to characterize the actions of the Grievant as more of a lean than a jump. This characterization is by no means an attempt to downplay the incident. However, witnesses to the event indicated that they would not go so far as to say that Grievant jumped on the pile of students. In addition, at least one witness testified that it did not appear to them that Grievant's weight was placed on the students. Whatever the motive of Grievant might have been in participating in the dog pile, the video evidence clearly demonstrates that after Grievant placed herself on one side of the pile the male students broke up the pile, pulled themselves off the floor, and the incident was over.

Much was made by Respondent at level three over safety concerns, and that is certainly understandable. Nevertheless, there is simply no evidence, or little evidence except by inference, that safety issues were present. Student members of the dog pile and parents of those students indicated that there was not much chance that the participants in the dog pile would be hurt. It should be mentioned, but carries little weight, that Grievant notes that due to Grievant's son being a member of the dog pile she would not have participated if she thought that there was even a remote chance that harm would come to her son. This argument calls for as much inference or speculation as the argument of

Respondent. In any event, the undersigned agrees with Grievant that there is insufficient evidence to establish that her slight participation in the activity increased the chances of harm.

Turning to the justification that Grievant lied about her participation in the dog pile it appears from the record that this allegation is not supported by the evidence. The record established that Grievant met with Superintendent Lampinen and Assistant Superintendent Pettit on May 20, 2009, as requested. Grievant acknowledged that a dog pile incident had occurred. Grievant basically confirmed what appears on the video in that she walked up to the pile and leaned, or hopped, into the pile. The choice of jump, leap, hop, or any other verb, and their appropriate use, could be debated in this case with limited usefulness. In any event, it does appear somewhat unfair and misplaced to draw a conclusion that Grievant lied about her participation because she did not describe her actions as jumping onto the pile. The record does not support Respondent's five day justification based upon what they believe was Grievant's attempt to diminish her role in the dog pile incident. This would further support mitigation of the punishment.

An important factor in the decision to suspend Grievant for five days was that it was consistent with other suspensions assessed to other employees for inappropriate physical or verbal conduct. However, none of the examples offered demonstrated an employee getting a five-day suspension on a first offense. An example was given of a custodian that was given a three-day suspension for assaulting a co-worker. For the second offense, which consisted of using a loud voice with students, striking the wall above their head, and then bumping into a teacher, the custodian was given a five-day suspension. Subsequently, on the third offense, in which the custodian picked up a student and carried

him to a classroom, the custodian received a seven-day suspension. Another example provided was a teacher who was given a four-day suspension for her second offense of inappropriate physical contact. Neither of these situations fully justifies the discipline assessed against Grievant.

For the reasons set out above, a five-day suspension is too harsh a penalty for Grievant's proven conduct. While Grievant demonstrated a lapse in judgement, the penalty for this lapse was excessive. Given the nature of the offense, the totality of the circumstances of Grievant's conduct, and the record failing to establish the primary justifications behind the length of the suspension, a suspension of one working day is reasonable.

The following conclusions of law support the decision reached.

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. 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.

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." *Santer v. Kanawha County Bd. of Educ.*, Docket No. 03-20-092 (June 30, 2003); *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. Respondent established by a preponderance of the evidence that Grievant participated in the dog pile incident by attempting to jump on the pile of students. Respondent demonstrated that Grievant's behavior was such that she was properly subject to discipline in accordance with W. VA. CODE § 18A-2-8.

5. 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).

6. Grievant has demonstrated that a five-day suspension is too harsh a penalty. Given the nature of the offense, the totality of the circumstances of Grievant's conduct, and the record failing to establish the primary justifications behind the length of the suspension, a suspension of one working day is reasonable.

Accordingly, this grievance is **GRANTED, IN PART**, **AND DENIED, IN PART**. Respondent is **ORDERED** to reduce Grievant's suspension without pay to one day, and to pay her back pay and restore all benefits she lost as a result of the additional four days of suspension.

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: May 6, 2011

_____
Ronald L. Reece
Administrative Law Judge