THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JASON VANNOY,
Grievant,

v. **Docket No. 2024-0479-KanED**

KANAWHA COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Grievant, Jason Vannoy, was employed by Respondent, Kanawha County Board of Education, as a special education teacher. On January 10, 2024, Grievant filed this grievance directly to Level Three stating, "I was wrongfully terminated without a chance to improve or change. I was in need of further training and assistance." For relief, Grievant seeks for the Grievance Board to "restore my job status, and backpay from the termination date."

A Level Three hearing was held on June 18, 2024, before the undersigned Administrative Law Judge at the Grievance Board's Charleston, West Virginia, office. Grievant appeared in person and was represented by counsel, Todd W. Reed. Respondent appeared by Brian Phillips, special investigator for Kanawha County Schools, and was represented by counsel, Lindsey D. C. McIntosh. This matter became mature for decision on August 6, 2024, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant was employed by Respondent as a special education teacher in a self-contained autism classroom. Grievant filed this grievance directly to Level Three, as permitted by West Virginia Code § 6C-2-4(a)(4), following his termination for willfully

neglecting his duties and cruelty toward a student. Grievant requested that Respondent reinstate his employment and provide him additional training to allow him an opportunity to improve. Respondent met its burden of proof by a preponderance of the evidence that Grievant was willfully neglectful of his duties and engaged in cruelty toward a student when he unnecessarily and forcefully restrained the student in violation of the CPI model and county policy. Accordingly, the grievance is DENIED.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

Findings of Fact

1. Grievant has been employed by Respondent since 2016.

2. For the three years leading up to the incident underlying this grievance, Grievant was employed by Respondent as a special education teacher in a self-contained autism classroom at Dunbar Primary School.

3. At the heart of this matter is a student (hereinafter, "S.") who had been in Grievant's class for three years.

4. All of the events underlying this matter were recorded on the school's video surveillance system by multiple cameras mounted throughout the school's hallways and cafeteria.[1] There is no audio to the recordings.[2]

[1] The video was edited by special investigator Brian Phillips to the extent that he spliced together the recordings from multiple cameras to create a continuous video account of the incident.

[2] Findings related to what was said during the incident in question are based on witness testimony.

5. On October 12, 2023, Grievant and his classroom aide, Carrie Palmer, were escorting his class from the playground to the cafeteria for lunch, utilizing a wrist loop and rope to keep the students together.

6. Because S. was upset that he could not stay on the playground with another class and S. often tried to elope from the school if he was upset or dissatisfied with a situation, Grievant also held S.'s hand to ensure that he stayed with the group.

7. At varying points in the walk to the cafeteria, S. walked upright, then dropped to his knees and "walked" on his knees, then was pulled along the way as he remained on his knees.

8. As the class entered the cafeteria, S. was again on his feet and walking.

9. Grievant escorted S. to a cooler along the wall to get milk before taking S. to a table to sit with the rest of the class.

10. S. laid down on the bench at first, rather than sitting upright.

11. Not long after getting to the table, S. either spilled or poured his milk on the table, where it ran through a crack between the two halves of the table and pooled on the floor.

12. Grievant physically removed S. from the bench, parted the table (which is designed to be two pieces), and moved S. to the floor to have him clean up the spill.

13. The janitor offered to clean up the spill, but Grievant insisted that S. would clean it up.

14. Grievant can be seen almost hunching over S., with his hands over S.'s hands and physically—if not forcibly—causing S. to wipe up the spill.

15. Grievant then physically moved S. back to his seat. Grievant admitted that he used "some degree of force" to try to get S. to sit on the bench again.

16. As Grievant tried to keep S. upright in his seat—preventing him from sliding under the table or laying down again—Grievant placed his foot on the bench, bracing his leg against S.'s back.

17. S. was unable to sit on the bench at that point, but he was also not able to support himself on the ground with his knees either, leaving S. suspended by his chest between the edge of the table and Grievant's leg. S. was clearly upset, screaming at times and crying out that "it hurts."

18. This struggle continued off and on for several minutes, with Grievant employing the same tactic multiple times. At other times, Grievant held S.'s arm behind his back.

19. At another point, Grievant wrapped his own arms and legs around S. to try to hold him in a sitting position on the bench, essentially bearhugging S. but, in Grievant's words, "not to any great degree."

20. When an aide attempted to deliver a lunch tray for S., Grievant waved the tray away and said that S. did not want to eat. Grievant did, however, remove a biscuit from the tray and proceeded to eat it.

21. Special education teacher Wendy Helton and aide Kaitlyn (Lester) Vandergriff reported what they witnessed in the cafeteria to the principal, Michelle Adams,

who reported the incident to the central office.[3] Assistant Superintendent for Elementary Schools Amanda Mays referred the matter to special investigator Brian Phillips.

22. As part of his investigation, Phillips interviewed substitute cook Erana Walker, aide Carlton Wiley, teacher Makenzie Hall, Vandergriff, Palmer, Helton, and Grievant. Of those witnesses, only Helton and Vandergriff were called to testify at the Level Three hearing.

23. Grievant was not forthcoming in his interview with Phillips.

24. The testimony of Helton and Vandergriff was consistent with their statements to Phillips.

25. Kanawha County special education teachers are trained in the Crisis Prevention Institute (hereinafter, "CPI") model.

26. Training is given to teachers every two years.

27. The CPI model should only be used as a "last resort" and only if there is a risk that the student will injure himself or others.

28. The CPI model advises teachers to begin with verbal de-escalation. Other students and adults should be removed from the area so the agitated student does not have "an audience."

29. Only when the risk of doing nothing exceeds the risk of doing something should physical intervention or restraint be used.

[3] Though the question was raised by Grievant's counsel at the Level Three hearing, the Grievance Board will not consider whether, when, or by whom the incident was reported to Child Protective Services. While teachers are mandatory reporters of suspected abuse under West Virginia Code § 49-2-803(a), whether this incident was duly reported by any of the witnesses is not relevant to whether Respondent wrongfully terminated Grievant.

30. The CPI model does not recognize "bearhugging" as an appropriate restraint because it constricts the airway. Instead, the CPI model teaches that the child's arms should be held above his airway in a position called the "child control position."

31. If a child is using his arm as a weapon, the CPI model teaches that the child's arm should be held at his side, but never behind his back.

32. According to the CPI model, it is never appropriate to physically restrain a child who just wants to lay down.

33. The only physical intervention that is approved by the CPI model for one person to employ is the "child control position." Any other physical interventions are meant to be performed by multiple people. However, it is not advised that bystanders intervene unless they are specifically asked to help. Instead, they should alert their supervisor to the situation.

34. The CPI model also instructs teachers on how to de-escalate themselves if they are getting too upset in the moment, including voicing their need for help.

35. Special Education Compliance Specialist Holly Samples reviewed the video recording of the October 12, 2023, incident.

36. Grievant did not correctly employ the CPI model in which he was trained because the situation never escalated to a "crisis"; so, there was no need for any physical restraint of S. in the first place.

37. Grievant also did not properly employ the "hand-over-hand" technique of assisting S. in the clean-up of the milk because Grievant was too aggressive, using the technique less to help S. and more to control him.

38. Grievant's actions escalated the situation, whereas the goal is to *de-*escalate a student's behavior.

39. Grievant's CPI model training was up to date on October 12, 2023. In fact, Grievant acknowledged that he had been trained in the model multiple times, dating back to his early employment as a classroom aide and every two years since then—at least four times. Additionally, Grievant had previously been involved in an incident in which he improperly restrained another student, following which he was given additional training in the CPI model.

40. Grievant's colleagues had witnessed other incidents with students wherein it was questioned whether he was too "rough." Nonetheless, troubled students were often sent to Grievant specifically because he was thought to be better at addressing behavioral issues.

41. S. had been placed in his classroom for three years because it was believed that Grievant could best control S.'s behaviors.

42. S. had acted out before, and it was not uncommon for him to cry or scream if he did not get his way.

Discussion

The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W. VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May

17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

County boards of education are bound by law to provide a safe learning environment for their students and, so, are given the authority to terminate any employee who jeopardizes the health, welfare, or safety of students. W. VA. CODE § 18A-2-8(d) (2024). The use of that authority, however, must be based on one or more of the "just causes" listed in West Virginia Code § 18A-2-8; and it must be exercised reasonably, not arbitrarily or capriciously. Syl. Pt. 4, *Maxey v. McDowell County Bd. Of Educ.*, 212 W. Va. 668, 575 S.E.2d 278 (2002); Syl. Pt. 2, *Parham v. Raleigh County Bd. of Educ.*, 192 W. Va. 540, 453 S.E.2d 374 (1994); Syl. Pt. 3, *Beverlin v. Bd. of Educ*., 158 W. Va. 1067, 216 S.E.2d 554 (1975); *Bell v. Kanawha County Bd. of Educ*., Docket No. 91-20-005 (Apr. 16, 1991). Those "just causes" are

> [i]mmorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, a finding of abuse by the Department of Human Services in accordance with §49-1-1 et seq. of this code, the conviction of a misdemeanor or a guilty plea or a plea of nolo contendere to a misdemeanor charge that has a rational nexus between the conduct and performance of the employee's job, 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(a) (2024).

In the instant case, Respondent terminated Grievant for willful neglect of duty and cruelty. The term "willful neglect of duty" "'encompasses something more serious than incompetence'[;] . . . it 'ordinarily imports a knowing and intentional act, as distinguished from a negligent act.' *Bd. of Educ. of the County of Gilmer v. Chaddock*, 183 W. Va. 638, 398 S.E.2d 120 (1990)." *Lancaster v. Ritchie Cnty. Bd. of Educ.*, 2016 WL 2979245

(W. Va., No. 15-0554, May 23, 2016) (memorandum decision); *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). Significantly, in affirming the circuit court's reversal of the Grievance Board's decision granting the grievant therein relief, the *Lancaster* Court agreed with the circuit court that the board of education "proved . . . that, despite having provided numerous trainings and warnings about appropriate conduct, [the grievant] willfully engaged in prohibited behaviors."

Here, Grievant had received training on the expected and effective use of the CPI model multiple times, including after Grievant physically restrained another student prior to the October 12th incident. Nonetheless, on October 12, 2023, Grievant seemed to not draw on that training at all. The video and eyewitness testimony—and even Grievant's own testimony—demonstrated that Grievant's actions with S. on October 12th were purposeful. Grievant knowingly and intentionally undertook each of his actions that day despite his training. His actions were not simply reactions to a crisis because there was no crisis. Indeed, even after being effectively retrained with the aid of a video of his own mistakes during the testimony of Holly Samples, Grievant repeatedly offered what he clearly believed were well-reasoned explanations for his actions on October 12th, demonstrating a continuing willful disregard for what Kanawha County policy and the CPI model require.

At this point, it should be noted that Grievant's testimony was largely incredible. In assessing the credibility of witnesses, some factors to be considered are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for

honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ 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. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

Here, Grievant's demeanor was cagey at best. He clearly had the capacity to perceive the stakes, but he seemed almost incredulous that anyone would even question his actions. He crafted his testimony in a way that almost dared someone to find fault in his answers. But in the end, he only succeeded in undermining his own credibility. For instance, he asserted that he was not "bearhugging" S. but was merely wiping off his hands. The video belies that. In another instance, Grievant described how he "cradled" S. to put him back on the seat when the video refuted that notion as well. Additionally, Grievant often hesitated before answering his own attorney's questions, seeming to very carefully choose his words. To a question regarding whether he "forced" S. back to his seat after cleaning up the milk—a simple "yes" or "no" question—Grievant paused before answering that he "assisted" the child.

Grievant also contradicted his own testimony multiple times. For example, at one point, Grievant testified that he pressed his leg against S.'s back to keep him from laying down or sliding under the table. He later testified that he did it to keep S. from running out the door. He testified yet again that he did it because another student had recently fallen backward and hit his head; so, he was trying to prevent S. from doing the same.

Perhaps most revealingly, though, even after hearing the testimony of Samples, who outlined all the things Grievant had done incorrectly on October 12th, Grievant attempted to justify his actions that day and pointed the finger back at S.'s actions, saying at one point that S. knows when people are watching and that he played to his audience. Grievant also seemed to blame the other adults in the area, expressing that he believed that the situation would not have gotten as far as it did if someone had just offered to help him. Again, he stated this after hearing Samples' testimony that the CPI model teaches bystanders to stand down unless specifically asked for assistance.

When it was most crucial for Grievant to demonstrate that he was deserving of another chance and could be improved with further training, he, instead, showed that he was either unable or unwilling to do so. After hours of hearing the testimony of multiple people explain how he had mishandled the situation with S. and watching and re-watching the video account of the incident, Grievant was steadfast that he had done the best he could that day. Ultimately, Grievant did acknowledge that he had inappropriately restrained S. on October 12, 2023, and that he would not handle the situation in the same way if he had it to do over again, but that was only after much brow-beating. That alone shows that Grievant not only willfully neglected his duties on October 12, 2023, but also that he is unlikely to be amenable to further training.

Moving on, cruelty is a deliberate act to inflict pain and/or suffering. *Bailey v. Kanawha County Bd. of Educ*., Docket No. 2011-0070-KanED (Aug. 2, 2011). Actions such as belittling, threatening, grabbing, and restraining a student when such actions are not necessitated by self-defense or the defense of others meet this definition of "cruelty." *See id.; Powell v. Hardy County. Bd. of Educ.* Docket No. 04-16-412 (April 4, 2005); *Sinsel*

v. Harrison County. Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996); *Slack v Morgan County Bd of Educ.*, Docket No. 91-03-268 (July 13, 1991); *Adkins v. Cabell County Bd. of Educ*., Docket No. 89-06-656 (May 23, 1990). As explained previously, the evidence adduced at the Level Three hearing demonstrates that Grievant grabbed and restrained S. unnecessarily—in fact, improperly, per the CPI model—and that S. reacted in pain. Further, the act of forcibly making S. clean up the milk on his hands and knees when the janitor offered to clean up the spill was belittling at best. Finally, for Grievant to decline a lunch tray on S.'s behalf and then take a biscuit from that tray and eat it in front of S. was simply cruel in its very nature.

Respondent has proven by a preponderance of the evidence that Grievant was willfully neglectful of his duties and engaged in cruelty against a student. Respondent's action in terminating Grievant's employment is supported by applicable law and policy. Accordingly, the grievance is DENIED. The following Conclusions of Law support the decision reached:

Conclusions of Law

1. The burden of proof in disciplinary matters rests with the employer to prove by a preponderance of the evidence that the disciplinary action taken was justified. W. VA. CODE ST. R. § 156-1-3 (2018). "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. Dep't of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993), *aff'd*, Pleasants Cnty. Cir. Ct. Civil Action No. 93-APC-1 (Dec. 2, 1994). Where the evidence equally supports both sides, the employer has not met its burden. *Id*.

2. County boards of education are bound by law to provide a safe learning environment for their students and, so, are given the authority to terminate any employee who jeopardizes the health, welfare, or safety of students. W. VA. CODE § 18A-2-8(d) (2024).

3. The use of that authority, however, must be based on one or more of the "just causes" listed in West Virginia Code § 18A-2-8; and it must be exercised reasonably, not arbitrarily or capriciously. Syl. Pt. 4, *Maxey v. McDowell County Bd. Of Educ.*, 212 W. Va. 668, 575 S.E.2d 278 (2002); Syl. Pt. 2, *Parham v. Raleigh County Bd. of Educ.*, 192 W. Va. 540, 453 S.E.2d 374 (1994); Syl. Pt. 3, *Beverlin v. Bd. of Educ*., 158 W. Va. 1067, 216 S.E.2d 554 (1975); *Bell v. Kanawha County Bd. of Educ*., Docket No. 91-20-005 (Apr. 16, 1991).

4. Those "just causes" for terminating an employee who jeopardizes the health, welfare, or safety of students include "[i]mmorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, [or] unsatisfactory performance." W. VA. CODE § 18A-2-8(a) (2024).

5. The term "willful neglect of duty" "'encompasses something more serious than incompetence"[;] . . . it 'ordinarily imports a knowing and intentional act, as distinguished from a negligent act.' *Bd. of Educ. of the County of Gilmer v. Chaddock*, 183 W. Va. 638, 398 S.E.2d 120 (1990)." *Lancaster v. Ritchie Cnty. Bd. of Educ.*, 2016 WL 2979245 (W. Va., No. 15-0554, May 23, 2016) (memorandum decision); *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).

6. In assessing the credibility of witnesses, some factors to be considered are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. HAROLD J. ASHER & WILLIAM C. JACKSON, REPRESENTING THE AGENCY BEFORE THE UNITED STATES MERIT SYSTEMS PROTECTION BOARD 152-153 (1984). Additionally, the ALJ 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. *Id.*, *Burchell v. Bd. of Trustees, Marshall Univ.*, Docket No. 97-BOT-011 (Aug. 29, 1997).

7. Cruelty is a deliberate act to inflict pain and/or suffering. *Bailey v. Kanawha County Bd. of Educ*., Docket No. 2011-0070-KanED (Aug. 2, 2011).

8. Actions such as belittling, threatening, grabbing, and restraining a student when such actions are not necessitated by self-defense meet this definition of "cruelty." *See id.; Powell v. Hardy County. Bd. of Educ.* Docket No. 04-16-412 (April 4, 2005); *Sinsel v. Harrison County. Bd. of Educ.*, Docket No. 96-17-219 (Dec. 31, 1996); *Slack v Morgan County Bd of Educ.*, Docket No. 91-03-268 (July 13, 1991); *Adkins v. Cabell County Bd. of Educ*., Docket No. 89-06-656 (May 23, 1990).

9. Respondent has met its burden of proof and established by a preponderance of the evidence that Grievant was willfully neglectful of his duties and engaged in cruelty against a student, which was good cause for the termination of his employment.

Accordingly, the grievance is **DENIED.**

Any party may appeal this decision to the Intermediate Court of Appeals in accordance with W. VA. CODE § 51-11-4(b)(4) and the Rules of Appellate Procedure. W. VA. CODE § 6C-2-5(b). Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such an appeal and should not be named as a party to the appeal. However, the appealing party must serve a copy of the petition upon the Grievance Board by registered or certified mail. W. VA. CODE § 29A-5-4(b) (2024).

DATE: September 18, 2024

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Lara K. Bissett
Administrative Law Judge