DAVID LANEHART,

Grievant,

v. **Docket No. 95-23-235**

LOGAN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, David Lanehart, grieves a two day suspension for "extremely unprofessional behavior, and what could be considered an act of abuse towards a student." Grievant allegedly lost his temper, "grabbed" two students, and then "hollered" at them in front of his gym class. Grievant requests, as relief, that the Logan County Board of Education ("LCBOE") rescind his suspension, restore his salary, and make him whole in every way. Pursuant to W. Va. Code §18A-2-8, Grievant appealed his suspension directly to Level IV. After several continuances, a Level IV hearing was held on September 18, 1995. The parties originally agreed to submit proposed findings of fact and conclusions of law on October 20, 1995, but extended that deadline to October 27, 1995 by mutual agreement.

Issues

Grievant makes several arguments in his proposed findings of fact and conclusions of law. (See footnote 1) Grievant states he did not use excessivephysical force, in fact, he used no physical force on the students, (See footnote 2) thus his suspension for failure to follow LCBOE's Policies VI.5.1 and 5.2 and for insubordination, per W. Va. Code §18A-2-8, for failure to follow county policies, is inappropriate. Grievant also argues LCBOE did not comply with Logan County Policies VI.5.1 and 5.2 when it suspended him.

Because the essential facts are in dispute, the final decision in this case rests on the witnesses' credibility and will be discussed in some detail. Testimony in this grievance consisted of only three witnesses. Grievant testified at hearing about the incident, and Superintendent John Myers and

Principal Wayne Bennett testified as to what Grievant told them about the incident a few days after it occurred. These reports are contradictory. When asked by Grievant's counsel why LCBOE had not subpoenaed the students as witnesses, Mr. John Sims, Counsel for LCBOE, replied Grievant had already told both Principal Bennett and Superintendent Myers he had grabbed the boys, thus he did not think that element of the charge was at issue. Accordingly, they did not wish to require students to come to Charleston for a hearing.

In assessing the witnesses' credibility the undersigned utilized the guidelines and factors set out in the United States Merit System Protection Handbook ("MSPB Handbook"). Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit System Protection Board 152-53 (1984). Some identified factors to consider in assessing a witness's testimony 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. Id. Additionally, an 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. Id.

Grievant has been employed as a Health and P.E. teacher with LCBOE for twenty-three years. He currently teaches at Logan County Junior High School.

His testimony is as follows. On May 31, 1995, the last day before final exams, Grievant was to review exam material with the students. Because he had reviewed the material the day before, Grievant allowed the students to choose a group activity or game to play on the gym floor while he worked on permanent record cards at his desk on the stage adjacent to the gym.

After being eliminated from the game, four students, two boys and two girls, left the gym through the outside door on the side of thebuilding. Leaving class was not permitted. Grievant "hollered" at the students to return to the gym. When they ignored him, he left his desk, and walked toward them while he continued to call for them to return. He received no response from the students. When he reached the students they were "hanging around" the doors, and the two boys were attempting to distract other classes that were in session. It is at this point that the stories diverge.

Grievant states that one male student, J.W. (See footnote 3), was doing jumping jacks with his back to him, and as Grievant attempted to place his left hand on his shoulder to get his attention, J.W. jumped into his hand, and Grievant accidently grabbed his shirt. Grievant then used his right

hand, with no force, to guide J.W. back into the gym.

Grievant then called to the other male student, J.Z., to "come on", and when he received no response, Grievant reached out with only his fingers to touch the boy's elbow to get his attention. He then told all four, "Come on, get in the gym." J.Z. then screamed in Grievant's face, "I did not hear you." Grievant stated he did not become upset until J.Z. screamed at him. Even though he was then upset, Grievant testified he did not confront the students, but escorted them into the gym and returned to his desk. (See footnote 4) Grievant stated he had had minor "run-ins" with each of the students. These incidentshad occurred throughout the year, and none was stated as occurring close in time to the incident in question.

Principal Bennett testified he heard about the incident when J.W.'s mother called him at home the evening after the incident. According to Principal Bennett, Ms. W. (See footnote 5) was very upset and stated her son had been roughly grabbed and his T-shirt (See footnote 6) torn by Grievant during the incident. She threatened to sue LCBOE, and expressed concern that this event may have worsened her son's cerebral palsy.

Principal Bennett discussed the situation with Superintendent Myers who told him to investigate the incident. Principal Bennett took J.W.'s statement, and statements of the other students J.W. said were witnesses to the event.

These statements were basically consistent and stated Grievant had grabbed the students, pulled or pushed them into the gym, and then had "hollered" at the four students after they were in the gym. Several of the witnesses stated Grievant then went on the porch after the incident to smoke a cigarette. (See footnote 7)

After Principal Bennett investigated the incident he called Superintendent Myers and reported there appeared to be a problem. On June 2, 1995, Principal Bennett and Superintendent Myers reviewed thestatements with the Board's attorney, Mr. Sims. Later that day Principal Bennett and Grievant went to Superintendent Myer's office for a discussion about these events. Principal Bennett told Grievant on the way over that if the charges appeared true, a suspension was one of the possible outcomes of Grievant's actions.

Principal Bennett testified that at this meeting Grievant stated he had "grabbed" one student by the shirt and the other by the elbow. Grievant also stated he was more upset when he returned to the building and had "hollered" at the students once they were inside. Grievant did not think he had

grabbed J.W.'s shirt hard enough to tear it.

Principal Bennett testified that Superintendent Myers asked about the credibility of the witnesses. Principal Bennett noted he knew the students involved, and the administration had had some trouble with J.Z. Principal Bennett indicated the girls were good students and reliable. Principal Bennett also noted he had had some difficulty with Grievant loosing his temper in the classroom and then using "bad" language. Principal Bennett found it was necessary to talk to Grievant two separate times about this behavior, but never formally reprimanded him because after the second discussion Grievant said it would never happen again and it did not. Principal Bennett thought Grievant did at times have a problem with his temper.

Superintendent Myers also testified about the meeting with Grievant. He noted he had thought about what the proper discipline might be if the incident proved true. In that regard, he had had his secretary, who would go home before the meeting, to prepare a two-dayand a three-day suspension letter if he needed it. He indicated he had not predetermined what his decision might be and was waiting until the Grievant's interview to decide.

During the interview with Principal Bennett, Superintendent Myers, and Mr. Sims, Grievant told Superintendent Myers he had "grabbed" J.W. from behind by the shirt, and "grabbed" J.Z. by either the elbow or shoulder. Grievant stated he put these students back in the building, but did not think he used enough force to tear J.W.'s shirt. Grievant also told Superintendent Myers he became upset when J.Z. screamed in his face and that he "yelled" at the four students once they returned to the building. Because Superintendent Myers believed Grievant had lost his temper and used physical restraint when he had not been threatened or had a need for self-defense, he suspended Grievant for two days. He thought this matter important, and a two-day suspension was to call Grievant's attention to a serious mistake.

As to smoking a cigarette on campus during class, Grievant told Superintendent Myers he may have done this, he did not remember. At hearing Grievant stated he did not smoke a cigarette. As this issue was not mentioned in the suspension letter, the inconsistencies do not have to be resolved.

Discussion

An Administrative Law Judge is charged with assessing the credibility of the witnesses that appear before her. Perdue v. Dept. of Health and Human Resources/Huntington State Hosp., Docket

No. 93- HHR-050 (Feb. 4, 1993). The demeanor of Principal Bennett andSuperintendent Myers was credible and convincing. Their statements were consistent. They merely reported what was told them at the time of the occurrence. They consistently reported Grievant admitted to them he "grabbed" the students and "hollered" at them after they were in the gym. Grievant also told both gentlemen he did not believe he used enough force to tear the shirt.

The Administrative Law Judge also finds Grievant's version to the events to be implausible. First, Grievant already admitted to Principal Bennett and Superintendent Myers he "grabbed" the students and when they were inside the gym he "hollered" at them. Second, Grievant's demeanor was not convincing when he told his version of the events. Third, it is unclear how Grievant could have even grabbed J.W.'s shirt if the events occurred as he said. Although the undersigned believes Grievant did not intend to harm the students, this belief is actually unimportant. The fact is Grievant inappropriately grabbed the two boys somewhat roughly without sufficient provocation and without the need for self-defense. Accord, Miller v. Kanawha County Bd. of Educ., Docket No. 89-20-108 (July 31, 1989).

Because the undersigned finds Grievant did grab the two male students in an unnecessarily rough manner, the next issue to decide is whether this behavior is violative of statutory provisions and county policy.

It is clear Grievant violated Policy VI.5.1, which relates to performance of duties in general. Specifically, Grievant "failed to maintain satisfactory and harmonious working relationships with . . .the public" when he grabbed the two students. Although this Policy states an employee "should normally receive at least two warnings", the policy does not require these warnings. LCBOE stated this incident of unnecessary roughness without sufficient provocation was of such importance as to relieve them of the necessity of giving two warnings. Also LCBOE noted Principal Bennett had had two prior discussions with Grievant about "his temper" although neither had resulted in any type of official warning.

Policy VI.5.2 deals with personal conduct and states "an employee may be suspended without warning for cause . . .". Grievant is specifically charged with participating in an "action which would tend . . . to seriously disrupt operation of a school." Grievant's behavior had a negative impact on his interaction with the students and parents involved and on his relationship with other students. The "hollering" at the students in the presence of the whole class was a disruption to his classroom.

Finally, Grievant violated W. Va. Code §18A-2-8 and was insubordinate when he acted against known county policy. "Insubordination encompasses more than [an] explicit order and refusal to carry it out. It may also involve flagrant or willful disregard for implied directions of an employer." Nicholson v. Logan County Bd. of Educ., Docket No. 95-23-129 (Oct. 18, 1995); Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988), aff'd 387 S.E.2d 529 (W. Va. 1989). In this incident, Grievant "grabbed" the boys, and then "hollered" at the four students. Grievant violated known county policies and behaved in a insubordinate manner.

The next step in this assessment is whether a two-day suspension was justified. A county board of education has the authority to discipline an employee under W. Va. Code §18A-2-8, but this discipline must be based on the identified causes and must not be exercised in an arbitrary and capricious manner. Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991). Here, although the students were guilty of some mild provocation, going outside without permission, Grievant's reaction was inappropriate and excessive, and the sanction placed against him was warranted. Miller, supra. Additionally, the sanction imposed was within the stated guidelines of county policy.

The above discussion will be supplemented with the following findings of fact and conclusions of law.

Findings of Fact

1. Grievant has been a teacher for twenty-three years with LCBOE and teaches Health, PE, and study skills at Logan County Junior High School.

2. On May 31, 1995, Grievant grabbed one student, J.W., from behind and another student J.Z. by the elbow and then escorted both boys into the gym. J.Z. screamed in Grievant's face, and when the group reached the gym Grievant yelled at the four students he had retrieved from the porch.

Conclusions of Law

1. An employer must establish the charges in a disciplinary matter by a preponderance of the evidence. W. Va. Code §18-29-6;Nicholson v. Logan County Bd. of Educ., Docket No. 95-23-129 (Oct. 18, 1995).

2. "Insubordination is one of the causes listed in W. Va. Code §18A-2-8 for which an education employee may be disciplined and encompasses more than an explicit order and refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." Nicholson, supra.

3. The authority of a county board of education to discipline an employee under W. Va. Code §18A-2-8 must be based on the causes listed therein, and cannot be exercised in an arbitrary and capricious manner. Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991)

4. LCBOE proved by a preponderance of the evidence that Grievant violated Policies VI.5.1 and 5.2, and W. Va. Code §18A-2-8 when he used force with two students, without sufficient provocation.

5. LCBOE imposition of a two-day suspension for Grievant's use of force with two students was not arbitrary and capricious. Nicholson, supra; Bailey v. Logan County Bd. of Educ., Docket No. 93- 23-383 (June 23, 1994); Bell, supra.

6. An employee raising an affirmative defense must establish such defense by a preponderance of the evidence. McFadden v. W. Va. Dept. of Health and Human Resources/Colin Anderson Center, Docket No. 94-HHR-428 (Feb. 17, 1995).

7. Grievant did not establish his affirmative defenses that LCBOE violated their own policies, or failed to follow proper procedure in suspending Grievant.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Logan County and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: December 29, 1995

Footnote: 1

Grievant, citing W. Va. Code §18A-2-7, alleges Superintendent John Myers did not file the charges with LCBOE, thus his suspension should be vitiated pursuant to Totter v. Mingo County Bd. of Educ., Docket No. 29-88-036-04 (Sept. 29, 1988).

This argument must fail as the issue was not raised until the submission of proposed findings of fact and conclusions of law, and LCBOE had no opportunity to respond. Additionally, as Grievant asserts this issue as an affirmative defense, he must establish such defense by a preponderance of the evidence. McFadden v. W. Va. Dept. of Health and Human Resources/Colin Anderson Center, Docket No. 94- HHR-428 (Feb. 17, 1995). As this issue was not raised at hearing, Grievant did not establish this defense. Further, it must be noted that the W. Va. State Department of Education has assumed control over the Logan County School System, and Superintendent Myers' decisions are reviewed by Superintendent Henry Marockie, not LCBOE.

Footnote: 2

Grievant allegedly used physical force on two male students.

Footnote: 3

In keeping with Grievance Board policy, the undersigned will use only the initials of juveniles.

Footnote: 4

The students were never otherwise disciplined for their behavior. Principal Bennett indicated it is the teacher's place to request disciplinary action from the assistant principal and Grievant did not do so.

Footnote: 5

LCBOE did not subpoena Ms. W. or J.W. Counsel for LCBOE stated Ms. W. did not wish to cooperate with the school system, and LCBOE did not wish to antagonize her.

Footnote: 6

The alleged shirt was submitted into evidence. It was torn around the collar. The shirt apparently a fairly new Reebok T-Shirt and had a 1-1/2 inch tear on the right shoulder seam and an inch tear on the left shoulder seam.

Footnote: 7

These statements were not made a part of the record by either party.