NANCI L. SHIPLEY,

Grievant,

v. DOCKET NO. 97-12-169

GRANT COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

On April 10, 1997, Grievant, Nanci L. Shipley, submitted this grievance directly to Level IV, (See footnote 1) in accordance with W. Va. Code §18A-2-8, challenging her five day suspension by Respondent, Grant County Board of Education. Grievant alleges Respondent violated her due process rights, State Board of Education Policies 5300 and 5310, and "the rights of a teacher ... to use physical force in a disciplinary procedure" (See footnote 2) based on W. Va. Code §18A-5-1, the doctrine of loco parentis, and Smith v. W. Va. State Bd. of Educ., 170 W. Va. 593, 295 S.E.2d 680 (1982). Although Grievant failed to specify the relief she seeks in her grievance statement, in her post-hearing submission Grievant requested that the letter of insubordination be removed from her personnel file, and that she be "restored her five (5) days back pay."

On May 29, 1997, an evidentiary hearing was held at the Grievance Board's office in Elkins, West Virginia. On August 15, 1997, this case became mature upon receipt of Grievant's post-hearing submission. The following facts are derived from the record created at the May 29, 1997, Level IV evidentiary hearing.

FINDINGS OF FACT

1. Grievant is employed by Respondent as a third and fourth grade teacher at Union Education Complex (UEC).

2. Grievant received a letter of reprimand, dated February 2, 1996, because she grabbed a student by the arm in the cafeteria. Grievant "apologized for grabbing [the student] and speaking to him in anger." R. Ex. 1. Principal Mark E. Nicol also made the following suggestions:

> One - if you reach a point of not feeling in control of your emotions please let me know and I will help in assisting you with the students and/or give you a chance to take a break. Two - the guidance counselor and I are available to help with problem areas. At-risk students need immediate attention. Please use the referral process.

Id.

3. On January 2, 1997, Superintendent Garber met with Grievant, a school representative of Grievant's choosing, and

Principal Nicol. Complaints concerning Grievant physically grabbing students had been received, and were discussed. At that

meeting, Superintendent Garber instructed Grievant not to touch or grab children. Tr. at 89.

4. Grievant understood the Superintendent's directive.

5. On March 21, 1997, Grievant and Mrs. Rachel Tracey, a special education/art teacher, were having lunch in the speechteacher's room. No other teachers were eating in that room that day.

6. During the lunch period students were walking, single file, from the cafeteria, past the room where Grievant was eating lunch. The students were on their way to the gym for lunch time recess.

7. Grievant grabbed K.C. (See footnote 3) and pulled her out of line.

8. On March 25, 1997, Superintendent Garber spoke to Grievant about the March 21, 1997, incident. At that time, Grievant offered no explanation for physically grabbing K.C. She did not allege that K.C. was in a fight or altercation of any type.

9. Grievant was suspended for five days by letter dated March 27, 1997, effective April 7, 1997, for insubordination.

10. Grievant had satisfactory evaluations. Tr. at 102.

DISCUSSION

W. Va. Code §18A-2-8 provides, in pertinent part:

> [n]otwithstanding any other provisions of law, 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. A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation pursuant to section twelve of this article. Emphasis added.

Grievant's argument that in accordance with State Board of Education Policies 5300 and 5310, Respondent should have placed her on an improvement plan, is misplaced. Provisions for

improvement plans are found in W. Va. Code §18A-2-12. That Code Section provides, in pertinent part:

> [a] professional whose performance is deemed to be unsatisfactory shall be given notice of deficiencies. A remediation plan to correct deficiencies shall be developed by the employing county board of education and the professional. The professional shall be given a reasonable period of time for remediation of the deficiencies and shall receive a statement of the resources and assistance available for the purposes of correcting the deficiencies.

In this case, the problem is not a deficiency in Grievant's professional skills. Grievant was clearly warned against physically handling students. She willingly violated that directive. Grievant grabbing a student is not a deficiency in a professional skill. Grievant was not suspended because she incorrectly disciplined a student, but because she physically grabbed a student.

The intended purpose of Policy 5300 evaluations is to encourage improvement of school personnel's skills which, in turn, will benefit the students. Hosaflook v. Nestor, 176 W. Va. 648, 346 S.E.2d 798 (1986). Furthermore, "the factor triggering the application of the evaluation procedure and correction period is 'correctable' conduct. What is 'correctable' conduct does not lend itself to an exact definition but must, ... be understood to mean an offense or conduct which affects professional competency." Rovello v. Lewis County Bd. of Educ., 181 W.Va. 122, 381 S.E.2d 237 (1989), citing Mason County Bd. of Educ. v. State Superintendent of Schools, 165 W. Va. 732, 274 S.E.2d 435 (1981). Therefore, W. Va. Code §18A-2-12 and State Board of Education Policies 5300 and 5310 are not applicable in this case.

Second, Grievant was suspended for insubordination. Insubordination is usually defined by this Grievance Board as "a deliberate, willful or intentional refusal or failure to comply with a reasonable order of a supervisor." Reynolds v. Kanawha- Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990), citing Gill v. W. Va. Dept. of Commerce, Docket No. COMM-88-031 (Dec. 23, 1988). See, Thompson v. Logan County Bd. of Educ., Docket No. 95- 23-127 (July 17, 1995). It has also been stated that insubordination "encompasses more than an explicit order and subsequent refusal to carry it out. It may also involve a flagrant or willful disregard for implied directions of an employer." Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988), citing Weber v. Buncombe County Bd. of Educ., 266 S.E.2d 42 (N.C. 1980). (See footnote 4) Furthermore, in order to establish insubordination, the employer must demonstrate that the employee's failure to comply with a directive was sufficiently knowing and

intentional toconstitute the defiance of authority inherent in a charge of insubordination. Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995); Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995).

Grievant was verbally directed not to grab students. Grievant was issued a letter of reprimand for grabbing a student on January 29, 1996. Grievant knew her actions were inappropriate, apologized to the student, and assured Principal Nicol that it would not happen again. R. Ex. 1. Moreover, Grievant attended two presentations by Principal Nicol during Faculty Senate meetings about appropriate and inappropriate student touching. Grievant clearly violated the directive of Superintendent Garber.

Third, Grievant did not seriously pursue her due process claim. Her counsel made few inquires pursuing this allegation during the Level IV hearing, and did not address the issue in his post-hearing submissions. Counsel's emphasis in his post-hearing submissions were directed to what he termed, in his opening

statement, “the rights of a teacher ... to use physical force in a disciplinary procedure”. (See footnote 5)

Last, Grievant cited W. Va. Code §18A-5-1, the doctrine of loco parentis, and a line of cases beginning with Smith v. W. Va. State Bd. of Educ., 170 W.Va. 593, 295 S.E.2d 680 (1982), for the proposition that teacher's have certain “rights” in discipliningstudents, regardless of instructions or directions from their employer. However, none of the above stand for the proposition Grievant alleges. Smith does not create “rights” for teachers, and at best, creates an affirmative defense for teachers when they take physical action against a student. See, Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995).

In this case, Grievant has failed to prove, by a preponderance of the evidence, that the amount of force she used was necessary given the circumstances surrounding the March 21, 1997, incident. A large portion of this case hinges on the credibility of the witnesses. When Grievant was originally questioned about the incident by Superintendent Garber four days after the incident, she did not remember the incident. Even after she remembered the incident (when speaking with Superintendent Garber), she did not offer any explanation for physically grabbing K.C. Then, at Level IV Grievant alleged she had to physically move K.C. for her own safety. The undersigned administrative law judge finds Grievant's testimony incredible.

Furthermore, the current case is easily distinguishable from Smith, supra. In Smith, a teacher struck a student with a wooden paddle for fighting. In the instant case, even according to Grievant, K.C. was not fighting her sister, but merely pestering her. Second, in Smith, the discipline imposed was paddling. In the instant case, Grievant's yanking K.C. was not part of the discipline involved. Grievant's physical contact, the yanking,simply got K.C.'s attention. Grievant could easily have gotten K.C.'s attention simply by asking K.C. to come to her.

After considering the totality of the circumstances, and the evidence offered by the parties, Respondent proved by a preponderance of the evidence that Grievant was insubordinate when she wilfully grabbed K.C. on March 21, 1997. Furthermore, a five day suspension is not too harsh given the circumstances of the offense, and Grievant's prior incidents of similar conduct.

In addition to the foregoing findings of fact and narration, it is appropriate to make the following conclusions of law.

CONCLUSIONS OF LAW

1. The employer must establish the charges in a disciplinary matter by a preponderance of the evidence. W. Va. Code § 18-29-6; Bierer v. Jefferson County Bd. of Educ., Docket No. 95-29-558 (Apr. 8, 1996); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41- 232 (Dec. 14, 1989).

2. A county board of education must exercise its discretion in personnel matters in a manner which is not arbitrary or capricious. Lilly v. Summers County Bd. of Educ., Docket No. 90-45- 040 (Oct. 17, 1990), citing State ex rel. Hawkins v. Tyler County Bd. of Educ., 166 W. Va. 363, 275 S.E.2d 908 (1980).

3. The intended purpose of Policy 5300 evaluations is to encourage improvement of school personnel's skills which, in turn,
will benefit the students. Hosaflook v. Nestor, 176 W. Va. 648, 346 S.E.2d 798 (1986). 4. "The factor triggering the application of the evaluation procedure and correction period is 'correctable' conduct. What is 'correctable' conduct does not lend itself to an exact definition but must, ... be understood to mean an offense or conduct which affects professional competency." Rovello v. Lewis County Bd. of Educ., 181 W. Va. 122, 381 S.E.2d 237 (1989), citing Mason County Bd. of Educ. v. State Superintendent of Schools, 165 W. Va. 739, 274 S.E.2d 439.

5. Insubordination is one of the causes listed in W. Va. Code §18A-2-8 for which an education employee may be disciplined. See, Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554

(1975).

6. Grievant's handling of K.C. on March 21, 1997, was not an act of disciplining a student, and violated the directive of Superintendent Garber.

7. “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 (June 23, 1994); Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991)].” Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995).

8. Respondent proved by a preponderance of the evidence that Grievant was insubordinate when she wilfully grabbed K.C.

9. Grievant did not establish a violation of W. Va. Code §18A-2-12 or State Board of Education Policy 5300 or 5310.

Accordingly, this grievance must be **DENIED**.

Any party may appeal this DECISION to the Circuit of Kanawha County or to the Circuit Court of Grant 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.

DATED 9/29/97 _____

JEFFREY N. WEATHERHOLT

ADMINISTRATIVE LAW JUDGE

Footnote: 1 Cites to the transcript of the Level IV hearing will referred to as "Tr. at ___", with the page number appearing in the blank. Likewise, Respondent's and Grievant's exhibits will be referred to as "R. Ex. ___" and "G. Ex. ___", with the exhibit number in the blank.

Footnote: 2 Tr. at 7.

Footnote: 3 Consistent with the Grievance Board's practice, the initials of juvenile students will be used throughout this decision in lieu of their names. Eggleston v. Greenbrier County Bd. of Educ., Docket No. 94-13-395 (Dec. 29, 1994); Edwards v. McDowell County Bd. of Educ., Docket No. 93-23-38 (June 23, 1994).

Footnote: 4 It should be further noted that Sexton was affirmed in part and reversed in part by the Kanawha County Circuit Court, Docket No. 88-AA-154. It was then appealed to the Supreme Court of Appeals of West Virginia which reversed the Circuit Court's ruling, in Sexton v. Marshall Univ., 182 W. Va. 294, 387 S.E.2d 529 (1989).

Footnote: 5 Level IV, Tr. at 7.