BARRY HUFFSTUTLER,

Grievant,

v. **Docket No. 97-06-150**

CABELL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Barry Huffstutler, grieves his ten day suspension issued to him by the Cabell County Board of Education ("CCBOE") for "falsification of records". As this was a disciplinary action, it was appealed directly to Level IV after Grievant's pre-suspension hearing and subsequent action by CCBOE, pursuant to W. Va. Code §18A-2-8. Level IV hearings were held on April 28, and May 12, 1997. This case became mature for decision on June 13, 1997, the deadline for the submission of the parties' proposed findings of fact and conclusions of law.

After a careful review of the entire record, the Undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed by CCBOE as a physical education ("PE") teacher for thirty-two (32) years. He currently teaches at Cabell Midland High School ("CMHS"). (See footnote 1)

2. CMHS was opened in 1994, and during the first school year many teachers were allowed to utilize Teacher's Assistants ("TA") to assist them. Numerous problems resulted from this practice, and the following school year, 1995-1996, during the initialorientation, the faculty at CMHS were informed that TA's could not be utilized except in special situations which had received the prior approval of Associate Principal John Flowers.

3. Grievant was present at this meeting, but did not hear this announcement.

4. At the beginning of the 1996-1997 school year, Ms. Drexena Dilly, another teacher in the P.E. department, asked Grievant if he would take a student as a TA. He asked her why she did not take the student, and she replied she already had two TA's and could not use another one. She

informed Grievant that the student, M.C. (See footnote 2) , had no place to go and encouraged Grievant to take the student. (See footnote 3)

5. Grievant did not ask M.C. what class she was currently enrolled in or any other questions, and agreed to take M.C. as a TA in his Team Sports class.

6. M.C. wrote a note to her counselor, which stated, "Mr. Huffstutler said he would go ahead & take me in his 2nd block class (team sports) since I'd already had outdoor recreation." To this note Grievant attached and signed a Post It Note which stated, "[M] has permission to be in Team Sports 2nd." Resp. Exh. 3.

7. The counselor, based on the information she was given, and knowledge that M.C. had not previously taken this class,enrolled M.C. in the Team Sports class as a student. Grievant did not talk to the counselor, and left any discussion with the counselor on the subject of M.C.'s TA status up to M.C. and Ms. Dilly. Pre-suspension Trans. at 47.

8. The proper procedure for obtaining a TA is to contact Associate Principal Flowers. He then calls the student in and talks to them to find out why they want to be a TA, why they do not want to take the class they are signed up for, confirms they do not need the assigned class to graduate, and requires them to obtain a note from their parents stating they have permission to work as a TA. Mr. Flowers also talks with the teacher to find out why they want a TA, and to find out what benefit this experience would be to the student.

9. After these discussions are held and permissions have been received, Mr. Flowers assigns the TA a special TA number, and codes the computer so the student cannot receive a grade in the class. A special attendance form is also generated for this student to track their attendance as a TA.

10. Mr. Flowers is sparing in his approval of TA's. (See footnote 4)

11. All other teachers, with one exception (See footnote 5) , have followedthe proper procedure for obtaining TA's. (See footnote 6)

12. Mr. Steve Beckelhimer, Chairperson of the Science Department, related his experience of obtaining a TA. He stated a student came to him, asked to be a TA, and he was in favor of the idea. He called the counselor, because they are in charge of scheduling, and was reminded that all TA's must be approved by Mr. Flowers. He then talked to Mr. Flowers, who completed the permission requirements and paper work, and the student was allowed to be a TA in his class.

13. M.C. stated she became aware, "Pretty much from Ms. Dilly, . . . probably right when I was

getting into it or right after [I'd] gotten approval to be in the class and everything, I kindly [sic] figured it out myself, I wasn't supposed to be in there as a TA." M.C. talked to Ms. Dilly, and she informed M.C. that CMHS had quit "doing the TA's in classes" and M.C. stated I "knew to keep [my] mouth shut." Level IV Hrg., Tape 2.

14. M.C. would come to Grievant's class every day and take his attendance sheet to the office. She then went to either Ms. Dilly or Mr. McCracken to complete whatever tasks they assigned to her. M.C. never participated in any way in the Team Sports class.

15. Because M.C. had not been identified as a TA, her name appeared on Grievant's grade sheet for the Team Sports class. 16. Grievant asked M.C. if she was to be graded, and she toldhim she thought she should get a grade.

17. Grievant asked Ms. Dilly if M.C. should receive a grade, and "Ms. Dilly said she was giving hers grades and that . . . it was my decision." Pre-suspension Hrg. Trans. at 44.

18. Before giving M.C. a grade the first six weeks, Grievant talked to Mr. McCracken and Ms. Dilly about M.C.'s performance. He did not talk to them before giving her a grade the second and third six weeks or before giving her a final grade for the semester. He decided to grade M.C. at a 94%, an A, because her work deserved it, but she did not deserve a 100%, like Ms. Dilly gave her TA's, because she had missed some days.

19. M.C. received a 94%, or an A, and credit for the Team Sports class, on her Report Card.

20. After the end of the semester, CCBOE received an anonymous phone call complaining about Ms. Dilly giving grades to students in classes when they did not complete the work.

21. CMHS Principal Richard Fillmore was informed of these charges, discussed the matter with Ms. Dilly, and she informed him that Grievant had also done the same thing she had.

22. Mr. Fillmore discussed the issue with Grievant. Grievant explained he did not know he had done anything wrong, and stated he thought M.C. received grades he reported on his grade sheet as a TA. Mr. Fillmore informed Grievant his actions were not in conformance with the grading policies, as the student had received a grade in a class in which she completed none of the course requirements. 23. On February 17, 1997, Mr. Fillmore issued Grievant a written reprimand.

24. On February 21, 1997, CCBOE received an anonymous letter, from "Cabell Midland Concerned Parents" asking why no action had been taken against the teacher who had given grades

to students who had not completed class requirements.

25. CCBOE directed Superintendent Richard Jefferson to investigate the matter. Superintendent Jefferson met with Grievant, discussed the matter with Mr. Fillmore, and on February 26, 1997, he informed Grievant he would recommended a ten day suspension for "the falsification of student records" at the CCBOE meeting on March 18, 1997. On that date, CCBOE conducted Grievant's pre-suspension hearing and voted to accept Superintendent Jefferson's recommendation.

ISSUES

Grievant raised the following issues at the Level IV hearing: 1) Whether Grievant should be suspended when the directions to guide him about the TA's use were not a written, formal policy, but were given only briefly and orally; thus, requiring him to use his own judgement; 2) Whether Grievant's conduct constituted willful neglect of duty or immorality; 3) Whether Grievant's reliance, to his detriment, on the advice of a colleague should mitigate his punishment; and 4) Whether a ten day suspension was excessive given the facts of the case. In essence, Grievant believes he made an innocent mistake at the direction of Ms. Dilly, and that the proper punishment for this offense would be the written reprimandhe received from Mr. Fillmore.

Respondent states Grievant was guilty of willful neglect of duty, immorality, and/or insubordination (See footnote 7), in that he knew or should have known that giving a grade to a student, who did not complete the requirements of the class, was a violation of county and school grading policies as well as the State's Code of Conduct for teachers which requires them to "treat students fairly."

Discussion

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; 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). 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).

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

> Notwithstanding 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 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.

The suspension letter from Superintendent Jefferson indicates Grievant received a ten day suspension for "falsification of student records" which could be seen as insubordination if a grievant disobeyed a supervisor's directive, or as willful neglect of duty if a grievant failed to investigate properly a situation for which he is responsible. (See footnote 8)

Insubordination involves the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." 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). In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance ofauthority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995). (Cf. Rogliano v. Fayette County Bd. of Educ., Docket No. 94-10-164 (Oct. 25, 1994), where it was determined that "Grievant was given ample opportunity and notice that disciplinary action would be taken against him . . . ."). "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990) citing Meads v. Veteran Admin., 36 M.S.P.R. 574 (1988). See also Daniel v. U. S. Postal Serv., 16 M.S.P.R. 486 (1983); Davis v. Smithsonian Institute, 13 M.S.P.R. 77 (1983). Additionally, an employer has the right to expect subordinate personnel “to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority . . .”. McKinney v. Wyoming County Bd. of Educ., Docket No. 92-55-112 (Aug. 3, 1992)(citing In re Burton Manufacturing Co., 82 L.A. 1228 (Feb. 2, 1984)).

When an employee is charged with willful neglect of duty, the respondent must prove its case by a preponderance of the evidence. Arbaugh v. Putnam County Bd. of Educ., Docket No. 90-40-437 (May 22, 1991). To prove willful neglect of duty, the employer must establish that the employee's

conduct constituted a knowing and intentional act, rather than a negligent act. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). See Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990). Although the West Virginia Supreme Court has not formulated aprecise definition of "willful neglect of duty", it does encompass something more serious than incompetence and imports "a knowing and intentional act, as distinguished from a negligent act." Chaddock, supra.

It is clear Grievant disobeyed a direct order to not have TA's in his class unless he received prior approval from Mr. Flowers, and unless the student's parents had given permission to allow her to work as a TA. His excuse for disobeying this direct order is that he did not hear the information when it was explained in the school orientation for teachers that he attended. Grievant's failure to hear the rule did not make it any less a rule and does not alter the fact that he disobeyed it.

It is also clear Grievant gave a grade to a student for a class she did not take. His defense to this charge is that Ms. Dilly told him she was giving her students a grade, and what he did was "his decision." This should have been a red flag to Grievant. If he did not know before that there was a problem with M.C.'s TA status, he certainly should have known then because either TA's should or should not get a grade. It would not make sense that Ms. Dilly's TA's got grades, and Grievant's did not.

Additionally, the record is clear that M.C.'s name appeared on the Team Sports grade sheet in alphabetical order with all the other students who were taking the course. Again, this should have been a red flag to Grievant, if he had not known before that there was a problem with M.C. status. Further, when Grievant gave approval for M.C. to be in his class he attached it to a notewritten by M.C. which would indicate to the counselor that she would be taking the course for credit. Grievant's note said nothing that would disabuse a counselor of this notion. In fact, Grievant's statement would reinforce the idea that M.C. was taking the class for credit.

Grievant, as a teacher, is expected to know his employer's rules, whether they are written or not. He is also expected to be reasonably prudent in his actions within the school setting. This would mean investigating situations which seem not to meet other rules and policies of which he is aware. This would also require a teacher to question the appropriate supervisor to obtain a definitive answer to the concern.

In this situation, Grievant either did not choose to think for himself and relied on the information

given by Ms. Dilly, or he knew the situation was wrong and chose to ignore it.

When an intelligent, professional employee is given data and fails to hear it, or fails to act on it, or fails to investigate a situation a reasonably prudent teacher would explore, these acts can be seen as willful and intentional and more serious than incompetence. Williams v. Cabell County Bd. of Educ., Docket No. 95-06-325 (Oct. 31, 1996). "County boards have the right to expect [a teacher] to follow its directives without constantly checking and reminding, and to seek assistance if something is unclear." Id.

Additionally, an administrative law judge is responsible for determining the credibility of testimony. Perdue v. Dept. ofHealth and Human Resources/Huntington State Hosp., Docket No. 93- HHR-050 (Feb. 4, 1994). Some factors to be considered in assessing a witness's credibility 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 and 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.

None of the witnesses who testified at hearing appeared untruthful. It is clear that CMHS Faculty were told that TA's could only be assigned through Mr. Flowers. Grievant did not hear this information although he attended the meeting. It is clear that most faculty would have paid attention to the red flags raised by Ms. Dilly's answers to his questions. Indeed, M.C., a seventeen year old student, without knowledge of the system, "figured out" she should not be a TA; however, Grievant did not.

Unfortunately, it appears Grievant was inattentive to facts and data; unconcerned about the possible effects of his actions; and unwilling to take the time and effort to assure that the situation in which he involved himself met the rules and regulations of the school, county, and state.

In specific response to the issues raised by Grievant: 1) The fact that the policy regarding TA's was given verbally at a teachers' meeting instead of in writing, does not relieve Grievant of responsibility in this situation. Grievant is expected to attend to the information given at these meetings whether it is in written or verbal form.

2) Relying on the advice of a fellow employee, when that employee is not in a supervisory

capacity, does not relieve an employee of the duty to investigate a situation before he acts.

3) Grievant's actions can be classified either as insubordination or willful neglect of duty, but his actions do not rise to the level of immorality.

4) On whether the imposition of a ten day suspension is excessive given the facts of the situation, this 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).

"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). In assessing the above-cited factors, I find that while Grievant's evaluations were satisfactory during his long tenure with CCBOE, he had been clearly told how TA's were to be assigned, and his penalty was the same as the suspension imposed on the other teacher who committed the same offense. As the employer has substantial discretion to determine a penalty, the Undersigned Administrative Law Judge will not substitute her judgement for that of the Respondent. This suspension is not subject to reduction.

Grievant violated school, county, and state policy by allowing a student to receive a grade in a class she did not take. He took no action to investigate the situation even when events occurred which should have put him on notice that "something was rotten in the state of Denmark." Thus, the punishment was not excessive, although lesser punishment could also have been appropriate.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code §18-29-6; 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. The authority of a county board of education to dis cipline 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 exercisedreasonably, 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).

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

> Notwithstanding 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 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.

4. Insubordination involves the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." 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).

5. In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995).

6. "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dept., Docket No. 90-H-128 (Aug. 8, 1990).

7. An employer has the right to expect subordinate personnel“to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority . . .”. McKinney v. Wyoming County Bd. of Educ., Docket No. 92-55-112 (Aug. 3, 1992) citing In re Burton Manufacturing Co., 82 L.A. 1228 (Feb. 2, 1984).

8. When an employee is charged with willful neglect of duty, the respondent must prove its case by a preponderance of the evidence. Arbaugh v. Putnam County Bd. of Educ., Docket No. 90-40- 437 (May 22, 1991). To prove willful neglect of duty, the employer must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act. Hoover v.

Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). See Bd. of Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990). Although the West Virginia Supreme Court has not formulated a precise definition of "willful neglect of duty", it does encompass something more serious than incompetence and imports "a knowing and intentional act, as distinguished from a negligent act." Chaddock, supra.

9. When an intelligent, professional employee is given data and fails to hear it, fails to act on it, or fails to investigate a situation when a reasonably prudent teacher would, these acts can be seen as willful and intentional and more serious than incompetence. Williams v. Cabell County Bd. of Educ., Docket No. 95-06-325 (Oct. 31, 1996). "County boards have the right to expect [a teacher] to follow its directives without constantly checking and reminding, and to seek assistance if something is unclear." Id. 10. "Immorality denotes conduct not in conformity with accepted principles of right or wrong behavior or 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 the County of Harrison, 285 S.E.2d 665, 668 (W.Va. 1981).

11. CCBOE has not met its burden of proof on its charge of immorality and has not demonstrated that Grievant's conduct was so egregious as to be contrary to the acceptable standards of the community or so reprehensible as to be typified as "wicked."

12. Respondent has met its burden of proof and demonstrated Grievant falsified student records, this act can be classifies as either insubordination or willful neglect of duty.

13. Given that Grievant was informed of the proper procedure to use when seeking a TA, that the penalty imposed on Grievant was the same as the penalty imposed on another teacher guilty of the same offense, and given the nature of the proven charges, the Undersigned Administrative Law Judge does not find the penalty to be disproportionate.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Cabell 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 itsAdministrative 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

October 31, 1997

Footnote: 1

Grievant indicated he would be retiring shortly, and it was unclear whether he would retire at the end of the 1996-1997 or 1997-1998 school year.

Footnote: 2

In keeping with the practice of this Grievance Board in respecting the privacy of students in such circumstances, this student will not be identified except by initials. See Edwards v. McDowell County Bd. of Educ., Docket No. 93-35-118 (July 13, 1994).

Footnote: 3

M.C. was enrolled in a class she did not want to take. She did not need this class to graduate.

Footnote: 4

CMHS has 2,160 students in grades nine through twelve, and 130-135 professional employees. For the first semester of 1996- 1997 he approved eight (8) TA's, and for the second semester he approved nineteen (19).

Footnote: 5

The other teacher, Ms. Dilly, also received a ten day suspension. This board action was recently upheld in Dilly v. Cabell County Board of Education, Docket No. 97-06-164 (Sept. 19, 1997).

Footnote: 6

During the Level IV hearing it was revealed that the Chairman of the P.E. department, Mr. Blaine McCracken, had three TA's and had only received permission for one. This case was somewhat different, as he had talked to Mr. Flowers and thought he had received permission to have all three as TA's.

Footnote: 7

At the pre-suspension hearing, Grievant's representative asked CCBOE to clarify the specific charges that were being brought against Grievant pursuant to the language in W. Va. Code § 18A-2-8. CCBOE stated it was not necessary for it to label the charges, as it was up to the courts and the Grievance Board to identify them pursuant to the above-stated Code Section. However, at that hearing, CCBOE stated Grievant's actions could be seen as immorality or willful neglect of duty. In its post-hearing submissions CCBOE also argued that Grievant's behavior constituted insubordination.

Footnote: 8

"Immorality denotes conduct not in conformity with accepted principles of right or wrong behavior or 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 the County of Harrison, 285 S.E.2d 665, 668 (W.Va. 1981). The Undersigned does not find CCBOE has met its burden of proof on this charge. CCBOE did not demonstrate Grievant's conduct was so egregious as to be contrary to the acceptable standards of the community or so morally reprehensible as to be typified as "wicked."