DREXENA DILLEY,

Grievant,

v.

DOCKET NO. 97-06-164

CABELL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Drexena Dilley, is employed by the Cabell County Board of Education ("Board") as a physical education teacher at Cabell Midland High School. She filed this grievance on March 25, 1997, pursuant to W. Va. Code § 18A-2-8, after the Board suspended her for ten days, without pay, for "falsifying student records." A level four hearing was held on May 29, 1997, and this case became mature for decision on June 23, 1997, the deadline for the parties' submission of proposed findings of fact and conclusions of law.

SUMMARY OF EVIDENCE

Board Exhibits

Ex. 1 -

Report of Pupil Progress

Ex. 2 -

Report of Pupil Progress

Ex. 3 -

Letter dated February 10, 1997 from Principal Fillmore to Grievant

Ex. 4 -

Grievant's grade book for Outdoor RecreationEx. 5 -
Grievant's grade book for Personal Fitness

Ex. 6 -

1996-97 Roster for Teaching Assistants

Ex. 7 -

Cabell County Public Schools Job Expectations/Responsibilities - Teachers

Ex. 8 -

Letter dated February 21, 1997, from Cabell Midland Concerned Parents (unsigned) to Board

Ex. 9 -

High School grade report instructions to parents and students

Ex. 10 - Cabell County Schools Report Card Policy adopted September 5, 1978

Ex. 11 - Teacher Code of Conduct

Transcript of pre-suspension hearing before the Board on March 18, 1997.

Grievant's Exhibits

Ex. 1 -

List of activities performed by Grievant's teaching assistants, prepared by Grievant

Testimony

The Board presented the testimony of Richard Fillmore, John Flowers, Steve Beckleheimer, and Charles Barnett.

Grievant testified in her own behalf and presented the testimony of Peggy Campbell and Bane McCracken.

ISSUE

The issue is whether the Board has proven by a preponderance of the evidence that Grievant falsified student records, which would constitute possible grounds for disciplinary action under W. Va. Code § 18A-2-8.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. Grievant has been employed as a physical education teacher for the Board for over eighteen (18) years.

2. At the beginning of the 1996-97 school year, Grievant was approached by a student who requested to be a student teaching assistant during the fall 1996 semester. Grievant assigned that student as teaching assistant for Grievant's Personal Fitness course.

3. Grievant subsequently asked another student to be a student teaching assistant during the fall 1996 semester, for Grievant's Outdoor Recreation course.

4. These two students performed a wide range of tasks for Grievant and other teachers in the department as well. These tasks included, but were not limited to, the collection and transmittal of daily attendance records to the office, word processing, measurement of body fat, running computer programs which assisted in fitness and related calculations for the students, and other tasks.

5. These two students completed no course work, took no tests, and did not dress for the physical education classes in which they acted as student teaching assistants.

6. For each of the first three 1996-97 grading periods, and for the first semester, Grievant gave these two students grades of 100, or A's. These grades were entered into the students' overall high school grade point average and, therefore, their class standing. Because they received passing grades, the students received credit for the Personal Fitness and Outdoor Recreation courses, respectively.

7. Grievant did not confuse these two students with others who actually had completed the course work for those two courses. Nor did she mistakenly think that the students had completed the course work themselves. By her own admission, Grievant knew that the students had met none of the course requirements. 8. Student teaching assistants at Cabell Midland High School are only assigned with the express approval of Associate Principal John Flowers, who is responsible for

scheduling classes.

9. Student teaching assistants are not permitted to receive grades.

10. At a meeting at the beginning of the 1995-96 school year, all teachers, including Grievant, were told that only Mr. Flowers could approve the assignment of student teaching assistants.

11. Grievant understood that only Mr. Flowers could approve student teaching assistants.

12. Associate Principal Flowers is sparing in his approval of student teaching assistants. (See footnote 1) He makes sure the assignment is appropriate in light of the student's other curricular needs. He verifies, in advance, that both the teacher in question and the student's parents agree to the assignment. When he agrees that a student may serve as a teaching assistant, Mr. Flowers makes an entry in the school's computer system which not only causes the student's name to appear, for attendance purposes, on a class list which is separate from the roster of other students, but which also ensures that the approved students cannot receive a grade or credit for the course.

13. Grievant did not receive Mr. Flowers' approval for her two student teaching assistants in the fall of 1996. As Mr. Flowers was never consulted about the students, the computer was never coded to prevent them from receiving a grade or credit for the classes. 14. With one exception, all other teachers who had student teaching assistants in 1996-97 followed the proper procedure. (See footnote 2)

15. In giving the student teaching assistants grades at the end of all three marking periods and the semester, Grievant never drew anyone's attention to the fact that the students served only as teaching assistants. The students' names were included in Grievant's Personal Fitness and Outdoor Recreation grade book. On their report cards, and in all official records, it appeared as if the students had, indeed, taken the respective courses like any other student.

16. There is no policy or practice of Cabell Midland or the Board which allows a student to undertake the duties of a student teaching assistant without following the process involving Mr. Flowers' permission. There is no policy or practice which allows a teacher to award a grade, and, therefore, course credit, to a student who serves as a teaching assistant even when Mr. Flowers approves the assignment.

17. It was only through an anonymous telephone call that Cabell Midland officials discovered the situation with Grievant's two student teaching assistants. Once they did, the school's principal, Richard Fillmore, changed school records to deprive the students of the grades and credit for the

Personal Fitness and Outdoor Recreation courses. The students did not protest this action in any way.

18. Principal Fillmore and his superior Charlie Barnett, Administrative Assistant, Secondary Schools, discussed the situation, and decided a letter of reprimand placed inGrievant's personnel file was sufficient disciplinary action. Mr. Fillmore then issued the letter of reprimand.

19. Subsequently, members of the Board received an anonymous letter asking why nothing had been done about this situation. The Board contacted Richard Jefferson, Superintendent of Schools, and informed him that the letter of reprimand was not sufficient. Mr. Jefferson subsequently issued the ten day suspension, without pay, to Grievant.

20. Grievant has never received any other type of disciplinary action in her 18 years of service to the Board.

21. Grievant is recognized as an excellent physical education teacher, both locally and nationally. Grievant was very active in Cabell County's move to consolidation, and served as Chairperson of the Cabell-Midland Planning Committee.

DISCUSSION

In disciplinary matters, the burden is on the employer to prove that the action taken was justified. Rule 4.19, Procedural Rules West Virginia Education and State Employees Grievance Board, 156 CSR 1-4.19.

W. Va. Code § 18A-2-8 provides:

> 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 or a plea of nolo contendre to a felony charge.

The Board imposed a ten-day suspension, without pay, on Grievant for “falsifying student records.” The Board alleges that offense constitutes insubordination, willful neglect of duty and/or immorality under W. Va. Code § 18A-2-8. Insubordination may be defined as willful failure or refusal to obey reasonable orders of a superior entitled to give such orders. Webb v. Mason County Bd. of Educ., Docket No. 26-88-206 (Jan. 5, 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 of authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ., Docket No. 94-01-394 (Jan. 31, 1995). “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).

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. Williams v. Cabell County Bd. of Educ., Docket No. 95-06-325 (Oct. 31, 1996); 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). “'Willful neglect of duty' may be defined as an employee's intentional and unexcusable failure to perform a work-related responsibility.” Adkins v. Cabell County Bd. of Educ., Docket No. 89-06-656 (May 23, 1990).

“Immorality denotes conduct in conformity with accepted principles of right and 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 County of Harrison, 285 S.E.2d 665, 668 (W. Va. 1981). The Cabell County Public Schools Job Expectations/Responsibilities for Teachers provides, in part, that: 1) Teachers shall foster a classroom climate conducive to learning, which includes “treat[ing] students in a fair and equitable manner;” 2) Teachers shall monitor student progress towards mastery of instructional objectives and goals, which includes, “follow[ing] grading policies and regulations” and “maintain[ing] accurate and complete student records;” 3) Teachers shall communicate within the education community, which includes, “communicat[ing] student progress according to established procedures and policies;” and 4) Teachers shall meet professional responsibilities, which includes, “adher[ing] to established laws, policies, rules,and regulations.” R. Ex. 7.

West Virginia Board of Education Policy 5902, Teacher Code of Conduct, provides that teachers shall “treat each student fairly”, “be a good adult role model”, “exhibit a caring, honest and professional attitude”, and “abide by policies and regulations.” R. Ex. 11.

There is no dispute Grievant gave the two teaching assistant's As in the two courses, which showed up on their report cards. Grievant's grade books show the two students names are placed at the end of the roster, separate from the alphabetical listing, with “T/A” written beside their names.

The grade books show these students were given 100's for the first three grade periods and the semester.

Grievant denies that she deliberately intended to give the teaching assistants grades and credit in the Personal Fitness and Outdoor Recreation courses. Grievant contends she gave those students “A's” as teaching assistants, in recognition of their service to her. At their first meeting following the telephone call, Grievant expressed to Principal Fillmorethat she did not know she had done anything wrong, and was surprised at his assertion that she had done so.

There is no written policy regarding teaching assistants, however, teachers had been instructed at the beginning of the 1995/96 school year regarding the use of and procedure for obtaining teaching assistants. That procedure consists of the following:

A teacher first has to justify a teaching assistant (“TA”) to Mr. Flowers. The teacher and parent have to provide notes giving permission, which must be given to Mr. Flowers. If he agrees to the assignment, he assigns a section and course number to the TAs which are coded into the school's computer system. The computer is set up so that TAs cannot receive grades. The computer generates grade scanners for each class. The grade scanners are presented to the teachers to fill in at the end of the grading periods. The teacher pencils in the grades on the grade scanner, which then get scanned into the computer. A worksheet is then given back to the teachers to double-check their entries, and they can make corrections if necessary. The teachers then return the work sheet which is processed into the computer. If properly assigned, a TA's name will not appear on the grade scanner for a class. The computer also generates a separate attendance sheet for each class. The TA's name does appear on that attendance sheet.

This process was confirmed by Steve Beckleheimer, a science teacher with a TA. He had to go through this process to get a TA. His student does not get a grade, nor does the student's name appear on the grade scanner. It does appear on the attendance sheet.

Grievant testified she did not remember that meeting or the instructions regarding the procurement of teaching assistants. Grievant did recall having a conversation with theother teacher who has been disciplined for the same infraction about teaching assistants, but did not recall whether they discussed how to grade teaching assistants.

Mr. Flowers testified that Grievant, and the other teacher referred to above, were the only teachers he was aware of that used TA's without going through the proper procedure. On Mr.

Flowers' roster of TAs, the only Physical Education teacher who is shown as properly being assigned a TA is Bane McCracken. Mr. Flowers did not recall Grievant or a counselor coming to him to request the TAs. If the students had come to him, he would have told them they had to get written permission from the teacher and their parents before he could approve TA assignments.

At the time of the level four hearing, Grievant testified she had a TA for the second semester, as well. She had not gone through the proper procedure for that TA, either. Mr. Flowers' roster is generated as TAs are requested. Grievant did not have a TA approved by him for the second semester. She believed the student talked to her counselor, and the counselor approved it. Interestingly, Grievant met with Principal Fillmore after he received the anonymous telephone call on February 3, 1997. She had gotten a TA for the second semester, yet it appears that even after learning from Principal Fillmore that what she did the semester before was wrong, she apparently did not, at that, or any other time throughout this proceeding, try to seek guidance from the principal or Mr. Flowers about the correct procedure for getting the second semester TA.

Grievant also testified she could not recall whether she had TAs in the past, or whether they were given grades.

Grievant is a high-profile person in Cabell County. She believes someone was out to get her for her involvement in school consolidation. Cabell County officials were firstnotified of this incident via an anonymous telephone call to the Board's office. Principal Fillmore and Mr. Barnett investigated the situation and determined a letter of reprimand was sufficient. The Board then received an anonymous letter asking why nothing had been done about this incident. Of course, something had been done, but because the caller refused to leave his or her name, it was impossible for Principal Fillmore or Mr. Barnett to inform him or her of the status of the matter.

Thus, while it would appear that the caller/writer did desire some public attention be given to Grievant over this situation, this does not excuse the fact that she did what she was accused of doing. The only significance the desired intention of the anonymous writer has in this matter is the degree of punishment imposed on Grievant by the Board after receiving the letter.

Grievant's Principal and Mr. Barnett had already meted out what they believed to be sufficient punishment for Grievant's actions. It was only after the Board received the anonymous letter that it was determined that something more needed to be done. It is not a stretch of logic to conclude that the Board was merely reacting to public pressure to take action, and rather than just affirm the

punishment already determined to be appropriate to the situation, the Board decided it had to make an example of Grievant.

Unfortunately for Grievant, while I do not find that a letter of reprimand was too little punishment, I also do not find a ten day suspension, without pay, to be too much. Grievant did not follow the proper procedures for procuring a teaching assistant. Grievant gave those teaching assistants grades for courses they did not take. Grievant then went right on to procure a teaching assistant for the second semester without following the proper procedures, and did not seem to feel she had done anything wrong again at the level fourhearing. While I understand that Grievant is not being punished for the second semester teaching assistant, her apparent inability to either comprehend or obey directives of the Board in this regard leads me to believe that a ten-day suspension, without pay, is warranted.

Further, I do not find Grievant to be credible in her testimony that she was not aware of the proper procedures for procuring teaching assistants. Grievant has been a teacher with Cabell County for eighteen years, and undisputedly an excellent one. I find it incredible that she does not remember if she ever had teaching assistants before this incident, or whether she ever gave them grades before. I also find it incredible that Grievant did not know, when she transferred the grades from her grade book to the computer scanner sheet, that she was giving those students grades for those courses. Grievant did not testify that she did not know how the computer system worked, or that she had any questions regarding the computer scanner sheet. Grievant knew what that sheet was for - it was for giving grades. Thus, I must conclude that Grievant was aware she was giving those students grades for the courses in which they assisted.

CONCLUSIONS OF LAW

1. 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).

2. W. Va. Code § 18A-2-8 provides:

> 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 or a plea of nolo contendre to a felony charge.

3. Insubordination involves the willful failure or refusal to obey reasonable orders of a superior entitled to give such orders. 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. 26-88-206 (Jan. 5, 1989).

4. 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).

5. “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).

6. 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. Williams v. Cabell County Bd. of Educ., Docket No. 95-06-325 (Oct. 31, 1996); 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).

7. “'Willful neglect of duty' may be defined as an employee's intentional and unexcusable failure to perform a work-related responsibility.” Adkins v. Cabell County Bd. of Educ., Docket No. 89-06-656 (May 23, 1990).

8. “Immorality denotes conduct in conformity with accepted principles of right and 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 County of Harrison, 285 S.E.2d 665, 668 (W. Va. 1981).

9. Grievant clearly disregarded a procedure which was communicated to, and followed by, Cabell Midland High School teachers regarding the appointment and grading of student teaching assistants. She also knowingly gave grades for work which was never done, in contravention of school rules, board policy, the state Code of Conduct, and her job description. The Board has proven by a preponderance of the evidence that Grievant was insubordinate.

10. Grievant knew the students received an “A” for work they never performed, in disregard of

her duty to issue grades only to students who actually took the Personal Fitness and Outdoor Recreation classes. She also did not obtain a student teaching assistant in the proper way. The Board has proven by a preponderance of the evidence that Grievant was guilty of willful neglect of duty.

11. While Grievant's conduct may not have conformed with acceptable principles of right and wrong, it is not conduct which is normally associated with the term “immorality.” Thus, the Board has not proven by a preponderance of the evidence that Grievant's conduct constitutes “immorality.”

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 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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MARY JO SWARTZ

Administrative Law Judge

Dated: September 19, 1997

Footnote: 1

Cabell Midland High School has 2,160 students and 130-135 professional employees. For the first semester of 1996-97, Mr. Flowers approved only eight (8) student teaching assistants. For the second semester, he approved nineteen (19). None were approved for Grievant.

Footnote: 2

Like Grievant, the one other teacher who breached procedure was suspended for ten days, without pay. His case is the subject of another level four grievance proceeding.