KIMBERLY TICKETT,

Grievant,

v. **Docket No. 97-06-233**

CABELL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Kimberly Tickett, grieves her ten day suspension issued by the Cabell County Board of Education ("CCBOE") for "allow[ing] a student to give her money for charity for an absence and/or tardy, which exempted [the student] from taking a final exam." 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. A Level IV hearing was held on June 23, 1997. This case became mature for decision on August 7, 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 math teacher for seven years. She currently teaches at Cabell Midland High School ("CMHS").

2. During the 1996-1997 school year, as in previous years, CMHS adopted and followed an "Attendance Incentive Policy" ("AIP" or "Policy") designed to reward high school students for good attendance. This policy was initiated by the School Improvement Council with faculty senate input. The Assistant Superintendent of Schools and an Administrative Assistant at the Board office approved this policy for CMHS.

3. The AIP allowed students who had three or fewer unexcused absences in a teacher's class to opt out of taking the final exam. In computing these absences, three tardies in a specific class would be equal to one absence.

4. Although CMHS keeps a record of each student's attendance in the office, the teacher's

grade book is the official record of a student's attendance.

5. On March 24, 1997, Assistant Principal John Flowers received a report from another teacher that Grievant had allowed a student to pay money to a charity in order to have a tardy or absence removed from the teacher's grade book. He reported this information to Principal Richard Fillmore, who immediately asked Grievant about his information.

6. Grievant is the faculty advisor for the Impact Club, a community service organization. During the Thanksgiving holidays, the club had a project to give food to the needy, and they had trouble raising enough money to buy all the turkeys they needed. A student in Grievant's first period Tech 3 Math class, KJ, who was not a member of the club, contributed two turkeys to the project. 7. Although there was some confusion, Grievant's grade book reflects KJ received three absences and three tardies in Grievant's class during the course of the school year, thus she was ineligible for the AIP and would be required to take the Tech Math exam.

8. Before Christmas, the Impact Club collected money for Secret Santa presents and food for needy children and their families. Again the club was having trouble meeting its goal. One day after class, KJ asked Grievant if she wanted her to collect money to assist the club during her lunch period. Grievant willingly agreed to this offer of assistance. KJ collected $100.00 for this project.

9. After Grievant received this collected donation, she removed one of KJ's tardies which made KJ eligible to participate in the AIP for Grievant's class.

10. Grievant did not tell KJ she would remove a tardy if she collected money for the Impact Club, nor did KJ ever ask Grievant to remove a tardy as the result of her contributing food and collecting money for the Impact Club.

11. Grievant removed the tardy because she thought an act of kindness deserved an act of kindness.

12. Teachers are not authorized to depart from the AIP in any way.

13. Although the process by which a student receives a tardy is supposed to be uniform, teachers vary greatly in their implementation of this process. Grievant's policy is that “a tardy is a tardy in her class”, and she enforces this interpretation strictly.

14. Grievant admitted to Principal Fillmore that she had removed a tardy from KJ's attendance record for her help with needy families. 15. During Principal Fillmore's investigation of this matter, Superintendent Jefferson visited the school, and Principal Fillmore shared the information he

had with the Superintendent. The Superintendent instructed Principal Fillmore to inform him of the final outcome of this investigation.

16. Another teacher at CMHS removed a tardy or an absence from a student in return for a charitable contribution. He received a ten-day suspension without pay for this action.

17. Principal Fillmore notified Superintendent Jefferson that the investigation had confirmed that Grievant had removed a tardy from KJ's records as the result of a contribution.

18. By letter dated March 27, 1997, the Superintendent suspended Grievant without pay for ten days because she “allowed a student to give money for a charity for an absence and/or a tardy, which exempted [the student] from taking a final exam.” (Grievant.'s Exh. No.).

19. Principal Fillmore believed Grievant deserved some type of disciplinary action because of her failure to follow school policy, but testified he felt a written letter of reprimand would have been sufficient. He was not consulted in any way about what type of disciplinary action should be taken in relation to Grievant.

20. At the board hearing prior to her suspension, CCBOE found Grievant had been guilty of insubordination and willful neglect of duty and upheld her ten day suspension.

Issues

Grievant argues the actions she engaged in do not rise to the level of insubordination or willful neglect of duty or any of the other charges listed in W. Va. Code 18A-2-8. She agreed she should receive some form of disciplinary action because of her failure to follow policy, but strongly felt that a ten-day suspension was too harsh. (See footnote 1)

CCBOE argued that Grievant's failure to followed a clearly defined policy that she was aware of was indeed insubordination and willful neglect of duty, and that the disciplinary action was reasonable given Grievant's actions.

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 "allow[ing] a student to give her money for charity for an absence and/or tardy, which exempted [the student] from taking a final exam." This action can be seen as insubordination if a grievant disobeyed a supervisor's directive, or as willful neglect of duty if a grievant knowingly gave a student a benefit to which she was not entitled.

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 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) 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).

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.

It is clear Grievant knew of the existence of the AIP and knowingly failed to follow it. Grievant did not deny she was aware of the Policy, and indeed stated she was strict in her interpretation of the tardy policy. Although it is clear Grievant's action was well- intentioned, in that she wanted to reward behavior that demonstrated a student's willingness to help those less fortunate than she, Grievant's actions were still against a known policy which had been developed to encourage school attendance. Accordingly, Grievant's actions constituted insubordination and willful neglect of duty.

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. ofEduc., Docket No. 97-20-089 (May 5, 1997). In assessing the above-cited factors, I find that while Grievant's evaluations were satisfactory during her tenure with CCBOE, and her wish to reward a selfless act is understandable, Grievant knew this action was against the policy. It is also noted that her penalty was the same as the suspension imposed on another 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 Respondent. This suspension is not subject to reduction. (See footnote 2)

Grievant violated school policy by changing the number of tardies a student received so she would not have to take the final exam. This penalty was the same as that imposed on another teacher. 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 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).

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. 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).

8. Respondent has met its burden of proof and demonstrated Grievant changed a student's attendance record so that she would not be required to take Grievant's final exam; this act can be classified as either insubordination or willful neglect of duty.

9. Given Grievant was informed of the Policy, 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 penalty is not 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 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: March 12, 1998

Footnote: 1

Grievant also argued in her opening statement that she was treated differently than others in similar situations. As no evidence to support this contention was raised, and in fact, evidence was introduced to demonstrate that another teacher who engaged in the same type of activity received exactly the same punishment, this argument was deemed abandoned by Grievant.

Footnote: 2

It is noted, however, that Principal Fillmore is in charge of CMHS, is Grievant's first level supervisor, and was not consulted before the penalty was imposed. Typically, in grievances presented before this Grievance Board, the supervisor plays a significant role in the decision of what type of disciplinary action to take against an employee.