RODNEY BROWN,

Grievant,

v. **Docket No. 98-27-113**

MERCER COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, teacher Rodney Brown, grieves his five day suspension without pay by the Mercer County Board of Education (MCBE) for inappropriate conduct. As this was a disciplinary action, Grievant appealed directly to Level IV pursuant to W. Va. Code § 18A-2-8. A Level IV hearing was held before the undersigned on June 8, 1998. Grievant represented himself at this hearing, and MCBE was represented by Kathryn R. Bayless, Esq. The parties submitted proposed findings of fact and conclusions of law. This case became mature for decision on July 10, 1998.

The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievant has been employed by MCBE as a teacher for thirteen years, the past eleven at Glenwood Elementary School (GES). He is also football coach at Glenwood Junior High School (GJHS).

2. On February 24, 1997, Grievant was supervising some students in the gym at GJHS. Several GJHS students were throwing a basketball at the basketball goal from the bleachers. Feeling that this endangered some nearby elementary school students,Grievant approached the GJHS students and told them to stop.

3. One of the students, K., (See footnote 1) reacted by directing a series of abusive and obscene words at Grievant, and made an obscene hand gesture.

4. Grievant asked another teacher to get GJHS Principal Ed Clark (Clark). When Clark did not arrive, Grievant escorted K. to Clark's office.

5. As part of an angry exchange of words in Clark's office, Grievant threatened to break K.'s neck.

6. K.'s mother filed a citizen's complaint against Grievant with MCBE. Grievant was informed of the charge against him, and a hearing was held. Both Grievant and K.'s mother were represented by attorneys at the hearing.

7. As a result of the hearing, MCBE found that Grievant's conduct was in violation of Mercer County Policy GBC, which requires teachers to deal justly and considerately with each student, and was very inappropriate for a professional teacher. 8. MCBE voted to place a letter of reprimand in Grievant's file, to place Grievant on an improvement plan including anger control counseling, and to require Grievant to write letters of apology to K., his mother, Clark, and Loretta Raines (Raines), Principal of GES.

9. Grievant questioned some aspects of the improvement plan. SuperintendentDeborah S. Akers (Akers) felt that the wording of Grievant's letter of apology reflected a lack of sincerity. Akers asked Grievant to inform her if he did not intend to comply with the improvement plan, and informed him that his failure to follow the plan would result in GCBE taking appropriate action.

10. Because of problems with Grievant's participation in the improvement plan, MCBE reconsidered its earlier decision and suspended him for five days without pay. MCBE also strongly recommended that Grievant seek professional counseling for anger control.

11. Grievant had a history of angry conflicts with his superiors and co-workers, as well as a history of inappropriate treatment of students.

12. Grievant was Teacher of the Year in 1997-1998, and has worked extensively with children in summer programs and athletic camps.

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). A preponderance of the evidence is defined as “evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.” Black's Law Dictionary (6th ed. 1991), Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of

proof. Id. The authority of a county board of education to suspend an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8, and must be exercised reasonably, not arbitrarily or capriciously. Parham v. Raleigh County Bd. of Educ., 192 W. Va. 540, 453 S.E.2d 374 (1994), 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.

GCBE has not specified which of the statute's causes for suspension it believes applies to Grievant's conduct. The letter of reprimand placed in Grievant's file states that Grievant's "conduct was in violation of Mercer County Policy GBC, which requires teachers to deal justly and considerately with each student, and was very inappropriate for a professional teacher."

However, the grievance procedure is intended to provide “a simple, expeditious and fair process for resolving problems.” W. Va. Code §18-29-1. It was not intended to be a procedural quagmire where the merits of a case are forgotten. Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990). A charge of violating school board policy and very inappropriate conduct, resulting from threatening to break a student's neck, may fairly be viewed as a charge of either insubordination or willful neglect of duty. Theproper focus is whether the charge of misconduct is proven, not the label attached to such conduct. Gillespie v. Kanawha County Bd. of Educ., Docket No. 90-20-496 (June 6, 1991), citing Russell v. Kanawha County Bd. of Educ., Docket No. 90-20-415 (Jan. 24, 1991).

Insubordination is 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). Insubordination may also be found when an employee shows a willful disregard for the 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).

To prove 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). An employer also 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 Mfg. Co., 82 L.A. 1228 (Feb. 2, 1984)).

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 one. 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 requires "a knowing and intentional act, as distinguished from a negligent act." Chaddock, supra. Willful neglect of duty has also been defined as an employee's intentional and inexcusable failure to perform a work- related responsibility. Adkins v. Cabell County Bd. of Educ., Docket No. 89-06-656 (May 23, 1990).

The facts in this grievance are not in dispute. Grievant had a long history of angry conflicts with his superiors and co-workers. In 1989, Grievant was notified that his spanking of a student violated MCBE's Corporal Punishment Policy. Also in 1989, Raines told Grievant that he was to stop being hostile to students and to stop abusing their rights and feelings by calling them such names as idiot, dummy, and wimp, telling students he hated them, showing favoritism to girls by hugging, kissing and winking at them, discriminating against boys, and threatening students. In 1994, Grievant became angry at Raines, repeatedly screaming at her in her office. This incident resulted in a letter of reprimand. Also in 1994, Grievant, during a meeting, screamed at Raines, used foul language, was very angry, and called her a liar. His manner at this meeting was described as threatening, physically intimidating, and frightening. As a result of Grievant's behavior at this meeting, he was informed by Raines that his behavior was most inappropriate and unacceptable. Grievant was also given a list of areas of concern for the 1994-1995 school year, including “must demonstrate better self-control - volatile anger outbursts.” In 1995 Grievant was observed to have disobeyed direct orders and been very disrespectful toRaines during faculty senate meetings. Also in 1995, Raines sent Grievant a

memo titled “Theft of Items - School Accounting Business.” This memo detailed Grievant's breaking into office files, pilfering, and leaving items in disarray.

Grievant admitted threatening to break K.'s neck. It is reasonable for MCBE to expect Grievant, both as a professional and as an adult, to demonstrate greater self-control than a junior high school student. MCBE proved that it had a policy, in effect at the time of the violation, that required teachers to deal justly and considerately with each student. The undersigned finds it reasonable to conclude that threatening a student with grievous bodily harm represents a failure to deal justly and considerately with that student. MCBE also proved that Grievant knew of the policy. Indeed, Grievant had been repeatedly warned and reprimanded, over an eight year period, about his anger control problem. His action in threatening to break K.'s neck was sufficiently knowing and intentional to constitute the defiance of authority inherent in a charge of insubordination. Grievant's failure to obey MCBE's policy also represents a failure to perform a work-related responsibility. Adkins, supra. His act was more serious than incompetence, and was sufficiently knowing and intentional to constitute willful neglect of duty.

As noted above, Grievant admitted threatening to break K.'s neck. He called no witnesses to say that this violation of MCBE policy did not occur. Grievant instead chose to nit-pick trivial aspects of the citizen complaint process. For example, Grievant complained that K.'s mother was represented by an attorney during her citizen complaint hearing, but cited no law or policy forbidding this. Grievant himself was represented by an attorney during the citizen appeal. Grievant also complained that Clark somehow urgedK.'s mother to file her action against him. However, the record shows that Clark merely informed K.'s mother that the citizen complaint process was the means by which complaints such as hers were resolved. Neither of these issues affected the outcome of the complaint procedure in any way. Grievant also stated that he was never made aware of the charges against him. This is absurd. Grievant was clearly and unequivocally informed that he was charged with threatening a student. Furthermore, as noted above, he was represented by an attorney during the citizen complaint process, and so can hardly complain that his rights were not protected.

Grievant, in his proposed findings of fact and conclusions of law, argues that his punishment is excessive, and should be mitigated to a letter of reprimand being placed in his file and letters of apology to K. and his mother. This penalty is substantially less than the first one imposed by MCBE, in that it omits counseling for his anger control problem, as well as the letters of apology to Clark and

Raines. The undersigned also notes that Grievant could have avoided his five day suspension without pay merely by complying with his improvement plan.

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 Commission, 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 theclarity 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).

Mitigation of a penalty is considered on a case by case basis. Conner v. Barbour County Bd. of Educ., Docket No. 95-01-031 (Sept. 29, 1995); McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and include consideration of an employee's long service with a history of otherwise satisfactory work performance. Pingley v. Div. of Corrections., Docket No. 95-CORR-252 (July 23, 1996). This Grievance Board has held that “mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation.” Overbee v. Dep't of Health and Human Resources/Welch Emergency Hospital, Docket No. 96-HHR-183 (Oct. 3, 1996). In support of his request for mitigation, Grievant presented several letters from parents attesting to his fine performance as a teacher and coach, and pointed out that he was Teacher of the Year in 1997-1998. However, Grievant called no witnesses in support of his plea for mitigation.

In assessing the above-cited factors, the undersigned finds that Grievant's work record does not reflect a history of otherwise satisfactory work performance. Pingley,supra. Instead, it demonstrates an eight year history of inappropriate treatment of students, as well as repeated instances of

disrespect toward Raines, which undermined her status, prestige, and authority. McKinney, supra. MCBE's penalty, even after it was reconsidered and increased, is reasonable and not clearly disproportionate to the offense. Indeed, the undersigned notes that W. Va. Code § 18A-2-8 would allow MCBE to dismiss Grievant for his insubordination and willful neglect of duty. Grievant has failed to prove that his penalty is clearly excessive. A board of education has substantial discretion in determining a penalty. See McVicker v. Kanawha County Bd. of Educ., Docket No. 95-20- 339 (Feb. 9, 1996). The undersigned will not substitute his judgement for that of MCBE.

As the West Virginia Supreme Court of Appeals wrote in Parham, supra, it is hard not to be somewhat sympathetic to a teacher faced with a student's insolent and abusive behavior. However, teachers' emotions must not be allowed to dictate their actions. K. provoked this incident, but Grievant, a professional, had a greater responsibility than the student to act appropriately. Grooms v. Raleigh County Bd. of Educ., Docket No. 90-41- 482 (Apr. 30, 1991).

Consistent with the foregoing discussion, the following Conclusions of Law are made in this matter.

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, 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 states that a board of education 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.

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). Insubordination may also be found when an employee shows a willful disregard for the 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).

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. An employer has the right to expect subordinate personnel to not manifestdisrespect 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 Mfg. Co., 82 L.A. 1228 (Feb. 2, 1984).

7. 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 one. 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. Willful neglect of duty has also been defined as an employee's intentional and inexcusable failure to perform a work-related responsibility. Adkins v. Cabell County Bd. of Educ., Docket No. 89-06-656 (May 23, 1990).

8. MCBE has met its burden of proof and demonstrated, by a preponderance of the evidence, that Grievant threatened a student.

9. MCBE has demonstrated, by a preponderance of the evidence, that Grievant was guilty of insubordination and willful neglect of duty.

10. When considering whether to mitigate a 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 employeragainst 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).

11. A grievant bears the burden of demonstrating that a 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 Commission, Docket No. 89-SFC-145 (Aug. 8, 1989).

12. Grievant's penalty of a five day suspension without pay was reasonable and not clearly disproportionate to the offense.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mercer 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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ANDREW MAIER

ADMINISTRATIVE LAW JUDGE

Dated July 30, 1998

Footnote: 1