MARJORIE J. MAXEY,

Grievant,

v. **Docket No. 97-33-208**

McDOWELL COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

On April 24, 1997, Marjorie J. Maxey (Grievant) submitted this grievance directly to Level IV, in accordance with W. Va. Code § 18A-2-8, challenging her dismissal by Respondent McDowell County Board of Education (MCBE). Following a series of continuances, each of which was granted for good cause shown, a Level IV hearing was held in this Board's office in Beckley, West Virginia, on February 17, 1998. (See footnote 1) As agreed at the conclusion of the hearing, this matter became mature for decision on April 3, 1998, following receipt of Grievant's written post-hearing argument. Respondent did not submit a post-hearing argument.

DISCUSSION

Grievant was employed by MCBE as a classroom teacher at Bartley ElementarySchool. On March 7, 1997, MCBE Superintendent Dr. J. Kenneth Roberts advised Grievant of his intent to recommend her dismissal for the following reasons:

> On Friday, March 7, 1997, a conference was conducted with you, Mr. James Spencer, Mr. Larry Lane, and myself. The purposes (sic) of this conference was to address your behavior and charge of insubordination in throwing your observation on the floor, stomping it, and refusing to sign it. During this conference you showed a great degree of intemperance including threatening your own life and threatening to shoot Mr. Spencer in the head.
>
> Therefore, due to continued acts of disrespect, these specific incidents of insubordination, and your demonstrations of intemperance you are being suspended for thirty days and recommended for dismissal as per WV Code 18A-2-8. I intend to

> make this recommendation at the McDowell County Board of Education regular meeting scheduled for Monday, March 17, 1997.
>
> A hearing before the McDowell County Board of Education concerning this action will be held at the above meeting prior to the above recommendation being made. You may be represented by council (sic) or anyone of your choosing if you so desire. Please confirm in writing with me by Friday, March 14, 1997, if you plan to attend this hearing.

J Ex 2.

Following a hearing on this matter on April 7, 1997, MCBE met in special session on April 15, 1997, and terminated Grievant's contract for insubordination. (See footnote 2) J Ex 3. Insubordination is one of the grounds for terminating school personnel under W. Va. Code § 18A-2-8.

In disciplinary matters, the employer bears the burden of establishing the charges by a preponderance of the evidence. W. Va. Code § 18-29-6; Nicholson v. Logan County Bd. of Educ., Docket No. 95-23-129 (Oct. 18, 1995); Landy v. Raleigh County Bd. of Educ.,Docket No. 89-41-232 (Dec. 14, 1989). Moreover, 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). Further, the county board has the burden of proving the charges in a disciplinary action by a preponderance of the evidence. A preponderance of the evidence is 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 proven is more probable than not. It may not be determined by the number of witnesses, but by the greater weight of all evidence presented, which means that such factors as opportunity for knowledge, information possessed, and manner of testifying determines the weight accorded to testimony rather than the greater number of witnesses. See Black's Law Dictionary 1344-45 (4th ed. 1968); Petry v. Kanawha County Bd. of Educ., Docket No. 96- 20-380 (Mar. 18, 1997).

Most facts pertinent to resolution of this matter are not in dispute. However, Grievant's version of events differed from that offered by other witnesses in certain particulars. In such circumstances, where the existence or nonexistence of certain material facts hinges on witness credibility, detailed

findings of fact and explicit credibility determinations are required. Hurley v. Logan County Bd. of Educ., Docket No. 97-23-394 (Dec. 11, 1997). See Pine v. W. Va. Dept. of Health & Human Resources, Docket No. 95- HHR-066 (May 12, 1995). See also Harper v. Dept. of the Navy, 33 M.S.P.R. 490 (1987).

Shortly after the beginning of the 1996-97 school year, Grievant successfully bid intoa new teaching position for a split fourth/fifth grade teacher at Bartley Elementary School (BES). Grievant had previously taught a split seventh/eighth grade class at the same school. James Spencer was then serving in his first year as Principal at BES. As the school year progressed, Grievant's working relationship with Mr. Spencer began to deteriorate. Mr. Spencer's initial observation of Grievant's performance, conducted on November 18, 1996, contained some comments indicating areas where Grievant needed to improve her performance. Grievant declined to sign that Teacher Observation form. See Adm Ex 1 in J Ex 1.

Thereafter, following an observation of Grievant's classroom on March 3, 1997, Mr. Spencer met with Grievant on March 5, 1997, to discuss his observations on a second Teacher Observation form he had prepared in accordance with State Board of Education Policy 5310. Mr. Spencer made several negative comments regarding Grievant's conduct and performance in the course of that conference, and Grievant refused to sign the form.

According to Mr. Spencer, Grievant threw the form on the floor and stomped on it with both feet. Grievant claims that a gust of air from an open window blew the form off her lap, and she stepped on it to keep it from going any further. At that point, according to Grievant's testimony at Level IV, she asked Mr. Spencer; “Sir, what do you have against myself or my family, because I have nothing against you or yours.” Grievant proceeded to recall that Mr. Spencer seemed confused as to what she meant by “you or yours,” but went on to recall Mr. Spencer's subsequent comment that he had never before had an employee stomp an evaluation. According to Grievant, at that point Mr. Spencer “abruptly” left the room to go to lunch duty.

Thereafter, on March 6, 1997, Mr. Spencer approached Grievant at 11:00 a.m. andasked if she would sign the observation form. Grievant asked for a clean copy because the one she had stepped on was dirty, and she said she did not want to turn in “unclean materials in the workplace.” Mr. Spencer told Grievant he would get her a clean copy, and he brought her a copy to sign at 3:30 that afternoon, telling her that if she did not sign the form, he would be compelled to take her to Welch

(where MCBE's Central Office is located). Grievant's response was, “Do you want me to draw you a road map?” In her Level IV testimony, Grievant acknowledged that this remark was “uncalled for.”

In any event, Grievant remained unwilling to sign the form. Thus, Mr. Spencer sought guidance from his immediate supervisor, MCBE Assistant Superintendent Larry Lane. Thereafter, a meeting was called by Superintendent Roberts to discuss Grievant's possible insubordination during the evaluation process. This meeting was held in MCBE's Central Office in Welch, West Virginia, on the morning of March 7, 1997. Present at the meeting were Mr. Lane, Dr. Roberts, Mr. Spencer, and Grievant. Grievant was accompanied to the meeting by her husband, Silas Maxey, who is also employed by MCBE as a classroom teacher. (See footnote 3) Grievant was told that Mr. Maxey could be present during the meeting, but she declined that offer. Further, Grievant did not request representation at the meeting as authorized by W. Va. Code § 18-29-3(f).

During the first 45 minutes of the meeting, Mr. Spencer went over his observations on the Teacher Observation form Grievant had refused to sign. At the point in the meeting when Dr. Roberts told Grievant that she needed to sign the form or face possibletermination, according to the testimony of Dr. Roberts, Mr. Spencer and Mr. Lane at the pre-termination hearing, Grievant told Mr. Spencer, “I should have blown your head off with a shotgun,” or words to that effect, instead of simply refusing to sign the form. At that point, Mr. Spencer left the room to regain his composure. When he returned to the meeting approximately 15 minutes later, Grievant told him, “Mr. Spencer, if I was going to blow your head off, I would have already done it.” At that point, Mr. Spencer left the meeting and did not return. The meeting terminated after about two hours, when Dr. Roberts informed Grievant that he intended to recommend her termination for insubordination. Mr. Maxey testified, that after the meeting, Dr. Roberts told him he believed Grievant needed psychiatric help.

Grievant does not dispute that she made improper comments to her superiors during the meeting on March 7. Grievant complained that she was not given an opportunity to “debate” Mr. Spencer's comments during the “conference,” noting that she was not allowed to interject her responses after each item, as Dr. Roberts asked her to wait until Mr. Spencer was finished. Grievant declared that she was being treated as an “inanimate object” and likened herself to a “caged animal.”

Grievant acknowledged in her Level IV testimony that she made several “very unpleasant” comments during the meeting, including “Mr. Spencer, had I shot you I would have been in less trouble. I'd have been over in the jail, and the taxpayers would be supporting me, and I wouldn't be

worried about any employment." Grievant further agreed that at the conclusion of the meeting she made a comment about leaving by climbing out a window, stating she was so humiliated she would have "crawled through the floor." Indeed, during the course of the relatively brief Level IV hearing, Grievant repeatedlydisplayed her explosive personality before the undersigned administrative law judge. Despite a litany of apologies for her statements at the meeting in March 1997, Grievant remained patently emotional, hostile, and angry toward Mr. Spencer, who was not present, as well as Dr. Roberts, who was in the hearing. Given that this was eleven months after the incident which gave rise to her termination, it is difficult to accept Grievant's claim that her verbal incontinence was merely based on transitory stress. Further, Grievant repeatedly provided non-responsive answers and made emotional, gratuitous comments while being questioned by her counsel, strongly suggesting that she continues to have difficulty restraining her emotions, and maintaining a rational train of thought. Grievant testified that she has been under "constant psychological counseling," and has been taking medication since the incident. No diagnosis of her condition was introduced.

Ultimately, Grievant contends she is being terminated for her rhetorical statements during the meeting in the Central Office, and her performance problems are being mischaracterized as insubordination, emphasizing that Dr. Roberts and Mr. Lane did not believe she was seriously threatening bodily harm to Mr. Spencer. However, whether or not Grievant had any present intent to shoot her supervisor is not determinative of whether Grievant's conduct was insubordinate in violation of W. Va. Code § 18A-2-8. This Grievance Board has previously recognized 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). In Sexton, the Administrative Law Judge noted that insubordination had been shown through an employee's "blatant disregard for the authority" of his second-level supervisor. Sexton, supra at 10.

This approach is consistent with the treatment accorded insubordination by private sector arbitrators. The scope of insubordination as an offense was addressed extensively in Burton Manufacturing Co. v. Boilermakers Local 590, 82 Lab. Arb. (BNA) 1228 (1994) (Holley, Arb.). There, Arbitrator Holley noted:

> In general, if an employee refuses to obey an order or defies the authority of Management, he is guilty of insubordination. This is a serious offense and may justify

> disciplinary measures, including discharge. An employee may be charged with insubordination not only if he willfully disobeys an order, but also if he . . . uses abusive, threatening, or profane language in speaking to Management; or assaults a representative of Management. (Burton, supra, at 1234, citing Trotta, Arbitration of Labor-Management Disputes 282-283 (1974).)

Consistent with Sexton and Burton, Grievant's statement in the presence of Dr. Roberts, Mr. Lane and Mr. Spencer, that she should have shot Mr. Spencer unquestionably constitutes insubordinate conduct because it indicates total disrespect for Mr. Spencer's authority as her Principal and immediate supervisor. See Grueser v. W. Va. State Bd. of Rehabilitation, Docket No. 95-RS-084 (June 29, 1995); Payne v. W. Va. Dept. of Transp., Docket No. 93-DOH-454 (Apr. 29, 1994). Despite Grievant's suggestion that Mr. Spencer is somehow lacking in interpersonal skills, the record indicates that Grievant seriously breached the boundaries of appropriate conduct when her supervisors confronted her with the unpleasant topic of her teaching performance. Moreover, Grievant's demeanor at Level IV provided corroboration that Grievant acted substantially as alleged by MCBE in the course of the March 7 meeting.

Grievant had been employed by MCBE since 1983 and, prior to this incident, performed her teaching duties in a satisfactory manner, without incurring any disciplinaryaction. In assessing the particular penalty imposed by a county board, this Grievance Board will consider whether the punishment imposed was clearly excessive in light of the employee's past work record, as well as the clarity of existing rules or prohibitions regarding the situation in question, and any mitigating circumstances, all of which must be determined 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).

There was evidence that Grievant was under stress outside her employment situation, in that she had been caring for her mother at home since December 21, 1991, when she suffered a disabling stroke. Subsequently, Grievant's mother was hospitalized for 40 days before she passed away on January 27, 1997. In addition, Mr. Maxey's father passed away on December 28, 1996, and his uncle passed away on January 16, 1997. Further, Mr. Maxey's mother was hospitalized for an operation at some point in this same time frame. Obviously, Grievant was under considerable stress as a result of various matters beyond her control. Nonetheless, the sustained charges represent a serious breach of the tolerable limits of employee conduct. None of the mitigating circumstances presented

persuade the undersigned that MCBE should be expected to tolerate such behavior and retain Grievant in its employment. Indeed, a preponderance of the evidence indicates that, should Grievant be reinstated, her relationship with her supervisor would immediately return to the nadir reached in March of 1997. Accordingly, MCBE's decision to terminate Grievant's employment, rather than impose some lesser penalty, was neither arbitrary and capricious, nor an abuse of discretion, despite Grievant's significant tenure and prior unblemished record. See Beverlin, supra. See also Parham v. Raleigh CountyBd. of Educ., 192 W. Va. 540, 453 S.E.2d 374 (1994).

In addition to the foregoing discussion, the following findings of fact and conclusions of law are appropriate in this matter.

FINDINGS OF FACT

1. Grievant was employed by the McDowell County Board of Education (MCBE) as a classroom teacher at Bartley Elementary School (BES).

2. Grievant's immediate supervisor was Principal James Spencer.

3. On March 5, 1997, Mr. Spencer presented Grievant with a Teacher Observation form which he had prepared after observing her classroom on March 3, 1997. Grievant disagreed with various negative comments Mr. Spencer made concerning her performance, and did not believe she was given a fair opportunity to rebut his comments. 4. Grievant declined to sign the observation form, threw it to the floor and stepped on it. After Mr. Spencer provided Grievant with a clean copy of the observation form on March 6, 1997, she again refused to sign the form to acknowledge that Mr. Spencer had discussed his observations with her. When Mr. Spencer explained to Grievant that he would have to take her to MCBE's Central Office in Welch, should she continue to refuse to sign the form, Grievant offered to draw him a road map to Welch.

5. Mr. Spencer reported this incident to his immediate supervisor, MCBE Assistant Superintendent Larry Lane, who advised MCBE's Superintendent, Dr. J. Kenneth Roberts.

6. On the morning of March 7, 1997, Dr. Roberts called Grievant to a meeting is his office with Mr. Spencer, Mr. Lane and himself. Grievant's husband, also employed by MCBE as a classroom teacher, was directed to bring Grievant to MCBE's Central Officein Welch because he routinely transported Grievant to and from work.

7. Grievant elected not to have her husband present during the meeting, and did not request

representation.

8. During the course of the meeting, wherein Mr. Spencer discussed the comments resulting from his observation of March 3, 1997, and which lasted slightly over two hours, Grievant told Mr. Spencer, “I should have blown your head off with a shotgun,” or words to that effect, instead of simply refusing to sign the Teacher Observation form.

9. Following Grievant's comment, which Mr. Spencer perceived as a threat, Mr. Spencer left the room for approximately 15 minutes. When he returned, Grievant said, “Mr. Spencer, if I was going to blow your head off, I would have already done it.” At that point, Mr. Spencer left the meeting and did not return.

10. At the conclusion of the meeting, Dr. Roberts notified Grievant of his intent to recommend that MCBE terminate her employment under W. Va. Code § 18A-2-8. Following a hearing before MCBE on April 7, 1997, MCBE voted on April 15, 1997, to terminate Grievant's employment for insubordination .

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; Froats v. Hancock County Bd. of Educ., Docket No. 91-15-159 (Aug. 15, 1991); Landy v. Raleigh County Bd. of Educ., Docket No. 89-41-232 (Dec. 14, 1989).

2. Insubordination is one of the causes listed in W. Va. Code § 18A-2-8 for which an education employee may be disciplined. Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995). See Beverlin v. Bd. of Educ., 158 W. Va. 1067,216 S.E.2d 554 (1975).

3. Insubordination includes an employee's blatant disregard for the authority of her supervisors. Sexton v. Marshall Univ., Docket No. BOR2-88-029-4 (May 25, 1988).

4. By telling her immediate supervisor, BES Principal James Spencer, in a meeting with the County Superintendent and an Assistant Superintendent, “I should have blown your head off with a shotgun,” or words to that effect, Grievant was insubordinate. Likewise, Grievant's subsequent statement, “Mr. Spencer, if I was going to blow your head off, I would have already done it,” in the course of the same meeting, constituted insubordinate conduct. See Grueser v. W. Va. State Bd. of Rehabilitation, Docket No. 95- RS-084 (June 29, 1995); Payne v. W. Va. Dept. of Transp., Docket No. 93-DOH-454 (Apr. 29, 1994).

5. Despite Grievant's previously unblemished record, MCBE did not abuse its discretion or act

arbitrarily and capriciously in deciding to terminate Grievant's employment based upon Grievant's grossly insubordinate conduct. See Beverlin, supra.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of McDowell 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 preparedand transmitted to the appropriate court.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: April 30, 1998

Footnote: 1

Grievant was represented by counsel, J.W. Feuchtenberger of Stone, Feuchtenberger and Barringer. Respondent was also represented by counsel, Robert Edward Blair.

Footnote: 2

Although Grievant's conduct was originally characterized by MCBE as "intemperance," as well as insubordination, it appears that MCBE terminated Grievant on the basis of insubordination alone, and whether Grievant was "intemperant" in the circumstances presented does not need to be further addressed.

Footnote: 3

Mr. Maxey was summoned to BES to transport his wife to the Central Office in Welch, because school officials were aware that the Maxeys routinely drove to work together. Mr. Maxey was not designated as Grievant's representative.