WILLIAM MCCLOUD,

Grievant,

v. DOCKET NO. 98-22-051

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant William McCloud is employed by the Lincoln County Board of Education ("LBOE") as a classroom teacher. He also volunteered to serve as the boys' and girls' junior high basketball coach at Harts High School during the 1997-98 school year. On February 23, 1998, he filed a grievance at Level IV protesting his suspension from his volunteer boys' basketball coaching position for the remainder of the season, beginning February 5, 1998, for using profanity in the presence of members of the boys' basketball team. He was not suspended from his teaching position or from his volunteer coaching duties for the girls' basketball team. Grievant alleges he should not have been suspended, because his use of profanity was a reaction to his being struck in the groin area by a shoe thrown by a player. Grievant seeks the removal of the suspension letter from his personnel file, but has no problem with a letter being placed in his personnel file which fully describes what occurred. (See footnote 1) The following formal Findings of Fact are properly made from the record developed at Level IV.

Findings of Fact

1. Grievant is employed by LBOE as a classroom teacher at Harts High School. During the 1997-98 school year he volunteered to coach both boys' and girls' basketball at the junior high level.

2. On Saturday, January 31, 1998, after the boys' basketball practice that day, Grievant was sitting in the coach's locker room watching television when a member of the boys' basketball team

hurled a shoe at him, without warning. The shoe struck Grievant in the groin area, causing him great pain. Grievant reacted to this sudden unexpected pain by uttering profanity. The boy who threw the shoe, as well as three other student members of the basketball team, heard Grievant's exclamation. Grievant did not attempt to approach the boy, or inflict any reciprocal harm upon him.

3. Grievant does not otherwise ever use profanity in the course of carrying out his teaching or coaching duties.

4. Grievant was suspended from his volunteer boys' basketball coaching duties for the rest of the season, which concluded on or about February 20, 1998, and a suspension letter was placed in his personnel file. The same penalty would have been imposed had the use of profanity been intentional and not provoked as it was in this case.

Discussion

Pursuant to W. Va. Code § 18-29-6, the burden of proof in disciplinary matters rests with the employer, and the employer must meet that burden by proving the charges against an employee by a preponderance of the evidence. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994). The suspension of a teacher must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8. The authority of a board of education to suspend an employee must be exercised reasonably, and not arbitrarily and capriciously. Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

W. Va. Code § 18A-2-8 provides that professional personnel may be suspended at any time for immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, a felony conviction, entry of a guilty plea or a plea of nolo contendere to a felony charge. "`Immorality' is defined as `conduct not in conformity with accepted principles of right and wrong behavior; 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 (W. Va. 1981)." Hayes v. Kanawha County Bd. of Educ., Docket No. 94-20-1143 (June 28, 1995). "`Immoral conduct is conduct which is always wrong. Just as one can never be accidentally or unwittingly dishonest, immoral conduct requires at least an inference of conscious intent.' See Hayes, [supra], citing Youngman v. Doerhoff, 890 S.W.2d 330 (Mo. 1994)." Petry v. Kanawha County Bd. of Educ., Docket No.96-20-380 (Mar. 18, 1997). "[I]nsubordination involves `willful failure or refusal to obey reasonable orders of a superior entitled to give such order.'

[Citations omitted.] In order to establish insubordination, the employer must not only demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, but that the employee's failure to comply was sufficiently knowing andintentional to constitute the defiance of authority inherent in a charge of insubordination." [Citations omitted.] Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995). An employer asserting willful neglect of duty "must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act." Jones v. Mingo County Bd. of Educ., Docket No. 95-29-151 (Aug. 24, 1995).

Respondent did not explain which of the statutory grounds Grievant's action fell within. Respondent pointed to the Lincoln County Employees Code of Conduct and State Board of Education Policy 5902 in support of its action. Superintendent Rick Powell testified Grievant's action violated the Code of Conduct and Policy 5902 in that, in using the language he did, Grievant did not display a professional attitude, promote a safe and positive learning environment, and was not a good adult role model.

Although it is questionable whether Grievant's use of profanity in this situation falls within any of the statutory criteria, Grievant agreed that what he did was wrong, and felt some type of punishment was acceptable. Grievant simply believes that the suspension letter in his personnel file makes it look like he is the type of coach who intentionally swears at his players as part of his game plan. He believes this is too severe a penalty for his reaction to extreme unexpected pain. Superintendent Powell testified that the same penalty would have been imposed had the use of profanity been intentional and not provoked as it was in this case.

"Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and 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." McVay v. Wood County Bd. of Educ., DocketNo. 95-54-041 (May 18, 1995) (citations omitted). While Grievant's use of profanity in the presence of students, as he himself recognizes, is not appropriate, it also is not an unusual response to this situation. The undersigned would be surprised to find any male placed in this situation who would respond to it in a fashion appropriate for children. Respondent's expectations of Grievant in this situation are unreasonable. It was arbitrary and capricious to fail to consider Grievant's past record and the particular circumstances here, and to mete out the same punishment to the employee placed

in these extreme circumstances as would be imposed upon an employee who uttered profanity simply because a student did not do what he told him to do.

The following Conclusions of Law support the Decision reached.

Conclusions of Law

1. The employer bears the burden of proving the charges in a disciplinary proceeding by a preponderance of the evidence. Hoover v. Lewis County Bd. of Educ., Docket No. 93-21-427 (Feb. 24, 1994).

2. Pursuant to W. Va. Code § 18A-2-8, professional personnel may be suspended at any time for immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, a felony conviction, entry of a guilty plea or a plea of nolo contendere to a felony charge. The authority of a board of education to suspend an employee must be exercised reasonably, and not arbitrarily and capriciously. Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975).

3. Respondent proved the charges against Grievant.

4. "Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity ofexisting rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995) (citations omitted).

5. The penalty imposed upon Grievant was unreasonable under the circumstances, and clearly excessive.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to remove the suspension letter from Grievant's personnel file, and to replace it with a written reprimand which includes the facts outlined above in Findings of Fact 1, 2 and 3.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Lincoln 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.

BRENDA L. GOULD

Administrative Law Judge

Dated: June 17, 1998

Footnote: 1

Grievant was represented by Steve Angel and Brenda Scott, and Respondent was represented by Charles H. Damron, Esquire. This case became mature for decision on May 26, 1998, thedeadline for submitting written argument. Respondent declined to submit written argument. Grievant's written argument was received late, on June 8, 1998. As it was received prior to the issuance of this decision, and Respondent would not be prejudiced in any way by its late submission, it will be considered as though timely filed.