JOSEPH R. JONES,

Grievant,

v. **Docket No. 99-39-017**

PRESTON COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Grievant, Joseph R. Jones, challenges his termination from employment by the Preston County Board of Education (PCBOE), because of an altercation which occurred with one of his students. This matter was filed directly at level four on January 12, 1999, and a hearing was conducted in the Grievance Board's office in Morgantown, West Virginia, on February 18, 1999. Grievant was represented by Jacques R. Williams, Esquire, and Respondent was represented by Kimberly Croyle, Esquire. This grievance became mature for consideration on March 6, 1999, upon receipt of the parties' fact/law proposals. The following facts are essentially undisputed by the parties.

Findings of Fact

1. Since 1989, Grievant has been employed by PCBOE as an electronics teacher at Preston High School. Since 1993, Grievant's position has been as a part-time instructor. (See footnote 1)

2. Grievants' students are mostly 11th grade males, and his class has historically had a fair number of disruptive, disrespectful students. Grievant has haddifficulties in recent years with classroom control.

3. In 1995, Grievant received a two-day suspension for “jabbing” or “poking” a student in the abdomen with a ruler, because the student refused to take his seat. Grievant was warned that “[c]ontrol of your temper and the ability to exercise good judgement and restraint are essential if you are to be effective.” Level IV, Resp. Ex. 1.

4. Grievant's classroom had only broken, second-hand desks, which he had warned the

students to treat carefully, so as not to further damage them.

5. On December 10, 1998, Grievant's class had visitors. When the visitors left, Grievant was attempting to get the students to take their seats, because many were up milling around the room. When Grievant's back was turned, he heard a loud crash, and turned around to see BB (See footnote 2) on the floor, laughing, with a broken desk under him.

6. Grievant reacted angrily, because he perceived that BB had intentionally broken the chair and was laughing about it. Grievant rushed over to BB, picked him up under the arms, and pushed him into a blackboard.

7. Grievant and BB exchanged heated words, (See footnote 3) and two students stepped between them. Grievant told BB to leave the class, and BB did so, slamming the door behind him so hard that the glass in the door broke. BB was suspended from school for breaking the glass in the door.

8. After BB left the room, Grievant continued with normal class instruction. Hewas interrupted several times by RU, who laughed and taunted Grievant, saying that Grievant was going to lose his job (because of the BB incident). After Grievant told RU several times to be quiet, RU continued to taunt him. Grievant then walked over to RU and placed his closed fist against RU's cheek, stating something to the effect of “I'd like to knock you into next week.” Grievant did not strike or injure RU.

9. Following a meeting with Grievant on December 14, 1998, the following day Principal Gary Henline recommended to Superintendent Charles Zinn that Grievant be suspended and that he be placed on an improvement plan, focusing on classroom management and student discipline. Grievant agreed with the recommendation and welcomed any assistance in gaining better control of his classroom.

10. Superintendent Zinn was present at the December 14, 1998, meeting with Grievant and Principal Henline, at which time Superintendent Zinn mentioned to Grievant that dismissal was possible.

11. By certified letter dated December 30, 1998, Superintendent Zinn notified Grievant that the charges against him regarding the December 10 incident would be discussed at a special Board meeting on January 5, 1999. The letter also advised that suspension and dismissal were both potential disciplinary options.

12. Grievant lives in a rural area, where postal carriers place a yellow card in a resident's

mailbox, advising them that they have a certified letter at the post office. The resident can either sign the yellow card for delivery of the letter, or they can pick it up at the post office.

13. Grievant's postal carrier delivered a yellow card to Grievant's residence on Thursday, December 31, 1998. Grievant signed the yellow card, which was picked up bythe mail carrier on Saturday, January 2, 1999. The carrier then delivered the certified letter to Grievant's residence on Monday, January 4, 1999, one day prior to the Board hearing.

14. Grievant attended the January 5, 1999, Board meeting and represented himself. He testified at that time he was aware of his right to counsel and had chosen to proceed without counsel.

15. Despite the superintendent's recommendation of suspension, the Board voted to dismiss Grievant.

16. Grievant was notified on January 7, 1999, of the Board's decision, and he filed this grievance on January 12, 1999.

Discussion

A preliminary issue to be addressed is Grievant's allegation that he was denied due process regarding notification of the Board hearing on January 5, 1999. (See footnote 4) He contends that, because he received less than two days' notice of the hearing, he did not receive an adequate opportunity to prepare for it. He also claims that, prior to the Board hearing, he had no knowledge that dismissal was a possibility.

W. Va. Code § 18A-2-8 provides, in part, that, when an employee is suspended or dismissed for the causes listed in the statute:

> The charges shall be stated in writing served upon the employee within two days of presentation of said charges to the board. The employee so affected shall be given an opportunity, within five days of receiving such written notice, to request . . . a level four hearing [before the Grievance Board].

As noted by the West Virginia Supreme Court of Appeals in Bd. of Educ. v. Wirt,192 W. Va. 568, 453 S.E.2d 402 (1994), the current statute is “silent as to whether an employee has a right to receive notice and have a hearing prior to dismissal.” 192 W. Va. 573. After finding that board of education employees with continuing contract status are entitled to due process protections when they are terminated, the Court defined the extent of the due process to be afforded to such employees:

> [W]e hold under W. Va. Code § 18A-2-8, due process requires a pre- termination hearing of a tenured employee . . . . . It is not necessary for a pre-termination hearing to be a full adversarial evidentiary hearing; however, an employee is entitled to a written notice of the charges, an explanation of the evidence, and an opportunity to respond prior to a Board of Education's decision to terminate the employee.

192 W. Va. at 575. Under this ruling and the provisions of W. Va. Code § 18A-2-8, Grievant was entitled to written notice of the charges, an explanation of the Board's evidence, and an opportunity to respond.

On December 15, 1998, Principal Henline wrote a letter to Superintendent Zinn, which explained in detail what had taken place in Grievant's classroom on December 10, both with regard to BB and RU. Principal Henline then outlined his recommendations that Grievant be placed on an improvement plan and be suspended. Grievant received a copy of this letter. Additionally, on the previous day, when Mr. Henline and Mr. Zinn met with Grievant, the charges and the evidence that had been gathered from the students in the class were discussed, in detail, with Grievant. Grievant admitted that he had behaved as the students alleged and welcomed any assistance which could be provided to him in controlling his class. However, although Grievant alleged in his pre-hearing motion that he had not known prior to receipt of Mr. Zinn's December 30 letter that dismissal was possible, this is contradicted by the evidence. At the Board hearing and also at the level fourhearing, Superintendent Zinn testified that Grievant was told at the meeting on December 14 that dismissal was possible. Grievant did not disagree with this testimony or provide any evidence to contradict it. Accordingly, the undersigned finds that Grievant knew approximately three weeks before the Board hearing that dismissal was a potential punishment for his behavior.

Grievant was provided all of the due process protections discussed by the Supreme Court in Wirt, supra. He was twice notified in writing that charges against him resulting from this particular incident were pending. Grievant was fully informed, both in writing and orally, about the nature of the charges and the evidence against him, well before the Board hearing. At the December 14 meeting, Grievant was afforded the opportunity to contest the charges or explain his behavior, which he did again at the Board hearing. Although Superintendent Zinn's December 30 letter was not technically received by Grievant until the day before the hearing, he had already received substantial notice of the charges, their basis, and the possible consequences he was facing. Also, there is no way the Board could have anticipated the unique method for dealing with certified mail which was used by Grievant's area

postal service.

Therefore, the undersigned finds that PCBOE complied with the provisions of W. Va. Code § 18A-2-8. Grievant received written notice of the charges, an opportunity to respond, and a pre-termination hearing. Accordingly, he was afforded all the due process protections to which he was entitled, and his Motion to Invalidate Dismissal is denied.

As set forth above, Grievant admits that he engaged in the conduct with which he has been charged. With only slight variations regarding specific details, all of the witnesses, including Grievant, testified that the events of December 10, 1998, occurred asdescribed in this Decision. Upon seeing BB on the floor in the broken chair, Grievant picked him up, pushed him into the blackboard, exchanged words, and two students broke it up. As to RU, after being taunted several times, Grievant placed his fist against RU's chin and made the statement alleged.

The only dispute in the testimony involves RU. Three other students who were present in the room at the time testified that RU taunted Grievant repeatedly, and Grievant gently pushed his fist into RU's chin. These students also gave written statements at the time of the incident, which are consistent with their testimony. However, RU was the only witness who testified that Grievant actually “tapped” or “punched” him. He also claimed that he did absolutely nothing to provoke Grievant to do this. His testimony is totally inconsistent with the testimony of the other students and Grievant. Additionally, RU's testimony was very different from that of all the other students and Grievant with regard to the incident involving BB, including BB's own testimony.

An Administrative Law Judge is charged with assessing the credibility of the witnesses who appear before her. Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995). Factors to consider in assessing a witness's testimony are the witness's demeanor; opportunity or capacity to perceive and communicate; reputation for honesty; attitude toward the action; and admission of untruthfulness. In addition, one should consider the presence or absence of bias, interest, or motive; the consistency of prior statements; the existence or nonexistence of any fact testified to by the witness; and the plausibility of the witness's information. Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996) and authorities cited therein.

RU's testimony is simply not credible. Contrary to the testimony of all the otherwitnesses in the room, RU was the only person who stated that BB did not laugh when his chair broke. In RU's written statement given at the time of the incident, he stated that Grievant “punched” him in the face. When

questioned about this at the level four hearing, RU contended that it was a closed fist punch, but it did not cause pain or leave a mark. Obviously, this is not consistent with what is commonly considered to be a punch, which involves a blow of some force. Additionally, it is clear that RU was unwilling to admit that he taunted Grievant and behaved so disrespectfully to him, prompting Grievant's angry reaction. Further, the testimony of several credible witnesses completely contradicts RU. Because it is not credible, RU's version of the events of December 10 will not be accepted as true.

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.

When Grievant was dismissed following the Board hearing, PCBOE did not designate which of the causes listed in the above statute were the basis for the discharge. In such cases, the proper focus is whether the charge of misconduct has been proven, not the label attached to such conduct. Russell v. Kanawha County Bd. of Educ., Docket No. 90-20-415 (Jan. 24, 1991). At the level four hearing, Respondent argued that Grievant's conduct constituted cruelty, insubordination, willful neglect of duty and intemperance.

Cruelty has been defined as "deliberately seeking to inflict pain and suffering; enjoying other's suffering; without mercy or pity." Adkins v. Cabell County Bd. of Educ., Docket No. 89-06-656 (May 23, 1990). Physical and emotional abuse through name calling, placing hands on students, angry outbursts, and threatening behavior has been found to constitute cruelty. Pinson v. Cabell County Bd. of Educ., Docket No. 06-87-100-1 (July 21, 1987). However, where actions were not directed towards a student, teachers who essentially threw tantrums were found not guilty of cruelty. Nida v. Boone

County Bd. of Educ., Docket No. 91-03-268 (July 13, 1991); Slack v. Morgan County Bd. of Educ., Docket No. 92-32-420 (June 23, 1993). Clearly, Grievant placed his hands on two students and directed his anger specifically toward them. Therefore, his actions constitute cruelty.

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 knowingand 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).

Grievant was warned in 1995, after poking a student with a ruler, that he was to control his temper and that he should never strike a student, even when the student is being disruptive. Engaging in conduct after having been specifically warned about it is undisputedly insubordination. See Willis v. Jefferson County Bd. of Educ., Docket No. 96- 19-230 (Oct. 28, 1998). Additionally, Grievant testified that he attended the teacher orientation at the beginning of the school year, at which time all teachers were instructed that the faculty handbook and teacher code of conduct, which were provided to them, prohibit touching of students. Grievant knowingly and aggressively placed his hands on two students, in clear violation of these policies. Respondent has proven Grievant's conduct constitutes insubordination.

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.

As with the insubordination charge, Grievant clearly knew what conduct was prohibited--touching

or striking students--and he knowingly and willfully engaged in that conduct. He openly admitted at both hearings in this matter that he knew his conduct was wrong and regretted it immediately. Accordingly, his conduct was intentional and constituted willful neglect of duty.

Intemperance generally involves alcohol or substance abuse. See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 22, 1997). Since there has been no allegation that alcohol or drugs were involved in this incident, and Respondent has proven several other causes for Grievant's dismissal, a discussion of this area is not necessary.

Although admitting his actions, Grievant contends that dismissal was an excessive punishment for his misconduct. Mitigation of punishment 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).

Under the circumstances presented in this case, the undersigned finds that mitigation would not be appropriate. Although Grievant did have satisfactory evaluations throughout his employment, he knowingly violated prohibitions against touching of students. He also engaged in this behavior after having been specifically warned that striking or touching a student in anger was not acceptable conduct for a teacher.

Grievant introduced several letters at level four regarding discipline taken against employees involved in allegedly similar incidents with students. However, only two of these letters provide sufficient background information to allow comparison with Grievant's situation. One involved a teacher who grabbed a student by the shirt collar after he called her a name and ran, and the other involved horseplay which unintentionally resulted in an injury. Neither of these individuals was terminated. However, it does not appear that either situation involved conduct like Grievant's, which was clearly an aggressive “lashing out” at a student and grabbing him in anger. Also, there is no

information regarding whether these other individuals had been warned about similar conduct. Grievant has not proven that PCBOE has administered lesser punishments to other employees in situations similar to his.

It is very clear that Grievant is remorseful of his conduct, and he is well-liked by his students. Even BB testified that he did not believe that Grievant should have been terminated for this incident. All of the students who testified stated that they liked Grievant's class and that many students in the class were quite disrespectful and destructive. The superintendent and principal recommended that Grievant be suspended and given an improvement plan, which would also have been an appropriate penalty forhis conduct. However, the undersigned is not permitted to substitute her judgment for that of the Board of Education, when appropriate causes for dismissal have been proven, and the dismissal was not arbitrary or capricious. See Tickett v. Cabell County Bd. of Educ., Docket No. 97-06-233 (Mar. 12, 1998).

Consistent with the foregoing findings and discussion, the following conclusions of law are appropriate.

Conclusions of Law

1. Under W. Va. Code § 18A-2-8, due process requires a pre-termination hearing of a tenured employee under W. Va. Code § 18A-2-6 (1980). It is not necessary for a pre-termination hearing to be a full adversarial evidentiary hearing; however, an employee is entitled to a written notice of the charges, an explanation of the evidence, and an opportunity to respond prior to a Board of Education's decision to terminate the employee. Syl. Pt. 3, Bd. of Educ. v. Wirt, 192 W. Va. 568, 453 S.E.2d 402 (1994).

2. Grievant's due process rights were not violated in this case.

3. 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).

4. 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). 5. Cruelty is a deliberate act to inflict pain and/or suffering. Behavior which is directed toward a student, and which may include threatening, grabbing, slapping, and/or restraining, without the need for self defense, meets this definition. Slack v. Morgan County Bd. of Educ., Docket No. 92-32-420 (June 23, 1993); Adkins v. Cabell County Bd. of Educ., Docket No. 89-06-656 (May 23, 1990); Pinson v. Cabell County Bd. of Educ., Docket No. 06-87-100-1 (July 21, 1987).

6. Insubordination is the “willful failure or refusal to obey reasonable orders of a superior entitled to give such order.” Riddle v. Bd. of Directors, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). 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).

7. Willful neglect of duty involves conduct constituting 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 proven by a preponderance of the evidence that Grievant's conduct on December 10, 1998, constituted cruelty, insubordination and willful neglect of duty.

9. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether thepenalty 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. of Educ., Docket No. 97-20-089 (May 5, 1997).

10. Grievant did not establish that dismissal was a clearly excessive penalty for his conduct.

Accordingly, this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County or the Circuit Court of Preston 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 tosuch 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.

Date: March 16, 1999 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

The course Grievant teaches is largely vocational in nature, and cutbacks in funding have reduced the need for a full-time instructor for electronics.

Footnote: 2

Consistent with Grievance Board practice, only the initials of minors will be used throughout this Decision.

Footnote: 3

Testimony differed regarding exactly what these words were, and even BB and Grievant could not remember exactly what was said, aside from the words being angry.

Footnote: 4

Grievant made these allegations in a pre-hearing "Motion to Invalidate Grievant's Dismissal." The undersigned informed the parties at the level four hearing that no ruling would be made on this issue until all evidence had been presented.