VIC FERRARI,

Grievant,

v. **Docket No. 99-40-528**

PUTNAM COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Vic Ferrari, is employed as a teacher at Buffalo High School ("BHS"), with the Putnam County Board of Education ("PCBOE"). His Statement of Grievance reads:

> **Grievant was suspended for two days for willful neglect of duty and insubordination. He feels that the board's actions were arbitrary and capricious and without merit. RELIEF SOUGHT: Grievant is requesting that [the] Board's action be reversed[,] and he asks for all back pay, benefits and that this action be removed from his personnel file.**

On November 10, 1999, Grievant was notified of the charges against him, and that Superintendent Sam Sentelle would recommend he be suspended for two days. Grievant at the requested the matter be considered at the December 6, 1999 board meeting, and this request was granted. Grievant elected not to attend this meeting/hearing. By letter dated December 14, 1999, Superintendent Sentelle advised Grievant PCBOE voted at its December 13, 1999 meeting to adopt Superintendent Sentelle's recommendation. This grievance was filed directly to Level IV on December 17, 1999. A Level IV hearing was held on February 14, 2000. This case became mature for decision on March 16, 2000, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

Superintendent Sentelle listed the specific charges in the suspension letter as: 1) "unprofessional behavior at athletic events"; 2) threatening a student by saying, "I'll kick your ass all over Buffalo"; and 3) physically threatening N.C. (See footnote 2) **and conducting himself in "an unprofessional manner in a classroom confrontation" with N.C. Respondent**

argued the charges were proven, and with Grievant's history of temper control problems which have not been improved with counseling and an Improvement Plan, the two day suspension was the correct course of action.

Grievant agreed he had committed the first two acts listed in the suspension letter, but at those times he was either joking, or they were really not that "bad". Grievant denied the third charge.

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed as a teacher by the PCBOE at BHS for approximately 14 years. He teaches Math and coaches both football and basketball.

2. Vernon Goff has been principal at BHS for the past eight years, and Grievant has had a history of temper control problems during that entire time.

3. In the past, Grievant threw a book across the room in the direction of the student. Grievant stated he was just trying to get his attention. The student believed Grievant was trying to hit him. 4. Also in the past, Grievant told another student to leave the classroom and when he did not, Grievant took the student by the arm, told him he would kick his ass, and escorted him out in a somewhat rough manner.

5. On March 25, 1996, Principal Goff wrote Grievant a follow-up letter to a March 14, 1996 conference. This letter noted that during an investigation on another matter, it was brought to his attention that Grievant cursed his players. At the conference, Grievant admitted he did indeed curse at his players. Principal Goff informed Grievant this behavior was "not acceptable", Grievant had "a professional obligation to eliminate this behavior", and noted that as a teacher he was supposed to act as a role model.

6. Principal Goff was informed by the Director of Adolescent Education, Lydia McCue, that she and PCBOE Board members were receiving complaints from parents about Grievant's behavior. Principal Goff contacted board member Kim Sharp about the complaints she had received. On March 24, 1997, Principal Goff wrote Grievant informing him that these complaints had two common themes: "vulgar language" and "muscling attitude".

7. Over the past several years, Ms. McCue has also received many complaints about Grievant's teaching and classroom management. For her to receive this many complaints about a teacher is unusual. When she received these complaints, she reported them to Principal Goff.

8. Principal Goff and Ms. McCue frequently discussed these problems with Grievant, and during the 1998-1999 school year, Grievant was placed on an ImprovementPlan. Strategies for handling classroom discipline problems and methods for a more active and involved teaching style were discussed and reviewed with Grievant.

9. Grievant was not receptive to these suggestions and was confrontational during these exchanges. Although he talked during these discussions, he did not want to listen to suggestions for change. Grievant believed the issue was the students' problem, as the students failed to maintain control and lacked the ability to learn the materials he presented.

10. During these discussions Grievant frequently stated, "I don't care."

11. During the Spring of the 1998-1999 school year, the West Virginia Secondary Schools Activities Commission ("WVSSCA") called Principal Goff to inform him of Grievant's problems with foul language and temper control, and that these behaviors must stop. Principal Goff was told that if Grievant received one more technical foul during the school year, the entire school would be placed on probation. (See footnote 3)

12. During the 1998-1999 school year, Assistant Principal William Hughes observed Grievant "getting in a student's face" and having a verbal confrontation with him. Grievant told this student, "I'll whip your ass all over the town of Buffalo." Another coach was there and pushed Grievant and the student apart. Mr. Hughes was afraid there could be a fight, because the student had been a school discipline problem. (See footnote 4) **13. At the time of this hearing, Ms. McCue had already received three or four complaints about Grievant during the 1999 - 2000 school year.**

14. On Thursday, October 28, 1999, Principal Goff heard a loud exchange coming from Grievant's classroom. He could tell one of the participants was Grievant, but he was unable to discern what was said.

15. N.C. is a 16 year old student who is in the band, show choir, and volunteers at the Buffalo Fire Department. He had never had any trouble with Grievant before.

16. On Friday, October 29, 1999, N.C. was sent to the office by Grievant. N.C. told Principal Goff, Grievant had yelled at him on October 28, 1999, and told him that if he did not leave the classroom he would grab him by the neck, and throw him out in the hall. **(See footnote 5)**

17. Principal Goff was unsure if this was an accurate account of the incident.

18. Grievant wanted N.C. disciplined for his failure to report to the office on Thursday. All students agreed Grievant did not tell N.C. to go to the office, but only told him to go out in the hall. **(See footnote 6)**

19. On Monday, November 4, 1999, N.C. and his parents filed a formal complaint.

20. Principal Goff then interviewed several students, and they said they had not heard Grievant threaten N.C. The students did not want to get involved, and basicallyinformed Principal Goff they had not heard anything. He took written statements from several of them.

21. One student, J.G., stated he was ninety percent sure Grievant had made the threatening statement. Principal Goff did not take a written statement because J.G. was not 100 percent sure.

22. N.C. came to Principal Goff on the following Monday, and gave Principal Goff the names of three students who would verify his statements.

23. Principal Goff interviewed these three students, and they agreed Grievant had threatened N.C. in the manner or a similar manner to that identified above.

24. One of the students who testified at hearing, T.J., also stated he had seen Grievant lose his temper and yell at students before. He noted that when other teachers had problems with students, they sent them out of the classroom, but did not become aggressive like Grievant.

25. Principal Goff also discussed the incident with Grievant. Grievant denied having made the statement.

26. Grievant was upset during the confrontation, and he had decided N.C. would leave the room "one way or another." Grievant's test. at Level IV.

27. After N.C. reported the incident, he was harassed by other students for trying to get Grievant "fired."

28. On November 9, 1999, Principal Goff wrote Superintendent Sentelle detailing his

investigation of the N.C. matter. He found Grievant "made a physical threat and behaved in an unprofessional manner." Principal Goff also noted Grievant had a historyof this type of behavior including the recent problem with the WVSSAC, and the statement about kicking the student's ass. Principal Goff recommended Grievant be placed on an Improvement Plan, undergo psychological evaluation and receive anger management counseling, and be suspended for two days without pay.

29. On November 10, 1999, Superintendent Sentelle wrote Grievant informing him he would recommend to PCBOE that Grievant be placed on an Improvement Plan, undergo psychological evaluation and receive anger management counseling, and be suspended for two days without pay.

30. Superintendent Sentelle listed the specific charges as: 1) "unprofessional behavior at athletic events"; 2) threatening a student by saying, "I'll kick your ass all over Buffalo; and 3) physically threatening N.C. and conducting himself in "an unprofessional manner in a classroom confrontation" with N.C.

31. PCBOE accepted Superintendent Sentelle's recommendation and approved the above-identified disciplinary action.

32. The testimony of Grievant's student witnesses was not consistent with the statements given by students during Principal Goff's investigation.

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 evidence ofgreater 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. It may not be determined by the number of the witnesses, but by the greater weight of the evidence, which does not necessarily mean the greater number of witnesses, but the opportunity for

knowledge, information possessed, and manner of testifying[; this] determines the weight of the testimony." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met its burden. Id.; See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997).

The first two charges are basically proven as all parties agreed the WVSSAC called about Grievant's inappropriate behavior (abusive language and temper control problems), and the entire school was threatened with probation if he did not change. Further, Grievant agreed he cursed his players. Additionally, Grievant admitted he made the statement about whipping the student's ass. Although Grievant believes the WVSSAC call was not warranted, and he was "just kidding" with the student in the hall, he did not present evidence to this effect other than his beliefs. The evidence presented indicates Grievant is incorrect in his opinion. "[M]ere allegations alone without substantiating facts areinsufficient to prove a grievance." Baker v. Bd. of Trustees, Docket No. 97 BOT-359 (Apr. 30, 1998).

The one issue remaining in this case is a close call, as the testimony of the student witnesses was diametrically opposed and clearly someone is being less than truthful. Accordingly, the first issue to address is credibility.

I. Credibility

Although some facts pertinent to this matter are not in dispute, the description of the specific events which generated this portion of this disciplinary action presented by Respondent's witnesses was diametrically opposed to Grievant's testimony and witnesses regarding the same events. An Administrative Law Judge is charged with assessing the credibility of the witnesses that appear before her. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Resources/Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993). In these circumstances, where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are

required. Maxey v. McDowell County Bd. of Educ., Docket No. 97-33-208 (Apr. 30, 1998); Hurley v. Logan County Bd. of Educ., Docket No. 97-23-394 (Dec. 11, 1997). See Pine v. W. Va. Dep't of Health & Human Resources, Docket No. 95-HHR-066 (May 12, 1995). See also Harper v. Dep't of the Navy, 33 M.S.P.R. 490 (1987). "The fact that [some of] this testimony is offered in written form does not alter this responsibility." Browning v. Mingo County Bd. of Educ., Docket No. 96-29-154 (Sept. 30, 1996). The United States Merit Systems Protection Board Handbook ("MSPB Handbook") has set out factors to examine when assessing credibility, and this Grievance Board has recognized these factors as helpful. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984). Some factors to consider in assessing a witness's testimony are the witness's: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness. Id. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. Id.

It should be noted here as it was noted on the record, that during breaks in the hearing, Grievant went into the room where his student witnesses were waiting and talked to them at some length. Grievant's representatives stated they were not aware of this behavior. Grievant stated he did not know this behavior was not allowed. No questions were asked of the student witnesses about what Grievant had discussed with them. Each of Grievant's student witnesses was asked if he had heard N.C. asking other students to support his story. All replied in the negative.

The student witnesses were capable of perceiving and communicating, and their accounts were plausible. Respondent presented the testimony of Principal Goff, N.C., T.J., and the written statement of two additional students. All these students agreed they heard Grievant threaten N.C. with bodily harm. Their report of Grievant's exact wording of this threat differed somewhat, but all agreed he stated he would grab N.C. and throwhim out into the hall. Additionally, at hearing N.C. and T.J. agreed N.C. had refused to do his homework and did not leave when he was told to do so. N.C. also reported he was hassled by some students for reporting Grievant and getting him in trouble.

One of the students who testified Grievant did not threaten N.C. was the same student, J.G., who told Principal Goff a few days after the incident that he was ninety percent sure Grievant had threatened to rip N.C.'s head off and throw him in the hall. During the first part of hearing, Principal Goff testified about J.G.'s prior statement to him. This was the first hearing in this grievance, and Principal Goff's testimony about the ninety percent had not been included in any of the documentation. During the hearing, the following disturbing exchange took place between J.G. and Respondent's attorney. It should be noted that the undersigned Administrative Law Judge did not recognize the possible importance of this testimony until she listened to the tape and reviewed all the exhibits:

> **Mr. Grafton: "Do you remember telling Mr. Goff that you were ninety percent sure that (student interrupting). . . ."**
>
> **J.G.: "I don't . . . ." (Mr. Grafton attempting to finish the question).**
>
> **Mr. Grafton: "that Mr. Ferrari (student interrupting again) . . . "**
>
> **J.G.: "I don't remember that at all."**

Unfortunately, this exchange appears to indicate Grievant discussed Principal Goff's Level IV testimony with J.G. during the hearing and prior to J.G.'s testimony, and J.G. had been primed to answer the question in the negative. At no time was Mr. Grafton allowed to finish the question before the student was denying he had said it. Additionally, this wasthe student that had earlier indicated to Principal Goff that he was ninety percent certain that Grievant had verbally threatened N.C. Since J.G.'s testimony at hearing disagreed with what J.G. told Principal Goff, his testimony must be discounted. **(See footnote 7)**

One other student witness, J.S., had previously been interviewed by Principal Goff a few days after the incident and was called to testify on Grievant's behalf. Her written statement was very short, and she said she did not hear Grievant say he was going to rip N.C.'s head off. At hearing she repeated this statement, and indicated she had been busy doing her work sheets with A.D. during the class period. She also indicated she was close to Grievant, both N.C. and Grievant were loud, and she believed she would have heard this statement if Grievant had said it. A.D. stated she did hear N.C. state he was learning more from his tutor than Grievant was teaching him, did not hear Grievant threaten N.C., and she did not hear

everything that was said even though she was up front.

Grievant's student witnesses' stories were very much alike in the wording and phrases they used to describe the events in the classroom that day. Unfortunately, the undersigned Administrative Law Judge finds these student witnesses to be less than truthful.

Grievant testified in his own behalf. On the first two charges, he basically stated they occurred. However, on the incidents involving the WVSSAC, Grievant gave testimony to indicate he had been treated unfairly, the technical fouls he had received were not hisfault, and the referees had over reacted. (See footnote 8) In discussing the incident where he said he would whip the student's ass, Grievant agreed he said this, but he was joking. He then noted he probably said it with more emphasis because this particular student would not pay attention unless you made your point strongly. Joking does not explain why Grievant would be "in a student's face", and why another coach would need to push them apart. This testimony is not credible and affects the undersigned Administrative Law Judge's view of all of Grievant's statements.

Grievant's demeanor during cross-examination was hostile and argumentative, he frequently interrupted Mr. Grafton, and, at times, he chose to answer questions with another question. He clearly did not want to admit he had done anything wrong in regard to his behavior on the football field and the basketball court, and obviously did not understand that his statement to a student about kicking his ass all over the town of Buffalo was threatening and totally inappropriate. Grievant's behavior at hearing was of the same type described by Ms. McCue and Principal Goff as occurring during the counseling sessions.

On the N.C. incident, Grievant indicated he had not threatened the student, and that he would admit if he had. Grievant's testimony about the WVSSAC and "ass whipping" incidents did not indicate he would admit to a mistake if he had committed one. Althoughpresent in the room, Grievant misunderstood Principal Goff's testimony, and questioned during his cross-examination why Principal Goff had not intervened into his conversation with N.C. when he heard Grievant threaten him. All in all, the undersigned Administrative Law Judge finds Grievant's testimony to be less than credible.

II. Hearsay

The written statements of three students who did not testify at hearing were admitted into

evidence. The testimony of these witnesses is obviously hearsay, but relevant hearsay is admissible in administrative hearings. Gunnells v. Logan County Bd. of Educ., Docket No. 97-23-055 (Dec. 9, 1997). See W. Va. Code §18-29-6. The key question is whether these statements are credible, and what weight, if any, to give this testimony.

In Borninkhof v. Department of Justice, 5 MSBP 150 (1981), the Merit Systems Protection Board identified several factors that affect the weight hearsay evidence should be accorded. These factors are: 1) the availability of persons with first hand knowledge to testify at the hearings; 2) whether the declarants' out of court statements were in writing, signed, or in affidavit form; 3) the agency's explanation for failing to obtain signed or sworn statements; 4) whether the declarants were disinterested witnesses to the events, and whether the statements were routinely made; 5) the consistency of the declarants' accounts with other information, other witnesses, other statements, and the statement itself; 6) whether collaboration for these statements can be found in agency records; 7) the absence of contradictory evidence; and 8) the credibility of the declarants when they made their statements. Id.; Sinsel v. Harrision County Bd. of Educ., Docket No. 96-17-219 (Dec.31, 1996); Perdue, supra; Seddon v. W. Va. Dep't of Health/Kanawha-Charleston Health Dep't, Docket No. 90-8-115 (June 8, 1990).

All of the written statements were taken close in time to the event, and were signed. Two of the written statements indicated Grievant had threatened N.C. No reason was given why these students did not appear at the hearing. Additionally, no statements were made by any witnesses that these students had a reputation for untruthfulness, were interested in the outcome, or biased in their views. Their statements were consistent with other statements, were made close in time to the event, and were in writing and signed. (See footnote 9) Given this set of factors they will be given weight.

Although it is clear that N.C. was acting inappropriately in telling his teacher that he learning more from his tutor that Grievant, refusing to be quiet, and refusing to leave the room, and although the undersigned Administrative Law Judge can understand how this set of circumstances would be frustrating, the undersigned Administrative Law Judge finds Grievant did make a threatening statement to N.C.

III. Merits of the case

W. Va. Code §18A-2-8 identifies the types of conduct that can result in disciplinary action and 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 or aplea 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.**

Having found Grievant did the acts he is accused of committing, the next issue to decide is whether Grievant's behavior substantiates the charges against him. Grievant's behavior will be viewed under the following charges of W. Va. Code § 18A-2-8: insubordination and willful neglect of duty.

A. Insubordination

One of the charges against Grievant is insubordination. 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). 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 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). Insubordination can be shown through an employee's "blatant disregard for the authority" of his second-level supervisor. Sexton, supra at 10. An employee's belief that management's decisions or directions are incorrect, absent a threat to the employee's health or safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. Lilly v. Fayette County Bd. of Educ., Docket No. 97-10-084 (Feb. 11, 1998). See Parker v. W. Va. Dep't of Health and Human Resources,

Docket No. 97-HHR-042B (Sept. 30, 1997). See generally, Meckley v. Kanawha County Bd. of Educ., 181 W. Va. 657, 383 S.E.2d 839 (1989) (per curiam). "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dep't, Docket No. 90-H-128 (Aug. 8, 1990) (citing Meads v. Veterans' Admin. 36 M.S.P.R. 574 (1988)). An employee may not disregard a direct order or the directions of a supervisor based upon his belief that the order is unreasonable or without merit. See McKinney v. Wyoming County Bd. of Educ., Docket No. 92-55-112 (Aug. 3, 1992).

Grievant knew what type of behavior was expected of him in regard to his interactions with the students in his charge. The letters, counseling sessions, and prior Improvement Plan he received clearly notified Grievant what types of actions were inappropriate and were not allowed, at least in the classroom setting. Grievant did not appear to ever realize the seriousness of the situations he got involved in, did not see himself as being at fault, and did not understand the role he played in a student's reaction to his threatening behavior. His behavior remained confrontational and he continued to engage in "blame avoidance." While it is clear that N.C.'s behavior was unacceptable, it was not threatening, and Grievant's role was to demonstrate how an adult handles difficult situations, and to show N.C. a mature response to anger. Grievant's decisions to disregard the explicit directions and suggestions given to him in conferences and in hisImprovement Plan about how to deal with discipline and difficult situations in the classroom constitute insubordination.

Additionally, Grievant was on notice that continued violations of the policies would result in disciplinary action, as Grievant's principal had informed Grievant that such behavior was unacceptable and must not continue. Thus, PCBOE has established Grievant knowingly violated policies and his supervisor's directions and was insubordinate.

B. Willful Neglect of Duty

Respondent must also prove a charge of willful neglect of duty by a preponderance of the evidence. Arbaugh v. Putnam County Bd. of Educ., Docket No. 90-40-437 (May 22, 1991). Although the West Virginia Supreme Court of Appeals 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." Bd. of

Educ. v. Chaddock, 183 W. Va. 638, 398 S.E.2d 120 (1990). Hence, 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 Chaddock, supra.

The same reasoning stated in the insubordination discussion applies to this charge. Grievant had been instructed not to curse and act in a threatening manner when relating to students. He continued to treat students in this manner, and these actions must be considered "knowing and intentional". PCBOE has proven the offense of willful neglect of duty. See Brown, supra.

It should be noted that even if the third charge against Grievant had not been proven, the behavior exhibited in the first two charges, given Grievant's response to priorcounseling and directives, and his prior Improvement Plan, and Grievant's continued inability to realize he is at fault in these confrontations and to accept responsibility for his actions would be sufficient to uphold the discipline received by Grievant. The need for an Improvement Plan and anger management is clear from the record. It is also clear from the record that Grievant had not responded to prior, lesser directives to change his behavior. A two day suspension may help Grievant to understand the seriousness of the situation, and the need for him to change his way of interacting with his players and his students. It is noted that a two day suspension, although meaningful, is not so lengthy as to require the undersigned Administrative Law Judge to examine the need for mitigation given the facts of this case.

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. 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)).

6. An employee's belief that management's decisions and directions are incorrect, absent a threat to the employee's health or safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. See Parker v. W. Va. Dep't of Health and Human Resources, Docket No. 97-HHR-042B (Sept. 30, 1997). See generally, Meckley v. Kanawha County Bd. of Educ., 181 W. Va. 657, 383 S.E.2d 839 (1989) (per curiam).

7. "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dep't, Docket No. 90-H-128 (Aug. 8, 1990) (citing Meads v. Veterans' Admin. 36 M.S.P.R. 574 (1988)). 8. 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).

9. 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).

10. "Willful neglect of duty," encompasses something more serious than incompetence and imports "a knowing and intentional act, as distinguished from a negligent act." Chaddock, supra.

11. Respondent met its burden of proof and proven the charges of insubordination and willful neglect of duty.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha or Putnam County. Any 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 EmployeesGrievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. However, the appealing party is required by W. Va. Code § 29A- 5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

_____

JANIS I. REYNOLDS

Administrative Law Judge

Dated: April 25, 2000

Footnote: 1

Grievant was represented by Rosemary Jenkins and Steve Angel from the West Virginia Federation of Teachers, and Respondent was represented by its attorney, John Grafton.

Footnote: 2

In keeping with prior decisions of this Grievance Board, students and their relatives will be identified only by their initials. See Jones v. Preston County Bd. of Educ., Docket No. 99-39-017 (Mar. 16, 1999).

Footnote: 3

Grievant believed this complaint was filed during the 1997-1998 school year.

Footnote: 4

Grievant stated he was just joking with this student, and in order to get this student to understand what was said to him it was necessary to put more emphasis on his statements. Grievant did not explain why it was necessary to "put more emphasis" on a joke. This version of the confrontation is not believed.

Footnote: 5

Others additionally indicated Grievant also stated he would rip N.C.'s head off.

Footnote: 6

Grievant testified N.C. knew or should have known he was to go to the office. There was no evidence admitted to support this belief.

Footnote: 7

It also appears the parties did not notice this testimony, as there were no questions to the witness about whether Grievant had informed him of Principal Goff's testimony.

Footnote: 8

During the presentation of his case, Grievant testified the recent technical foul he received during football season was "totally wrong", and the technical foul he recently received at a basketball game was "uncalled for." Although these incidents were not cited as reasons for Grievant's suspension, this testimony is noted to demonstrate Grievant's consistent belief that he is an innocent victim in many of these occurrences, and he is not to blame for the negative incidents that happen to him.

Footnote: 9

The third written statement was from student A.H. It basically indicated Grievant and N.C. were "yelling at each other," N.C. finally left, and Grievant did not tell N.C. to go to the office. The student did not speak to the presence or absence of a threat. A.H. was not called by either side to testify.