ALISA LAKE,

Grievant,

v. **Docket No. 99-01-294**

BARBOUR COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

On July 19, 1999, Alisa Lake (Grievant) submitted this grievance directly to Level IV, in accordance with W. Va. Code § 18A-2-8, challenging her suspension with pay by Respondent Barbour County Board of Education (BCBE). On October 27, and November 8, 1999, a Level IV hearing was conducted in this Grievance Board's office in Elkins, West Virginia.[1] At the conclusion of that hearing, the parties agreed on a briefing schedule, and this matter became mature for decision on November 17, 1999, following receipt of the parties' written post-hearing arguments.

BACKGROUND

Grievant was employed by BCBE as a classroom teacher. At the time of the events which gave rise to this grievance, Grievant was assigned to Philippi Elementary School (PES) teaching preschool disabled children. Grievant has been employed by BCBE for

[1]Grievant was represented by counsel, Basil R. Legg, Jr. BCBE was likewise represented by counsel, Howard Seufer, with Bowles Rice McDavid Graff & Love.

four years. All of her prior evaluations have been satisfactory. Indeed, prior to the events at issue Grievant was considered a good employee with no prior disciplinary problems.

This grievance arises out of a proposed termination of Grievant's employment, initiated by BCBE's Superintendent, John H. Hager, on February 11, 1999. On that date, Superintendent Hager advised Grievant of the allegations against her in a lengthy notice which states:

> You are hereby suspended pending a dismissal hearing before the Barbour County Board of Education effective February 11, 1999.
>
> During the suspension period, you are not to enter upon any Board properties without my express permission. You are hereby authorized to come to my office to deliver the notice referred to below. You are not to go to any of the schools or homes where you provide instruction in Barbour County during the suspension or to call any parent or student in the school system about this matter.
>
> At a meeting of the Barbour County Board of Education to begin at 10:00 a.m. on March 18, 1999, at the Board office at 105 S. Railroad Street, Philippi, West Virginia, I will ask the Board to ratify your suspension and dismiss you from employment.
>
> I am taking this action for a number of reasons. On February 3, 1999, Mr. Jeff Kittle gave you a letter outlining the following dates and infractions:
>
> On January 4, 1999, a letter was sent to Mrs. Kratsas, [G. F.]'s[2] teacher, by [G. F.]'s parents. This letter said that [G. F.] was no longer permitted to participate in the Big Buddy Program that you have in your classroom. Their letter further stated that [G. F.] was to have no further contact with you, and requested that you be given a copy of the letter. Ms. Vasser verifies that you were given a copy of the letter from January 4, 1999.
>
> On January 19, 1999, [G. F.]'s parents came to the school and had a conference with Jeff Kittle, principal. During this conference, the [F.]s requested that Mr. Kittle tell you not to have any contact with their child. Mr. [F.] stated that [G. F.] was having personal difficulties, impeding his education due to personal/family problems that had occurred with you and [G. F.]'s parents. Based on the information presented to him at this meeting, Mr. Kittle immediately had a conference with you. At the conference, you informed him that you indeed had personal/family problems with Mr. [F.]. Your explanation of the events verified to Mr. Kittle that the request of the parents was valid. Due to the fact that you have no educational obligations with [G. F.], Mr. Kittle verbally communicated to you that you were not to initiate

[2]Consistent with the practice of this Grievance Board, the students and families involved in this matter will be identified only by their initials. See, e.g., Hurley v. Logan County Bd. of Educ., Docket No. 97-23-394 (Dec. 11, 1997); Edwards v. McDowell County Bd. of Educ., Docket No. 93-33-118 (July 13, 1994); Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994).

contact with [G. F.] in any manner except to say "Hello" or "Goodbye" and that was to be the extent of your communication and contact.

On January 29, 1999, Mr. [F.] came to see Mr. Kittle again. At this meeting, in writing, he stated .... "Mrs. Lake has continued to seek [G. F.] out, engage him in conversation, present him with gifts or mementos, and position herself where he has to walk by her as he gets on or off the bus. On one occasion, she told [G. F.] that she still loves him and another time told him that she knows he is upset with her but that he shouldn't be." Mr. [F] also stated in his letter that "... [G. F.] is emotionally upset" and "... feels that Mrs. Lake's interest in him is motivated by her desire to maintain contact with me." These events have occurred since Mr. Kittle's directive to you not to initiate contact or conversation. Based on the information that he had, he referred [G. F.] to Mrs. Disbennett.

On January 29, 1999, Mrs. Disbennett met with [G. F.]. During their time together, [G. F.] told Mrs. Disbennett that because Ms. Lake continually tried to contact him, he had a "funny feeling inside my chest", he was "scared", and "nervous" and even tries to "hide so she doesn't see me". His comments indicate to me that your behavior in regard to this situation has the potential to impede his school performance and borders on child abuse as outlined in WV Code § 49-1-3 (1). [G. F.] is afraid to come to school because of your persistence in having unnecessary contact with him.

Based on the information provided by Mr. [F.], Mrs. Disbennett, as well as others, Mr. Kittle was convinced that you had willingly violated his directive to refrain from initiating any contact with [G. F.] except to say "Hello" or "Good-bye." He then gave you an order in writing as follows: You are to have absolutely **NO CONTACT WITH [G. F.] IN ANY MANNER. Your are not to say anything to him, signal to him, or make eye contact with him. You are not to send messages to him via a courier, or to give written communication or gifts. You are also not to be physically close to him when he is getting on or off the bus, in the lunchroom while he is eating lunch, or at any other time.**

Mr[.] Kittle's belief is that you are impeding the education of this child who is experiencing emotional distress which could easily result in physical illness. [G. F.] is a child who is "at risk" because of his medical condition on a continual basis. Additional emotional stress could cause him great physical problems in the long run. You must cease and desist from having contact with this child. It is not normal that you would continue to pursue communication with this young lad after the events that have taken place and the emotional distress it has caused [G. F.].

Mr. Kittle's letter also stated, **"This letter is a written reprimand and a warning that severe penalties will be forthcoming if you do not accept this order. If you have questions, please let me know and I will answer them."**

After receiving the letter dated February 1, on February 3, you were again given another formal reprimand on February 5, 1999. The details of that event are as follows:

You were given an oral directive to move your students away from a particular area during bus duty. Mrs. Jones, head teacher, explained that the reason for the move is that the students were too near the buses and she feared that one might be hurt. When Ms. Jones' back was turned, she again found you and your students in the area she had asked you to move away from. Mr. Kittle again had to demand that you stay where you were directed and gave you a written reprimand to that effect. During this disciplinary conference, you stated a number of times that you did not believe that you could follow the directive about avoiding contact with [G. F.].

On February 9, 1999, Mr. Kittle received a telephone call at home from a parent who was concerned about your behavior in class that day. The parent related the following to Mr. Kittle:

1. The Big Buddies were in your classroom with the pre-school children. You directed a question to a student as to why [G. F.] was no longer coming to the Big Buddy program,, and asked the student what he had been saying about you. A female student stated [G. F.] had said his parents weren't getting along because Ms. Lake and his dad "had a thing" and he wouldn't be back to class. **In reality, you already knew why [G. F.] was not returning to the program and you had no right to bring this issue up in a public school classroom thereby violating [G. F.]'s right to privacy.**
2. Ms. Lake told the students [G. F.] had written a letter telling he[r] how much he disliked her and he hoped she went to "Hades."
3. Ms. Lake admitted to the students that she and Mr. [F.] shared "friendship kisses" and were involved.
4. Ms. Lake stated [G. F.]'s mother, as a result, was not friendly to her in church.
5. Ms. Lake told the students her daughter had made the information about her relationship with Mr. [F.] public, telling her class at Feed My Sheep Christian School.
6. Ms. Lake stated she was not embarrassed about this because it is the truth and now it is out in the open.
7. Ms. Lake told the students she wanted to be honest and open with them about the situation and that was her reason for providing them with the information.
8. Ms. Lake stated to her students that she and Mr. [F.] did not sleep together.
9. Ms. Lake informed two fifth grade teachers that she had a discussion in class during the Big Buddy Program about her relationship with [Mr. F.], [G. F.]'s letter and the reason why [G. F.] is no longer attending the Big Buddy Program. She went on and asked these same two teachers what rumors they had heard and what they knew about this whole situation.

Another source said Ms. Lake related that they only kissed, they didn't have sex.

In a conference in my office on the morning of February 11, 1999, you admitted points 1 through 8 that are listed. Mr. Jeff Kittle and Ms. Elaine Benson and I were in attendance at this conference.

Ms. Lake, it is hard for me to believe that a teacher who loves children would share details of such a situation with the children in her care. The students in your care deserve not to be dragged into your personal problems. I find it unconscionable that you have shared the details of your relationship with [Mr. F.] with children who are pre-school and fifth grade age.

Your conduct is in direct opposition to both oral and written directives to you to avoid contact with [G. F.]. In your oral comments during the last conference with Mr. Kittle and Ms. Benson, you said you had had a family meeting with your children and you all decided that [G. F.] needed to be punished for writing a negative letter to you. You have punished him by demeaning him in front of his peers. Not only have you demeaned him personally but you have also demeaned both of his parents in front of your class. As you already know from your educational training, confidentiality is immensely important in dealing with children and students in school. One idle word or deed can scar a student for a very long time or for life. In spite of our oral and written instructions to you, you have continued to malign, intimidate and harrass (sic) a young man who is innocent.

Based on the foregoing information included in this letter, I have decided to recommend that your employment with the Barbour County Board of Education be terminated. If you would like to appear at the Board meeting to be heard, you must deliver

> written notice to me by noon on March 8, 1999. You have a right to counsel, to ask questions of witnesses and to present a defense.

S Ex 1 at PTH (emphasis in original).[3]

An extensive pre-termination hearing was conducted before BCBE on June 2 and 21, and July 12, 1999. On July 12, 1999, following completion of that hearing, BCBE declined to approve Grievant's termination, but ratified her suspension with pay from February 11, 1999, through the end of the 1998-99 school year. Superintendent Hager issued written notice to Grievant of this result on July 14. 1999. R Ex A at L IV. This grievance was filed contesting BCBE's decision.

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; 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). 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

[3]Exhibits from the pre-termination hearing before BCBE will be cited as "S Ex __ at PTH" for Superintendent's Exhibits and "E Ex __ at PTH" for Employee's Exhibits. The transcript of the pre-termination hearing will be cited as "PTH HT Vol. 1, 2 or 3 at __," with Volume 1 representing the transcript from June 2, 1999, Volume 2 representing the transcript from June 21, 1999, and Volume 3 representing the transcript from July 12, 1999. Exhibits from the Level IV hearing will be cited as "R Ex ___" for Respondent's exhibits, and "G Ex __" for Grievant's exhibits.

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). 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).

W. Va. Code § 18A-2-8 provides, in pertinent part:

> [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 plea of nolo contendere to a felony charge.

In the correspondence which proposed Grievant's termination and affirmed her suspension, BCBE did not specify which of the specific causes in the statute it was relying upon to support this disciplinary action. However, BCBE argued at Level IV that Grievant's conduct constituted insubordination and willful neglect of duty, as well as cruelty. In such cases, the proper focus is whether the charge of misconduct has been proven, not the label attached to such conduct. Bradley v. Cabell County Bd. of Educ., Docket No. 99-06-150 (Sept. 9, 1999); Willis v. Jefferson County Bd. of Educ., Docket No. 96-19-230 (Oct. 28, 1998); Russell v. Kanawha County Bd. of Educ., Docket No. 9-20-415 (Jan. 24, 1991). See Jordan v. Mason County Bd. of Educ., Docket No. 99-22-080 (July 6, 1999).

Although many facts surrounding these allegations are undisputed, certain facts pertinent to resolution of this grievance were contested by the parties. 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). Some factors to consider in assessing the credibility of a witness include the witness' demeanor, opportunity or capacity to perceive and communicate, reputation for honesty, attitude toward the action, and admission of untruthfulness. Additionally, the trier of fact 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' information. Haddox v. Mason County Bd. of Educ., Docket No. 98-26-283 (Nov. 30, 1998). See Perdue v. Dep't of Health & Human Resources, Docket No. 93-HHR-050 (Feb. 4, 1994). See generally, Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Bd. 152-53 (1984). Although the undersigned was unable to observe the demeanor of the witnesses who appeared at Grievant's pre-termination hearing, the remaining factors provide an ample basis to evaluate the credibility of their testimony. See Williams v. Kanawha County Bd. of Educ., Docket No. 98-20-321 (Oct. 20, 1999); Reynolds v. W. Va. Dep't of Admin., Docket No. 99-ADMN-049 (Sept. 1, 1999). Consistent with these standards, certain aspects of the witnesses' testimony will be considered in detail.

Certain information relating to Grievant's alleged conduct was presented in the form of hearsay testimony. Because formal rules of evidence, excepting the rules of privilege recognized by law, do not apply in grievance proceedings, hearsay evidence is generally

admissible. W. Va. Code § 18-29-6. See Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996); Seddon v. W. Va. Dep't of Health, Docket No. 90-H-115 (June 8, 1990). Nonetheless, an administrative law judge must determine what weight, if any, is to be accorded hearsay evidence in a disciplinary proceeding. See Holmes v. Bd. of Directors, Docket No. 99-BOD-216 (Dec. 28, 1999); Harry v. Marion County Bd. of Educ., Docket Nos. 95-24-575 & 96-24-111 (Sept. 23, 1996); Seddon, supra.

There are several factors to consider in determining the weight to be allocated to hearsay evidence, including: the availability of persons with first-hand knowledge to testify at the hearing; whether the declarants' out-of-court statements were in writing, were signed, or were in affidavit form; the employer's explanation for failing to obtain signed or sworn statements; whether the declarants were disinterested witnesses to the events and whether the statements were routinely made; the consistency of the declarants' accounts with other information in the case, their internal consistency, and their consistency with each other; whether corroboration for the statements can otherwise be found in the employer's records; the absence of contradictory evidence; and the credibility of the declarants when they made the statements attributed to them. Jennings v. Wyoming County Bd. of Educ., Docket No. 98-55-379 (Mar. 10, 1999); Miller v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-501 (Sept. 30, 1997). See Borninkhof v. Dep't of Justice, 5 M.S.P.B. 150 (1981). Accordingly, the forgoing factors will be applied to hearsay evidence included in this record.

Insubordination is one of the grounds for terminating school personnel under W. Va. Code § 18A-2-8. Jude v. Mingo County Bd. of Educ., Docket No. 96-29-136 (July 29, 1996). This Grievance Board has previously recognized that insubordination "encom-

passes 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.

Likewise, 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. Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995); 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).

In taking this action, BCBE relied upon two prior disciplinary actions which were described in the termination notice issued to Grievant. Ordinarily, the merits of a prior disciplinary action, properly documented in the employee's record and which the employee had an opportunity to challenge, may not be contested in a grievance involving a subsequent disciplinary action. Williams, supra; Aglinsky v. Bd. of Trustees, Docket No. 97-BOT-256 (Oct. 27, 1997); Jones. v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996); Nicholson v. Logan County Bd. of Educ., Docket No. 95-23-129 (Oct. 18, 1995). Grievant received a written reprimand on February 3, 1999, for willfully violating Principal Kittle's verbal directive regarding contact with G. F. S Ex 7 at PTH. In addition, Grievant was issued a written reprimand on February 5, 1999, for failing to comply with an oral directive from PES Head Teacher Anne Jones. S Ex 8 at

PTH. Grievant did not file a grievance challenging either of these disciplinary actions.[4] Accordingly, the undersigned will consider the allegations contained in these disciplinary actions as true. See Aglinsky, supra; Perdue, supra.

Because the merits of the reprimands Grievant previously received are not at issue, the crux of this grievance is whether Grievant violated Principal Kittle's written directive which was incorporated into the reprimand Grievant was administered on February 3, 1999. Grievant contends she complied with Principal Kittle's directive because she had no further contact with G. F. from that point to the time this disciplinary action was initiated. BCBE contends Grievant's actions in her classroom on February 9, 1999, constituted an overt defiance of Principal Kittle's directive.

To a certain extent, the facts presented in this grievance are similar to the situation which arose in Conner v. Barbour County Board of Education, Docket No. 94-01-394 (Jan. 31, 1995) (hereinafter "Conner I"). In that case, a Bus Operator had been chastised by her supervisor, the Director of Transportation, for operating a hand-held tape recorder while transporting students on her regular bus route. The employee was directed to prepare a Plan of Improvement to address this matter, which she did a short time later, promising, in writing, "I will not use my tape recorder while students are on board the bus." Subsequently, the employee was charged with insubordination when the employee's daughter, a ninth grade student, rode her bus, and operated a video camera mounted on a tripod while students were on board the bus.

[4]The instant grievance was not filed until July 19, 1999, well after the time limit for challenging disciplinary actions that were administered in February 1999.

The school board alleged in Connor I that the employee had been instructed not to have "taping devices" on her bus. However, the controlling "directive" in that case was held to be the Plan of Improvement drafted by the employee, and approved by the supervisor, which spoke only to a tape recorder being operated by the employee herself. The employee's belief that she was still permitted to have another person operate a recording device was found not to be so unreasonable that the employee's conduct represented the sort of defiance of authority discussed in Sexton, supra, and required to establish a charge of insubordination. Conner I, supra.

In the grievance at issue here, Principal Kittle's directive to Grievant was much more comprehensive than the instructions at issue in Conner I. Moreover, the scope of Principal Kittle's earlier verbal directive had already been tested by Grievant, who contended that she had been explicitly authorized to have certain contact with G. F., such as she would have with any other student at the school who was not in her classroom. Although Principal Kittle told Grievant she could have no contact with G. F. other than to say "hello" or "goodbye," in the same way that she treated any other student at PES, Grievant took this to mean that she could invite G. F. to her classroom to see a puppy, and go on the school bus and deliver a T-shirt, because she took the same action toward other PES students who were then or had been Big Buddies. PTH HT Vol. 3 at 16-23. Accordingly, Principal Kittle's written directive of February 1 was much more restrictive, stating:

> I am now ordering you in writing that you are to have absolutely **NO CONTACT WITH [G. F.] IN ANY MANNER. Your (sic) are not to say anything to him, signal to him or make eye contact with him. You are not to send messages to him via a courier, or to give written communication or gifts. Your (sic) are also not to be physically close**

to him when he is getting on or off the bus, in the lunchroom while he is eating lunch, or at any other time.

S Ex 7 (emphasis in original).

An employee's belief that management's decisions are incorrect, absent a threat to the employee's health or safety, does not confer upon him or her the right to ignore or disregard the order, rule, or directive. Dyess v. W. Va. Dep't of Admin., Docket No. 99-DOA-397 (Dec. 16, 1999). 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). Additionally, an employer has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, privilege, and authority." Dyess, supra. See McKinney v. Wyoming County Bd. of Educ., Docket No. 92-55-112 (Aug. 3, 1992).

Grievant testified that she prepared a lesson plan dealing with "love" for her class on February 9, 1999. This subject was chosen due to the approach of Valentine's Day on February 14, 1999. She had presented similar materials to her classes in previous years. PTH HT Vol. 3 at 41-42. Grievant asserted that on multiple occasions during the preceding five weeks, some of the Little Buddies had asked her why G. F. was no longer coming to their classroom. PTH HT Vol. 3 at 42-43. Grievant maintained that whenever a Big Buddy had left the Big Buddy Program, over the time this program had been in existence, she had engaged in a similar colloquy to help the Little Buddies understand the reasons why those

students were no longer interacting with them in the program.[5] PTH HT Vol. 3 at 42; Grievant testimony at L IV. Therefore, she decided to include the issue of G. F.'s departure as part of her lesson, when the other Big Buddies were present.

Accordingly, Grievant asked one of the Big Buddies, J. G., if she knew why G. F. was no longer coming to Big Buddies. Grievant testimony at L IV. J. G. responded, honestly, stating that she had heard that Grievant and G. F.'s father had "slept together" and had "an affair." PTH HT Vol. 3 at 44-46; Grievant testimony at L IV. Grievant stated that she was "absolutely shocked" by the response. PTH HT Vol. 3 at 46; Grievant testimony at L IV. Of course, Grievant had previously been "shocked" when Principal Kittle told her to stay away from G. F., despite having received a letter from G. F.'s parents on January 4, 1999, stating that they wanted G. F. to "have no further contact with Mrs. Lake at all." PTH HT Vol. 3 at 14; S Ex 5. In describing her conversation with Principal Kittle on January 19, 1999, Grievant stated:

> He told me, that the child's parents had come to see him[,] and had a meeting with him[,] and they had discussed me[,] and they didn't want me to have anything to do with their son, and I was quite shocked at this. I was quite shocked that they had not called me into the meeting. And I asked him, what power did the parents have that they could come into the school and dictate whom I should and should not speak to in the course of my duties at work . . . .

PTH HT Vol. 3 at 15.

Apparently as a result of this "shocking" response from J. G., Grievant elected to depart from her lesson plan and refute this rumor from her perspective. However, whether

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[5]Grievant named four students who had ceased serving as Big Buddies over the three years the program had been in existence. G. F. was one of the original Big Buddies, having been in the program for nearly three years.

viewed as grossly inappropriate, incredibly enlightened, or completely asinine, the remainder of this conversation need not be analyzed in detail. Regardless of what Grievant might have done to address the departure of other Big Buddies in the past, the ground rules for dealing with G. F. were comprehensively established by Principal Kittle's written directive on February 3. As with Principal Kittle's previous verbal directive, Grievant argued that she did not engage in any of the conduct which was explicitly prohibited in the letter, ignoring the general prohibition against having contact with G. F. "in any manner." S. Ex 7.

Grievant had to understand that whatever was said about G. F. to his classmates and peers in the course of her post mortem on his departure from the Big Buddy program would get back to G. F. in a small school such as Philippi Elementary. Whether Grievant said that G. F. was a sinner or a saint, someone would most likely pass along these comments to G. F. Certainly, when Grievant revealed that G. F. had written a letter to her in which he stated that he wished she would go to Hades, such a statement was unlikely to escape without being circulated to the remainder of the fifth grade.

That this colloquy with her fifth grade Big Buddies and their preschool Little Buddies did not develop in accordance with Grievant's lesson plan is of no moment. G. F.'s name did not come up in this conversation by accident. Grievant deliberately planned initiating a conversation about G. F. with her class and his classmates who were still Big Buddies. This was consistent with her previously documented defiance of Principal Kittle on this issue, and involves nothing more than a clever rationalization for indirectly accomplishing something she knew she could no longer get away with if she did it directly. Grievant's

claim that she believed this would be acceptable, despite Principal Kittle's broadly stated written directive, is simply not credible.

G. F. had been gone from the Big Buddy program nearly five weeks. Grievant knew that G. F.'s departure was based upon the fact that his parents wanted her to have no contact with G. F. Grievant had seen the letter from the parents expressing this request. Grievant testimony at L IV. Principal Kittle had verbally directed her to stay away from G. F. Grievant had received a written reprimand from her Principal for disobeying his prior directives less than a week earlier. In these circumstances, Grievant's conduct falls precisely within the character of activity that Grievant had been directed to refrain from doing. Her actions were willful and deliberate. As such, Grievant's conduct constitutes insubordination and willful neglect of duty prohibited by W. Va. Code § 18A-2-8.[6] Moreover, this type of conduct is not "correctable" within the meaning of W. Va. Department of Education Policy 5300 and Trimboli v. Board of Education, 163 W. Va. 1, 254 S.E.2d 561 (1979). See Conner v. Barbour County Bd. of Educ., 200 W. Va. 405, 489 S.E.2d 787 (1997) (hereinafter "Conner II"); Mason County Bd. of Educ. v. State Supt. of Schools, 165 W. Va. 732, 274 S.E.2d 435 (1980).

Grievant contends that this disciplinary proceeding is the result of G. F.'s parents, particularly G. F.'s mother, using the school administration in a vendetta resulting from Grievant's relationship with G. F's father. However, the record indicates that this dispute

[6]Based upon this determination, it is not necessary to determine if BCBE established by a preponderance of the evidence that Grievant's alleged conduct constituted "cruelty" prohibited under W. Va. Code § 18A-2-8. Although Superintendent Hager suggested in the proposed termination notice that Grievant's conduct toward G. F. bordered on "child abuse," no child abuse charges were ever filed against Grievant, and no such charges were before the undersigned in this matter.

is primarily a dispute between Grievant and her Principal. Principal Kittle made an educational decision that it was in the best interests of G. F. to separate Grievant from G. F. as much as possible. It is evident from the totality of the record that Grievant did not agree with Principal Kittle's determination, and made an effort to maintain contact with G. F. Indeed, this ill-guided effort apparently backfired when her comments to her preschool students and some of their Big Buddies elicited more candid remarks than she was prepared to handle.

Grievant argues that she was denied due process because BCBE did not properly apprize her of the allegations against her. Grievant correctly asserts that the West Virginia Supreme Court of Appeals stated in Board of Education v. Wirt, 192 W. Va. 568, 453 S.E.2d 402 (1994), that while an employee is not entitled to a full adversarial pre-termination hearing, the employee "is entitled to a written notice of the charges and an explanation of the evidence," as well as an opportunity to respond before the decision to terminate is made by the county board. Grievant specifically claims that BCBE's Superintendent "failed to list dates and times of the alleged violations of the verbal directive from Principal Kittle." Grievant's Post-Hearing Brief at 4.

As previously discussed, this disciplinary action involves allegations of insubordination and willful neglect of duty based upon Grievant's conduct in her classroom on February 9, 1999. BCBE alleges Grievant's initiation of a discussion with her class and the remaining Big Buddies, regarding the reasons why G. F. was no longer participating in the Big Buddy program, violated the written directive from Principal Kittle in her reprimand dated February 1, 1999. This allegation is spelled out in considerable detail in the termination notice issued to Grievant on February 11, 1999. S Ex 1. It was not

necessary to set forth the dates and times when Grievant engaged in the acts for which she was reprimanded by Principal Kittle, because BCBE only referenced those prior events as evidence to support the current charges, and as prior disciplinary measures taken which arguably supported the proposed penalty of termination. In these circumstances, Grievant has not established any due process violation under Wirt. See Jones v. Preston County Bd. of Educ., Docket No. 99-39-017 (Mar. 16, 1999).

It is apparent that BCBE recognizes Grievant as a teacher with potential who can make an important contribution to meeting the educational needs of the students of Barbour County. Not every teacher, regardless of their academic credentials, has the aptitude and commitment to succeed in teaching students with special needs. The testimony of numerous parents of children who have been taught by Grievant at PES, including parents who are themselves professional educators, reflected that Grievant has been very successful in teaching preschool students with various disabilities. By approving this suspension with pay, BCBE separated Grievant from G. F. for the remainder of his elementary education, as the record indicates G. F. has since moved on to middle school. PTH HT Vol. 2 at 295. It is obvious that BCBE, in rejecting the Superintendent's proposed penalty of termination, believed Grievant deserved a second chance to salvage her career.

On the other hand, a suspension represents a more severe form of progressive discipline than a reprimand, and may properly be imposed when written reprimands do not have the desired effect of correcting the behavior in question. This suspension was imposed on the grounds that Grievant was insubordinate and willfully neglected her duty to comply with the directions of her Principal in violation of W. Va. Code § 18A-2-8. In the circumstances presented, this suspension with pay does not represent an abuse of the

county board's broad discretion to select an appropriate penalty for proven misconduct. See Harry v. Marion County Bd. of Educ., 203 W. Va. 64, 506 S.E.2d 319 (1998); Conner II, supra.

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 Barbour County Board of Education (BCBE) as a classroom teacher assigned to Philippi Elementary School (PES) to teach preschool disabled children.

2. Grievant has been employed by BCBE for approximately four years. All of her prior performance evaluations were satisfactory. Indeed, Grievant was considered a very good teacher, given her level of experience.

3. During the 1998-99 school year, G. F. was a fifth grade student at PES. PTH HT Vol. 1 at 64. Kathleen Kratsas was G. F.'s regular classroom teacher. PTH HT Vol. 1 at 64; Vol. 2 at 165-66; Kratsas testimony at L IV.

4. Grievant was not one of G. F.'s teachers during the 1998-99 school year. PTH HT Vol. at 65. In fact, Grievant has never been assigned to provide G. F. with any educational services. However, G. F. participated in the "Big Buddy Program" at PES which involved older elementary students, during their recess period, visiting Grievant's preschool classroom approximately two times each week to interact as "mentors" with the disabled preschool students, who were generally referred to as "Little Buddies." This was a voluntary program, and students could withdraw from serving as a Big Buddy at any time. PTH HT Vol. 1 at 134; Grievant testimony at L IV.

5. On or about January 2, 1999, G. F.'s mother called Ms. Kratsas at home and advised her that she did not want G. F. to continue participating in the Big Buddy Program. PTH HT Vol. 2 at 168-69. On January 4, 1999, G. F.'s mother notified Ms. Kratsas, in writing, that G. F. was no longer permitted to participate in the Big Buddy program. PTH HT Vol. 2 at 167-68. Mrs. F. further requested that G. F. have no further contact with Grievant. S Ex 5.

6. Jeffrey Kittle is Principal of PES. PTH HT Vol. 1 at 63, 132. In that capacity, he is Grievant's immediate supervisor. PTH HT Vol. 1 at 92.

7. On January 4, 1999, Ms. Kratsas discussed Mrs. F.'s letter with Principal Kittle. PTH HT Vol. 1 at 135. Ms. Kratsas subsequently provided a copy of the letter to Grievant, through Cecelia Vassar, a Speech Pathologist, who hand delivered the letter. PTH HT Vol. 2 at 170-71, 192; Vol. 3 at 86-88; Grievant testimony at L IV.

8. On January 19, 1999, G. F.'s parents met with Principal Kittle and indicated that due to unspecified "personal family problems" they did not want Grievant to associate with G. F. PTH HT Vol. 1 at 137.

9. Immediately after meeting with G. F.'s parents on January 19, 1999, Principal Kittle met with Grievant and discussed the parents' concerns. PTH HT Vol. 1 at 137-39. Grievant advised Principal Kittle that she had a romantic encounter with G. F.'s father, they had shared a kiss, and she subsequently told G. F.'s mother what had happened between her and G. F.'s father. PTH HT Vol. 1 at 140-42. Based upon this disclosure by Grievant, Principal Kittle instructed Grievant not to have any communication or contact with G. F., except to say "hello" or "goodbye," and otherwise to not seek out G. F. to initiate any conversation. PTH HT Vol. 1 at 142.

10. On January 29, 1999, Mr. F. met with Principal Kittle, alleging that Grievant was continuing to have contact with G. F. Mr. F. handed Principal Kittle a letter in which he asked Principal Kittle to discuss this matter with Grievant once again, and put an end to her contacts with G. F. PTH HT Vol. 1 at 143; S Ex 6; Mr. F. testimony at L IV.

11. Following the meeting with Mr. F., Principal Kittle had Nancy Disbennett, the School Guidance Counselor, interview G. F. to determine if the student was having any particular problems in dealing with the situation. PTH HT Vol. 1 at 150; Vol. 2 at 254; Disbennett testimony at L IV.

12. G. F. suffers from a rare skin disorder, epidermolysis bullosa. PTH HT Vol. 2 at 28. There was some concern among school administrators that the stress from Grievant's persistent efforts to maintain contact with G. F. could aggravate his condition. PTH HT Vol. 2 at 30. However, there was no evidence that any aggravation or physical injury actually occurred. Kratsas & Disbennett testimony at L IV; Joint Stipulation of Fact at L IV.

13. G. F. told Ms. Disbennett about a series of encounters with Grievant after he left the Big Buddy program, which he claimed were unwanted. He also told Ms. Disbennett that he did not want to come to school because he did not want to see Grievant. PTH HT Vol. 2 at 261; Disbennett testimony at L IV. G. F. was never referred for any psychological counseling or treatment. PTH HT Vol. 2 at 276; Disbennett testimony at L IV.

14. On February 3, 1999, Grievant was reprimanded by Principal Kittle for violating his earlier verbal directive not to have any contact with G. F. except to say "Hello" or "Goodbye." PTH HT Vol. 1 at 181, 233-34; S Ex 7. Elaine Benson, BCBE's Director of

Special Education, was present when Principal Kittle presented Grievant with this reprimand, and instructed Grievant more specifically on avoiding any communication or contact with G. F. PTH HT Vol. 2 at 21-22; Benson testimony at L IV.

15. In the written reprimand issued to Grievant on February 3, 1999, Principal Kittle expanded upon his earlier verbal directive limiting Grievant's contact with G. F., stating the following:

> I am now ordering you in writing that you are to have absolutely **NO CONTACT WITH [G. F.] IN ANY MANNER. Your (sic) are not to say anything to him, signal to him or make eye contact with him. You are not to send messages to him via a courier, or to give written communication or gifts. Your (sic) are also not to be physically close to him when he is getting on or off the bus, in the lunchroom while he is eating lunch, or at any other time.**

S Ex 7 (emphasis in original).

16. On February 5, 1999, Grievant was given a written reprimand by Principal Kittle for failing to follow a verbal directive from Anne Jones, PES Head Teacher, on the afternoon of February 4, 1999, to move her students to a different location while waiting for their school bus. PTH HT Vol. 1 at 158-59; S Ex 8. Ms. Jones and Ms. Benson were also present at the meeting where this disciplinary action was administered. PTH HT Vol. 1 at 161; Vol. 2 at 30-31; Benson testimony at L IV; Jones testimony at L IV.

17. In the course of the meeting on February 5, 1999, Grievant told Principal Kittle and the others present that she and her children had held a “family meeting,” and determined that G. F. should be “punished” for writing a letter that was critical of Grievant. PTH HT Vol. 1 at 163. She further told Principal Kittle, “I cannot abide by your directive,”

and that she could not change who she was. PTH HT Vol. 1 at 163-64; Vol. 2 at 138; Vol. 3 at 26.

18. Whenever a Big Buddy leaves the program, it has been Grievant's practice to discuss the reasons that student is no longer coming to her classroom with the remaining Big Buddies and Little Buddies.

19. Grievant prepared a lesson plan dealing with "love" for her class on February 9, 1999, in preparation for Valentine's Day on February 14. PTH HT Vol. 3 at 41. In conjunction with this lesson plan, Grievant decided to address the reasons for G. F.'s departure from the Big Buddy Program, as he had been a Big Buddy since the inception of the program, and some of the children had asked Grievant why G. F. was no longer coming to "Buddy Time." PTH HT Vol. 3 at 42-44.

20. On the afternoon of February 9, 1999, after the Big Buddies had joined her class, Grievant resumed her lesson on "love" by asking one of the Big Buddies, J. G., if she knew why G. F. was no longer coming to "Buddy Time." PTH HT Vol. 3 at 44-45; S. J. testimony at L IV.

21. J. G. responded by stating that "all the kids were saying" that G. F.'s father and Grievant "slept together," and that they had "an affair." PTH HT Vol. 3 at 46.

22. Grievant proceeded to tell the students that G. F. had written a letter to Grievant telling her how much he disliked her, and he hoped she went to "Hades." S Exs 9 & 11. Grievant told the students that she and G. F.'s father shared "friendship kisses" and were involved. S Ex 9. Grievant stated that G. F.'s mother was no longer friendly with her in church. Grievant went on to explain that her daughter had made her relationship with Mr. F. public, telling her class at Feed My Sheep Christian School. She indicated that

she was not embarrassed by all of this because it is the truth, and it is now out in the open. She further told the students that she wanted to be "honest and open" with them about the entire situation. S Ex 9.

23. On February 9, Ms. J., a parent of one of the Big Buddies who was present in Grievant's classroom during the events described in Findings of Fact Numbered 20 through 22, expressed her concerns regarding Grievant's discussion with the class, as reported to her by her daughter, S.J., to Principal Kittle. Ms. J. later sent a written summary of what her child had told her about the incident to Superintendent Hager at his request. PTH HT Vol. 1 at 168-69; S Ex 9; J. testimony at L IV. Shortly afterward, another parent, Ms. G., whose child was also present in Grievant's classroom during the conversation regarding G. F., complained to Principal Kittle about the adult nature of Grievant's conversation with the students. PTH HT Vol. 1 at 171.

24. On February 11, 1999, Principal Kittle, Superintendent Hager, and Ms. Benson met with Grievant to discuss the complaints about her classroom discussion in front of the Big Buddies and Little Buddies on February 9. PTH HT Vol. 1 at 172.

25. Grievant substantially confirmed that her discussion with the students occurred as described by Ms. J. PTH HT Vol. 2 at 34-37.

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 in W. Va. Code § 18A-2-8 for which a school employee may be disciplined. Maxey v. McDowell County Bd. of Educ., Docket No. 97-33-208 (Apr. 30, 1998); Jude v. Mingo County Bd. of Educ., Docket No. 96-29-136 (July 29, 1996).

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

4. 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).

5. BCBE established by a preponderance of the evidence that Grievant's conduct on February 9, 1999, asking her class why G. F. was no longer participating in the Big Buddy Program, and her subsequent discussion of a romantic relationship with G. F.'s father, constituted insubordination and willful neglect of duty in the circumstances presented.

6. Ordinarily, when an employee fails to file a timely grievance challenging an earlier disciplinary action, the merits of that action cannot be challenged in a subsequent grievance proceeding. Williams v. Kanawha County Bd. of Educ., Docket No. 98-20-321 (Oct. 20, 1999). See Aglinsky v. Bd. of Trustees, Docket No. 97-BOT-256 (Oct. 27, 1997);

Jones. v. W. Va. Dep't of Health & Human Resources, Docket No. 96-HHR-371 (Oct. 30, 1996).

7. Grievant received all the due process to which she is entitled in the context of a suspension for one or more of the causes specified in W. Va. Code § 18A-2-8. See Bd. of Educ. v. Wirt, 192 W. Va. 568, 453 S.E.2d 402 (1994); Jones v. Preston County Bd. of Educ., Docket No. 99-39-017 (Mar. 16, 1999); Bell v. Mingo County Bd. of Educ., Docket No. 97-29-172 (Mar. 10, 1998).

Accordingly, this grievance is **DENIED**.

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

LEWIS G. BREWER
ADMINISTRATIVE LAW JUDGE

Dated: January 31, 2000