RICHARD HIXENBAUGH,

Grievant,

v. **Docket No. 01-15-023**

HANCOCK COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Richard Hixenbaugh, employed by the Hancock County Board of Education (HCBOE) as a bus operator, filed a grievance directly to level four pursuant to W. Va. Code §18A-2-8, challenging a three day suspension. Grievant requests that the suspension be rescinded and that he be compensated for lost wages. An evidentiary hearing was conducted in the Grievance Board's Wheeling office on March 1, 2001, at which time Grievant was represented by Owens Brown of WVEA, and HCBOE was represented by William Fahey, Esq. Both parties waived the opportunity to file post- hearing proposed findings of fact and conclusions of law, and the matter became mature for decision at the conclusion of the hearing.

The facts of this matter are undisputed and may be set forth as the following formal findings of fact.

Findings of Fact

1. Grievant has been employed by HCBOE as a bus operator since April 1993. He has received satisfactory evaluations, and has no prior disciplinary record.

2. On November 3, 2000, Robert Pantuso, HCBOE Coordinator of Transportation, received a telephone call from the mother of student C.A., who complainedthat Grievant had started the bus before her son could get seated, referred to him as an “asshole”, and used the “F” word “on her son.” (See footnote 1)

3. Mr. Pantuso spoke with Grievant the following morning regarding the complaint. Grievant admitted that he called the student an “asshole,” but denied using the “F” word.

4. Mr. Pantuso called the parent to report his findings and to apologize. At that time, the parent

conceded that perhaps the “F” word was not used during the exchange.

5. HCBOE instructs its bus operators to report discipline problems to the school principal for resolution.

6. HCBOE does not have a policy addressing staff usage of profanity; however, it does have a policy which mandates a three day suspension for the first offense when a student uses such language with a staff member.

7. By letter dated January 9, 2001, HCBOE Superintendent Danny Kaser notified Grievant that the board had approved his recommendation for a three day suspension without pay.

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 defined as"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 proved is more probable than not." Black's Law Dictionary (6th ed. 1991), Leichliter v. W. Va. Dep't of Health & Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, a party has not met its burden of proof. Id.

The authority of a county board of education to suspend an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8, and must be exercised reasonably, not arbitrarily or capriciously. Parham v. Raleigh County Bd. of Educ., 192 W. Va. 540, 453 S.E.2d 374 (1994), 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.

Respondent did not specifically identify which of the statutory reasons were the basis of

Grievant's suspension. However, the proper focus is whether the charge of misconduct is proven, not the label attached to such conduct. Gillespie v. Kanawha County Bd. of Educ., Docket No. 90-20-496 (June 6, 1991) (citing Russell v. Kanawha County Bd. of Educ., Docket No. 90-20-415 (Jan. 24, 1991)). However, at hearing, Superintendent Kaser opined that Grievant's conduct constitutes unsatisfactory performance and/or insubordination. Insubordination is 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). It "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).

Incompetence, sometimes referred to as unsatisfactory performance, refers "to the individual's ability to perform all the expectations of a position, not just one." Zimowski v. Mineral County Bd. of Educ., Docket No. 98-28-050 (July 20, 1998); Sinsel v. Harrison County Bd. of Educ.,Docket No. 96-17-219 (Dec. 31, 1996). Generally, an employee whose performance is unsatisfactory due to a lack of ability or training may be found incompetent. Wilson v. Bd. of Trustees/W. Va. Univ., Docket No. 99-BOT-115 (Dec. 21, 1999)

MCBOE argues that the use of profanity by school employees is simply intolerable. Superintendent Kaser further stated that while he considered a lesser punishment, he believed that a letter of reprimand was insufficient since Grievant had not reported theincident, but admitted that it took place. (See footnote 2) He concluded that the three day suspension was determined by a policy which would impose the same suspension on a student for a first offense.

Grievant admits that his use of the profanity in front of, and in reference to a student, was inappropriate. However, he contends that, under the circumstances, a three day suspension is excessive. Specifically, Grievant testified that C.A. had been riding his bus for only two or three weeks prior to the incident, and had established a pattern of not wanting to sit down, and pestering

other students. On November 2, 2000, he had embarked the bus with a can of soda. Grievant reminded the student that soda was not allowed, at which time C.A. threw it on the floor. Grievant's request that he remove the soda was ignored.

Grievant's recollection of the November 3, 2000 events was that C.A. again reluctantly sat down, allowing Grievant to proceed. When he was required to stop after traveling only a short distance, C.A. shouted, “Why are we stopping dickhead? I need to get home.” In response, Grievant opined that C.A. was an “asshole.” There is no indication that Grievant approached the student, threatened him, or inflicted any type of harm. (See footnote 3) "Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis." McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995) (citations omitted). Grievant has been employed by Respondent for seven years with an unblemished personnel record. While MCBOE reasonably contends that the use of profanity is unacceptable conduct, the evidence in this case does not rise to the level of a flagrant disregard of authority which would constitute insubordination. Further, the isolated expression of frustration in dealing with what appears to have been a daily problem, was not brought to Grievant's attention through evaluation, therefore, a charge of unsatisfactory performance is unsupported. (See footnote 4) Finally, it must be considered that this is not a case in which Grievant approached the student, or that the profanity was used in an angry or threatening manner, which would warrant more severe punishment. See Ferrari v. Putnam County Bd. of Educ., Docket No. 99-40-528 (Apr. 25, 2000). (See footnote 5) Grievant's conduct admittedly showed poor judgment in thatprofanity spoken to or before students is never condoned. While MCBOE may correctly take some disciplinary measure, the action under this specific set of circumstances did not warrant a suspension without pay, and this punishment was excessive in light of the circumstances presented, and in the absence of a prior specific warning or reprimand, or unsatisfactory evaluations. (See footnote 6)

Consistent with the foregoing, the following conclusions of law are made.

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 suspend an employee must be based upon one or more of the causes listed in W. Va. Code § 18A-2-8, and must be exercised reasonably, not arbitrarily or capriciously. Parham v. Raleigh County Bd. of Educ., 192 W. Va. 540, 453 S.E.2d 374 (1994), 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. A board of education employee may be suspended at any time for immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactoryperformance, the conviction of a felony or a guilty plea of nolo contendere to a felony charge. W. Va. Code § 18A-2-8.

4. 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).

5. MCBOE failed to prove that Grievant acted in an intentional manner to defy authority sufficient to constitute insubordination, or that any unsatisfactory performance had been brought to Grievant's attention through evaluation.

6. MCBOE has proven by a preponderance of the evidence that Grievant engaged in profanity while addressing a student .

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

8. The penalty imposed upon Grievant was unreasonable and clearly excessive under the circumstances presented in this case.

Accordingly, this grievance is **GRANTED**. Respondent is **ORDERED** to remove the suspension

letter from Grievant's personnel file and replace it with a written reprimand. Respondent is **FURTHER ORDERED** to reimburse Grievant all lost wages, benefits, and seniority, plus interest at the statutory rate.

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

Date: March 6, 2001 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Consistent with Grievance Board practice, the student will be referred to only by his initials.

Footnote: 2

Grievant stated that he was on his way to report the incident the following morning when he met Mr. Pantuso.

Footnote: 3

Grievant states that C.A. did not ride the bus after November 3, 2000, and withdrew from school. Although not directly related, further insight into the student's demeanor was provided when Grievant stated that C.A. entered the bus and assaulted him on February 14, 2001.

Footnote: 4

Generally, prior to discipline being imposed under W. Va. Code §18A-2-8, an employee must be made aware through the evaluation process of performance which is not acceptable, and be given an opportunity to improve.

Footnote: 5

This matter would be more appropriately compared to McCloud v. Lincoln County Board of Education, Docket 98-22-

051 (June 17, 1998), in which a coach uttered a profanity after being struck in the groin area with a shoe thrown by a student. The suspension in McCloud was rescinded by the level four decision based upon a finding that the staff member's reaction was not unusual in that situation, and he had not approached or inflicted any reciprocal harm upon the student. Also, in Trembly v. Preston County Board of Education, Docket No.00-39-355 (Feb. 28, 2001), a two day suspension imposed upon a bus operator who used the word "shit" in a conversation with a student was rescinded based upon a determination that the comment did not constitute insubordination under those particular circumstances.

Footnote: 6

While application of the same level of discipline placed on students for this action may initially appear to be fair, it is noted that while the student suffers no serious or ongoing consequences, Grievant lost in excess of $255, and three days of seniority.