JAMES BRADLEY,

Grievant,

v. Docket No. 01-20-099

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, James Bradley, employed by Kanawha County Board of Education ("KCBOE" or "Board") as a teacher at the Cabell Alternative School, appealed his suspension on March 20, 2001. A pre-disciplinary hearing on the issue of using unnecessary force with a student, was held on January 16, 2001, followed by a recommended decision to terminate Grievant's employment dated March 2, 2001. (See footnote 1) The Superintendent recommended Grievant's termination to KCBOE which declined to follow this recommendation, and instead voted to suspend Grievant for the remainder of the school year, and to require Grievant to seek counseling. A Level IV hearing was held on May 22, 2001, and this case became mature for decision on June 12, 2001, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 2)

Issues and Arguments

Respondent asserts Grievant's suspension was justified because he engaged in an unnecessary altercation with a student. Respondent notes Grievant has experience and training in relating to at-risk students, and he knew his behavior was incorrect. Respondent also reports Grievant had received CPI training on how to handle angry students, and he was aware of the school's "no touch" policy which was to be followed, unless the student was a danger to himself or others. (See footnote 3) KCBOE also notes Grievant did not utilize the techniques he had been repeatedly trained to use in situations dealing with angry and confrontive students. Respondent asserts Grievant engaged in an avoidable confrontation

with a student, M.H. (See footnote 4) , which was witnessed by the supervisory aide, Ms. Sandra Fuller. In this confrontation, Grievant blocked M.H.'s path, grabbed him, and pushed him into a chair. KCBOE avers there were no self-defense issues, nor was there any need to protect other students or staff. KCBOE points out Grievant has a history of inappropriate interaction with students.

Grievant argues his actions were correct, as he was trying to prevent harm to himself and to another student. Grievant maintains he was justified in his actions, as the student was becoming violent, and he believed M.H. was going to pick up a chair to throw at him or someone else in the room. 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 by KCBOE at the Cabell Alternative School for four years.

2. The majority of students are placed at the Cabell Alternative School because of behavior problems. They are a disruptive force in the normal school setting.

3. For the majority of the day, Grievant is assigned to the Alternative Leaning Center ("ALC"), where students are sent for in-house suspension. When students are sent to the ALC, they must stay in the one room for a specified period, and they are not allowed to have snacks and soda while they are there. They are expected to work on their regular school work. The ALC is a small, narrow room with carrels at the far end and a table at the end toward the door.

4. A supervisory aide, Ms. Fuller, is assigned to the ALC full-time. She stays with the students while Grievant performs his other duties, such as home room coverage and teaching. Grievant is in the ALC for four periods out of seven.

5. On or about October 28, 2000, student M.H. was assigned to the ALC by his teacher, Daniel Arbaugh. Mr. Arbaugh has M.H. for home room and three other classes. M.H. was assigned to the ALC for three days as punishment for repeated cursing. M.H. has a history of frequent cursing; he curses in his normal conversation. 6. M.H. is a ninth grader in his second year at the Cabell Alternative School. He is approximately 5' 3 ½" and weighs 135

pounds. (See footnote 5) He has a temper and responds to things he thinks are unfair by cursing and having "a little yelling fit." Test. of M.H.'s teacher, Daniel Arbaugh, pre-disciplinary hearing.

7. On the morning of M.H.'s third and last day of ALC, he brought a soda into the ALC, and this act is against the rules. Ms. Fuller told him this was against the rules, and although M.H. did not like it, he took his soda to the principal's office, so he could pick it up later.

8. When Grievant arrived in the ALC, Ms. Fuller told him of M.H.'s continued cursing, and asked Grievant if he wanted to extend M.H.'s stay in the ALC. Grievant wanted to give M.H. another chance. Ms. Fuller also questioned whether M.H. should be allowed to attend the Halloween party the next day. This remark upset M.H.

9. After lunch, M.H. asked Grievant if he could have his soda, and Grievant said he could. (See footnote 6) M.H. picked up it up from the office, hid it in his jacket, and took it to the ALC. When Ms. Fuller discovered M.H. had the soda again, and found out Grievant gave him permission to have the soda which was against the rules, she became upset. She called to the principal's office for someone to come get the soda. By the time Assistant Principal Durham came to get the soda, M.H. had given Ms. Fuller the soda, and she had put it away for later use.

10. Grievant and Ms. Fuller discussed Grievant's granting M.H. permission to have the soda, and Grievant noted M.H. was "playing" them, and that he had not paid enough attention to M.H.'s request to get the soda.

11. There was one other student in the ALC that day, E.M. He began to instigate trouble, saying, "Man, if I'd paid for a soda, they wouldn't take it away from me."

12. E.M. was told to "hush", but he continued to make these type of remarks and M.H. became further agitated. (See footnote 7)

13. M.H. began to curse. He got up out of his seat, walked toward the door, and said he was going to the office. He said he wanted to be suspended, and these people couldn't tell him what to do.

14. Grievant stepped into M.H.'s path, which blocked the way to the exit, and told him to sit down. M.H. came up to Grievant with his fists cliched and down at his sides. He indicated he was leaving, and he continued to curse.

15. Grievant and M.H. engaged in an argument with raised voices, mainly consisting of

Grievant telling M.H. to sit down, and M.H. saying he was leaving and cursing. Grievant also told M.H. to calm down and noted there was only a portion of the day left. Neither party backed down, and neither party stopped arguing. 16. During this confrontation, Ms. Fuller told Grievant several times he should take a walk, and she told M.H. to sit down. Both parties ignored her. (See footnote 8)

17. The phrase, "take a walk" is used among staff to indicate they need to leave the situation and cool off.

18. M.H. then got within two feet of Grievant, and he told Grievant to "suck his dick."

19. Grievant had a "reaction" to this phrase, and grabbed M.H.'s upper arms and tried to walk him backwards to his chair. (See footnote 9)

20. While Grievant was physically directing M.H. toward his chair, M.H.'s foot accidently caught the chair, and Grievant and M.H. fell down. While on the floor, Grievant continued to hold on to M.H. Ms. Fuller told Grievant to get up.

21. Grievant then hauled M.H. up, by either his shirt or his jacket lapels, and he placed him in a chair. M.H. bounced back up, and started cursing even louder and punching the walls.

22. Just as Ms. Fuller was getting ready to call the office with her cell phone, Assistant Principal Durham appeared at the door of the room, and Grievant and/or Ms. Fuller told Assistant Principal Durham to take M.H. to the office.

23. Ms. Fuller accompanied Assistant Principal Durham to the office, and M.H. went down the hall punching and kicking the walls and cursing. 24. When Ms. Fuller returned to the room, she stayed with E.M. while Grievant went to the office to talk to the principal.

25. For reasons unknown to Ms. Fuller, Grievant had excused E.M. early from the ALC, and E.M. was to spend the last period in Grievant's room.

26. Grievant received his suspension letter the following day at school. (See footnote 10) **The letter directed Grievant to leave the premises immediately. He came to the ALC to tell Ms. Fuller of his suspension. He also called Ms. Fuller numerous times at home over the next few days. Ms. Fuller spoke to Grievant once, and then did not return his repeated calls, but did listen to his messages. Some of these messages appeared to blame Ms. Fuller for the events of October 30, 2000.**

27. Grievant repeatedly testified during the pre-disciplinary hearing, that M.H. was not

angry with him, but M.H. was upset with Ms. Fuller. Grievant also repeatedly testified he was not upset with M.H.

28. Contrary to Grievant's testimony, his evaluations rated him as satisfactory or "Meets Standards" not excellent.

29. Prior to this incident, Grievant had been charged with engaging in inappropriate physical contact when disciplining students. The investigation into these alleged actions was inconclusive, but the investigation did find Grievant had used inappropriate language in front of students. On May 15, 2000, Grievant and Superintendent Ronald Duerring signed an agreement on the issues surrounding the prior investigation. This agreement noted Grievant had been previously investigated for similartypes of behaviors, and no charges had been proven. The agreement stated Grievant was to complete the rest of the school year as a homebound teacher, and if he did not find another position he could return to the Cabell Alternative School; he may be monitored by the principal; he was required to see Dr. William Mullet, the Lead Counselor "for such counseling as Dr. Mullet may deem necessary"; and Grievant was "to conduct himself in a professional and appropriate manner with all students at all times and understands that failure to do so may result in disciplinary action." Resp. Ex. No. 6, at pre-disciplinary hearing.

31. Contrary to Grievant's testimony, the "One Hand Wrist Grab Release" technique described on page 14 of CPI's Participant Workbook, entitled "Nonviolent Crisis Intervention" is not a technique to utilize in restraining aggressive individuals, but is a technique to effect release from a one hand grab by an aggressive individual. (Emphasis Added.) Grt. Exhibit Number 1, Level IV.

32. The grab Grievant stated he used on M.H. is not described in CPI's Participant Workbook, entitled "Nonviolent Crisis Intervention" and was identified by Grievant as a "bar arm", a wrestling move. Grt. Exhibit Number 1, Level IV, and testimony of Grievant at pre-disciplinary hearing.

33. The grab Ms. Fuller stated Grievant used on M.H. is not described in CPI's Participant Workbook, entitled "Nonviolent Crisis Intervention". Grt. Exhibit Number 1, Level IV.

34. The CPI booklet and Grievant's witnesses explained the key is to de-escalate the

situation, and to touch students only when there is a danger, to self or others. 35. M.H. has physically acted out at school in the past.

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 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. 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 testimony of the witnesses is 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 disciplinary action presented by Ms. Fuller was diametrically opposed to Grievant's testimony 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.

In applying these factors to Ms. Fuller's testimony, the undersigned Administrative Law Judge makes the following assessments. Ms. Fuller did not appear before the undersigned Administrative Law Judge so her testimony must be judged from the pre- suspension hearing transcript, and the written summary of the interview conducted on November 2, 2000, shortly after the incident. Ms. Fuller communicated clearly, no evidence was presented to indicate Ms. Fuller was lacking in honesty or untruthful; she was not a party to this action, only a witness; and there was no suggestion she had any reason or interest in altering her testimony. The statement of November 2, 2000, and her testimony at the pre-disciplinary hearing were consistent; there was no evidence to any misstatement of fact; and her information was plausible.

In judging Grievant's statements, the undersigned Administrative Law Judge makes the following findings: Grievant's demeanor was quite anxious, but this behavior would be appropriate given the importance of the outcome of the hearing. Grievant told his story in "fits and starts" and his explanation of the events was frequently confusing, especially at the pre-

disciplinary hearing. Of course, Grievant was interested in the outcome of this grievance.

Grievant's testimony was inconsistent on many points. For example, at the pre-disciplinary hearing Grievant stated M.H. was 5' 3" to 5' 4" and weighed 130 pounds. At the Level IV hearing, Grievant stated M.H. was 5'7" to 5'8" tall and weighed 140 to 150pounds. At the pre-disciplinary hearing Grievant stated he did not know M.H. At the Level IV hearing, Grievant stated he knew M.H. had a propensity to throw chairs when he was upset. At the Level IV hearing, Grievant stated the hold he used on M.H. was in the CPI manual and was an approved hold pictured in the booklet. This is not true. At the pre- disciplinary hearing Grievant stated he used a wrestling hold on M.H. Grievant stated he acted to protect E.M. as well as himself, but he also stated E.M. got out of the way. Grievant's testimony also varied about the position of M.H.'s hands during the encounter. Grievant also stated he gave M.H. his space, but it is clear Grievant moved into M.H. path, and this action blocked M.H.'s route out of the room.

As for whether Grievant's statements were plausible, some clearly were not. He constantly stated M.H. was not upset with him, but was upset with Ms. Fuller. It is hard to believe M.H. would get in Grievant's face and tell him to "suck his dick" if he were not upset with Grievant. Again it is not plausible to believe you have given someone their space when you approach them and block their path out of the situation. Further, it is just not plausible that this relatively small student was going to grab and throw a chair with one arm in the confined space of the ALC. Additionally, Grievant stated after he and M.H. fell to the floor, M.H. smiled at him, and then he got up and turned his back on this student he believed a few seconds before to be a threat and a chair thrower. It is much more believable that he picked M.H. up by his lapels and placed him in the chair as had been his original intent. Accordingly, the undersigned Administrative Law Judge finds Grievant's testimony to be less than credible on key points.

<u>II. Hearsay</u> **On January 3, 2001, the day before the pre-disciplinary hearing, Grievant's attorney, asked E.M. some questions.** **(See footnote 11)** **Ahmed Whitten, a teacher's aide, was present at Grievant's attorney's request. Also present in the room was the school counselor, Dr. Terry Novak. These two individuals then testified at pre-disciplinary hearing about what E.M. said in this meeting. The testimony of Mr. Whitten and Dr. Novak agreed on major points,**

but disagreed on the how E.M. described the incident. This testimony 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).

E.M.'s statement to Grievant's attorney were verbal, unsworn, and he stated he would not attend the hearing and would not talk if the interview were recorded. No signed statement of any kind resulted from this meeting. E.M. was not subpoenaed by Grievant at Level IV, and no reason for this failure was given. As previously stated, E.M.'s account of the events differs from the sworn testimony on Ms. Fuller, Grievant, and M.H. For example, E.M. did not remember Grievant and M.H. falling to the floor. E.M. did remember Grievant grabbing M.H. by the lapels after M.H. had been the aggressor. E.M. was not sworn and not subject to cross exam. He did not describe the event in words, but acted out what he saw. Given this set of factors E.M.'s statement is entitled to little to no weight.

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 a 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.**

It is not necessary for Respondent to label an employee's behavior, but it is essential the employee know what the charges are. Grievant did not assert he was unaware of the reason for his suspension. 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

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 had received training on methods to use when relating to an angry student. The keys are to de-escalate the situation, give the student his space, and remain non-confrontational. In training, staff are taught to never "square up" their body position with the student and to not get involved in a "power struggle". Grievant had many years of experience in dealing with at-risk students in alternative schools across the country, and he knew what type of behavior was expected of him in regard to his interactions with the students in his charge. The educational course work, experience, and training he received clearly notified Grievant what types of actions were inappropriate and were not allowed in the classroom setting.

A review of the facts demonstrates Grievant's behavior was confrontational in this encounter. It is clear that M.H. was acting inappropriately in getting in his teacher's face, continuing to curse, and refusing to take a seat. The undersigned Administrative Law Judge can understand how this set of circumstances would be frustrating and upsetting; however, the undersigned Administrative Law Judge finds Grievant acted inappropriately. Grievant's decision to disregard the explicit directions given to him in his CPI training and by his supervisor about how to deal with discipline and difficult situations in the classroomconstitutes insubordination. Thus, KCBOE 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 act in a threatening manner when relating to students and to use the de-escalation techniques taught in CPI training. Additionally, Grievant has many years of experience, a degree in special education, and is close to completing his masters in special education. He is should to be knowledgeable about relating to troubled youth and skilled in dealing with at-risk students. The fact he treated M.H. in the manner described must be considered a "knowing and intentional" act. KCBOE has proven the offense of willful neglect of duty. See Brown, supra.

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). "A preponderance of the evidence is evidence 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. 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).

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-CharlestonHealth 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 has proven the charges of insubordination and willful neglect of duty. Grievant did not act to de-escalate the situation, engaged in a power struggle, and used unnecessary physical force in his interaction with M.H.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha 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 Boardnor 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.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: July 27, 2001

Footnote: 1

The parties agreed to the submission into evidence at Level IV of Ms. Sandra Fuller's statement, taken on November 2, 2000, and the transcript of the pre-disciplinary hearing. The statement of Ms. Fuller was unsworn, but the parties did not object to this deficiency.

Footnote: 2

At the pre-disciplinary hearing, Grievant was represented by Attorney Charles Donnelly and Rosemary Jenkins from the West Virginia Federation of Teachers. Respondent was represented by KCBOE's General

Counsel, Attorney James Withrow. At Level IV Grievant was represented by Mr. Donnelly's partner Mark Carbone, and Ms. Jenkins.

Footnote: 3

CPI is the acronym for the Crisis Prevention Institute. This group teaches non- violent crisis intervention, and training on de-escalating and resolving crisis situations. Included in this training is how to talk to upset individuals to decrease anxiety, and how to control individuals who pose a threat of physical violence.

Footnote: 4

In keeping with the Grievance Board's policy, the names of minor students are not used, only the initials.

Footnote: 5

Ms. Fuller stated M.H. was small, approximately 4' 10". During the pre-disciplinary hearings Grievant testified that M.H. was 5' 3" to 5' 4" and 130 to 140 pounds. At the Level IV hearing, Grievant stated M.H. was 5' 7" to 5' 8" tall and weighed 140 to 150 pounds.

Footnote: 6

Grievant stated he thought M.H. was just kidding when he asked for the soda.

Footnote: 7

Prior to that day, M.H. had been the only student in the ALC, and he had been no trouble. Grievant believed M.H.'s actions may have occurred because M.H. was trying to "show off" for E.M.

Footnote: 8

Grievant testified he did not hear Ms. Fuller say anything until he and M.H. were on the floor.

Footnote: 9

Grievant's testimony is he grabbed one of M.H.'s forearm and reached for the other. The term "reaction" is Grievant's term for his response to this phrase.

Footnote: 10

Grievant was initially suspended pending an investigation into the events.

Footnote: 11

The Hearing Examiner at a pre-disciplinary hearing has no subpoena power.