TAMELA BIERER,

Grievant,

v. **Docket No. 01-19-595**

JEFFERSON COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Tamela Bierer (Grievant), employed by the Jefferson County Board of Education (JCBE or Respondent) as a teacher, filed a grievance directly to level four, as is permitted by W. Va. Code § 18-29-4(c), following her dismissal, effective November 28, 2001. Grievant alleges JCBE acted in violation of Department of Education Policies 5300 and 5310, and W. Va. Code §§ 18A-2-12 and 18A-2-2. She requests reinstatement with back pay, benefits, and attorney fees.

An evidentiary hearing was conducted on February 26, 2002, for the purpose of supplementing the extensive record previously developed. Grievant was represented by Daniel C. Staggers, Esq. of Staggers and Staggers, and JCBE was represented by Claudia W. Bentley, Esq. of Bowles Rice McDavid Graff and Love. The matter became mature for decision upon receipt of final post-hearing submissions on or before April 8, 2002.

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

Findings of Fact

1. Grievant has twenty years of teaching experience, and has been employed by JCBE since 1989. Grievant was most recently assigned to teach third grade at North Jefferson Elementary School at Kearneysville, West Virginia. 2. JCBE policy on “Lesson Planning” emphasizes the benefit and need for good planning to ensure good teaching, by both the regular and substitute teachers. The policy requires, in part:

-Teachers are required to prepare written lesson plans which will be adequate to serve their needs, or those of a substitute in case such is needed.

-Plans shall be available at least one week in advance.

-Plans shall be checked periodically.

In addition, JCBE provides a lesson plan checklist which provides a more detailed accounting of what information is to be included in lesson plans.

3. During the 1989-1990 school year, Grievant was assigned to Blue Ridge Elementary School (BRES). On February 7, 1990, Principal W. Michael Martin completed an observation of Grievant as part of the evaluation process. Mr. Martin noted deficiencies relating to lesson plans and inadequate visual stimulation in his written summary. Grievant's lesson plans for the current and prior week were deemed unsatisfactory. Specifically, Reading plans were non-existent, while Math plans were minimally completed for one week, and non-existent the second. Page headings were not completed, and he found it extremely difficult to determine for which week the plans were written. The principal advised Grievant that she was to turn in copies of her completed lesson plans every Monday morning.

4. On February 28, 1990, Principal Martin “recommended with reservations” that Grievant be re-employed with a second probationary contract. The reservations were to be included on the back of the recommendation, but none are included on the record copy. 5. Mr. Martin provided Grievant with her end of year evaluation on March 6, 1990. The evaluation form rated employees on thirty-six factors grouped in seven areas, including instructional management and professional work habits. Employees were rated from one (Low) to five (High), and written comments could be included. Grievant was predominately ranked as average. Comments included by Mr. Martin were that Grievant was demonstrating improvement in lesson planning, and her official attendance register was also showing improvement in accuracy. However, documentation of student grades was found to not meet the minimum guidelines required by county policy.

6. Grievant was unable to produce lesson plans when requested by Principal Martin on April 9, 1990, resulting in a letter memorializing the matter being placed in her file. Mr. Martin noted in the document that Grievant appeared to revert to her unacceptable lesson planning practices, and reminded her that the plans were to be completed at least one week in advance.

7. During the 1990-1991 school year, Principal Martin noted on the October 2, 1990 observation form that Grievant had demonstrated improvement in lesson planning. On February 11, 1991, Mr. Martin noted that Grievant had complete lesson plans for that week, but there were “considerable gaps in previous months.”

8. On February 19, 1991, Sherry S. Hetzel, Coordinator of Elementary Education, visited Grievant's classroom and learned that both her plan book and grade book were at home. Grievant was directed to again submit her plans to the school principal each Monday morning, to be kept at school. 9. Lesson plans were found acceptable again on February 28, 1991, but Mr. Martin noted that some were very explicit while others listed only teacher manual pages, and suggested that a “happy medium” be discussed.

10. In March 1991, Mr. Martin recommended without reservations that Grievant be re-employed with a third probationary contract. Her end of year evaluation was generally average or above, but her weakness in preparing lesson plans was again noted.

11. During the 1991-92 school year, Mr. Martin observed Grievant's lesson plans were incomplete on December 9, 1991. A mid-year evaluation completed on December 11, 1991, noted Grievant's continued failure to comply with county policy regarding lesson plans.

12. Grievant was placed on an improvement plan on December 11, 1991, for the purpose of assisting her with the development and completion of lesson plans.

13. By letter dated February 18, 1992, Mr. Martin notified Grievant that while reviewing her lesson plans for that week, he found the plans for Math and Handwriting were identical to those for the previous week. He stated that a similar incident on February 3 had been considered accidental, but the repeated incident would be considered intentional.

14. Associate Superintendent George R. Frame met with Grievant on February 20, 1992, and followed up with a letter stating the serious nature of the situation, and advising her that any recurrence of her failure to comply with the improvement plan could result in a recommendation that she be suspended or her employment terminated.

15. On March 6, 1992, Mr. Martin recommended without reservation that Grievant be awarded a continuing contract. 16. Grievant's end of year evaluation, dated March 9, 1992, was generally satisfactory. Mr. Martin noted that she was making progress with her improvement plan, but that it had been extended to allow her to meet all the objectives.

17. During the 1992-1993 school year, Mr. Martin's first inspection of Grievant's lesson plans on September 3, 1992, revealed that she had none. Plans submitted on September 4, 1992, were found to be satisfactory.

18. An observation form dated October 6, 1992, noted that Grievant was submitting lesson

plans in compliance with county policy; however, on October 28, 1992, Mr. Martin found incomplete lesson plans for the period of October 12 through October 30, 1992.

19. On April 1, 1994, Mr. Martin completed Grievant's annual evaluation, on which he rated her satisfactory in all areas. Comments included that lesson plans had been available for review during observations, and that he would be monitoring Grievant's punctuality in reporting to work.

20. Mr. Martin advised Grievant by letter dated November 28, 1994, that he again found her current lesson plans to be duplicates of those submitted the prior month.

21. Grievant called BRES on January 4, 1995, to report that she would be late. Grievant's students had been unsupervised for approximately twenty-one minutes. This was Grievant's third incident of tardiness.

22. Grievant's May 18, 1995 evaluation noted that her lesson plans were completed for that week, but that Principal Martin would require a more traditional format the following year. 23. November 13, 1995, Grievant was unable to produce lesson plans for that week. Mr. Martin advised Grievant that he would recommend a one-day suspension, without pay, and that she be placed on an Improvement Plan. JCBE subsequently upheld the suspension.

24. Grievant's evaluation for the 1995-1996 school year was satisfactory in all areas with the exception of “Instructional Management System” and “Professional Work Habits.” Both areas were rated unsatisfactory due to Grievant's ongoing problems with lesson plans.

25. An observation form completed by Mr. Martin on October 23, 1995, stated that Grievant's “plans are completed in all subject areas one week in advance.” However, on November 13, 1995, he found that Grievant “was unable to provide me with any evidence of prior planning for the current week.” He further noted that the last entry in her plan book was for the week of October 23.

26. Grievant's evaluation for 1995-1996 once again indicated her performance was satisfactory in all areas, with the exception of those which included lesson plans.

27. Grievant was placed on a plan of improvement on March 20, 1996, effective April 1 through June 6, 1996, to again assist her with the production of lesson plans. Grievant was determined by the improvement team and Mr. Martin to have successfully completed this second plan of improvement.

28. An observation form completed November 20, 1996, and Grievant's annual evaluation, dated April 14, 1997, both indicate satisfactory completion of lesson plans.

29. On November 5, 1997, Mr. Martin noted on an observation form that Grievant was

providing detailed lesson plans one week in advance. 30. By letter dated December 12, 1997, Mr. Martin advised Grievant that he would recommend the termination of her employment to the Superintendent, based upon deficiencies in her lesson plans noted on December 1, and not corrected by December 8. The concerns cited by Mr. Martin included the failure to produce any plans in a number of subject areas, the plans for Reading were from February 1997, and the untimeliness of the plans. Examples provided included “Letter to Santa” on September 22, “Presidents' Day” on December 1, “Thanksgiving Break” on September 9, “when March comes in like a lion” on November 20, and a “shamrock activity” on November 24.

31. Superintendent David Markoe agreed with Mr. Martin, and recommended Grievant's dismissal to JCBE. Following a hearing on the matter, JCBE declined to terminate Grievant's employment, but suspended her without pay from February 26, 1998, for the remainder of the 1997-98 employment term. JCBE further determined that if Grievant returned to work for the 1998-99 school year, she was to be placed on an improvement plan, and that any violation of the plan was to be immediately brought to the attention of the board.

32. Grievant returned to work in August 1998 at North Jefferson Elementary School at Harpers Ferry, and was provided an improvement plan for the first semester. In March 1999, the improvement team members concluded that Grievant had successfully completed the plan of improvement.

33. On or about February 26, 2001, Charles Hampton assumed the position of principal at North Jefferson Elementary School. By memorandum dated August 17, 2001, Mr. Hampton memorialized a conversation held with Grievant earlier in which he advised her that he had disposed of rugs in her classroom. He explained that the action was takenbecause the rugs were in poor condition, dirty, and had a terrible odor. He additionally commented that in May 2001, he had personally removed three large garbage cans full of plastic coffee cups from Grievant's classroom. The cups were collected from around the room, and he stated that old drink was in some of them, with mold growing in the cups. He requested that Grievant cooperate in keeping a clean learning environment.

34. The Jefferson County Health Department has identified a number of maintenance deficiencies at several schools since 1990. In January 2002, North Jefferson was determined to be in minimal compliance with environmental standards.

35. On September 10, 2001, Mr. Hampton reminded Grievant in writing that she had acted

inappropriately when she removed the lock from an outside door to have a key made. No disciplinary action was taken as a result of Grievant's action.

36. On September 12, 2001, Mr. Hampton noted in a memorandum to Grievant that he had observed many soda cans stacked on her counter and many items piled on top of the heat and air unit. Many other boxes, some empty, were observed stacked around the room. The principal additionally noted a “strong odor” in the classroom, and stated that he would continue to explore the source of that problem. Grievant was given until September 17, 200l, to remove the empty boxes and cans.

37. Mr. Hampton issued another memorandum to Grievant, dated September 14, 2001, in which he advised her that he had discussed the lock incident with Superintendent Romine. He reiterated that the action was inappropriate, and expressed hope that she would act in a more responsible manner in the future.

38. Mr. Hampton conducted an observation, as part of the formal evaluation process, of Grievant's classroom performance on October 26, 2001. The observationlasted approximately twenty minutes, and he did not complete a post observation conference with Grievant.

39. On October 28, 2001, Mr. Hampton notified Grievant, via memorandum, that he had observed soda cans around her sink and in a cabinet, roaches in the room, and ants crawling on her desk. He noted that a dead fly was in an open salad dressing container, as well as wilted carrots. He again perceived a strong odor in the classroom. He directed that the soda cans, old food, and other items which were garbage, be removed from her room immediately. This memorandum was placed in Grievant's personnel file.

40. Concerns regarding lesson plans and grades were addressed by Mr. Hampton in a November 6, 2001 memo to Grievant. Specifically, he cited dates there were no subject area plans. Regarding grades, he noted only five math grades, with no average recorded, no handwriting grades, and the consolidation of Social Studies, Science, and Health, with only three grades for all three subjects, and no average.

41. Superintendent Romine notified Grievant by letter dated November 14, 2001, that he would recommend her dismissal to JCBE. The reasons for the dismissal were stated as follows:

Mr. Hampton, Principal at North Jefferson Elementary School, has brought to my attention serious concerns with your performance, specifically regarding lesson plans, grading and classroom

environment. Regarding lesson plans and grading, lesson plans are missing, at times repetitive and do not reflect the instruction to occur. The number of grades recorded in your grade book is inconsistent with Jefferson County Schools' grading policy. The lesson plan book and instruction reflected therein is inconsistent with the schedule you submitted to the Board Office.

Regarding classroom environment, your classroom is dirty despite requests that you remove drink and food remains,and there is an offensive odor reported. These matters have been brought to your attention through memos, observations and conferences with Mr. Hampton this school year. Concerns regarding lesson plans, instructional time and grading have been brought to your attention several times previously and have been addressed in evaluations and improvement plans. In fact, similar concerns have resulted in two (2) prior suspensions without pay.

Based upon these serious concerns, and in consideration of the repeated opportunities you have had to correct your performance, your are hereby suspended with pay effective immediately. I will recommend that the Board of Education confirm this suspension with pay at its Board meeting on November 28, 2001, at 7:00 p.m., in the Board of Education offices.

At this same Board meeting, I will be recommending your dismissal to the Board of Education. . . .

42. The Superintendent's recommendation that Grievant be dismissed was approved following a hearing conducted by JCBE, and was effective November 28, 2001.

Discussion

In disciplinary matters, the employer bears the burden of proving 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. ofEduc., 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).

W. Va. Code §18A-2-8 identifies the types of action 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.

While Superintendent Paine did not include any of the above statutory terms as reasons for Grievant's dismissal, JCBE asserts that the charges constitute “willful neglect of duty” and/or “insubordination.” Noting the multiple opportunities to improve her performance, JCBE concludes that the termination of Grievant's employment was well- founded, reasonable, and procedurally appropriate. Grievant argues that the dismissal was improper in that Principal Hampton did not complete an observation form, and she was not given a plan of improvement, as is required by W. Va. Department of Education Policies 5300 and 5310. First, it must be determined whether Grievant's behavior substantiates the charges of willful neglect of duty or insubordination. If the evidence supports Grievant's contention that her behavior was simply unsatisfactory performance, it must then be determined whether JCBE followed the proper procedure when terminating her employment.

Insubordination involves the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Riddle v. Bd. of Directors/So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). In order to establish insubordination, an employer must demonstrate that a policy or directive that applied to the employee was in existence at the time of the violation, and the employee's failure to comply was sufficiently 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). "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).

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. Unsatisfactory performance is addressed in W. Va. Code § 18A-2-12, which states, in pertinent part:

A professional whose performance is deemed to be unsatisfactory shall be given notice of deficiencies. A remediation plan to correct deficiencies shall be developed by the employing county board of education and the professional. The professional shall be given a reasonable period of time for remediation of the deficiencies and shall receive a statement of the resources and assistance available for the purposes of correcting the deficiencies.

State Board of Education Policy No. 5300 provides that teacher evaluations are to be conducted on a regular basis, that evaluations be “open and honest”, and that the teacher “be given an opportunity to improve deficient performance prior to any adverse personnel actions.” State Board of Education Policy 5310 requires that this opportunity to improve be formally provided in the form of an improvement plan which is “implemented in a manner consistent with the goal of raising the deficient performance to an acceptable level.” See Jones v. Braxton County Bd. of Educ., Docket No. 00-04-220 (Dec. 29, 2000); Rosenau v. Tucker County Bd. of Educ., Docket No. 99-47-192 (Oct. 28, 1999).

As is apparent from the foregoing definitions, the factor which distinguishes willful neglect of duty and insubordination from unsatisfactory performance is that the employee knows her responsibilities, and is competent to perform them, but elects not to complete them. When an employee's performance is unacceptable because she does not know the standards to be met, or what is required to meet the standards, and her behavior can be corrected, the behavior is unsatisfactory performance.

Grievant offers explanations for many of the specific incidents cited by JCBE. Regarding the cleanliness of her room, she was collecting cans for recycling, the old saladwith the dead fly was left on a day she was experiencing car trouble and had to leave school abruptly, and the custodian had not cleaned her room over the summer. Some grades and lesson plans were home on her computer. Grievant also opines that Mr. Hampton had a personal bias against her from their previous employment at another school. However, Grievant does not deny that she knew exactly what was expected of her in regard to these matters.

Grievant argues that she had successfully completed her most recent plan of improvement approximately four years earlier, and that JCBE may not consider prior plans when imposing a subsequent discipline. However, the Grievance Board has held that it is appropriate for a board to consider an employee's past performance evaluations, improvement plans, disciplinary actions, and warning letters, as well as the reoccurrence or continuation of identified problems when determining a disciplinary action. This review can establish an employee was on notice of her unacceptable behavior, and that a continuing patter of behavior is present which has proven not correctable. See Williams v. Cabell County Bd. of Educ., Docket No. 95-06-325 (Oct. 31, 1996).

The two suspensions and three plans of improvement she completed clearly notified Grievant what was to be included in the lesson plans, and when they were to be available for review. The successful completion of the plans of improvement further establish that Grievant was competent in developing the plans. Because Grievant demonstrated that she could complete the lesson plans, her failure to do so shows a disregard for her responsibilities, and constitutes willful neglect of duty and/or insubordination.

It is not necessary that Grievant be given a plan of improvement for every deficiency. A directive to clean her room was simple and straightforward, and does not require assistance from a team of one's colleagues to complete. The request that Grievant keep her room free of old food or other items which would attract insects and cause odors was certainly appropriate, given the evaluation of the facility by the county health department. Grievant's failure to keep her room clean was also willful neglect of duty and/or insubordination.

Finally, recording student grades in the official grade book is a basic duty performed by all teachers, and the failure of Grievant, who has nearly twenty years of teaching experience, to do so constitutes willful neglect of duty and/or insubordination.

The foregoing findings of fact and discussion is supplemented with the following formal conclusions of law.

Conclusions of Law

1. An employer must establish the charges in a disciplinary matter 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); Froats v. Hancock County Bd. of Educ., Docket No. 91-15-159 (Aug. 15, 1991).

2. A county board of education possesses the authority to terminate an employee, but this authority cannot be exercised in an arbitrary and capricious manner. W. Va. Code §18A-2-8; See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995).

3. 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).

4. It is not necessary for a board of education to identify an employee's offenses by the exact terms utilized in W. Va. Code § 18A-2-8, as long as the required written notice of charges specifically identifies the alleged acts of which the employee is accused.

5. Insubordination, willful neglect of duty, and unsatisfactory performance, are among the causes listed in W. Va. Code §18A-2-8 for which an education employee may be disciplined. See Rovello v. Lewis County Bd. of Educ., 181 W. Va. 122, 381 S.E.2d 237 (1989); Beverlin v. Bd. of Educ., 158 W. Va. 1067, 216 S.E.2d 554 (1975); Woo v. Putnam County Bd. of Educ., Docket No. 93-40-420 (June 2, 1994), aff'd 202 W. Va. 409, 504 S.E.2d 644 (1998); Jones v. Mingo County Bd. of Educ., Docket No. 95-29-151 (Aug. 24, 1995).

6. Insubordination includes "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).

7. "Insubordination encompasses more than an explicit order and 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 20, 1988), aff'd 182 W. Va. 294, 387 S.E.2d 529 (1989).

8. 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.Graham v. Putnam County Bd. of Educ., Docket No. 99-40-206 (Sept. 30, 1999); 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).

9. "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.

10. It is proper to review an employee's past performance evaluations, Improvement Plans, and disciplinary actions and warning letters, as well as the reoccurrence or continuation of identified problems when deciding whether the disciplinary action was appropriate. This review can establish an employee was on notice of his inappropriate behavior, and that a continuing pattern of behavior is present which has proven not correctable. See Williams v. Cabell County Bd. of Educ., Docket No. 95-06-325 (Oct. 31, 1996).

11. JCBE proved by a preponderance of the evidence that Grievant's failure to produce lesson plans constitutes "willful neglect of duty" and/or “insubordination.”

Accordingly, the grievance is **DENIED**.

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

Date: May 17, 2002 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE