BETTY ANN MITCHELL,

Grievant,

v. **Docket No. 02-52-417**

WETZEL COUNTY BOARD OF EDUCATION,

Respondent.

DECISION

Betty Ann Mitchell ("Grievant") filed this grievance at level four on December 16, 2002, challenging a three-day suspension for incompetence and willful neglect of duty. She seeks reversal of the suspension and reimbursement for lost wages, seniority and benefits. A hearing was held in the Grievance Board's office in Wheeling, West Virginia, on February 10, 2003. Grievant was represented by Owens Brown of the West Virginia Education Association, and Respondent was represented by counsel, Larry W. Blalock. This matter became mature for consideration upon receipt of the parties' fact/law proposals on March 11, 2003.

The following findings of fact are made based upon a preponderance of the credible evidence of record.

Findings of Fact

___1. Grievant has been employed by Respondent Wetzel County Board of Education ("WCBOE") for 22 years, most recently assigned as a math teacher at Paden City High School. 2. Grievant was on sick leave at the beginning of the 2002-2003 school year. Amy Littell substituted for Grievant from September 23 through October 11, 2002.

3. In Grievant's classroom, table and chair combinations are used in lieu of individual desks. The tables and chairs are attached to one another and to the floor by bolts and screws, and they are made from a combination of wood and steel.

4. When Grievant returned to work on October 14, 2003, there was writing on the back wall of her classroom, which had apparently been put there by students.

5. By October 28, 2002, there were at least a dozen separate areas containing handwriting or markings on the wall of Grievant's classroom. The writing contained negative remarks about Grievant and Mrs. Littell and included a “666" marking.

6. Rather than removing them or asking to have the marks removed from the wall, Grievant wrote over some of the writing with a black magic marker.

7. On October 28, 2002, Grievant worked until approximately 12:00 noon, then left for a doctor's appointment.

8. Upon opening the room for the substitute and students in Grievant's seventh period class on October 28, Principal Warren Grace discovered the markings on the wall for the first time, including the areas of black magic marker made by Grievant. In addition, there was a large hole (approximately six inches in diameter) in the wall immediately adjacent to the “666" marking.

9. In a meeting with Principal Grace on November 4, 2002, Grievant admitted to writing on the wall with black magic marker, in order to cover the statements students had made about herself and Ms. Littell. The students' original markings were made in pen and/or pencil, and Grievant did not know who had made them. 10. When confronted regarding the hole in the wall, Grievant stated that one of the chairs had been “kicked into the wall”, and she did not know how that had occurred. She stated that she and a student had forcibly pulled the chair out of the hole afterwards, and this had occurred between morning classes on October 28, 2002. Grievant also said that she was going to report the damage to Mr. Grace when she returned to work on October 29.

11. Two custodians who were assigned to repair the damage to Grievant's classroom attempted to determine what made the hole in the wall. Upon testing to see of any of the chairs in that area could have made the hole, they determined that it was not possible. The chairs are attached to a base, and no part of any of the chairs made contact with the part of the wall where the hole was made.

12. On October 31, 2002, one of the large tables in Grievant's classroom fell to the floor after a student had loosened twelve bolts holding its pedestal to the floor. The bolts had been loosened using tools which were later discovered hidden under a cabinet in the classroom. Grievant did not see the student loosen the bolts or bring tools into the classroom. No students were injured when the

table fell.

13. At the time of the events described above, Grievant was on an improvement plan for teaching deficiencies, including unsatisfactory classroom management skills.

14. WCBOE's cost for repairing the damage to the wall, painting, and replacing the pedestals for the table was over $300.

15. WCBOE suspended Grievant for three days without pay for willful neglect of duty and incompetence as a result of the damage in her classroom.

Discussion

In a disciplinary matter the burden is upon the Board to prove the charges against the employee by a preponderance of the evidence. W. Va. Code § 18A-2-8. Perkins v. Greenbrier County Bd. of Educ., Docket No. 94-13-019 (Aug. 12, 1994). 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 (See footnote 1) and must be exercised reasonably, not arbitrarily or capriciously. Rovello v. Lewis County Bd. of Educ., 181 W. Va. 122, 381 S.E.2d 237 (1989); Bell v. Lincoln County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991); Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995).

In the instant case, WCBOE contends that Grievant's actions constitute willful neglect of duty and incompetence. Grievant had been placed on an improvement plan due, in part, to problems with her classroom management techniques. Respondent argues that, even if Grievant's version of events is to be believed, she was obviously inattentive to her students' conduct during class, resulting in significant vandalism to the room. In addition, Grievant has admitted to marking on the wall with black magic marker, which she argues constituted only bad judgment, rather than willful neglect of duty or incompetence.

An employer asserting willful neglect of duty “must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act.” Jones v. Mingo County Bd. of Educ., Docket No. 95-29-151 (Aug. 24, 1995). “It encompasses something more serious than 'incompetence.'” Bd. of Educ. v. Chaddock, 183 W. Va. 638,640, 398 S.E.2d 120, 122 (1990); See Wayts v. Wetzel County Bd. of Educ., Docket No. 02-52-011 (Apr. 12, 2002); Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996). Although incompetence has not been specifically defined, it has been noted that a charge of incompetency or unsatisfactory performance

may include any aspect of the job which may be reasonably expected to be performed, such as appropriate interaction with students, classroom discipline, and other assigned duties. Sinsel, supra.

Grievant's use of black magic marker on the wall cannot be characterized as negligent. Although Grievant testified that she informed Mr. Grace that the students had written on the wall when she first returned to work on October 14, Mr. Grace denies this. Nevertheless, regardless of whether the writing was previously reported, Grievant's act of marking on the wall herself demonstrates seriously impaired judgment, not to mention a deliberate, intentional act which would not be expected of a professional educator. This conduct clearly falls within the definition of willful neglect of duty.

In addition, it is also painfully obvious that Grievant was, at the very least, being less attentive to her students than she should have been, which resulted in significant damage being done to her classroom. As testified to by custodians and Ms. Littell, the students' writing on the wall increased as time went by in the fall of 2002, meaning that at least some of it must have occurred while Grievant was present in the room. Additionally, a student managed to bring tools into the classroom, hide them, and then use them to loosen bolts under the table. If Grievant was not present in the room when these events occurred, she must have left her class unsupervised for long periods of time, which would not be acceptable. As to the hole in the wall, again, students were able to cause significant damage to the room without Grievant witnessing their actions. Grievant admitted that sheinstructs many “problem” students, who would obviously need extra supervision. An important part of a teacher's duties includes classroom management and supervision of children, which, if done properly, should prevent the type of vandalism and misbehavior which occurred in Grievant's class.

Although Grievant has not requested that the punishment in this case be mitigated, it should be noted that boards of education have substantial discretion to determine a penalty in these types of situations, and the undersigned administrative law judge will not substitute her judgment for that of the employer. Cooper v. Kanawha County Bd. of Educ., Docket No. 02-20-097 (July 31, 2002); Tickett v. Cabell County Bd. of Educ., Docket No. 97-06-233 (Mar. 12, 1998); Huffstutler v. Cabell County Bd. of Educ., Docket No. 97-06- 150 (Oct. 31, 1997). In view of Grievant's already having been counseled regarding classroom management problems, along with her deliberate actions in damaging school property, the three-day suspension imposed is not clearly excessive.

The following conclusions of law support the decision reached.

Conclusions of Law

1. In a disciplinary matter the burden is upon the Board to prove the charges against the employee by a preponderance of the evidence. W. Va. Code § 18A-2-8. Perkins v. Greenbrier County Bd. of Educ., Docket No. 94-13-019 (Aug. 12, 1994).

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 amendedand must be exercised reasonably, not arbitrarily or capriciously. Rovello v. Lewis County Bd. of Educ., 181 W. Va. 122, 381 S.E.2d 237 (1989); Bell v. Lincoln County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991); Stover v. Mason County Bd. of Educ., Docket No. 95-26-078 (Sept. 25, 1995).

3. An employer asserting willful neglect of duty "must establish that the employee's conduct constituted a knowing and intentional act, rather than a negligent act." Jones v. Mingo County Bd. of Educ., Docket No. 95-29-151 (Aug. 24, 1995).

4. A charge of incompetency or unsatisfactory performance may include any aspect of the job which may be reasonably expected to be performed, such as appropriate interaction with students, classroom discipline, and other assigned duties. Sinsel v. Harrison County Bd. of Educ., Docket No. 96-17-219 (Dec. 31, 1996).

5. Respondent has proven by a preponderance of the evidence that Grievant's conduct and inadequate classroom management constitute willful neglect of duty and incompetence, justifying a three-day suspension.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Wetzel 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: March 28, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

That statute provides that an employee may be suspended or dismissed at any time for immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, a felony conviction, entry of a guilty plea or a plea of nolo contendere to a felony charge.