SANDRA HODGES,

Grievant,

v. **Docket No. 04-31-233**

MONROE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Sandra Hodges, an employee of the Monroe County Board of Education ("MCBOE"), filed this grievance on June 16, 2004, Grievant grieves her semester-long suspension and seeks to have it overturned or decreased. The Statement of Grievance indicated Respondent had violated W. Va. Code §§ 18A-2-8 and 18A-2-12a. Grievant also requests back pay and interest, reinstatement of any lost benefits, and removal of all references to the suspension from her personnel file.

As this grievance concerned a suspension, it was filed directly to Level IV. A hearing was held on August 9, 2004, at the Grievance Board's Beckley Office. (See footnote 1) This case became mature for decision on September 8, 2004, after receipt of the parties' proposed findings of fact and conclusions of law.

The parties agreed to utilize the pre-disciplinary hearing transcript instead of taking extensive testimony at the Level IV hearing. The parties also agreed that the pre- disciplinary hearing transcript and the Level IV hearing of a companion case, Johnston v. Monroe County Board of Education, Docket No. 04-31-234 should be used in this case. After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant has been employed as a regular, Special Education Aide for three years. Additionally, Grievant also served as a substitute Aide for five years.

2. Grievant has been assigned to care for BM for her entire time as a regular Aide. By her own admission, Grievant is well aware of BM's fragile medical condition. Grievant has good evaluations, and is viewed as taking good care of BM. (See footnote 2)

3. BM is 13 years old and is considered "medically fragile." He is paralyzed from the waist down, has a recurring urinary tract infection, cerebral palsy, hydrocephalus, and cannot communicate verbally. Because of paralysis, he is confined to a wheelchair and has very brittle bones. He recently fractured a femur while he was being turned/ repositioned. BM seldom cries at school and is usually calm and happy. The one day BM cried all day, the teacher called BM's father, CM, and he took the child home.

4. BM has an older brother, BBM, who is also in a wheelchair. BBM also has an aide, but she does not ride the bus home with him. BM and BBM ride the same bus. 5. On May 14, 2004, CM put his son on the bus as usual. His son was suffering from a urinary tract infection, but was calm and able to attend school.

6. During the day, the occupational therapist saw BM from 8:30 a.m. to 9:00 a.m. She noted BM was asleep until she used a cold cloth to increase his alertness. BM did not participate in any of his activities. 7. The nurse's notes for May 24, 2004, noted BM had been sleeping most of the day, but could be awakened. Although not reflected by the nurse's notes, the nurse usually visits BM around lunch time.

8. The teacher's notes for May 14, 2004, stated, "O.T. puts cool paper towel on student's face to wake him up for therapy. Otherwise student sleeps all day and snores." Exh. 2, Pre-disciplinary hearing.

9. BM lives a short distance from the school, approximately two blocks. On May 14, 2004, a substitute bus operator, Stephen Johnston, was driving BM's bus. He operated the wheelchair lift to place BM on the bus, and Grievant strapped BM's wheelchair to the vehicle. Mr. Johnston asked Grievant if she needed any assistance in strapping the wheelchair, and Grievant replied in the negative. Mr. Johnston did not check the wheelchair to see if it was properly attached to the floor of the bus.

10. Grievant was shown how to attach the restraining straps to the wheelchair by the regular bus operator, and never raised any questions about whether she had been shown the right method until this grievance was filed. Grievant believed at the time she strapped BM's wheelchair in that day that she knew the right way to perform this task. (See footnote 3)

11. Grievant did not properly place the straps on the wheelchair. 12. The bus went a short distance to a stop sign. After the stop sign, the bus operator made a left turn, and then Mr. Johnston

heard Grievant yell for help. He saw BM's wheelchair on the floor of the bus on its right side.

13. Mr. Johnston properly stopped the bus and assisted Grievant in setting the wheelchair upright. (See footnote 4)

14. Edward Looney was on the street and saw the wheelchair through the back window of the bus. It was lying on its side.

15. BM began crying after this event.

16. Grievant then restrapped the wheelchair to the floor of the bus. Mr. Johnston again asked Grievant if she had secured the wheelchair, and Grievant again answered in the affirmative. Mr. Johnston did not check the straps.

17. When the bus arrived to BM's house, CM asked Grievant what was wrong with his son. Grievant answered that she did not know, and BM had been like that all day. One of BM's left shoulder restraints was off the wheelchair and had been placed in the wheelchair with BM.

18. Mr. Johnston made no response to CM's inquiry.

19. It took BM's parents an hour to calm him down. BM's behavior after he returned home was unusual. As BM is non-verbal, he had no way to tell his father what happened on the bus.

20. That evening, Grievant called Mr. Johnston and asked if he had told CM that BM's wheelchair had fallen over. Mr. Johnston answered in the negative. Grievant askedMr. Johnston if they should report the accident, and he told Grievant it was up to her, as she knew the child, and he was just a substitute.

21. On May 20, 2004, while CM was out walking his dogs, a woman stopped him and asked him if knew that one of his children's wheelchairs had fallen over on the bus Thursday.

22. CM called BBM's aide and asked her if BBM's wheelchair had fallen over. She said no, but she would see if she could find out any information for CM.

23. At some point, CM called Grievant and asked her if anything had happened on the bus the prior week with BBM. Grievant replied no. Upon continued questioning, as to why someone would tell him that, Grievant finally told CM, BM's wheelchair had "wobbled."

24. BBM's Aide called CM back and informed him something had happened on the bus, but the child in question was BM.

25. Grievant called Mr. Johnston to tell him that CM was aware of the accident.

26. CM questioned Mr. Johnston about the incident on the afternoon of May 20, 2004, and he

told CM that BM's wheelchair had fallen over on the bus.

27. CM is an ardent advocate for his children, and he has had disagreements with MCBOE about the care BM should receive. Grievant feels intimidated by CM.

28. Contrary to Grievant's assertions, Bill Bell, the Director of Special Education, has never told Grievant not to report things to CM. He did tell her she should report facts, not opinions.

29. When Superintendent Lyn Guy found out about these events she conducted an investigation. 30. On May 21, 2004, Superintendent Guy questioned Grievant about the events. Grievant indicated either she did not strap the wheelchair correctly, or the straps did not work properly.

31. Superintendent Guy checked the straps, and they were found to be functioning properly.

32. During the conversation on May 21, 2004, Grievant informed Superintendent Guy that she had told CM when he called that the wheelchair had "tipped." On close questioning, Grievant stated that she caught the wheelchair as it was falling, and it did not "hit" the floor. Grievant told Superintendent Guy she did not tell CM because she was fearful he would be very angry. (See footnote 5)

33. During this conversation, Superintendent Guy asked Grievant if she had called Mr. Johnston, and Grievant stated she had not. As Superintendent Guy was leaving after the interview, Grievant finally admitted she had called Mr. Johnston.

34. By letter dated May 21, 2004, Superintendent Guy informed Grievant she would recommend her termination at the June 3, 2004 board meeting. Superintendent Guy noted Grievant had failed to secure the wheelchair adequately and failed to report an accident that could have been life-threatening.

35. At the June 3, 2004 board meeting, MCBOE reduced Superintendent Guy's recommendation to a one semester suspension.

Issues and Arguments

Respondent, while noting Grievant's failure to secure the wheelchair properly was a serious matter, believes the real problem was Grievant's failure to report the accident. Grievant asserts she did not report the accident because there was nothing to report. She knew BM was not injured. Grievant maintained BM was crying all day, and his behavior did not change after the wheelchair fell. Grievant also asserts she was following the directions of Mr. Bell. Grievant did not raise the issue of

following Mr. Bell's directions until the Level IV hearing.

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 Res., Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the employer has not met itsburden. 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).

I. Credibility

An issue that must be addressed is credibility. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Res., Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Res., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Res./Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993). "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 Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4)

attitude toward the action; and 5) admission of untruthfulness. 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'sinformation. (See footnote 6) See Holmes v. Bd. of Directors/W. Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.

Grievant's testimony is not credible. Grievant testified BM had crying spells all day. When confronted with the notes from the other care givers, which were completed on May 14, 2004, Grievant stated they did not see him when he was crying, and he was calm and medicated in the morning and cried in the afternoon. Further, she testified the teacher knew BM was crying. This is not what is stated in the teacher's report.

Additionally, as noted by Superintendent Guy and CM, Grievant has not been forthcoming throughout this entire series of events, including the subsequent investigation. She was asked what was wrong with BM, and she told CM, BM had been that way all day; she was asked by Superintendent Guy if she called the bus operator, and Grievant repeatedly said she did not; when CM called her, Grievant indicated nothing had happened, but then said almost offhandedly that BM's wheelchair had "wobbled." Accordingly, the testimony of Grievant is not accepted. This includes her allegation that the director of Special Education told her not to tell CM information about his children.

II. Merits

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, unsatisfactoryperformance, 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.

Respondent has charged Grievant with willful neglect of duty in relation to this incident. MCBOE must 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.

Grievant was assigned to care for a student who could not care for himself. Grievant was well aware of BM's fragile state, and reported his bones were so brittle he had broken his leg when he was being positioned. It is difficult to believe that Grievant, knowing this information, did not tell CM the wheelchair fell over. While it was lucky BM was not injured in this accident, Grievant still willfully neglected her duty when she failed to tell CM of the event. Her excuse that she did not tell because nothing happened is remiss and inappropriate.

The Findings of Fact demonstrate Grievant acted to protect herself from CM's dissatisfaction when she failed to report the wheelchair accident, and this dereliction of duty could have resulted in severe harm to BM. **III. Mitigation/Severity of Penalty**

The argument Grievant's suspension is excessive given the facts of the situation, is an affirmative defense, and Grievant bears the burden of demonstrating the penalty was "clearly excessive or reflects an abuse of the agency['s] discretion or an inherent disproportion between the offense and the personnel action." Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).

"When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997). Mitigation of a penalty is considered on a case by case basis. Conner v. Barbour County Bd. of Educ., Docket No. 95-01-031 (Sept. 29, 1995); McVay v. Wood County Bd. of Educ., Docket No. 95-54-041 (May 18, 1995). A lesser disciplinary action may be imposed when mitigating circumstances exist. Mitigating circumstances are generally defined as conditions which support a reduction in the level of discipline in the interest of fairness and objectivity, and also include consideration of an employee's long service with a history of otherwise satisfactory work performance. Pingley v. Div. of Corrections, Docket No. 95-CORR-252 (July 23, 1996). This Grievance Board has held that "mitigation of the

punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense thatit indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of the employee's conduct and the prospects for rehabilitation." Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996). Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge will not substitute her judgement for that of the employer. 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).

The undersigned Administrative Law Judge cannot find that a termination reduced to a one semester suspension was excessive, given the failure of Grievant to report a potentially life-threatening accident.

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).

2. "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 weightof 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 Res., 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).

3. A county board of education possesses the authority to suspended 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).

4. Willful neglect of duty is 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).

5. 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). 6. "Willful neglect of duty," encompasses something more serious than incompetence and connotes "a knowing and intentional act, as distinguished from a negligent act." Chaddock, supra.

7. MCBOE has met its burden of proof by a preponderance of the evidence and demonstrated Grievant is guilty of willful neglect of duty under W. Va. Code § 18A-2-8.

8. An allegation that a particular disciplinary measure is disproportionate to the offense proven, or otherwise arbitrary and capricious, is an affirmative defense and the grievant bears the burden of demonstrating that the penalty was clearly excessive, or reflects an abuse of the employer's discretion, or an inherent disproportion between the offense and the personnel action. Conner v. Barbour County Bd. of Educ., Docket No. 94- 01-394 (Jan. 31, 1995). See Martin v. W. Va. Fire Comm'n, Docket No. 89-SFC-145 (Aug. 8, 1989).

9. "When considering whether to mitigate the punishment, factors to be considered include the employee's work history and personnel evaluations; whether the penalty is clearly disproportionate to the offense proven; the penalties employed by the employer against other employees guilty of similar offenses; and the clarity with which the employee was advised of prohibitions against the conduct involved." Phillips v. Summers County Bd. of Educ., Docket No. 93-45-105 (Mar. 31, 1994). See Austin v. Kanawha County Bd. of Educ., Docket No. 97-20-089 (May 5, 1997).

10. "Mitigation of the punishment imposed by an employer is extraordinary relief, and is

granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee's offense that it indicates an abuse of discretion. Considerable deference is afforded the employer's assessment of the seriousness of theemployee's conduct and the prospects for rehabilitation." Overbee v. Dep't of Health and Human Res./Welch Emergency Hosp., Docket No. 96-HHR-183 (Oct. 3, 1996).

11. Respondent has substantial discretion to determine a penalty in these types of situations, and the undersigned Administrative Law Judge will not substitute her judgement for that of the employer. 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).

12. Given the charge proven against Grievant, the penalty is not disproportionate or excessive, nor is the penalty arbitrary and capricious. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Bailey v. Logan County Bd. of Educ., Docket No. 93-23-383 (June 23, 1994); Bell v. Kanawha County Bd. of Educ., Docket No. 91-20-005 (Apr. 16, 1991).

Accordingly, this grievance is **DENIED**.

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

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: September 30, 2004

Footnote: 1

Grievant was represented by John Roush, Esq., from the West Virginia School Service Personnel Association, and Respondent was represented by Greg Bailey, Esq. of Bowles Rice McDavid Graff and Love.

Footnote: 2

(See footnote 7) (See footnote 8) In keeping with Grievance Board policy, initials are used instead of names when

discussing students.

Footnote: 3

The strapping of the wheelchair on the bus does not appear to require a training session, only common sense. There are four straps, two in the front and two in the back. These straps are hooked into the floor of the bus, there are hooks on the ends of the straps that attach to the wheelchair, and a tightening mechanism on the straps similar to that used in an airplane seatbelt that are used to tighten the straps once they are attached.

Footnote: 4

The bus operator stated he did not notice the child's behavior and could not remember if he was crying either before or after the incident.

Footnote: 5

There was no indication from anyone that CM expressed his dissatisfaction about the care of his children in any way but verbally.

Footnote: 6

The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984).

Footnote: 7

In keeping with Grievance Board policy, initials are used instead of names when discussing students.

Footnote: 8

In keeping with Grievance Board policy, initials are used instead of names when discussing students.