RANDALL HOPKINS,

Grievant,

v.

DOCKET NO. 05-31-192

MONROE COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Randall Hopkins, filed this grievance against his employer, the Monroe County Board of Education ("MCBOE") on June 6, 2005, alleging:

> The Grievant, a coach at James Monroe High School, was terminated from his contract on June 02, 2005. This is a violation of WVDE Policy 5310. No observations, no evaluations, Plan of Improvement.
>
> Relief Sought: Make the Grievant whole by reinstating his coaching contract and directing the administration of Monroe County Schools to use WVDE Policy 5310 as a tool to improve job performance.

This grievance was filed directly to Level IV on June 6, 2005, and was remanded for proceedings at the lower levels. After discussion with the parties, the direct filing to Level IV was accepted. The parties agreed to submit this grievance on the pre-disciplinary hearing held before MCBOE on June 2, 2005, and this case became mature for decision on August 3, 2005, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 1)

Issues and Arguments

Respondent asserts it properly terminated Grievant's coaching contract because of his failure to follow West Virginia Secondary School Activities Commission ("SSAC") rules. Because Grievant's behavior is not correctable, no Improvement Plan is needed prior tothis termination. Additionally,

Respondent notes Grievant admits he failed to follow the "pitching rule" twice now, both times resulting in a forfeited playoff game.

Grievant asserts since his actions were unsatisfactory, MCBOE must put him on an Improvement Plan pursuant to State Board of Education Policy 5310 to correct his unsatisfactory behavior.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact. As well as the pre-disciplinary hearing and its exhibits, the parties agreed to make the additional exhibits submitted by Respondent part of the record.

Findings of Fact

1. Grievant has been employed as the head baseball coach at James Moore High School ("JMHS") for some time. The length of this tenure was at least four years.

2. There are two assistant baseball coaches at JMHS.

3. As the head coach, Grievant is required to attend the training provided by the SSAC on a yearly basis. This training includes a review of the current rules with a focus on the recent rule changes.

4. Some years ago, the SSAC put the pitching rule into place, which limits the number of innings a high school player may pitch in one game and on successive days. The purpose of this rule is to prevent injury to the pitcher. (See footnote 2) Grievant is aware of this rule. 5. On May 20, 2001, Grievant, like all coaches and principals, received a bulletin from the SSAC informing him of the penalty for coaches for a violation of the pitching rule. The penalty was suspension from coaching for three games, and the pitcher was also suspended from pitching for three games.

6. On May 19, 2003, during the sectional baseball tournament, Grievant violated the pitching rule during the second half of a double header. This violation resulted in the game being forfeited.

7. Pursuant to SSAC rules, Grievant was suspended for three games, and the pitcher was not allowed to pitch for next three games.

8. On May 21, 2003, Grievant's principal, Christine Parker, suspended Grievant from practice for the remainder of the season. Principal Parker discussed her action with Athletic Director Danny Wickline and Superintendent Lynn Guy before she took it, and they agreed with her action. (See letter dated May 20, 2003.) Contrary to Grievant's testimony, he was notified of his suspension from practice and the reasons for it by a letter from Principal Parker dated May 21, 2003. The reasons

Principal Parker took this action was because the parents and players were very upset, Grievant had not expressed any remorse for his actions, and Grievant did not seem to understand the consequences of his acts on the team. JMHS did not advance in the playoffs.

9. Grievant did not grieve his suspension from practice. (See footnote 3) 10. In 2004, Principal Parker and Athletic Director Wickline wanted to place Grievant on an Improvement Plan for many reasons, some of which were long-standing and were prior to Principal Parker's time as the Principal at JMHS. Principal Parker had tried to affect change in Grievant's management of the team through discussions and suggestions, but this approach did not result in correction of these behaviors. The failure to follow SSAC rules was only one of many concerns. There were concerns about Grievant's management of the entire program, including maintenance of the field, completion of purchase orders, maintenance of the equipment, and taking inventory.

11. Grievant's representatives/union told MCBOE an Improvement Plan could not be instituted because Principal Parker and Athletic Director Wickline had not properly completed the required observations and evaluations. All concerned parties agreed there were some areas that needed to be corrected, and Grievant and his representatives agreed Grievant could be placed on something similar to an Improvement Plan, if certain stipulations were met. (See footnote 4)

12. For reasons that are somewhat unclear in the record, Grievant was never placed on the Improvement Plan. (See footnote 5) 13. Principal Parker has assigned Athletic Director Wickline to observe the coaches, and they then complete the evaluations together. Athletic Director Wickline has not had evaluation training.

14. The SSAC training meeting for the 2005 school year included a review of the pitching rule, and at this time the penalty for the violation was included in the rules. (See Respondent's additional exhibits attached to letter dated July 13, 2005.)

15. In May 2005, during a sectional baseball tournament, Grievant again violated the pitching rule. The game was again forfeited.

16. The Executive Director of the SSAC wrote Grievant on May 31, 2005. He noted Grievant had violated the pitching rule in 2003 and again in 2005. Pursuant to these two recent violations, Grievant was now suspended for six games, directed to review the pitching rule, and informed if he violated the rule again he could be suspended for 365 days.

17. On May 17, 2005, Superintendent Guy wrote Grievant to commemorate the meeting they

had that day. She found his excuses for violating the pitching rule not credible given the same violation had occurred in 2003, with a resulting suspension. Superintendent Guy informed Grievant she was recommending the termination of his coaching contract to MCBOE at the June 2, 2005 Board meeting, and Grievant could attend if he so desired. 18. On June 2, 2005, MCBOE conducted a pre-disciplinary hearing concerning the termination of Grievant's coaching position. He was present and had representation. (See footnote 6)

19. On June 2, 2005, verbally at the hearing, and by letter dated June 6, 2005, Grievant was informed MCBOE approved Superintendent Guy's recommendation to terminate Grievant's extracurricular contract. Superintendent Guy noted this termination was due to Grievant's failure to follow the rules and a lack of judgment. She noted these actions were ones that were not amenable to correction through an Improvement Plan. Superintendent Guy explained that Grievant, as coach, was expected to know and follow the SSAC rules. Superintendent Guy also noted Grievant's suspension for six games for the new season was also a cause for concern.

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 oftestifying[; 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 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 issues raised by the parties will be discussed one at a time.

I. Credibility

While the majority of the facts were not in dispute, Grievant asserts he was confused and just lost track of how many innings the player had pitched, and he did not receive notice from Principal Parker of his prior suspension. 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's information. (See footnote 7) See Holmes v. Bd. of Directors/W. Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.

The undersigned Administrative Law Judge finds Grievant's testimony to be less than credible. Grievant's explanations about his failure to follow the pitching rule might be more believable if this rule violation had only occurred once, or if both violations had not occurred in playoff games. The undersigned Administrative Law Judge finds Grievant's explanation that he got confused both times just not plausible. Additionally, Grievant's testimony about how he learned of his suspension in 2003 is incorrect. Principal Parker wrote Grievant a letter dated May 21, 2003, as stated in Finding of Fact 8, that informed Grievant of his suspension from practice and the reasons for it. Grievant testified one of the assistant coaches told him he was suspended from practice, but he never bothered checking if this was true. Again this statement is implausible, and it is clearly incorrect.

II. Merits of the case

The next issue to address is whether MCBOE's termination of Grievant's coaching contract without an Improvement Plan was a violation of West Virginia Board of Education Policy 5310.

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).

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.

Grievant's repeated violation of a clearly identified SSAC rule can be viewed as insubordination and/or willful neglect of duty. "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." Jordan v. Mason County Bd. of Educ., Docket No. 99-26- 080 (July 6, 1999).

A. Insubordination

Respondent asserts Grievant is guilty of insubordination, and Grievant avers he is not. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." Butts v. Higher Educ. Interim Governing Bd., 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). See 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). "[F]or there to be 'insubordination,' the following must be present: (a) an employee must refuse to obey an order (or rule or regulation); (b) the refusal must be wilful; and (c) the order (or rule or regulation) must be reasonable and valid." Butts, supra.

An employer can establish insubordination by demonstrating 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).

In this case, Respondent established Grievant twice violated a known, reasonable, and valid rule issued by the SSAC, the committee who has the authority over these matters. Grievant's first violation was pointed out to him, and he received discipline from both the SSAC and his supervisor for his failure to follow the rule. Two years later, Grievant knowingly violated the same rule. This action on the part of Grievant constitutes insubordination. B. Willful Neglect of Duty

Respondent 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.

Again, if Grievant had "forgotten" and violated the rule only once, or had not been disciplined by both MCBOE and the SSAC, or both violations had not been only so close in time, or the violations had occurred right after the rule change, or both violations had not occurred during playoff games, Grievant's actions may not have appeared quite so intentional. As it is, it is practically impossible to find other than Grievant's actions were a willful neglect of duty.

C. Improvement Plan

Grievant's argument that an Improvement Plan is required in this instance is incorrect. Improvement Plans are required for unsatisfactory performance, not insubordination and willful neglect of duty. If MCBOE had terminated Grievant's coaching contract because he had completed paperwork incorrectly, failed to teach certain baseball skills to his players, or did not keep the facilities clean and equipment repaired, this type of negligence would be appropriate for an Improvement Plan. That is not what happenedhere. Grievant was on notice of the rule and the

consequences of breaking the rule. Fortunately, it does not appear any player was physically injured by Grievant's failure to abide by the rule. Unfortunately, Grievant was not the only person to pay for his violations; the team lost its opportunity to advance in the playoffs.

Under the facts presented here, an improvement plan is not required. Grievant was given notice of his deficiencies, he was disciplined for these acts, and he failed to change his behavior. Grievant's continued, wilful violation of the SSAC pitching rule did not constitute "incompetence" or "unsatisfactory performance" which can be corrected through a plan of any sort. Indeed, the undersigned Administrative Law Judge cannot envision what an Improvement Plan in this area would say, and what measurable goals could be written. (See footnote 8) Moreover, Grievant's actions exhibited poor judgment and poor sportsmanship, which are usually intrinsic or established traits that cannot simply be called to someone's attention and corrected. Mezzatesta v. Hampshire County Bd. of Educ., Docket No. 05-14- 144 (Aug.15, 2005). This conclusion was demonstrated by Grievant's prior failure to rectify his behavior after the first violation.

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 isevidence 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 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. W. Va. Code § 18A-2-8 identifies the types of behaviors for which a board may suspend or dismiss an employee. These behaviors are identified as: "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. . . ."

3. Grievant's repeated failure to follow the SSAC pitching rule constitutes insubordination and willful neglect of duty.

4. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." Butts v. Higher Educ. Interim Governing Bd., 212 W. Va. 209, 569S.E.2d 456 (2002)(per curiam). See 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 involves the "willful failure or refusal to obey reasonable orders of a superior entitled to give such order." Riddle, supra; Webb, supra.

6. In order to establish insubordination, an employer must demonstrate 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).

7. Respondent established Grievant was insubordinate when he wilfully refused to obey a valid rule issued by the SSAC.

8. "[W]illful neglect of duty," encompasses 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). See Arbaugh v. Putnam County Bd. of Educ., Docket No. 90-40-437 (May 22, 1991).

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 Chaddock, supra.

10. Respondent established Grievant willfully neglected his duty as a coach when he knowingly and intentionally violated the SSAC pitching rule. 11. Improvement plans are required for

correctable conduct, which involves professional incompetency. Mason County Bd. of Educ. v. State Supt. of Schools, 165 W. Va. 732, 739, 274 S.E.2d 435, 439 (1980).

12. Improvement Plans are not typically required for insubordination or willful neglect of duty as these are intentional acts. Behaviors which involve intrinsic or established personality traits, such as poor judgment and poor sportsmanship, are usually not correctable with an Improvement Plan. See Mezzatesta v. Hampshire County Bd. of Educ., Docket No. 05-14-144 (Aug.15, 2005).

15. Grievant's insubordinate and wilful behavior involved a repeated violation of a clear rule and as such is not correctable through an Improvement Plan.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County, or to the Circuit Court of 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: August 23, 2005

Footnote: 1

Grievant was represented by John Estep from the American Federation of Teachers, and MCBOE was represented by Attorney Greg Bailey of Bowles Rice McDavid Graff and Love.

Footnote: 2

As stated by JMHS Athletic Director Danny Wickline, prior to the enactment of this rule many high school pitchers sustained serious injury caused by over-pitching.

Footnote: 3

During the pre-disciplinary hearing, it appeared Grievant was questioning the propriety of this suspension. Since Grievant did not grieve this suspension when it happened, it cannot be grieved at this time.

Footnote: 4

The testimony on this issue was confusing and unclear. Grievant's representative was providing much of the information on this issue. The undersigned Administrative Law Judge could not assess whether Grievant would be placed on a normal Improvement Plan or what effect the required stipulations would have.

Footnote: 5

One problem with the Improvement Plan may have been Grievant's requirement that a certain baseball coach from another county should be on the Improvement Plan Team, and there was a problem with paying his mileage.

Footnote: 6

During this hearing, Mr. Estep offered what amounted to testimony, but as he was not sworn, his statements cannot be accepted by the undersigned Administrative Law Judge as testimony.

Footnote: 7

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: 8

Although it sounds quite inane, would the goal be to violate the pitching rule only every three or four years instead of every other year?